Case Number: 3201127/2017

RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr M Cooper**

Respondent: **University of Northampton Enterprises Limited**

Heard at: **East London Hearing Centre**

On: **1 & 2 February 2018**

Before: **Employment Judge Jones**

Representation

Claimant: In person

Respondent: Miss S Lovell (Solicitor)

JUDGMENT

The judgment of the Tribunal is that the Claimant was not dismissed. His complaint of constructive unfair dismissal fails and is dismissed.

REASONS

1. The Claimant brought a complaint of constructive unfair dismissal on 7 September 2017. This was defended by the Respondent. The parties agreed on the following list of issues:-

    1. Whether the Respondent breached either an express or implied term of the Claimant's contract of employment. In this regard at the Claimant relies on alleged breaches of the following alleged terms of his contract:

    a. express term that he would be paid all of his expenses in payroll on or around the 24th of each month; and

    b. the implied term of mutual trust and confidence.

2. The Claimant relies on the following alleged actions as breaches:

(a) in respect of a. above, a failure to pay expenses on 24 February 2017 (later paid on 7 March 2017) and on 24 March 2017 (paid on 24 March 2017); and

(b) in respect of b. above, failure to communicate properly or resolve the matter up to and including 11 April 2017.

3. If so, was the breach fundamental?

4. If so, did the Claimant accept the breach by resigning?

5. If so, was there any delay in him doing so?

6. If the employment Tribunal considers that the Claimant was constructively and unfairly dismissed it will need to consider what, if any, compensation the Respondent should pay him. The employment tribunal will need to take into consideration:

(a) whether the Claimant has complied with his duty to mitigate his losses; and

(b) whether there should be a reduction in compensation as a result of an unreasonable failure to follow the ACAS code of practice by not using a grievance procedure.

Evidence

7. The Tribunal had an agreed bundle of documents. The Claimant gave live evidence on his behalf and for the Respondent, the Tribunal heard from Damian Pickard, deputy finance director; Julie Tebbutt, the Claimant's former line manager and Chantelle Rouse one of the University's HR advisors. All the witnesses provided signed, written witness statements.

8. From that evidence Tribunal made the following findings of fact

Findings of fact

9. The Claimant was initially employed as a social enterprise adviser by Exemplas Holdings Ltd in 2011. That changed in 2014 when he became employed jointly by Exemplas and Inspire2Enterprise CIC. The last change was in 2016 when he was part of a TUPE transfer to the Respondent.

10. The Claimant's contract of employment made the following statement about deductions from *salary "you authorise the company to deduct from your salary (or any other monies due to you) any sums which you may owe to the company, including, without limitation, any overpayment of salary or expenses, any debts or loans or any other sum or sums which may be required to be authorised pursuant to section 13 of the employment rights act 1996"*. It was confirmed in the Hearing that one of the permitted deductions from salary under section 13 ERA was a deduction required or authorised to be made by virtue of a statutory provision, which would include deductions required HMRC regulations.

11. There was a separate expenses policy. That policy gave the Claimant the opportunity to apply for reimbursement of certain expenses including for travel. However, the policy stated that it does not form part of his terms and conditions and that it is subject to change from time to time. The process to be followed was that the employee had to

submit expense claims using a particular online system. The policy stated that the expenses would be paid fortnightly. No specific date was mentioned in the policy although it may have been the practice that it was paid on the 24th of the month. The policy stated that the finance director has a right to withhold payment pending clarification of the details of an expense claim.

12. The Claimant's terms and conditions referred to his employment letter for details of his place of work. On 30 September 2016, following his transfer under TUPE to the Respondent, the Claimant received a letter welcoming him to the University and confirming that his place of work for business travel is his home address. The letter also confirmed that the Claimant's employment would continue under the same terms and conditions of employment applying at the time of his transfer.

13. While employed by Exemplas the Claimant used to submit claims for mileage and travel expenses incurred in travelling from home to the office. The Claimant's evidence was that he came to the office at least once a week and sometimes more frequently. Exemplas were in the habit of reimbursing these expenses to the Claimant. They were usually paid to the Claimant at the same time as his salary although that was not a term of his contract.

14. In a letter dated 5 August 2016 confirming the transfer to the Respondent, the Claimant's name is in the list of employees due to be transferred. It stated "Myles Cooper – Enterprise Adviser – Legal Specialist – Home based". Following the transfer, the Claimant continued to submit claims for mileage and travel expenses to the Respondent. The Respondent processed and paid claims for October, November, December 2016 and January 2017. The Tribunal was shown payslips which demonstrated that monthly expenses were paid at the same time as his pay, usually on or around the 25th of the month.

15. At the Respondent, the deputy director of finance, Damian Pickard, would undertake a check of the expenses claims submitted by employees to ensure that they had the right authorisations and were properly claimed. The Claimant's claims were always authorised by his manager, Julie Tebbutt. Miss Tebbutt had not been the Claimant's line manager at Exemplas but became so upon the transfer.

16. In checking expense claims, Mr Pickard's job was to ensure that the claims were in accordance with the Respondent's travel expenses policy and that they did not have tax implications for the Respondent or the Claimant. I find that Mr Pickard had not noticed any issue with the Claimant's expense claims previously but in relation to the February claim he noted the number of home to work travel claims submitted by the Claimant and it caused him some concern. The claim that the Claimant submitted in February was for a sum in excess of £300 which he considered was an unusually large sum for a travel expenses claim. Mr Pickard was concerned that the Respondent may have to incur a tax liability for the expenses if the Claimant should be taxed on them and the University had not properly reported the reimbursement as a benefit in kind to HMRC. The Respondent can also be fined by HMRC if they had not properly accounted for payments to employees. As Mr Pickard did not have specialist tax knowledge, he decided that he would enquire from an expert about these matters but in that in the interim, the Claimant's expense claim should not be paid.

17. Mr Pickard did not consult anyone else in reaching that decision. He simply took the claim out of the pile of claims waiting to be processed by the accounts payable team and put it aside while enquiries were made. Neither the Claimant nor his line manager was informed. Mr Pickard's evidence today was that with hindsight he appreciates that someone should have informed the Claimant that his expenses were not going to be paid - at least until the issue had been resolved. Mr Pickard consulted the Respondent's professional tax advisers, BDO LLP and asked if it was their professional advice that tax was payable on the Claimant's expenses. Mr Pickard instructed BDO via email on 16 February 2017 and that email was in the bundle of documents before me. In his evidence to the tribunal, the Claimant agreed that it was appropriate that the Respondent should get professional advice on this matter and that it had a right to act on that advice. I take judicial notice of the fact that the Respondent, as an employer, has an obligation to keep within HMRC rules and deduct and/or pay tax where appropriate.

18. On the following day, Mr Pickard emailed the Claimant's line manager, Julie Tebbutt and enquired of her on what basis the Respondent was paying the Claimant's home to work travel expenses. He did not inform Miss Tebbutt that he had pulled one of the Claimant's expense claims and that it had not yet been paid. Mr Pickard also emailed Chantelle Rouse, HR adviser to make her aware of the issue. Ms Rouse was also not told that the Claimant's February claim had not been paid.

19. The Claimant discussed with Miss Tebbutt the non-payment of the expenses sometime around 24th of February. Miss Tebbutt also received a copy of an email from Clare Stephen in accounts in which she stated that she believed that there had been some discussion about whether the Claimant's expenses were going to be paid but that she was unsure the current situation. Mr Pickard was on annual leave. Miss Tebbutt chased the matter on 3 March and the Claimant was paid his February expenses on 7 March 2017.

20. On 3 March, Mr Pickard wrote to the Claimant and his colleague, Andrew Cook who was in a similar situation regarding his expenses claim; to notify them that he needed to consider whether the home to university travel expenses that were being paid to them was to be treated as a taxable benefit to them. He confirmed that taxation of home to work travel is an extremely complicated issue and that he had referred the matter to BDO for comment. In order to assist with his enquiry with BDO, he asked both the Claimant and Mr Cook to provide further information. In particular, he asked for a description of their job role, the activities they undertook at the University as opposed to at home and the frequency and regularity of their visits to the University. It is clear that at this point Mr Pickard was still making enquiries of BDO. There was an email from BDO dated 16 February in which Mr Savjani requested further information while giving a preliminary view.

21. Miss Tebbutt updated the Claimant with the ongoing situational by email on 8 March 2017. She informed the Claimant that she had had a telephone conference call with Mr Pickard and Mr Johnston regarding the expenses. The Claimant confirmed that he had been paid the expenses on the previous day. Ms Tebbutt also confirmed that both she and Mr Johnston had told Mr Pickard that they were simply continuing the practice established by Exemplas over several years of bringing the Claimant into the office once a week so that he could continue to be embedded within the team, and enabling him to be able to mentor and train other advisers. Mr Johnston was the Head of Enterprise and Miss Tebbutt's line manager. The Claimant was advised that Mr Pickard was still waiting for

advice from BDO and that it made sense to await the outcome of that before deciding what action to take.

22. In his response, the Claimant confirmed that he had read the HMRC guidance and that his initial thoughts were that his arrangement with the Respondent may not be 'special enough' and that it was possible that HMRC could treat Northampton as being his place of work in addition to his home. He stated that this sounded like an oxymoron but acknowledged that it might still be the case. In relation to the process that happened to that date, the Claimant stated that he was "underwhelmed by the approach taken". I find that this related to the fact that he not been informed of there being an issue with his expenses. He asked what he was to do with his latest claim and receipts. Mr Johnston replied to that email and informed the Claimant that while everyone was waiting for Mr Pickard to revert following his consultations with BDO, he was to continue to submit his expense claims as normal and Mr Johnston and Miss Tebbutt would undertake to ensure that they were processed through payroll as normal. The Claimant was also informed that the information requested by Mr Pickard had been provided by Mr Johnston and that he need not make any further reply to Mr Pickard.

23. Mr Pickard heard from BDO with their considered advice on 16 March. Mr Sajvani informed him that there are tightly defined circumstances in which a home-based worker can be reimbursed travel costs on a tax-free basis to a place which would otherwise be their normal place of work. He set out two examples of work arrangements in which such travel costs could be paid in a tax-free basis. His advice was that based on the role descriptions applicable to the Claimant and Mr Cook, he did not believe that they would fall into the categories described as they could undertake their roles at the University site. He advised that there may be some difficulty in the Respondent being able to point to objective criteria that showed that it was necessary for the Claimant and Mr Cook to undertake their role at home. Mr Savjani's recommendation was that the Respondent either discontinue reimbursing the travel costs when the employees attend the University site or 'gross-up' the costs and process it through payroll. This could mean the University paying the tax on the expenses, on behalf of the employees. The Claimant was not shown a copy of Mr Savjani's advice.

24. On receipt of that advice which was addressed to Malcolm Johnston as well as Mr Pickard, there was then a series of emails between them in which they discuss possible approaches to dealing with the matter. The Claimant was not included in those emails. It is likely that Mr Pickard and Mr Johnston also met with the Respondent's tax advisers. From those emails, I find that there was not a consensus between Mr Pickard and Mr Johnston as to how to deal with the matter. Mr Pickard was clear that the historic payments would need to go on to a P11D which would mean that the Claimant would have to pay some tax to HMRC. He was also clear that if the Respondent chose to 'gross-up' the payments for tax it would be costly for the Respondent. However, it does not appear that he had final say in the matter. He was not the Claimant's line manager nor was he the person responsible for his department. Mr Johnston's perspective was different. He wished to retain both the Claimant and Mr Cook in employment. In an email dated 17 March to Mr Pickard he stated that *"this advice could mean we lose two very experienced advisers, creating a recruitment issue for us with the associated costs and a potential delay…"* He wanted to talk to HR about the options proposed by Mr Pickard in order that they can decide what to do.

25. Mr Pickard informed the Respondent's HR of the tax advice that had been received, as he understood it. This was set out in an email of 30 March 2017. In relation to the Claimant, it stated that the assessment and advice from BDO was that because his role was essentially providing legal advice to the company as opposed to just the clients, and because he visits the University so regularly; HMRC would not consider that he was truly home-based but instead, that he chose to work from home most of the time. Mr Pickard's understanding was that HMRC would not consider the Claimant's visits to the University as attending a temporary workplace. This would mean that his travel from home to his place of work would be deemed taxable. It was Mr Pickard's advice to HR that the reimbursement of his home to travel work expenses needed to be entered in the P11D for him to be taxed on the cost. There was a different understanding of the work done by Mr Cook at the University which meant that his expenses would continue to be paid without any tax deduction.

26. The Claimant submitted another claim form in March for travel expenses. He emailed Julie Tebbutt on 24 of March to inform her of this. She also telephoned him about it. Within an hour of his email, the payment was made. The Respondent's case is that the delay in March was due to an admin error and Miss Tebbutt's evidence was that she had been told on the day that there had been an admin error which had affected several employees. Although the Claimant disputes this, both parties agree that the payment was made within an hour of the Claimant raising a query. If the Claimant had been expecting to be paid his expenses on 24 March, they were paid on that day and there was no delay in the Respondent making that payment.

27. Mr Johnston forwarded Mr Pickard's email of 30 March to Julie Tebbutt and advised that the matter needed to be handled carefully and sensitively to both the Claimant and Mr Cook. I find that this demonstrates a desire to retain both employees and to ensure that nothing affected their relationship with the Respondent. He advised Miss Tebbutt that if she if either of them had not heard by Monday from Carrie Birnie, the HR adviser, they should contact her to agree how the matters going to be handled and to schedule meetings involving a chart with the Claimant and Mr Cook. Mr Johnston also encouraged Miss Tebbutt to come back to him with any further queries.

28. On 4 April, Miss Tebbutt chased Miss Bernie to arrange meetings with the Claimant and Mr Cook. She also sent a further email on 5 April suggesting that the meeting should be held when the Claimant is next in the office. The meeting was held on 11 April between the Claimant, Chantelle Rouse of HR and Malcolm Johnston, Head of Enterprise.

29. In the meeting, Ms Rouse informed the Claimant of the advice that the Respondent had received from BDO. She did not give him a copy of the advice as she had not been instructed to do so, it contained advice about another employee and it would breach confidentiality to give the Claimant that document; and because the Claimant never asked for a copy. She informed the Claimant that the Respondent had decided that his expense claims would be taxable from now on. In response to the information provided in the meeting, the Claimant had two questions for the Respondent. His first question was in relation to his historic expense claims and whether those would now be taxed and his second question was about the submission of the expense claim for a meeting that he had recently attended and whether he was should continue to submit claims in the same way as he had done previously. The Claimant did not ask the Respondent whether there was any way in which they could assist him in paying the tax or any other arrangements that

could be made to assist him. He also did not challenge the understanding of the HMRC rules as it was told to him.

30. As this meeting occurred just before the start of the Easter weekend, the Claimant was advised that he would be receiving a letter confirming the new arrangements but that it was unlikely that he would get the letter before the holidays. I find it unlikely that he was told that it would take weeks before he would receive confirmation in writing of the new arrangements. I find that no minutes are taken at this meeting and there was no written agenda but both parties agree that the one matter discussed at that meeting was the Respondent's decision that the Claimant's expense claims would have to be tax from now on.

31. Ms Rouse undertook some investigations with regard to the two questions the Claimant asked. On the following day, 12 April, she raised those issues with Mr Pickard by email. Mr Pickard responded later that day. Miss Rouse replied by email to ask him to speak on the telephone about this matter. It is clear that the matter had not yet been finalised within the Respondent as further discussions were taking place.

32. On the following day, 13 April 2017 and before he was given the response from Ms Rouse in relation to the queries he had raised at the meeting; the Claimant attended the office in Northampton and handed in a written letter of resignation to Miss Tebbutt. Miss Tebbutt had not been involved in the 11 April meeting and it is likely that she was surprised to receive the Claimant's resignation. She informed the Claimant that she was willing to continue to discuss the matter with him and she offered to get Malcolm Johnston to come and speak to the Claimant while he was in the office; to discuss the matter further. The Claimant refused. Miss Tebbutt was disappointed at the Claimant's decision and his refusal to engage in any further discussion on the matter or to try and resolve it.

33. The resignation letter was clear that the Claimant considered that it was a fundamental term of his contract that he was a home-based employee and that the travel expenses from home would be reimbursed. The letter continued that he is now told that this is no longer the case due to some *"arcane or obscure HMRC ruling"*. The Claimant was unhappy that he had not seen the advice from BDO. The Claimant continued to express unhappiness about that in the Hearing. In the letter he also expressed unhappiness that a decision had been presented to him as a fait accompli in the meeting on 11 April. The Claimant considered this to be a unilateral breach of contract and an appalling lack of communication showing that the trust and respect that should exist between an employer and employee had disappeared. He stated that engaging in a grievance procedure would simply delay matters further. He also stated that he had strongly resisted the inclination to resign on 11 April after the meeting but that he had since concluded that it was the only option available. The Claimant indicated that he had decided not to return to work after Easter. The Claimant resigned with immediate effect.

34. Miss Tebbutt passed the resignation letter on to Ms Rouse. Another senior manager, Simon Denny, emailed Mr Pickard to express his disappointment at losing the Claimant over this matter. Mr Pickard gave him some advice on the financial implications of his suggestion to increase the Claimant's pay to make up for any perceived shortfall the Respondent subsequently submitted.

35. On 24 April Chantelle Rouse wrote to the Claimant to acknowledge receipt of his resignation letter. She confirmed that the Respondent respected the Claimant's wish not

to engage in the Respondent's internal grievance process to try to resolve matters. However, the Respondent still wanted to explain its position clearly to him. She stated that the meeting on 11 April was an initial meeting to inform him of the advice from BDO and that she had done as promised and asked Mr Pickard to confirm the position with regard to the Claimant's historic expense claims and she gave the details of the advice in the letter. She confirmed that the Claimant's last day of employment was 13 April and that he would be sent outstanding annual leave payments.

36. On 26 June, the Respondent sent the Claimant a copy of a form P11D (the original of which been sent to HMRC) declaring the travel expenses already paid to him as a benefit. The Respondent did not include in the P11D any money paid to him in relation to the parts of his journeys where he was collecting colleagues or seeing clients. The Claimant recently had to pay £444.20 to HMRC as a result of its assessment of the P11D.

Law

37. In considering a complaint of constructive unfair dismissal the Tribunal has to apply the following law.

38. Section 95(1)(c) of the Employment Rights Act 1996 states as follows:-

> "*The employee terminates a contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employers' conduct".*

39. The circumstances in which an employee would be entitled to terminate his contract would be where the employers' conduct amounted to a repudiatory breach of contract.

40. The Claimant's complaint was that there had been a breach of an express term and that the Respondent also breached the implied term of trust and confidence which is in each employment contract. By the end of the evidence the Claimant had conceded that there had not been a breach of any express term in his contract. He confirmed that the Tribunal was only being asked to consider whether there had been a breach of the implied term of mutual trust and confidence. In that regard the Tribunal would need to conclude that the employer had acted without reasonable cause in such a way that was calculated or likely to destroy or seriously damage the relationship of trust and confidence between it and the employee. Also, the Tribunal needs to be certain that the employee had not affirmed the contract under which he was employed after such a breach and before he resigned, or that if he had affirmed the contract there was subsequently a "*final straw"* capable of contributing to a series of earlier acts which cumulatively amounted to a repudiatory breach of contract and that he had resigned in response to the repudiatory breach.

41. The leading case of constructive dismissal remains the case of *Western Excavating Ltd v Sharp [1978] ICR 221 (CA)* where, as Lord Denning stated:

> "*If the employer is guilty of conduct which is a significant breach going to the root of employment, which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he*

terminated the contract by reason of the employer's conduct. He is constructively dismissed".

42. The test that must be applied in determining whether or not this has occurred, is an objective test as summarised above and set out in the case of *Mahmud v BCCI [1997] IRLR 462* in which Lord Nicholls stated that:-

> "*The conduct must…impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. That requires one to look at all the circumstances"*.

43. In the Court of Appeal decision in *Buckland v Bournemouth University Higher Education Corporation* [2010] IRLR 445 the test to be applied in a constructive dismissal case was set out as follows:

> "in determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the unvarnished *Malik* test applies
>
> - What was the employer's conduct that was complained of?
>
> - Was the conduct complained of calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties;
>
> - Did the employer have reasonable and proper cause for that conduct?
>
> If acceptance of that breach entitled the employee to leave, he has been constructively dismissed;
>
> It is open to the employer to show that such dismissal was for a potentially fair reason;
>
> If he does so, it will then be for the employment tribunal to decide whether the dismissal for the reason, both substantively and procedurally, fell within the range of reasonable responses, and was fair."

44. Dealing with the issue of the "*last straw*" the Tribunal had in mind the case of *Waltham Forest v Omilaju [2005] IRLR 35*. In that case at the Court of Appeal Lord Justice Dyson said the following:

> "*The 'final straw' may not always be unreasonable, still less blameworthy. …the only question is whether the 'final straw' is the last in a series of acts or incidents which cumulatively amount to repudiation of the contract by the employer. The 'last straw' must contribute, however slightly, to the breach of implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the abrogation of trust and confidence that it lacks the essential quality to which I have referred.*
>
> *If the 'final straw' is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied trust and confidence, there is no need to examine the earlier history to see whether the alleged 'final straw' does in*

> *fact have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the 'final straw' principle.*
>
> *Moreover, an entirely innocuous act on the part of the employer cannot be a 'final straw', even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in his employer. The test of whether the employee's trust and confidence has been undermined is objective"*.

45. The Tribunal was also aware of the case of *Post Office v Roberts [1980] IRLR 347* where it was held by the EAT that the conduct by the Respondent which amounted to a repudiatory breach of contract need not be deliberate or intentional or prompted by bad faith. However, unreasonable behaviour by the employer is not enough. The bar is set much higher. The employer has to be guilty of what would be, in effect, the equivalent of gross misconduct from an employee who was summarily dismissed.

Applying law to facts

46. Firstly, it is this Tribunal's judgment that the terms and conditions of employment that the Claimant had with Exemplas transferred to the Respondent and applied without alteration.

47. The Claimant's terms and conditions gave the Respondent the power to deduct any money owed to it from his salary or expenses, if appropriate. There is no express term of the contract that he would be paid all of his expenses through payroll on or around 24th of each month. The expenses policy did not form part of the Claimant's contract. It did not do so with Exemplas and that situation continued with the Respondent. In the Exemplas expense policy the finance director was given the right to withhold payment pending clarification of the details of expense claim.

48. The Claimant conceded and it is this Tribunal's judgement that the Respondent did not breach any express term of the Claimant's contract. There was no express term in his contract that gave him the right to claim travel expenses and also no express term that payments would be made by the 24th of each month.

49. The second question for the Tribunal in the list of issues is whether the Respondent breached the implied term of mutual trust and confidence in the way it dealt with the matter of the Claimant's expenses?

50. The Claimant's main contention was that the way in which the Respondent conducted the matter in February and thereafter amounted to a fundamental breach of contract. He relies on the Respondent's failure to pay his expenses in February, its failure to let him know that there was a query on his expenses or to involve him in the discussions about it, or show him the advice from BDO as well as telling him how the Respondent had decided to treat his expenses for tax purposes as a fait accompli.

51. In relation to the complaint about the February expenses, it is my judgment that there was no evidence that the Respondent intended not to pay the Claimant's expenses at the time of his transfer or subsequently. There was no evidence that Mr Pickard intended to stop payment of the Claimant's expenses when he first looked at the expense form in February. After his initial assessment Mr Pickard decided that the expenses would not be paid until he had queried the position regarding the HMRC rules. In my judgment, this was in keeping with the Respondent's expenses policy. He was withholding payment pending clarification of the details of the expense claim, as the policy allowed. He has readily accepted that he ought to have informed someone at the time that the Claimant expense would not be paid in February and he failed to do so. Also, Mr Pickard did not confirm with HR or the Claimant's line managers that he had pulled the expense claim from accounts payable and so this was not agreed to or authorised by anyone else. However, subjectively, at that stage, the Claimant did not consider that his contract had been breached, he simply queried the payment with his line manager and it was eventually paid on 7 March, in full. Even when he knew that the expenses had been withheld because of the tax query, the Claimant did not indicate that he considered that the contract had been breached. He expressed exasperation at the way it had been handled, commenting that he was underwhelmed by the approach. He then did his own research on the taxation of expenses. In the Hearing he agreed that the Respondent was entitled to seek professional advice on such a matter and to act on that advice. There was no specific date on which expenses were to be paid in the Claimant's contract but the Claimant had become accustomed to having expenses paid on or around the 24th of each month which would mean that February's expenses were paid 1.5 weeks later. In my judgment, the failure to pay the expenses in February was badly handled in the sense that the Claimant was not warned of it and only found out when he noticed that it had not been paid but it was not a breach of the implied term of mutual trust and confidence.

52. In my judgment, the Respondent sought professional advice on the issue of taxation of the Claimant's expenses. That was a matter legitimately raised by the deputy finance director on seeing one of the Claimant's expense claims. There was no personal motivation that I was told of by Mr Pickard for his actions. Mr Johnston and Miss Tebbutt had nothing to do with the initial query and when they were told of it they expressed a desire to continue the status quo. Once it had the advice from BDO the Respondent arranged a meeting to inform the Claimant that it had no choice but to report his expenses as a benefit in kind to HMRC so that it could be taxed.

53. In relation to the complaint that the Respondent failed to communicate with the Claimant on this matter and involve him in the discussions; the evidence showed that there was communication from Mr Johnston to the Claimant informing him of all they knew of Mr Pickard's queries with BDO and about the tax issue. It is this Tribunal's judgment that from 24th February the Claimant was aware that there was a query about his expense claims and from 8 March he was aware of the exact nature of the query and that it related to tax. The only piece of information that the Claimant was not given was a copy of the email advice from BDO.

54. The discussions by email between Mr Johnston, Mr Pickard and staff in the HR Department were management discussions as to how to deal with an issue concerning a member of staff. The Claimant would have had no right to have been included in those discussions and in my judgment the Respondent's failure to include him in those could not be considered fundamental breach of his contract. The Claimant was never told that he would be shown the advice from BDO. He was told that the Respondent was waiting for

that advice and as soon as it was received he would to be told about it. That is what happened. The advice was received on 16 March and a meeting was arranged with him as soon as possible thereafter so that he could be told. The meeting took place on 11 April and as he was only in the office once a week, it is unlikely that the Respondent delayed excessively or to the extent that would breach his contract in arranging that meeting. At the meeting he was told what the Respondent had decided in light of the advice it had received.

55. The documentation from the Respondent, which the Claimant would not have known about at the time, demonstrate that the Claimant's managers were concerned about the implications of the advice from BDO and wanted to find a way around it that would still allow it to keep within the HMRC rules. There is no evidence of any intention not to be bound by the terms of the Claimant's contract or to destroy the trust and confidence that there was between employer and employee. Mr Pickard advised the Claimant's managers on the implications of their suggested ways to accommodate the new advice. I find it likely that neither Miss Tebbutt nor Mr Johnston had any issue with continuing to pay the Claimant his expenses as they had been doing since he transferred to the Respondent. I also find that Mr Pickard's concern was that the Respondent should not breach any tax laws. The Respondent had no issue with continuing to pay the Claimant's expenses.

56. Although it is correct that the Claimant had not had any emails from Mr Pickard or Miss Tebbutt about this matter after the email on 8 March, he had been told that Mr Johnston and Miss Tebbutt were dealing with Mr Pickard's queries directly and that he did not need to respond. The Claimant met Miss Tebbutt on occasion while the Respondent was waiting for advice from BDO and did not raise the matter with her. It is reasonable to conclude that he was happy to leave it to his managers to address while he got on with his work. I find there is no breach of contract demonstrated there.

57. The Claimant does not have a contractual right to his expenses to be paid gross or without tax deduction. It was not part of the Claimant's case that the Respondent sent incorrect contractual information to or otherwise misled BDO in order to obtain a particular type of advice.

58. The Claimant's expense claims were all paid. The February claim was paid late. The March claim was paid soon as it was queried. The Tribunal was not told when it should have been paid but if it is a Claimant's case that it should have been paid on 24th of the month then it was paid on 24th March which means that there was no delay in payment.

59. The Respondent was not changing any terms of the Claimant's contract. The Respondent was not making a deduction of the Claimant's wages. The Respondent was simply seeking to ensure that it was, in compliance with HMRC rules while processing his expense claims in accordance with contract.

60. In looking at whether the Respondent had conducted itself in a way that calculated or likely to destroy or seriously damage the relationship of trust and confidence with the Claimant; it is this Tribunal's judgement that the process of sorting out the treatment of the Claimant's expense claims had not completed at the time the Claimant handed in his resignation. The Claimant had not yet had the decision in writing. He was told at the end of the meeting on 11 April that the decision would be sent out to him in writing in a few

days. He had not yet got that letter at the time of his resignation. The Respondent had made it clear that the Claimant's expenses will still be paid and that any travel to see clients will be paid tax-free and the only part that has to be taxed was expenses incurred in travelling into the office. The Claimant did not raise a grievance about this decision. He was aware of the grievance procedure and even referenced it in his letter of resignation. His case was that he had already been through a grievance process but in this Tribunal's judgment he had not. A grievance would be where he sets out his complaint that the proposed change in the way that the Respondent is proposing to deal with his expense claim would cause him hardship. A grievance could also have included a request that other measures are put in place to assist him in dealing with that hardship such as an increase in pay or a reduction in the number of times he is required to attend the University. At the time of his resignation he had not made any suggestions to the Respondent of other ways to address this issue. At the meeting on 11 April he had not asked how the Respondent was going to help him as well as keep within HMRC rules. He simply asked whether his old claims would be included in a P11D report to the HMRC and what would happen to his future claims. The discussions suggested by Mr Johnston on how this is going to be dealt with, had not yet taken place.

61. When his manager attempted to discuss the matter with him or call Mr Johnston to join a discussion with him on 13 April, the Claimant refused. Miss Tebbutt and Mr Johnston were the Claimant's managers but he did not give them an opportunity to resolve matters. He simply does not know what would have happened if he had raised a grievance or if he had discussed it further with them on 13 April or at another arranged meeting. In this Tribunal's judgment the emails, the attempts by Ms Tebbutt on the day to discuss the matter with the Claimant and to get Mr Johnston to further discuss this with him; are real indicators that the process had not yet completed. The Claimant had not given the Respondent an opportunity to resolve any hardship that the changed treatment of his expense claims would have caused him.

62. The Claimant decided that he no longer wanted to engage with the Respondent on this matter. From the resignation letter it is a possibility that the Claimant thought that the Respondent had decided not to pay any expenses. If he did, this would have been a misunderstanding as what had been decided (after seeking professional advice) was that from now on any expenses paid to him would be taxed. Any misunderstanding that the Claimant had did not come from anything that the Respondent said or did as Ms Rouse was clear in the meeting that the issue was about taxation of his expenses. Any misunderstanding about what had been said at the meeting on 11 April would have been cleared up in the letter that would have been sent to him thereafter setting out the Respondent's position. That letter had not yet arrived at the time that he wrote his resignation letter.

63. In my judgment, the failure to pay the expenses for 1.5 weeks in February was not a breach of contract. However, even if the Claimant considered the 1.5 week delay in paying his expenses in February to be a breach of contract, he does not resign in response it and instead he appears to understand the situation in his email of 8 March. If there was a breach of contract, he has not accepted as so. The Claimant continued to be employed by the Respondent does not resign until 13 April.

64. There are no breaches that add to a final straw to become a fundamental breach of contract. The meeting on 11 April could not be a final straw and was not a fundamental breach of contract. At that meeting the Claimant was told that your expense claims will be taxed as of now. That was as a result of professional tax advice. He had no contractual right to have his expenses paid gross, even though this had been the practice up to this time. He was able to come back to the Respondent to talk about how that tax would be paid or whether he could attend the office less or whether there was some other way of dealing with it. Nothing that was said at that meeting leads this Tribunal to conclude that the discussions were closed or that the Claimant had been led to believe that discussions were closed. The Respondent was willing to consider making some arrangement that would allow the Claimant to continue to claim his expenses and remain in employment. The Respondent had not behaved unreasonably and had not fundamentally or otherwise, breached the Claimant's contract of employment. There was no intention by the Respondent demonstrated at that meeting that it did not want to be bound by the terms of the contract of employment that it had with the Claimant.

65. That conclusion is bolstered by Ms Tebbutt's reaction to the letter of resignation that she received on 13 April. She was surprised to receive it and did all she could that day to persuade the Claimant to continue the dialogue with the Respondent. That is not the actions of an employer that does not want an employee to remain or is reckless about them doing so. It is unfortunate that the Claimant did not want to continue to discuss the matter with the Respondent and specifically chose not to raise a grievance. I was not told on what basis he had decided that to do so would have been futile. I did not have evidence before me today that supported his position.

66. In this Tribunal's judgment, there was no fundamental or cumulative breach of the Claimant's contract of employment with the Respondent. The complaint of constructive unfair dismissal fails and is dismissed.

Employment Judge Jones

20 February 2018