



EMPLOYMENT TRIBUNALS

Claimant: Mr T Robins

Respondent: CAB Special Batteries Limited

CERTIFICATE OF CORRECTION **Employment Tribunals Rules of Procedure 2013**

Under the provisions of Rule 69, the Reserved Judgment sent to the parties on 8 November 2018 is corrected as set out in the attached Judgment.

Employment Judge

Date 10 January 2019

SENT TO THE PARTIES ON

11 January 2019

FOR THE TRIBUNAL OFFICE

Important note to parties:

Any dates for the filing of appeals or reviews are not changed by this certificate of correction and corrected judgment. These time limits still run from the date of the original judgment, or original judgment with reasons, when appealing.



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr T Robins

CAB Special Batteries Limited

RESERVED JUDGMENT OF THE TRIBUNAL

Exeter

On

**12,13 &14 March 2018 and
8,9,10 &11October 2018**

Before: Employment Judge Goraj

The Judgment of the tribunal is that: -

1. Any basic or compensatory awards which would otherwise have been awarded to the claimant are reduced by 100 per cent pursuant to sections 122 (2) and 123 (1) of the Employment Rights Act 1996 by reason of the matters referred to at Issue 3a of the Amended List of Issues (relating to the claimant's conduct on 2 August 2016).
2. Further, and in the alternative, any compensatory award which would otherwise have been awarded to the claimant is also reduced by 100 per cent pursuant to section 123 (1) of the Employment Rights Act 1996 by reason of the matters referred to at Issue 3b of the Amended List of Issues (relating to the continuance of the claimant's contract with the respondent in any event).
3. The claimant's contract of employment with the respondent terminated by reason of the claimant's acceptance of the respondent's admitted repudiatory breach of contract (Issue 12 of the Amended List of issues) and the claimant is therefore entitled to damages in respect of his agreed notice entitlement of 7 weeks.

REASONS

Background

1. By a claim form which was presented to the tribunals on 22 May 2017, the claimant alleged that he had been constructively unfairly dismissed and wrongfully dismissed by the respondent and further that the respondent had made unlawful deductions from his wages in respect of accrued unpaid holiday monies.
2. The claims were resisted by the respondent save that the claim for accrued holiday pay was subsequently resolved between the parties.
3. This is a longstanding and highly acrimonious case which has involved several telephone case management hearings, multiple disputed applications and the adjournment of the Hearing in March 2018. The background to the case is set out in detail in the Order which was sent to the parties on 28 September 2018 and is therefore only referred to in summary below.
4. This matter has been complicated by the fact that the parties are also engaged in High Court proceedings. In February 2017, the respondent (and related parties) commenced proceedings against the claimant in the High Court for alleged breach of fiduciary duty and related claims in respect of the claimant's previous involvement with the respondent and others as an independent financial adviser. These proceedings are ongoing. In November 2017, the respondent made an application for injunctive relief against the claimant in respect of alleged sensitive/ confidential documentation which it believed that the claimant had taken from the respondent which included in particular the documents identified in a document entitled "Traffic and frequency analysis of emails sent by Timothy John Robins on 2 August 2016" which was prepared for the purposes of such application ("the Analysis document for 2 August 2016"). The application for injunctive relief was subsequently dismissed for reasons unrelated to this case. The claimant prepared a witness statement dated 1 December 2017 in response to the respondent's application for injunctive relief. This document is at pages 231- 234 of the Supplementary Bundle as referred to further below.

The Hearing on 12 – 14 March 2018.

5. The substantive Hearing commenced on 12 March 2018 but was subsequently adjourned on 14 March 2018 upon the application of the respondent following the termination of its instructions to its then legal representatives. The parties also confirmed at that Hearing that there was a Hearing in the High Court on 17 April 2018 relating to the application for injunctive relief referred to above.

Bundle of documents

6. The tribunal was provided with (a) an agreed bundle of documents ("the bundle") and (b) an agreed supplementary bundle ("the Supplementary Bundle"). At the commencement of the Hearing there was a further disputed application by the respondent to include additional documents in the bundle. The matter was however ultimately resolved by agreement on the basis that (a) the claimant confirmed that he did not challenge the veracity of the

Analysis document for 2 August 2016 and (b) it was agreed that the claimant's witness statement dated 1 December 2017 in the High Court proceedings (referred to above) would be included in the Supplementary Bundle.

Witnesses

7. The tribunal was provided with a witness statement and heard oral evidence from the claimant.
8. The tribunal was provided with witness statements and heard oral evidence from the following on behalf of the respondent: - (a) Mr Stuart Robertson, Managing Director and majority shareholder in the respondent and (b) Mr David Evans, Finance Manager of the Respondent. The tribunal also received witness statements from the following witnesses on behalf of the respondent :- (a) Mr Paul Kennelly HR consultant and (b) Mr Neil Mercer, solicitor advocate. The witness statements of Mr Kennelly and Mr Mercer were not however challenged by the claimant and the tribunal therefore did not hear any oral evidence from them.

The Issues

9. At the Hearing in March 2018 a List of Issues was produced following agreement between the parties / determination of certain aspects by the tribunal ("the List of Issues"). The List of Issues identified a number of alleged repudiatory breaches by the respondent upon which the claimant relied in support of his claim of constructive dismissal/ wrongful dismissal.
10. During the course of the Hearing in October 2018 the respondent however conceded that: -
 - (1) The respondent's conduct in respect of Item 12 of the List of Issues (the letter from the respondent to the claimant dated 10 February 2017 concerning possible disciplinary action against the claimant in respect of the claimant's failure to provide a witness statement in the civil case against the respondent's former accountants) breached the implied term of trust and confidence.
 - (2) The claimant's resignation in reliance on the respondent's breach identified at Item 12 in the List of Issues constituted a dismissal for the purposes of section 95 (1) (c) of the Employment Rights Act 1996 ("the Act") and further that the claimant had also been unfairly dismissed by the respondent for the purposes of section 98 of the Act because of such breach.
 - (3) The respondent further conceded that it had breached the ACAS Code of Practice in relation to Item 12 of the List of Issues and there would be an agreed percentage uplift of 15% to any compensatory award (if relevant) pursuant to section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992.

11. The parties subsequently agreed an Amended List of Issues dated 10 October 2018 (“the Amended List of Issues”) setting out the remaining issues for determination by the Tribunal (save that the claimant subsequently withdrew his claim pursuant to section 38 of the Employment Act 2002). A copy of the Amended List of Issues is attached.

FINDINGS OF FACT

Background

12. The claimant was employed by the respondent from 5 November 2009 until 24 February 2017. The claimant’s date of birth is 30 April 1960.
13. The Respondent is a family business which was set up by Mr Stuart Robertson’s father in 1982. At the time of the events in question Mr Stuart Robertson (“Mr Robertson”) was the majority shareholder and Managing Director of the Respondent and had been employed by the respondent for approximately 20 years. The respondent employed 10 staff including the claimant and Mr Robertson.
14. The claimant worked as and had dealings with Mr Robertson and the respondent as an independent financial adviser before joining the respondent as an employee in November 2009 in sales and marketing. The claimant subsequently also became a director and minority shareholder (30 per cent) in the respondent with effect from June 2010 at which time the claimant became the respondent’s sales and marketing director. The claimant invested £50,000 in the respondent in return for his 30 per cent shareholding and associated dividends.
15. The claimant and Mr Robertson shared an office and had adjoining desks/ computers. Mr Robertson and the claimant shared their respective computer passwords to the respondent’s email system for work purposes. Prior to the events in question the claimant and Mr Robertson had a close working relationship.
16. The respondent also employed Mr David Evans as Finance Manager. Mr Evans undertook financial and other administrative duties on behalf of the respondent. Mr Evans did not have any management responsibility for any other members of staff or any such experience. At all relevant times the claimant had a higher rate of salary than Mr Evans. The respondent also employed Mr Mike Angouras who had responsibility for production.

The claim against the respondent’s former accountants

17. Mr Robertson and the claimant had concerns regarding the conduct of a former director and also regarding the conduct of the former accountants of the respondent. Following the claimant’s appointment as a director and shareholder of the respondent, the respondent/ its shareholders/directors entered into a conditional fee agreement (“CFA”) with Enigma solicitors to pursue an action against the respondent’s former accountants. A copy of the CFA which the claimant signed on 22 June 2012 is attached to Mr Mercer’s witness statement in these proceedings.

Purchase of the claimant's shares and associated matters

18. In 2014 Mr Robertson and the claimant decided, following professional advice, to use their respective SSAS pensions to purchase the respondent's factory. Mr Robertson subsequently used some of the monies released by the purchase to buy back the shares which had previously been sold to the claimant as he wished to return the shareholding in the respondent to family ownership. The sale of the claimant's shares in the respondent to Mr Robertson was agreed on 8 October 2014 (page 58 of the bundle). The transaction was subsequently deferred to June 2015 at the request of the claimant for tax purposes following professional advice. A copy of the relevant special resolution dated 26 June 2015 relating to the share purchase is at page 88 of the bundle. The claimant received £180,000 in payment for his shareholding in the respondent.
19. The claimant contended that he was unhappy about being required to sell his shares back to the respondent but had no alternative but to agree to such request as the respondent was entitled under the terms of the respondent's memorandum and articles of association to purchase his shareholding. The tribunal is not however satisfied that the claimant raised any concerns with the respondent at the relevant time regarding such matter.
20. In October 2014 the claimant and Mr Robertson agreed revised working arrangements for the claimant in the light of the above changes. It was agreed that the claimant would be employed as the respondent's sales and marketing manager for 3 days a week on a salary of £25,000 per annum with effect from 1 January 2015. The claimant requested during the discussions regarding the claimant's revised working arrangements a salary of £50,000 per annum for a 3-day working week together with a car allowance both of which requests were refused by Mr Robertson on commercial grounds.

The claimant's terms and conditions of employment

21. On 9 October 2014, the claimant signed particulars of employment confirming his agreement to the terms contained therein ("the Particulars") with effect from 5 January 2015. The Particulars are at pages 60 – 67 of the bundle. The tribunal has noted in particular, the following provisions of the Particulars namely (a) paragraph 9 - job description – the person to whom the claimant was stated to be immediately responsible was "Stuart Robinson or the most appropriate person in a supervisory position". Further, the claimant was required to "well and faithfully serve the Employer and use your utmost endeavours to promote its interests ..." (b) paragraph 23 – notice (c) paragraph 25 – the reference to the attached disciplinary rules and procedures (d) paragraph 29- internet and email use including that – "The use of the Internet and work email addresses is restricted to work related activities.....All information on company IT equipment and systems is the property of the company (including emails and contact lists).... "Use of your company email address for personal use should be restricted to essential or urgent communication" and (f)

Paragraph 33 - confidentiality – the prohibition (during and after the termination of employment) of the disclosure of any trade secrets or other information relating to the respondent's business dealings or affairs of any customers, agents or suppliers.

The respondent's disciplinary rules and procedures

22. A copy of the respondent's disciplinary rules and procedures are at pages 68 – 70 of the bundle. Cited examples of gross misconduct justifying summary dismissal include breaches of confidentiality and theft.

The respondent's grievance procedure

23. A copy of the respondent's grievance policy is at pages 74 – 75 of the bundle.

The file note dated 22 February 2015

24. On or around 23 February 2015, the claimant discovered a copy of a note of a meeting between Mr Robertson and Mr Mercer of Enigma solicitors dated 22 February 2015 concerning the litigation with the respondent's former accountants which had been left on view in the middle of the office desks which the claimant shared with Mr Robertson. The note recorded that Mr Robertson had informed the solicitors as follows :- , "He says that Mr Tim Robins is now being essentially moved out of the company and has a job for the moment but in due course will be moving on and then Stuart says that money he has obtained from his pension he has used to pay off Tim by buying back the shares at..." (Extract at page 87 of the bundle).

25. The claimant contended that the discovery of such note made him feel concerned about his future with the respondent and that when he raised the matter with Mr Robertson he did not receive a satisfactory explanation.

26. The respondent contended that the note had been left out in error, that it referred only to the ending of the claimant's role as a director and shareholder in the business and did not refer to his continuing involvement as an employee. The respondent further contended that Mr Robertson gave appropriate assurances to the claimant which were accepted by him at the time.

27. The Tribunal is satisfied that the discovery of the above file note gave rise to genuine and reasonable concerns on the part of the claimant about his future with the respondent which he did not consider to have been satisfactorily addressed by the respondent at that time.

28. Following the termination of the claimant's role as a director and shareholder in the respondent in the summer of 2015 the claimant had more limited access to the respondent's financial information and had more limited authorisation to undertake customer visits.

The summer of 2016

29. By the summer of 2016 the claimant had increasing concerns about his future with the respondent in light of the matters referred to above and the further events referred to below.

The bonus payment

30. In July 2016 the claimant did not receive a bonus payment (of around £500) which he had expected to be paid to him on around 20 July 2016 in accordance with the respondent's normal practice and as had been received by him the previous year. Further, the claimant understood that he was the only employee who had not been paid such bonus payment. The claimant did not however raise any concerns with anyone in the respondent at that time concerning the non-payment of such monies.

The claimant's pension investment in the factory

31. On or around 27 July 2016 Mr Robertson raised with the claimant, whilst they were sitting at their respective desks at the respondent's premises, that he wished to purchase the claimant's share of the factory which had been funded by their respective pension investments in 2014. The claimant contended that he was ambushed and unnerved by such an approach and that he took immediate legal advice to ascertain whether Mr Robertson could require him to relinquish his pension investment in the factory.

32. The respondent contended that it was an informal approach by Mr Robertson as part of his desire to return the respondent, including the factory premises, to family ownership which was made in the context of what Mr Robertson understood to be the close working relationship between him and the claimant. The respondent further contended that Mr Robertson had not intended to upset or disadvantage the claimant in any way and that when the claimant indicated that he did not wish to sell his investment in the factory Mr Robertson did not pursue the matter further.

33. Having considered the evidence, the Tribunal is satisfied that (a) Mr Robertson approached the claimant on an informal basis as part of what Mr Robertson understood to be a close working relationship and an understanding by the claimant of Mr Robertson's desire to bring ownership of the respondent back into full family ownership (b) when the claimant informed Mr Robertson that he did not wish to sell his investment in the factory Mr Robertson did not pursue the matter further and (c) the claimant was upset and unsettled by Mr Robertson's approach which he perceived as an attempt by Mr Robertson to secure the return of the respondent's premises into family ownership (d) the claimant sought urgent legal advice (page 96) regarding the matter and as a result of which the claimant understood that he could not be forced to sell his pension investment in the factory (page 102 of the bundle).

Mr Robertson's comments on 27 July 2016

34. The claimant contended that on or around 27 July 2016, following the receipt of a telephone call from a large customer confirming that they would continue and increase its business with the respondent, Mr Robertson made comments to the claimant which were designed to undermine and upset him. In summary, the claimant contended that following the receipt of the telephone call Mr Robertson, who was sitting at the adjoining desk, made inappropriate comments that (a) God looked after him (b) that he would be taking £15,000 out of the Respondent to put

into his pension fund and (c) that he intended to purchase a set of Makita tools (which he knew that the claimant would want).

35. In summary, the Respondent accepted that (a) Mr Robertson was jubilant when he received the telephone call from the customer on 27 July 2016 as it had been feared that the respondent was about to lose an important and valuable client and (b) Mr Robertson informed the claimant that he would be investing £15,000 in his pension fund and purchasing a set of Makita tools. The respondent denied however that the comments were intended by Mr Robertson to, in any way, undermine or belittle the claimant.

36. The tribunal is satisfied that (a) the comments were made by Mr Robertson as alleged by the claimant (b) Mr Robertson's comments could reasonably have been regarded by the claimant as insensitive and (c) they were however made in the context of Mr Robertson's relief at retaining an important and valuable client and were not designed or intended by Mr Robertson to undermine or belittle the claimant.

The claimant's meeting with Mr Mercer on 20 July 2016

37. The claimant was interviewed by Mr Mercer of Enigma solicitors on 20 July 2016 as part of the process of providing a witness statement for the purposes of the proceedings against the respondent's former accountants. The claimant found this a difficult interview particularly because the claimant considered that Mr Mercer (a) was asking him for detailed information regarding his background prior to the claimant's involvement with the respondent which the claimant did not consider to be relevant to the matters in issue and (b) had made inappropriate comments during the meeting which appeared to suggest that the claimant had acted inappropriately in respect of his investment in the respondent.

The events of 2 August 2018 and associated matters

38. Mr Robertson was absent from work on leave from the afternoon of Wednesday 27 July 2016 until the morning of Tuesday 2 August 2016.

39. There is a significant dispute between the parties regarding the events of 2 August 2016. Having given careful consideration to the oral evidence of the claimant and Mr Robertson together with the available documentary evidence (including in particular the document entitled the Analysis document for 2 August 2016") (at pages 448-450 of the bundle) the tribunal is satisfied, on the balance of probabilities that the relevant events occurred as set out below.

40. The claimant arrived at the respondent's premises at around 7:30 AM. Mr Evans was not in attendance that day as he was on leave. Mr Robertson arrived at the respondent's premises around 8.10am – 8.15am.

41. Between 7:42 AM and 8:11 AM the claimant sent from his work email address to his personal email address the series of emails and attachments listed at paragraphs 1) – 14) of the Analysis document for 2 August 2016 (at pages 449 – 450 of the bundle). The emails and attachments were forwarded to the claimant's personal email address

without Mr Robertson's knowledge or consent. The claimant accepted in his evidence that he had forwarded such emails and attachments to his personal email address.

42. The Tribunal is satisfied that the documents / attachments listed at paragraphs 1) – 14) of the Analysis document for 2 August 2016 (and also the document/attachment listed at paragraph 20) referred to below) were (save for the document referred to at paragraph 12) commercially sensitive documents which were potentially useful to a competitor as they contained details of the respondent's customers/prices. When reaching this conclusion, the tribunal has taken into account the oral evidence of Mr Robertson, the nature of the documents as described in the Analysis document for 2 August 2016 and also that the claimant accepted in his oral evidence to the tribunal in March 2018 that some of the emails which he had sent to his personal email address on 2 August 2016 would have been useful to a competitor.
43. The claimant subsequently deleted the emails listed at paragraphs 1) – 14) (and also 20) of the Analysis document for 2 August 2016 from his sent email account at the respondent on 2 August 2016.
44. Following Mr Robertson's arrival at around 8:10 AM on 2 August 2016 Mr Robertson reviewed the documents which had been received during his absence on leave and there was a catch up discussion between Mr Robertson and the claimant. During this initial discussion between the claimant and Mr Robertson the claimant informed Mr Robertson that he had a GP appointment but refused to discuss the problem other than it was of a personal nature.
45. There was a dispute between the parties regarding the arrangements for the claimant's GP appointment and associated events including whether the claimant initially informed Mr Robertson that his GP appointment was at noon and subsequently changed it until 3pm which was denied by the claimant.
46. The limited available documentary evidence shows that (a) the claimant contacted his GP surgery by mobile telephone at 8:58 AM on 2 August 2016 (page 137 of the bundle) and (b) that a GP attended the claimant at his home at 16.32 PM on 2 August 2016 (the email from the claimant's GP surgery dated 28 November 2017 at page 414 of the bundle). The claimant has not provided the tribunal with a copy of any GP records for 2 August 2016.
47. Having given careful consideration to the conflicting evidence and limited documentary evidence the tribunal is satisfied on the balances of probabilities that (a) the claimant initially informed Mr Robertson that he had a GP appointment at midday (b) in light of the information which the claimant gave to Mr Robertson about the timing of his GP appointment Mr Robertson left the respondent's premises at around 9 AM to visit a local supermarket to purchase food for his breakfast and lunch and (c) Mr

Robertson was absent from the respondent for such purposes for approximately 45 minutes.

48. The respondent contended that during Mr Robertson's absence from the office the claimant accessed Mr Robertson's work computer and transferred to the claimant's work email address at 9:07 AM, 9:28 AM, and 9:35 AM respectively the emails and attachments identified at paragraphs 15), 16) and 18) of the Analysis document for the 2 August 2016 (page 450 of the bundle).
49. Document 15) is an email from Mr Mercer of Enigma Law to Mr Robertson dated 1 August 2016 attaching Mr Robertson's draft witness statement for the purposes of the litigation against the respondent's former accountants. Documents 16) and 18) are further emails from Mr Mercer of Enigma Law to Mr Robertson concerning the litigation against the respondent's former accountants including advice/update on the litigation.
50. The respondent further contended that whilst Mr Robertson was out of the office the claimant further acted as follows: (a) at 9.33am the claimant returned to his own work computer and forwarded the email and attachments at document 15) to his own personal email address and (b) at 9:45 AM the claimant forwarded the email and attachments at document 18) to his own personal email address (the references at paragraphs 17) and 19) in the Analysis document for 2 August 2016. The respondent further contended that these contained privileged information and such transfers were made without Mr Robertson's knowledge or consent.
51. In the witness statement which the claimant prepared on 1 December 2017 for the purposes of the subsequent High Court proceedings against him (pages 231-234 of the Supplementary Bundle) the claimant (a) denied that he had accessed Mr Robertson's work computer on 2 August 2016 (paragraph 7 i) at page 232 of the Supplementary Bundle) (b) stated that he had no recollection and therefore denied the events asserted by the respondent in respect of the privileged material in respect of the litigation against the former accountants (paragraph 7 ii) at page 232 of the Supplementary Bundle) and (c) accepted that he had sent a number of emails from his work email address to his personal email address on 2 August 2016 and that he had deleted those emails (but not all of his sent history) from his work email address on 2 August 2016 (paragraph 7 iv at page 233 of the Supplementary bundle).
52. In his evidence to the tribunal the claimant stated (a) that he had no memory of transferring the documents at 15), 16) and 18) of the Analysis document for 2 August 2016 from Mr Robertson's work email address to his work email address or of subsequently transferring any such documents (via the emails referred to 17) or 19) of the Analysis document for 2nd of August 2016) to his own personal email account and (b) that any denial made in the High Court proceedings was made by him because he could not recall any such actions and therefore believed that he had not done so.

53. It was also contended on behalf the claimant that the emails referred to at 15), 16) and 18) of Analysis document for 2 August 2016 may have been transferred to the claimant by Mr Robertson for filing after Mr Robertson had read them on his return to the office. The claimant did not however assert as such during his oral evidence to the tribunal and this was denied by Mr Robertson during his oral evidence.

54. Having given the matter careful consideration, the tribunal is satisfied on the balance of probabilities that: -

- (1) The claimant accessed Mr Robertson's work computer between 9:07 AM and 9:35 AM during Mr Robertson's absence from the office and transferred, without Mr Robertson's knowledge or consent, the emails and attachments relating to the litigation against the respondent's former accountants as referred to at documents 15), 16) and 18) of the Analysis document for 2 August 2016 to the claimant's own work email address.
- (2) At 9.33am and 9.45 am (again during Mr Robertson's absence from the office) the claimant transferred to his private email address, without Mr Robertson's knowledge or consent, the emails and attachments identified at documents 15) and 18 of the Analysis document for 2 August 2016 (via the emails identified at documents 17 and 19 of the Analysis document for 2 August 2016) (page 450 of the bundle).
- (3) The claimant subsequently also deleted from his work email address on 2 August 2016 the emails and attachments identified at paragraphs (1) and (2) above.
- (4) For the avoidance of doubt, the tribunal rejects any contention by the claimant that he did not access Mr Robertson's work email account on 2 August 2016 including any suggestion that the documents identified at 15) 16) and 18 of the Analysis document for 2 August 2016 were transferred by Mr Robertson to the claimant for filing and/or (b) that the claimant did not transfer the documents identified at (2) above to his personal email account on 2 August 2016.
- (5) When reaching the above conclusions, the tribunal does not consider the contention that the documents were transferred to the claimant by Mr Robertson for filing (which was denied by Mr Robertson and was not contended by the claimant in the High Court proceedings) to be credible. Further, it would not, in any event, explain the emails at 17) and 19) of the Analysis document dated

2 August 2016 forwarding the documents and attachments at 15) and 18) to the claimant's personal email address.

55. At 11.39 am (following Mr Robertson's return to the office) the claimant transferred from his work email address the emails and attachments concerning a purchase order from a customer, identified at document at 20 of the Analysis document for 2 August 2016, to his personal email address (page 450 of the bundle). Such emails and attachments were transferred to the claimant's personal email address without Mr Robertson's knowledge or consent. The Tribunal is satisfied, that these were further commercially sensitive documents which would potentially have been useful to a competitor. The claimant also deleted on 2 August 2016 the emails and attachments at document 20 of the Analysis document for 2 August 2016 from his work email address at the respondent.
56. The respondent did not produce any evidence to the tribunal to indicate that the claimant had subsequently disclosed (other than to his legal advisers) or used any of the commercially sensitive or confidential privileged documents which the claimant had taken from the respondent without consent on 2 August 2016.

Subsequent events in August 2016

57. On the evening of 2 August 2016, the claimant sent Mr Robertson an email informing him that following a visit to the doctors that day he had been signed off work for an initial period of one month and that he would send in the doctor's certificate the following day. Following an enquiry from Mr Robertson regarding the nature of the claimant's illness, the claimant informed Mr Robertson that he had been feeling generally unwell for a while, that he had been advised that his heart was under stress and that he would have to come to a full stop with a review in a month's time. The claimant further advised Mr Robertson that he would inform him if there was any change in his condition (pages 98-99 of the bundle).
58. The claimant subsequently provided the respondent with a statement of fitness from work certificate from his GP surgery ("a doctor's certificate") dated 2 August 2016 in which it was stated that the claimant was unfit for work because of a "stress related" condition until 6 September 2016 and that the position would be reviewed again at the end of that period (page 97 of the bundle).
59. In the light of the claimant's absence from work on 3 August 2016, Mr Robertson accessed the claimant's work email address in order to ascertain whether there were any work-related matters which he needed to deal with in the claimant's absence. Mr Robertson discovered on 3 August 2016 that the claimant had deleted sent emails from his email address. There is a dispute between the parties as to whether the claimant had deleted all of his sent emails from his work account. Although the tribunal is satisfied in the light of the findings above regarding the events of 2 August 2016 that the claimant had deleted various items

from his work sent email history, it is not satisfied that the claimant had deleted his entire sent history as contended by the respondent. Mr Robertson could not understand why the claimant had deleted emails from his sent emails. Mr Robertson did not however, suspect the claimant of any wrongdoing at that time.

60. There was a subsequent exchange of emails between the claimant and Mr Robertson between 3 August 2016 and 15 August 2016 (pages 100-105 of the bundle). During the exchange of emails Mr Robertson sent to the claimant on 8 August 2016 a copy of an email which he had received from Mr Mercer of Enigma Law a few days earlier. This email related to the claimant's uncompleted witness statement for the purposes of the litigation against the former accountants in which Mr Mercer requested Mr Robertson to confirm whether the claimant was still available to complete the witness statement as the claimant was a critical witness in the litigation. Mr Robertson requested the claimant to contact Mr Mercer as the deadline (for the exchange of witness statements) was drawing nearer (page 103 of the bundle). In a text message dated 15 August 2016 the claimant advised Mr Robertson that he was aware that Mr Robertson been trying to contact him but that he was unable to discuss work-related issues at that time because he had been signed off for a month with stress by his doctor (page 104 of the bundle).

61. There was a further exchange of text/emails between Mr Robertson and the claimant between 23rd and 31 August 2016 during which (a) Mr Robertson informed the claimant that he had received contact from the respondent's mobile telephone providers informing him that the claimant had asked for his telephone number to be removed from the respondent's account in response to which the claimant denied any such request and gave an alternative explanation (b) Mr Robertson expressed concern for the claimant's well-being and (c) the claimant advised Mr Robertson that he had an appointment with his doctors to discuss how things were proceeding with his health and that he would keep Mr Robertson informed.

The claimant's doctor's certificate dated 2 September 2016

62. The claimant was issued with a further doctor's certificate dated 2 September 2016 in which it was stated that (a) the claimant was unfit for work for one month and (b) that the cause of the claimant's absence was "stress at work" (page 113 of the bundle).

The claimant's email dated 3 September 2016 and subsequent correspondence

63. The claimant sent an email to the respondent dated 3 September 2016 (page 114 bundle) to which he attached the doctors' certificate dated 2 September 2016. In summary, the claimant advised Mr Robertson that his GP had signed him off for work for another month due to stress and that although he understood that his illness had come at an inconvenient time for the respondent it was beyond his control. The claimant advised Mr Robertson that he would be taking time seriously to think about his future at the respondent and that he would appreciate it if Mr Robertson would enable him to gather his thoughts. The claimant further stated that he

would let Mr Robertson know as soon as he had reached a decision. Mr Robertson responded briefly by email dated 6 September 2016 thanking the claimant for his email and expressing hope that they would be in touch shortly.

64. There was a further exchange of emails between the claimant and Mr Robertson between 23rd and 25 September 2016 (pages 117-18 of the bundle) which were initiated by the claimant. The claimant contacted Mr Robertson on 23 September 2016 suggested that they should have a face to face meeting. The claimant and Mr Robertson agreed to meet at a public house/ restaurant on 27 September 2016.

The telephone call on 26 September 2016

65. The respondent contended that on 26 September 2016 Mr Robertson received a telephone call from Mr Bob Prior, whom Mr Robertson understood to be a friend of the claimant, enquiring about the claimant's job at the respondent as the claimant had told Mr Prior that he was retiring. The claimant accepted that he had had an informal discussion with Mr Prior around this time but denied that he had informed him that he was retiring. Having balanced the evidence, including that the claimant accepted that he had had a discussion with Mr Prior around this time, the tribunal accepts on the balance of probabilities that Mr Robertson received a telephone call as contended by the respondent above including that Mr Prior told Mr Robertson that the claimant had told him that he was retiring.

The meeting on 27 September 2016

66. The claimant and Mr Robertson had a meeting over lunch on 27 September 2016. There was a dispute between the parties concerning the nature and the outcome of their discussions. There is limited documentary evidence to assist the tribunal in resolving such disputes. Neither party kept/ has provided the tribunal with any contemporaneous notes. Mr Robertson has provided the tribunal with a copy of his notes of the meeting which are at pages 119-120 of the bundle. The tribunal has however approached this note with caution as (a) Mr Robertson confirmed that it was not prepared until around the end of October 2016 and (b) the note goes beyond a factual recollection of the events of 27 September 2016 as it contains a highly critical analysis by Mr Robertson of the claimant's intentions and actions at this time.

67. In summary, the claimant's account of the meeting on 27 September 2016 was as follows:-

- (1) The claimant explained to Mr Robertson that (a) he had been to see his doctor on 2 August 2016 as he had felt very stressed and (b) that he thought that the stress had been caused by the erosion of his role since the sale of his shares culminating in the events of July 2016 and the request by Mr Robertson to buy back the claimant's share in the respondent factory.

- (2) The parties discussed the preparation of the claimant's witness statement for the purposes of the litigation against the respondent's former accountant. The claimant explained to Mr Robertson that he had not completed his witness statement as he had found the meeting with Mr Mercer of Enigma Law unsettling and stressful.
- (3) Mr Robertson explained to the claimant that he was due to attend a mediation meeting with the former accountants and the respondent's solicitors the following day and asked the claimant whether he was prepared to complete his witness statement. The claimant told Mr Robertson that he did not feel well enough to complete his statement at that time and also that he had concerns about the accuracy of any statement which would be prepared by Mr Mercer.
- (4) Mr Robertson informed the claimant that if he did not complete the witness statement when he had recovered from his illness he would be pursued by the respondent's solicitor on a personal basis.
- (5) The claimant explained to Mr Robertson that he felt that he no longer fitted into the respondent and that he could not stand the pressure of being pursued in respect of his witness statement and therefore asked Mr Robertson whether he would consider giving him a settlement package to allow them to part amicably.
- (6) Mr Robertson responded by asking the claimant whether £25,000 was the figure which he had in mind to which the respondent replied that he was aware that the first £30,000 could be paid tax free.
- (7) Mr Robertson told the claimant that if he agreed to give a witness statement and would allow Mr Robertson to confirm as such at the mediation meeting he would give the claimant an exit package of in the region of £30,000. The claimant informed Mr Robertson that he would write his own witness statement as he did not trust the respondent's solicitor but that Mr Robertson could confirm at the mediation meeting that he would provide a statement.
- (8) Towards the end of the meeting Mr Robertson said that he needed to look into the exit package to be clear on what he needed to do but as the mediation was the following day he could not do that straight away.

- (9) Mr Robertson confirmed that he was happy for the respondent to continue to pay the claimant full pay until the agreed end date.
- (10) The claimant and Mr Robertson shook hands on what was agreed.

68. In summary, the respondent's account of the meeting on 27 September was as follows:-

- (1) Mr Robertson asked the claimant about his intentions regarding the claimant's return to work. The claimant responded by informing Mr Robertson that he felt that it might be better for both parties if they parted company provided that the respondent could come up with a redundancy package for the claimant to give him a cushion whilst he continued to recover and look for another job.
- (2) Mr Robertson asked the claimant, in a jovial way "what are you looking for, a year's salary?" to which the claimant responded that the respondent could pay him up to £30,000 tax free if the respondent made him redundant and explained that he was fearful that it would be difficult for him to secure another job.
- (3) The claimant informed Mr Robertson that he had been the only person in the business who had not received a bonus and that he felt upset about this.
- (4) The claimant asked about the litigation against the former accountants and Mr Robertson told him that there was a mediation meeting the following day.
- (5) Mr Robertson asked the claimant about his intentions regarding the witness statement to which the claimant responded that he had taken advice from an employment solicitor who had advised him that he was not required to complete the witness statement if he did not want to do so.
- (6) Mr Robertson explained to the claimant that he believed that the claimant had been given incorrect advice and that it was necessary for the claimant to complete his witness statement as if he did not do so the consequences could be that Enigma Law might pursue the respondent or the claimant personally for any losses incurred by reason of

the claimant's failure to comply with his agreement to provide such a statement.

- (7) By the end of the meeting the claimant agreed to cooperate with regard to the completion of his witness statement for the litigation against the former accountants and Mr Robertson agreed to consider the claimant's request for a redundancy package. Mr Robertson also agreed to pay the claimant his full salary until they had agreed an exit package.
- (8) The parties shook hands on such basis.

69. Having given careful consideration to the contentions of the parties the Tribunal is satisfied, on the balance of probabilities, as follows: -

- (1) The meeting on 27 September 2016 was initiated by the claimant for the purposes of endeavouring to secure an exit package from the respondent. When reaching this conclusion the tribunal has taken into account in particular (a) the contents of the claimant's email to the respondent dated 3 September 2016 in which he stated that he wanted to take time to think about his future with the respondent and that he would let Mr Robertson know as soon as he had reached a decision (page 114 of the bundle) (b) the tribunal's findings regarding the telephone call which Mr Robertson received from Mr Prior on 26 September 2016 (c) the claimant's subsequent email to Mr Robertson dated 29 September 2016 (page 128) in which he states that it "was good to meet on Tuesday and discuss my exit plan from CAB" and (d) it is not contended by the claimant that he put to the respondent any proposals for a return to work.
- (2) The focus of the discussions at the meeting on 27 September 2016 were on two main issues namely (a) an exit package for the claimant and (b) the claimant's position regarding the completion of a witness statement/confirmation that he would provide such a statement for the purposes of the litigation against the former accountants.
- (3) The claimant explained that he felt that he no longer fitted in the respondent following the sale of his shares and the erosion of his role and that it would be best if the parties parted company on the basis that the respondent would pay him an agreed redundancy exit package. The claimant also informed Mr Robertson that he had been upset by the fact that he had been the only person in the business who had not received a bonus in July 2016.

- (4) Mr Robertson and the claimant discussed the amount of any exit package and Mr Robertson asked (as accepted by Mr Robertson) the claimant whether he was looking for “ a year’s pay”. The claimant responded to this by informing Mr Robertson that he understood that the respondent could pay him up to £30,000 tax-free if the respondent made him redundant.
- (5) Mr Robertson informed the claimant that he was attending the following day a mediation meeting in the litigation against the respondent’s former accountants and asked the claimant about his intentions regarding the completion of his witness statement.
- (6) The claimant advised Mr Robertson of his concerns about the way in which the matter had been handled by Enigma Law including that he had been advised by employment solicitors that he was not obliged to produce a statement. As part of this discussion Mr Robertson advised the claimant of what he understood to be the potential consequences of the claimant failing to complete his witness statement including that Enigma Law might pursue the respondent/the claimant personally for any consequential losses. The claimant was distressed by Mr Robertson’s suggestion that he could be pursued personally by Enigma Law if he did not complete his witness statement.
- (7) The claimant agreed to complete his witness statement and also for Mr Robertson to confirm at the mediation meeting that he had agreed to do so.
- (8) The tribunal is satisfied that the meeting concluded on the basis that (a) Mr Robertson agreed to consider further paying the claimant an agreed redundancy package in the realms of a year’s salary (b) the claimant agreed to complete, when he was well enough to do so, his witness statement for the purpose the litigation against the respondent’s former accountants and authorised Mr Robertson to confirm as such at the mediation meeting the following day and (c) Mr Robertson agreed to pay the claimant his full salary until they had agreed an exit package for him (d) the parties shook hands on such basis.
- (9) The tribunal is not satisfied that Mr Robertson agreed at the meeting to pay the claimant any agreed sum by way of a redundancy payment/ exit payment. When reaching this conclusion the tribunal has taken into account that the

claimant accepted in his witness statement that Mr Robertson told him that he would need to look into the exit package to be clear what he needed to do and that in the claimant's subsequent email to the respondent dated 29 September 2016 he talks about an "in the realm figure" of a year's salary". The tribunal is however satisfied that the claimant left the meeting on the understanding that he would receive an exit package in the realms of a year's salary provided that he cooperated with the provision of a witness statement in the litigation against the former accountants and which understanding was supported by the fact that Mr Robertson agreed to continue to pay his full salary until (as stated in Mr Robertson's witness statement) they had agreed an exit package for the claimant.

The claim against the former accountants

70. Following the mediation meeting on 29 September 2016 the respondent reached a negotiated settlement with their former accountants and a witness statement was no longer requested from the claimant.

The subsequent exchange of emails between the parties at the end of September and beginning of October 2016.

71. There was a subsequent exchange of emails between the parties at the end of September 2016 and beginning of October 2016 in which there was a noticeable deterioration in the relationship including in particular in respect of the tone of Mr Robertson's emails relating to the claimant's short delay in submitting a further sick note.

72. In the exchange of emails on 29 September 2016 the claimant stated that it had been good to meet with Mr Robertson to discuss the claimant's exit plan from the respondent and that he was glad that they were able to agree an "in the realm figure" of a year's salary and shake on it allowing them both to move forward (page 128 of the bundle).

73. Mr Robertson responded by stating that they had never agreed such a payment, that they had agreed that Mr Robertson would consider the claimant's request of redundancy and that he would be in touch in due course (pages 127-128 of the bundle).

74. Following the exchange of such emails the claimant discovered that he had not been paid full pay as agreed by Mr Robertson at the meeting on 27 September 2016.

75. On 3 October 2016 the claimant emailed Mr Robertson (page 129 of the bundle) in summary stating that (a) although Mr Robertson had agreed at the meeting on 27 September 2016 that he would continue to pay the claimant full pay until he had reached a redundancy agreement he had discovered that he was being paid SSP and queried whether Mr Robertson was aware of the position and (b) recorded his understanding that it had been agreed at the meeting on 27 September 2016 that Mr

Robertson would pay the claimant in the region of £25,000 i.e. one year's salary as an exit strategy.

76. Mr Robertson replied by email on 4 October 2016 (page 131 of the bundle) advising the claimant that he had given the instructions for the claimant to be placed on SSP. Mr Robertson further advised the claimant in summary that it was not a redundancy situation as his position was not being made redundant and that he would be in touch further in due course.

77. There was an acrimonious exchange of emails between the parties at the beginning of October 2016 regarding the short delay by the claimant in providing a further doctor's certificate during which (a) Mr Robertson notified the claimant that his failure to provide an up-to-date sicknote could result in disciplinary action (b) Mr Robertson questioned the claimant's explanation for the delay in submitting the doctor's certificate after contacting the claimant's GP practice (without the claimant's knowledge or consent) to verify the availability of the claimant chosen GP to provide such a certificate (pages 132-136 of the bundle). The claimant subsequently provided the respondent with a letter from his GP confirming that he had been seen in the surgery and providing a copy of the consultation note for 7 October 2016 (page 152 of the bundle). The claimant thereafter continued to provide the Respondent with doctor's certificates.

The claimant's email to the respondent dated 11 October 2016

78. The claimant sent what he described as a "without prejudice and subject to contract" email to the respondent dated 11 October 2016 (pages 147 a-147b of the bundle).

79. In summary, the claimant advised Mr Robertson as follows:-

- (1) Having taken advice from ACAS and a solicitor specialising in employment law he was sending Mr Robertson a without prejudice letter regarding the way in which he had been treated by the respondent.
- (2) He felt that he had suffered victimisation by being the only member of staff not to receive an annual bonus, bullying in the workplace and harassment resulting in him being signed off from work with "work related stress" and that he understood that such conduct constituted constructive unfair dismissal.
- (3) He felt so disadvantaged that despite being a key member of staff for the previous 7 years he could not return to work.
- (4) He had instigated an informal meeting with Mr Robertson when they had agreed that it was best for all concerned for

the claimant to receive an exit package in the region of one year's salary in return for which the respondent wanted him to complete a witness statement and to tie up any loose ends as reasonably required. The parties had shaken hands on such basis and Mr Robertson had agreed to pay the claimant his salary as usual until they had reached an agreement on the claimant's exit package.

- (5) Mr Robertson had since told the claimant that he had not agreed anything and that he was merely going to think about it. Further Mr Robertson had reduced the claimant's income to SSP without warning.
- (6) The tone of Mr Robertson's emails over the previous week had caused the claimant great anxiety resulting in further stress and a recommendation from his doctor that his doctor's certificate be extended for a further 6 weeks.
- (7) The claimant felt that Mr Robertson was trying to wear him down and break his spirit and force him to leave the employment of the respondent.
- (8) The claimant requested that in order for the situation to be dealt with quickly in a dignified manner and to avoid the need for expensive litigation Mr Robertson should honour his previous agreement to provide the exit package equivalent to one year's salary
- (9) That he would instruct a specialist employment solicitor to represent him in a case against the respondent if the situation could not be resolved.

The respondent's email dated 19 October 2016

80. Having taken legal advice from Mr R Smith (Mr Mercer's business partner at Enigma Law) Mr Robertson emailed the claimant on 19 October 2016 (pages 148-149 of the bundle) in summary as follows:-

- (1) Mr Robertson apologised for the delay in responding to the claimant which he attributed to heavy workload in the business and explained that he now had an opportunity to get back to the claimant to put his mind at rest at what he appreciated must be an emotionally distressing time for the claimant.
- (2) Mr Robertson gave his explanation for the failure to make payments of the claimant's bonus including that it had occurred as a result of an administrative error on the part of Mr Evans and that he had asked Mr Evans to make sure that the claimant was paid £550 (including an

additional payment of £50 as a gesture of goodwill to compensate the claimant for the delay in payment).

- (3) Mr Robertson expressed upset and concern about the allegations of bullying and harassment and suggested that they had a meeting so that he could get a better understanding of the claimant's concerns and to try to find a solution. Mr Robertson asked the claimant to come back to him with possible dates for a meeting if he wished to discuss the matter further.
- (4) Mr Robertson stated that it appeared that they had come away with different understandings of what had been agreed at the meeting on 27 September 2016 and set out his understanding as follows (a) he had reluctantly agreed to the claimant's request to let him go (b) the claimant had suggested that there was a redundancy situation and had asked Mr Robertson to consider an exit package by which the claimant could be paid up to £30,000 tax-free (c) he had not however agreed to pay the claimant such a sum as he was not asking the claimant to leave (d) he had since confirmed to the claimant that there was no redundancy situation and (e) he urged the claimant to discuss with him if there was anything at work which was making him feel that he wished to leave the employment of the respondent.
- (5) Mr Robertson denied that the respondent had any contractual obligation to pay the claimant full pay whilst he was absent from work because of sickness and contended that he had been appropriately treated having regard to how other staff had been paid and the affordability of such payments.
- (6) Mr Robertson stated that he respected that the claimant was unwell and assured him that he was not trying to wear him down or break his spirit.
- (7) Mr Robertson concluded the letter by stating that he would leave it to the claimant to decide whether he wished to discuss a phased/adjusted return to work or focus on his recovery away from the workplace. Mr Robertson further stated that he did not propose to involve the company's GP to obtain medical advice on any steps to assist the claimant at that time (but might do so if the claimant's absence continued for a prolonged period) but that if the claimant felt this would be worthwhile and would be happy to meet with the company's GP to let him know.

- (8) Mr Robertson finally advised the claimant that ultimately the respondent wished to manage the claimant's return to work but at the present time he would give the claimant the time and space to recover and asked the claimant to let him know if there were any issues which he would like to discuss that might speed up his recovery.

The doctor's note dated 18 November 2018

81. On 18 November 2016 the claimant sent Mr Robertson a further doctor's certificate certifying that the claimant was unfit for work because of stress at work from 16 November 2016 until 8 January 2017.

The Claimant's grievance dated 2 December 2016

82. By a letter dated 2 December 2016 the claimant's solicitors sent a detailed letter of grievance to the respondent on behalf of the claimant. This letter is at pages 155-164 of the bundle.

83. In brief summary, the letter (a) contended that the claimant had been subjected to a sustained campaign of poor, unfair, unreasonable and inappropriate behaviour from, in particular, Mr Robertson and that as a result of the sustained treatment the claimant had begun to suffer from work-related stress in July 2016 which had become progressively worse until the claimant was signed off by his GP on 2 August 2016 with work-related stress (b) further contended that the claimant had been subjected to further unfair and appropriate behaviour from Mr Robertson during his sickness absence (c) made reference to a wide range of issues including alleged inappropriate conduct by Mr Robertson (including with regard to such matters as the sale of the claimant's shares in the respondent, alleged conduct following the meeting on 27 September 2017, alleged conduct on 27 July 2016 with regard to the proposed purchase of the claimant's investment in the respondent's factory premises, refusal to pay the claimant a car allowance, alleged inappropriate comments on 27 July 2016 following the retention of an important customer, failure to pay bonus in July 2016, failure to pay the claimant full pay and other conduct towards the claimant during his sickness absence and (d) raised concerns relating to the conduct of Mr Mercer of Enigma Law solicitors in relation to the preparation of the claimant's witness statement for the litigation against the respondent's former accountants and associated matters.

84. The claimant requested in particular the following resolution from his grievance:-

- (1) A full and impartial investigation into the matters raised.
- (2) That Mr Robertson be removed as the claimant's line manager.
- (3) That Mr Robertson's behaviour should be scrutinised in line with the respondent's disciplinary rules and bullying and harassment procedures and appropriate action taken against him.

- (4) That the claimant would like a written apology from Mr Robertson in respect of the unfair, unreasonable and inappropriate behaviour/ treatment to which he had been subjected and,
- (5) The payment of full pay (backdated in accordance with Mr Robertson's promise on 27 September 2016 to make payment of such monies).

85. The claimant further stated that (a) as the grievance was against Mr Robertson it was not appropriate for him to be appointed as the investigating officer or to be involved in the grievance in any way other than as a witness and (b) further it would not be appropriate for Mr Evans to be the investigating officer as he was involved in the failure to make payments of the claimant's annual bonus and the reduction to SSP.

The appointment of an independent HR consultant

86. The respondent appointed an external HR consultant, Mr Paul Kennelly, to investigate and "chair" the claimant's grievance.

87. Mr Kennelly wrote to the claimant by letter dated 16 December 2016 (a) confirming his appointment including that he would chair, conduct the investigations and reach an independent decision and (b) inviting the claimant to attend a grievance Hearing in January 2017.

The claimant's email dated 8 January 2017

88. The claimant emailed Mr Robertson on 8 January 2017 attaching a further doctor's certificate dated 29 December 2016 certifying that the claimant was unfit for work due to stress at work until 26 February 2017. The claimant also requested holiday leave and asked to retrieve certain items of property which had been kept in storage which requests were granted by the respondent.

The investigations into the claimant's grievance

89. As part of his investigation into the claimant's grievance Mr Kennelly prepared written questions for the claimant and other key persons involved. The tribunal has had regard to the questions and responses which are pages 172-184 of the bundle. In the responses which Mr Robertson gave to Mr Kennelly's questions he denied the allegations against him and further stated that he believed that (a) the claimant had resented him since the time that Mr Robertson had bought back the claimant's shares in the respondent company and (b) the claimant had been trying at the meeting on 27 September 2016 to bribe him into paying an exit package in return for the completion of his witness statement in the litigation against the former accountants (pages 183-184 of the bundle).

90. Mr Kennelly conducted a grievance meeting with the claimant on 12 January 2017. The meeting was recorded - a copy of the transcript of the

recording is at pages 185-295 of the bundle. The claimant gave Mr Kennelly a detailed account of his background and of how he became involved in the respondent. Mr Kennelly discussed with the claimant the grievances which he had raised in the grievance letter dated 2 December 2016. The main focus of the discussion related to the way that the claimant believed that he had been treated by Mr Robertson. The claimant however (a) shared his concerns with Mr Kennelly regarding the conduct and practices of Mr Mercer in relation to his dealings with Mr Mercer for the purposes of preparing his witness statement for the litigation against the respondent's former accountants (including in respect of alleged comments by Mr Mercer suggesting that the claimant had benefitted inappropriately from his investment in the respondent) and (b) made a number of highly critical comments regarding Mr Mercer's professional conduct and practice.

91. In his interview with Mr Kennelly the claimant suggested that Mr Evans had a vested interest in the claimant's disappearance from the business as Mr Evans had raised concerns regarding the effect of the claimant's 3 day week on the working arrangements in the office.
92. The audio recording of the claimant's interview with Mr Kennelly was transcribed by Enigma Law who were then acting as the respondent's employment lawyers in respect of the claimant's grievance and associated matters. Following authorisation by Mr Robertson, Mr Smith was provided with a copy of the transcript of the claimant's interview with Mr Kennelly. The transcript was thereafter released to Mr Mercer without the knowledge or consent of the claimant.

The events of February 2017

93. On or around 8 February 2017, Mr Robertson (a) decided following legal advice from Enigma Law, to pursue a claim against the claimant for alleged breach of fiduciary duty and related claims relating to the claimant's investment/ the claimant's previous dealings with the respondent as an Independent Financial adviser and (b) became aware that Enigma Law intended to write to the claimant in respect of the adverse comments which had been made by the claimant concerning Mr Mercer/ Enigma Law during the claimant's interview with Mr Kennelly.

The letters dated 10 February 2017

94. On Saturday 11 February 2017 the claimant received a series of letters from the respondent and Enigma Law as follows: -
- (1) A letter from Mr Robertson on behalf of the respondent in summary, advising the claimant that (a) the respondent and its shareholders would be contacting him shortly through Enigma Law regarding a damages claim against him (b) the action was not been taken against him in his

capacity as an employee or by the respondent in its capacity as the claimant's employer and that their employment relationship was a separate matter (page 337 of the bundle).

- (2) A letter from Mr Robertson dated 10 February 2017 on behalf of the respondent concerning the claimant's failure to provide a witness statement in relation to the respondent's claim against its former accountants. In summary, Mr Robertson reminded the claimant of the provisions of his contract requiring him to undertake additional duties from time to time and also to provide faithful service and promote the interests of the respondent as reasonably required. Mr Robertson advised the claimant that whilst no disciplinary action had been taken to date in respect of the claimant's conduct relating to the above-mentioned witness statement (and that the letter should not be taken by the claimant as notice of any such action) the claimant's conduct in relation to the witness statement was currently being considered by the respondent and the respondent fully reserved its position in respect of any such action. Mr Robertson further advised the claimant that the respondent might contact him further regarding the matter in due course. This letter, which is at page 338 of the bundle, is the letter referred at Item 12 of the Amended List of Issues which was accepted by the respondent to have constituted a breach of the implied term of trust and confidence resulting in the claimant's consequential constructive unfair dismissal.
- (3) A letter dated 10 February 2017 from Enigma Law on behalf of the respondent and the shareholders of the respondent advising the claimant (a) that they had identified claims for damages against the claimant personally and that the claimant would be informed of the details of the claims in due course. Enigma Law did not however, provide the claimant with any further details of the claims (b) that it was necessary for their clients to take immediate action to secure their position by entry into a standstill agreement in relation to time or by issuing proceedings against the claimant in the High Court and (c) to take immediate legal advice as they would take protected proceedings against the claimant if they did not hear from the claimant within the next 14 days (page 339 of the bundle).
- (4) A further letter from Enigma Law (which was expressly stated to be sent on behalf Enigma Law rather than the respondent) enclosing a transcript of the claimant's

grievance interview with Mr Kennelly. Enigma Law (a) advised the claimant that they considered that the transcript contained matters relating to the reputation of Enigma and its partners which were of grave concern to them including that it contained irrelevant gratuitous personal abuse of Mr Mercer and the firm (b) invited the claimant to repeat his allegations regarding Enigma and Mr Mercer in writing outside the ongoing employment matter and to report Mr Mercer to the Solicitors' Regulation Authority (page 340-341 of the bundle).

Letter dated 13 February 2017

95. Enigma Law sent a further letter to the claimant dated 13 February 2017 on behalf of the respondent and the shareholders in the respondent regarding the proposed claim against the claimant to which the claimant had not responded. In summary, Enigma Law advised the claimant that the claim would be pursued against him in his personal capacity because at all material times the claimant had dealt with their clients in his capacity as an independent financial adviser. Enigma Law invited the claimant to inform them whether he agreed with their proposition and advised that proceedings would be issued against him unless he entered into a standstill agreement or accepted that he was personally liable. The claimant was advised that in the absence of an appropriate response from him, proceedings would be issued against him on 27 February 2017 (page 342 of the bundle). The claimant declined to enter into a standstill agreement and High Court proceedings were subsequently issued against the claimant on 28 February 2017.

Mr Kennelly's letter to the claimant dated 16 February 2017.

96. Mr Kennelly wrote to the claimant by letter dated 16 February 2017 advising the claimant of his findings in respect of the claimant's grievance dated 2 December 2016. Mr Kennelly's detailed letter is at pages 344-362 of the bundle.

97. In brief summary, Mr Kennelly did not uphold the claimant's grievances including that there were any grounds for (a) any disciplinary action against Mr Robertson (b) Mr Robertson to be removed as the claimant's line manager or (c) any apology by Mr Robertson.

98. Mr Kennelly however, expressed the views that (a) he believed that the working relationship between the claimant and Mr Robertson could be improved if they both focused on looking forward (b) although he acknowledged that the continuing employment relationship and long-term friendship between the claimant and Mr Robertson was under pressure it could be restored and many of the issues resolved and (c) that a professionally managed mediation meeting would help to bridge the gap between the claimant's concerns and what, until the claimant's absence on 2 August 2016, was considered by Mr Robertson to be a healthy

employment relationship and friendship with a view to producing a constructive framework for the claimant's continued future employment with the respondent. Mr Kennelly also confirmed in his letter that Mr Robertson was in agreement with the proposed way forward and was happy to arrange for mediation (pages 361- 362 of the bundle).

The claimant's letter of resignation dated 24 February 2017

99. The claimant resigned his employment with the respondent on 24 February 2017 with immediate effect. This date is the effective date of termination for the purposes of the Act. The claimant's letter of resignation is at pages 365 – 369 of the bundle. In summary, the claimant stated in his letter dated 24 February 2017 as follows:-

- (1) He was resigning his employment because of a fundamental breakdown in his employment relationship with the respondent due to the respondent's repudiatory breach of the implied term of trust and confidence.
- (2) Following the sale of his shares in the respondent in 2015 the implied term of trust and confidence had been breached on numerous occasions as his role had been steadily eroded by the conduct of Mr Robertson and the respondent. The claimant relied on the matters set out in his grievance letter dated 2 December 2016.
- (3) Following the submission of his grievance and attendance at an investigatory meeting the claimant had received 2 letters from the respondent dated 10 February 2017 in which (a) the respondent stated in the 1st letter that it was considering taking disciplinary action against the claimant in respect of his conduct relating to the production of his witness statement in respect of the respondents claim against its former accountants and (b) the respondent stated in the 2nd letter that the respondent and its shareholders had engaged Enigma Law to issue a claim against him in a non-employment context however no details had provided regarding the nature of the claim.
- (4) It was clear to the claimant that the respondent had written to him in such terms because he had raised a grievance.
- (5) On 10 February 2017 the claimant had received a letter from Enigma Law on their own behalf in which they cited comments made by the claimant during what he believed to be a confidential grievance meeting and which he deemed to constitute a gross breach of confidential information and confidence.
- (6) Enigma Law had written to him again on several occasions during February 2017 threatening High Court action and

requesting the claimant to sign a standstill agreement without clearly setting out the basis of any such claims. The claimant considered that Enigma Law had been instructed and were being used by the respondent to harass, bully and victimise him because he had raised a grievance. The claimant refuted any suggestion that action was not been taken against him as an employee of the respondent including that the respondent could differentiate between his relationship with them when seeking to threaten legal action against him.

- (7) the respondent's actions in sending its letters dated 10 February 2017 and instructing Enigma Law to write its letters constituted a repudiatory breach of the implied term of the claimant's contract of employment which had the effect of destroying the working relationship.
- (8) He did not accept the findings of the grievance outcome as he believed that Mr Kennelly had not dealt with the matter appropriately including that he had not fully investigated the grievance or act impartially.
- (9) That if he had not received the letters from the respondent and its solicitors dated 10 February 2017 he would have appealed the grievance outcome. The claimant did not however consider that there was any value in continuing with the grievance process given that he had been punished for raising a legitimate grievance and his trust and confidence in the respondent had been completely destroyed.

The respondent's email dated 2 March 2017

100. Mr Robertson wrote to the claimant by email dated 2 March 2017 (pages 373-374 of the bundle). In summary Mr Robertson (a) acknowledged receipt of the claimant's resignation (b) expressed disappointment that the claimant not completed the grievance process particularly as Mr Kennelly had identified a positive course of action namely, the mediation process which could hopefully have resolved all of the issues regarding the claimant's employment relationship with the respondent/his grievance(c) confirming that he considered that the proceedings which had been issued against the claimant were separate to the claimant's employment relationship and (d) confirmed that notwithstanding the claimant's resignation the lines of communication with Mr Kennelly remained open and that Mr Kennelly and the respondent were still willing to address the issues raised in the claimant's grievance if he wished to do so.

The tribunal proceedings

101. The claimant presented a claim form to the tribunals on 22 May 2017 in which he alleged that he had been constructively unfairly dismissed and lawfully dismissed by the respondent and that the

respondent had made unlawful deductions from his wages in respect of accrued unpaid holiday monies. The claims were fully resisted by the respondent until the course of the Hearing in October 2018 save that the claim for accrued holiday pay was resolved between the parties.

The High court proceedings and associated matters

102. The High Court proceedings against the claimant for alleged breach of fiduciary duty and related matters are ongoing. In November 2017 the respondent became aware that the claimant had accessed Mr Robertson's computer on 2 August 2016 without his consent and had taken/transferred to his work, and subsequently to his personal computer, confidential/commercially sensitive documents belonging to the respondent. The respondent believed that the documents included the documents identified in the Analysis Document for 2 August 2016 (pages 448-450 of the bundle) referred to previously above. The respondent commenced injunctive proceedings for the recovery of documents. In response to such application the claimant prepared the witness statement dated 1 December 2017 which is at pages 231-234 of the Supplementary Bundle. The application for injunctive relief was not granted by the High Court for reasons which are unrelated to the present proceedings.

Submissions

103. The Tribunal has had regard to the written and oral submissions provided by the parties including the additional written submissions provided by the parties in respect of the claimant's wrongful dismissal claim. The tribunal has also had regard to the various authorities referred to by the parties in such submissions including in particular those referred to below. The tribunal has also had regard to the extracts from **Harvey** referred to in such submissions.

The issues

104. As stated above, the respondent conceded during the Hearing in October 2018 that the claimant had been constructively and unfairly dismissed by the respondent for the purposes of section 95s (1) (c) and 98 of the Act. The respondent conceded that it had acted in breach of the implied term of trust and confidence in respect of Item 12 of the Amended List of Issues relating to the respondent's letter dated 10 February 2017 concerning the failure of the claimant to provide a witness statement for the respondent's litigation against its former accountants as referred to previously above.

105. The remaining issues which the tribunal is required to determine are therefore limited to those contained in the Amended List of Issues save that :-

- (1) The claimant's claim for compensation pursuant to section 38 of the Employment Act 2002 was withdrawn by the claimant on 11 October 2018.
- (2) It was agreed that the tribunal would confine its Judgment to (a) Issues 3 a and b of the Amended List of Issues (in respect of the claimant's unfair dismissal claim) and (b) to the claimant's wrongful dismissal claim.

- (3) It was agreed between the parties, for the purposes of any subsequent quantification of compensation, that (a) the claimant's gross weekly pay at the effective date of termination of his employment with the respondent was £480.69 (which for the purposes of any basic award would be subject to a statutory cap of £479) (b) the claimant's net weekly pay at the effective date of termination of his employment with the respondent was £387.87 and (c) that the appropriate sum for any award for the loss of any statutory rights would be £450.

THE LAW

The claimant's unfair dismissal claim

106. The tribunal has had regard in particular to sections 122 (2) and 123 (1) of the Act in respect of Issue 3a and section 123 (1) of the Act in respect of Issue 3b of the Amended List of Issues (as it was agreed with the parties that section 122 (2) of the Act does not apply in respect of Issue 3b).
107. The tribunal has also had regard to the various authorities referred to in the written submissions of the parties/referred to below.
108. The issues at 3 a and 3 b of the Amended List of Issues give rise to 2 principal questions namely (a) should any compensation which would have otherwise have been awarded to the claimant be reduced because of the claimant's conduct on 2 August 2016 (which only came to light after the termination of the claimant's employment with the respondent) and (b) what is the prospect that the claimant's employment with the respondent would, in any event, have continued in the aftermath of the claimant's grievance.
109. The tribunal has reminded itself in particular that :-
- (1) The overriding duty placed on the tribunal is to award what is just and equitable in all the circumstances having regard to the loss sustained by the claimant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.
 - (2) In cases of misconduct occurring prior to the termination of employment which do not come to light until a later date, the tribunal should ensure that, notwithstanding the principles contained in **W Devis and Sons Limited v Atkins [1977] IRLR 314 HL** it does not leap to the conclusion that it is invariably just and equitable to reduce any awards in such circumstances. In such situations the

tribunal has to have regard to overall fairness including whether a later dismissal for such misconduct would have been fair for the purposes of section 98 of the Act.

- (3) The tribunal should only make any reductions if it is satisfied that there is sufficient evidence to make such a determination and should not “embark on a sea of speculation” (**King and ors v Eaton Limited (No 2) 1998 IRLR 686 Ct Sess (Inner House)**).

The wrongful dismissal claim

110. The Tribunal has had regard in particular in respect of the claimant’s wrongful dismissal claim to the provisions of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 (“the 1994 Order”) together with the authorities referred to below/ in the written submissions/ additional submissions of the parties.

THE CONCLUSIONS OF THE TRIBUNAL

111. **Issue 3 a) of the Amended List of Issues.**

If the Claimant was unfairly dismissed, is it just and equitable in all the circumstances to reduce (and if so by what amount) any basic award pursuant to section 122 (2) of the Act and/or compensatory award pursuant to section 123 (1) of the Act on the basis of the Claimant’s own actions prior to dismissal, specifically his gross misconduct in taking a large volume of highly sensitive and confidential documentation (including legally privileged material) from the respondent without authorisation on or before 2 August 2016?

112. In brief summary, the claimant contended that it would not be just and equitable in all the circumstances for the tribunal to make any reductions in respect of Issue 3a) of the Amended List of Issues including on the following grounds :- (a) although the claimant admits taking the majority of the emails identified in the Analysis Document for 2 August 2016 he was suffering from stress at the time and further there is no evidence that he disseminated the information to a third party (b) a finding of misconduct by the claimant in respect of the Analysis Document for 2 August 2016 does not necessarily justify a reduction to the basic or compensatory awards as it has to be just and equitable pursuant to sections 122 (2) and 123 (1) of the Act and (c) no reductions should, in any event, be made to any basic or compensatory awards as the tribunal would have to determine whether the claimant would have been fairly dismissed by the respondent for such conduct and this would require the tribunal to embark on a very speculative exercise which is advised against in **Eaton Limited v King** referred to above.

113. In brief summary, the respondent contended that in the particular circumstances of this case and having regard in particular to **W Devis & Sons Ltd v Atkins** referred to above it would not be just and equitable to award the claimant any basic or compensatory awards including in particular having regard to (a) the nature of the claimant's conduct on 2 August 2016 / the subsequent concealment of his actions and (b) that the evidence clearly shows that the claimant would have been fairly dismissed by the respondent for the purposes of section 98 of the Act if it had been aware of the claimant's conduct prior to the termination of the claimant's employment.

The conclusions of the tribunal regarding Issue 3a of the Amended List of Issues

114. When reaching its conclusions regarding Issue 3 a) of the Amended List of Issues the tribunal has taken into account in particular the following matters:-

- (1) The claimant had 7 years' accrued service at the effective date of termination of his employment. There was no suggestion that the claimant had been guilty of any misconduct prior to 2 August 2016.
- (2) The claimant's employment with the respondent came to an end by reason of the respondent's admitted breach of the implied duty of trust and confidence in relation to its letter dated 10 February 2017 (Item 12 of the Amended List of Issues).
- (3) The claimant contends in his Schedule of Loss that he has suffered an accrued net loss of salary to the date of the tribunal of in excess of £30,000 and that he anticipates future loss of earnings to exceed £20,000.
- (4) By 2 August 2016 the claimant had become increasingly concerned about his position within the respondent including by reason of what he perceived to be unreasonable and/or insensitive treatment by Mr Robertson following the sale of the claimant's shares in the respondent business (paragraphs 24- 36 above).
- (5) The claimant also had concerns at this time by reason of what he considered to be a very difficult meeting with Mr Mercer on 20 July 2016 (paragraph 37 above).
- (6) On 2 August 2016 the claimant was certified by his GP as suffering from stress (paragraphs 46- 47 above) and the claimant's GP surgery subsequently confirmed that a GP had attended at the claimant's home on the afternoon of 2 August 2016 (page 414 of the bundle).
- (7) There was no evidence before the tribunal that the claimant had disclosed to a third party (other than his legal representatives) or

used to his own advantage any of the documentation which he took from the respondent on 2 August 2016.

115. The tribunal has also however, weighed in the balance the following matters:-

- (1) Although the claimant was no longer a director and shareholder of the respondent after June 2015 he continued to (a) hold a key position in sales and marketing and (b) be a trusted employee who shared an office and adjoining desks with Mr Robertson with access to Mr Robertson's computer password (paragraph 15 above).
- (2) The tribunal's findings of fact regarding the claimant's conduct on 2 August 2016 including that without Mr Robertson's knowledge or consent the claimant transferred to his own work/ personal email account the documents identified in the Analysis document for 2 August 2016 and further including that (a) the claimant accessed Mr Robertson's work computer and transferred documents during Mr Robertson's absence from the office (b) selected documents which were commercially sensitive/potentially useful to a competitor or contained confidential and privileged material relating to the respondent litigation with its former accountants (c) deleted the emails which he had sent in order to conceal what he had done (d) the claimant's failure to give a credible or consistent account of his actions (including the inconsistencies between the evidence which the claimant gave to the Tribunal and the High Court) regarding his activities relating to the privileged material (paragraphs 38 – 55 above) and (e) the claimant's failure overall to give any explanation for his actions other than to seek to justify them on the basis that he had transferred the documents by way of an insurance policy to demonstrate what he had achieved for the respondent as he feared that he was being manoeuvred out of the respondent.
- (3) The claimant has not produced any medical evidence in support of any contention that his judgment was impaired / his actions on 2 August 2016 were the consequence of any stress related illness.
- (4) The terms of the respondent's disciplinary rules and procedures including the cited examples of gross misconduct justifying summary dismissal included breaches of confidentiality and theft (paragraph 22 above).

116. Further, having regard to all of the above, the tribunal is satisfied that it has sufficient information to be able properly to determine what is

likely to have happened if the claimant's conduct on 2 August 2016 had become known to the respondent prior to the termination of his employment and the respondent had adopted a fair process/ procedure in response to such discovery.

117. Having given the matter careful consideration the Tribunal is satisfied that :-

- (1) In the light of Mr Robertson's limited experience of HR matters and his potential involvement as a witness in any disciplinary process he would have instructed an HR consultant such as Mr Kennelly to have conducted an investigation and either to chair or make any recommendations regarding any disciplinary action/ sanction (as with the grievance process).
- (2) If the respondent had conducted a proper investigation and disciplinary Hearing in accordance with the ACAS Code prior to its own repudiatory breach on 10 February 2017 the claimant would have been dismissed for gross misconduct. When reaching this conclusion the tribunal has taken into account in particular the following matters (a) the claimant's senior and trusted position within the respondent (b) the nature of the claimant's conduct on 2 August 2016 including his selection of commercially sensitive / privileged information and his covert actions (including the accessing of Mr Robertson's work computer during Mr Robertson's absence from the office and the deletion of the relevant sent emails before leaving the office to conceal his actions)(c) the absence of any medical evidence to support any contention that the claimant's judgment and actions were adversely affected on 2 August 2016 by any stress-related illness and (d) the claimant's inability to give any credible explanation regarding the accessing and transfer of the relevant material.
- (3) The Tribunal is further satisfied, in all the circumstances, the respondent would reasonably have concluded that the claimant had by his actions destroyed the implied term of trust and confidence and further that it would have been within the range of responses of a reasonable employer (having regard to the provisions of section 98(4) of the Act) to have dismissed the claimant for his conduct on 2 August 2016.

118. The Tribunal has gone on to consider whether in the light of all of the above it is just and equitable to award the claimant any compensation including whether it is appropriate to make any reductions to any basic or compensatory award pursuant to section 122 (2) and 123 (1) of the Act and if so, the amount of any such reduction.

119. The tribunal is satisfied having weighed carefully all of the above factors, including (a) that the claimant's employment ultimately came to an end by reason of the admitted repudiatory breach of contract by the respondent in respect of its letter dated 10 February 2017 and (b) the significant financial losses which the claimant contends that he has suffered as a result of the respondent's repudiation of contract, that it would not nevertheless be just and equitable in all the circumstances of this case to award the claimant any basic or compensatory award as the tribunal is satisfied that the claimant has not suffered any injustice by his dismissal in the light of his conduct on 2 August 2016 and the associated matters identified above.

120. For the avoidance of doubt (a) this means that the Tribunal is satisfied that any basic and compensatory awards which would otherwise have been awarded to the claimant should be reduced by 100 percent in the light of the claimant's conduct on 2 August 2016 and (b) that although the wording of sections 122(2) and 123 (1) of the Act are not identical the same broad legal principles apply and it is therefore appropriate on the facts in this case for the same reduction to be made to both awards.

Issue 3 b of the Amended List of Issues

In addition or in the alternative to (a) above, is it just and equitable in all the circumstances to reduce (and if so by what amount) any compensatory award pursuant to section 123 (1) of the Act on the basis of the prospect of the continuance of the claimant's employment with the respondent following the aftermath of his grievance.

121. In summary, the claimant relied on similar arguments to those identified above including that it would be too speculative for the tribunal to make any reduction to any compensatory award particularly given (a) the possibility of the continuance of the grievance process if the respondent had not committed a repudiatory breach of contract and (b) the positive views expressed by Mr Kennelly and Mr Robertson at the time of the termination of the claimant's employment including regarding mediation.

122. In summary, the respondent contended that the claimant's continued employment with the respondent was untenable by 2 December 2016 as (a) by that time the claimant had made it abundantly clear that he wanted to leave the respondent and could not return and (b) the claimant stated in his grievance letter that he could no longer be managed by Mr Robertson and wanted Mr Robertson to be disciplined.

The conclusions of the tribunal regarding Issue 3 b

123. The tribunal has considered what (if there is sufficient information for it to make such a determination) is likely to have happened (a) if the respondent had not committed a repudiatory breach of contract by reason of Item 12 of the Amended List of Issues (the letter dated 10 February 2017 at paragraph 94 above) and (b) following/in the light of the contents of and recommendations contained in Mr Kennelly's letter dated 16 February 2016 responding to the claimant's letter of grievance dated 2 December 2016 (pages 344-362 of the bundle).

124. The Tribunal is satisfied, in the light of its findings of fact, that it has sufficient material to be able properly to determine what is likely to have happened in the aftermath of the outcome of the claimant's grievance if the respondent had not committed the above mentioned repudiatory breach of contract.
125. Having given the matter careful consideration the tribunal is satisfied that if the respondent had not committed the admitted repudiatory breach of contract (a) the parties would have engaged in an independent professional mediation process and (b) that such process would have taken 4 weeks to organise and complete.
126. When reaching the above conclusions the tribunal has taken into account in particular that Mr Kennelly advised in his letter dated 16 February 2017 that such meeting should take place as quickly as possible and that Mr Robertson had agreed to and was happy to arrange such a meeting (page 362 of the bundle).
127. The tribunal is further satisfied that if the parties had engaged in such a process there would nevertheless have been no realistic prospect of them reaching an agreement whereby the claimant would have returned to work as an employee of the respondent.
128. When reaching this conclusion the tribunal has taken into account the following:-
- (1) Although Mr Kennelly did not uphold the claimant's grievances he expressed the following views (a) that he believed that a working relationship between the claimant and Mr Robertson could be improved if they both focused on looking forward (b) that although he acknowledged that the continuing employment relationship and long-term friendship between the claimant and Mr Robertson was under pressure he believed that it could be restored and many of the issues resolved and (c) that a professionally managed mediation meeting would help to bridge the gap between the claimant's concerns and what until the claimant's absence on 2 August 2016 was considered by Mr Robertson to be a healthy employment relationship and friendship with a view to producing a constructive framework for the claimant's continued employment within the respondent. Further, Mr Kennelly confirmed in his letter dated 16 February 2017 that Mr Robertson was in agreement with the proposed way forward and was happy to arrange for mediation.
 - (2) Mr Robertson had previously written to the claimant by letter dated 10 February 2017 (paragraph 94 above) seeking to assure the claimant that the actions which were been taken by Enigma on behalf of the respondents regarding the damages claim against him were not been pursued in relation to his capacity as an employee of the

respondent and that the employment relationship between the respondent and the claimant was a separate matter.

(3) Further in his letter to the claimant dated 2 March 2017 Mr Robertson expressed his disappointment that the claimant had not concluded the grievance process (page 373) and stated that he remained willing to address the issues raised in the claimant's grievance.

(4) Mr Robertson confirmed in his oral evidence to the tribunal that he would have been prepared to have engaged in a mediation process.

129. The tribunal has however also weighed in the balance the following factors:-

(1) The respondent is a small business with 10 employees at the relevant time. Mr Robertson was the key person in the business as the managing director and majority shareholder and had been employed in the business for approximately 20 years. Mr Robertson had day to day responsibility for the respondent including the overall responsibility for sales and marketing (paragraph 13 above).

(2) In all the circumstances, the tribunal is satisfied that it would have been wholly unrealistic for the claimant to have returned to any working arrangement which would not have involved the claimant having regular contact with Mr Robertson regarding sales and marketing matters/ being managed by him. The tribunal is also satisfied that it would have been wholly impracticable for the claimant to have reported instead to Mr Evans instead having regard to the matters referred to above and further that Mr Evans was a Finance manager with no involvement in sales and marketing and no experience of managing staff.

(3) By the summer of 2016 (and long before any repudiatory breach of contract by the respondent), the claimant had found it difficult to adjust to a working relationship as an employee of the respondent following his loss of status as shareholder and director.

(4) By 2 August 2016 the claimant had become increasingly concerned about his position within the respondent including by reason of what he perceived to be a course of unreasonable and/or insensitive treatment by Mr Robertson following the claimant's change in status (paragraphs 27- 36 above).

(5) Further, by 3 August 2016 the claimant had withdrawn from the workplace by reason of sickness and did not return to work/make any proposals to return to work at any time prior to the respondent's repudiatory breach of contract in February 2017.

(6) The claimant initiated the meeting with Mr Robertson on 27 September 2016 (having been given time to consider his position at the respondent as requested by the claimant during his period of sickness) for the purposes of endeavouring to secure an exit package from the respondent. Further, the claimant expressed the view at

that meeting on 27 September 2016 that it would be best if the parties parted company on the basis that the respondent would pay him an agreed redundancy exit package (paragraphs 63- 69 above).

(7) The focus of the claimant following the meeting on 27 September 2016 was on securing the exit package which he believed had been agreed at that meeting as evidenced by his without prejudice and subject to contract email to Mr Robertson dated 11 October 2016 (paragraphs 78 - 79 above).

(8) Further the relationship between the claimant and Mr Robertson deteriorated at the beginning of October 2016 with both parties considering that the other had acted inappropriately and in breach of what had been agreed at the meeting on 27 September 2016 (paragraphs 71 – 77 above).

(9) The claimant did not respond to the proposals contained in Mr Robertson's email dated 19 October 2016 for the claimant's possible return to work (paragraphs 80 and 82 above).

(10) In the claimant's subsequent letter of grievance dated 2 December 2016 the claimant (a) sought the resolutions of the matter referred to at paragraph 84 above (including that Mr Robertson should be removed as the claimant's line manager/Mr Robertson's conduct should be scrutinised in accordance with the respondent's disciplinary rules and bullying and harassment procedures and appropriate action taken against Mr Robertson).

(11) The claimant remained absent on certified sick leave from 3 August 2016 until the termination of his employment on 24 February 2017 and not propose to return to work at any time during that period.

(12) Enigma Law wrote to the claimant on 10 and 13 February 2017 (pages 339 and 342 of the bundle) on behalf the respondent and the shareholders in the respondent advising the claimant that a claim for damages had been identified against him personally in respect of his capacity as an independent financial adviser to the respondent (which would have placed additional significant pressure on any day to day working relationship between the claimant and Mr Robertson).

130. The Tribunal has gone on to consider whether in the light of all the above it would be just and equitable (disregarding for the present purposes the findings which it has already made in respect of issue 3 a) to award the claimant any compensatory award pursuant to section 123 (1) of the Act including to make any reduction to any such award in respect of

the matters identified at issue 3 b) of the Amended List of Issues and if so, the amount of any such reduction.

131. The Tribunal is satisfied having weighed carefully all of the above factors that, disregarding for present purposes the subsequently discovered pre-termination misconduct on the part of the claimant, it would have been just and equitable in all the circumstances having regard to the provisions of section 123(1) of the Act to have awarded the claimant 4 weeks' net salary in respect of the period which it would have taken the parties to have concluded the independent professional mediation.

132. The Tribunal is also satisfied however having carefully weighed all of the above matters (and again disregarding for present purposes any subsequently discovered pre-termination misconduct on the part of the claimant) that it would be just and equitable in all the circumstances to have reduced for the purposes of section 123 (1) of the Act any further compensatory award for any period after the 4 week period for mediation by 100%. When reaching this conclusion, the Tribunal is satisfied, for the reasons explained above at paragraph 129, that there was no realistic possibility by February 2017 of the parties being able to continue/ to resume a tenable employment relationship.

133. Moreover, the Tribunal is satisfied that it is not, in any event, just and equitable in all the circumstances having regard to the findings which it has previously made in respect of issue 3 a (namely that it is just and equitable in all the circumstances to reduce any compensatory award by 100 per cent in the light of the claimant's conduct on 2 August 2016) to award the claimant any compensation for the 4-week period of mediation pursuant to section 123 (1) of the Act.

134. The claimant is therefore not awarded any compensation in respect of his unfair dismissal.

The claimant's wrongful dismissal claim

135. It is accepted by the respondent that the claimant was entitled to 7 weeks' notice absent any gross misconduct / actionable repudiatory breach by the claimant.

136. The issues which the tribunal is therefore required to determine in respect of the claimant's wrongful dismissal claim are whether:-

- (1) The claimant without reasonable and proper cause conducted himself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee in respect of his conduct on 2 August 2016 which would have entitled the respondent to have terminated his contract without notice if it had

been aware of such alleged breach during the course of his employment and if so,

- (2) Whether in such circumstances the respondent is entitled to rely, in particular, on the principles contained in the Judgment of **Boston Deep Sea Fishing & Ice Company v Ansell [1888] 39 CHD 339 CA** and subsequently in **Williams v Leeds United Football Club [2015] EWHC 376(QB) IRLR 383** in defence to the claimant's claim for damages for wrongful dismissal in relation to the respondent's later admitted repudiation of contract (in respect of item 12 of the Amended List of Issues relating to the provision of a witness statement in respect of the respondent's claim against its former accountants).

137. During the course of the oral closing submissions a dispute arose between the parties in particular as to whether the principles contained in **Boston Deep Sea Fishing & Ice Company v Ansell** and **Williams v Leeds United Football Club** (in which cases the employment contracts came to an end by way of termination by the employer) also apply to cases where the contract is terminated by an employee in response to a repudiatory breach of contract by the employer (as in the present case). The parties were given an opportunity to submit further written submissions on this issue which have been taken into account by the tribunal (including the further judgments and extracts from **Harvey** referred to in the submissions) when determining this matter.

138. In summary, the claimant made the following contentions in support of his claim for damages for breach of contract: -

- (1) The claimant denied that his conduct on 2 August 2016 amounted to a breach of the implied term of trust and confidence having regard in particular to (a) the claimant's ill health at that time and (b) the claimant did not use or pass on any information which he transferred to his own email address that day.
- (2) Further and in any event, the claimant contended that the principle (as contained in the **Boston Deep Sea Fishing and Williams** cases) by which an employer can rely upon a previously undiscovered repudiatory breach by the employee to justify a dismissal is not applicable to the present case.
- (3) In summary, the claimant contended in support of such a proposition as follows:- (a) contract law does not recognise

a concept of dismissal which is a statutory concept which arises from the Act (b) a repudiatory breach of contract entitles the innocent party to discharge themselves from future performance of the contract (**Suisse Atlantic SA v Rotterdamsche Kolen Centrale [1967] 1 AC 361** and (c) the claimant elected to treat the breach by the respondent on 10 February 2017 (Item 12 of the Amended List of Issues) as a repudiation of contract and pursue a claim for damages for his notice pay in accordance with the elective or acceptance theory in **Geys v Society Generale London Branch [2012] UKSC 63 [2013] 2 WLR**.

- (4) The claimant further contended that the situation in the present case was distinguishable from that in **Boston Deep Sea Fishing** and **Williams** as in order for there to be a legitimate summary dismissal as in those cases there needed to be two things namely (a) conduct which entitled the respondent to terminate the contract and (b) an exercise of such contractual right of termination (albeit that they did not have to be a causal connection between the facts which entitled the employer to terminate the contract and the reason for the termination).
- (5) If the respondent had terminated the claimant's contract of employment by way of an express termination in early 2017 it could have relied upon the principles in **Boston Deep Fishing** and **Williams** to avoid being in breach of contract and therefore paying any notice pay. However, the principles in **Boston Deep Sea Fishing** and **Williams** cannot apply in the present case because the claimant rather than the respondent terminated the contract and a repudiatory breach of contract can never be justified. The claimant's claim for wrongful dismissal is a claim for damages flowing from the respondent's repudiatory breach and is therefore a valid one.
- (6) If the claimant committed a repudiatory breach of contract on 2 August 2016 (which is denied) the respondent's remedy is a claim for damages flowing from such breach and the only way which the respondent can avoid liability for the claimant's claim for damages for wrongful dismissal is by way of counterclaim/set off (which the respondent could not in any event pursue as Mr Robertson confirmed his evidence that there was no quantifiable loss sustained by the respondent flowing from the claimant's conduct on 2 August 2016).
- (7) The claimant's claim for damages must therefore succeed.

139. In summary, the respondent made the following contentions in support of its defence of the claimant's wrongful dismissal claim:-

- (1) The claimant's conduct on 2 August 2016 constituted for the purpose of any contractual claim a repudiatory breach of his contract of employment being gross misconduct and/or a breach of the implied term of trust and confidence.
- (2) At common law an employer can defend a wrongful dismissal claim on the basis of facts discovered after dismissal/during a period of notice if such conduct viewed objectively amounted to a repudiatory breach of contract entitling an employer to rely on such conduct to justify the dismissal (**Boston Deep Sea Fishing** and **Williams**).
- (3) The claimant is incorrect in his contention that the common law does not recognise dismissal and further if he was correct the claimant could not claim a breach of contract dismissal because he resigned.
- (4) The principles contained in **Boston Deep Sea Fishing** and **Williams** apply to all wrongful dismissal claims and there is no authority which distinguishes a claim for wrongful dismissal based on whether the employee resigned or not.
- (5) The position is confirmed in **Harvey** (A11(7) (A)(1) (c) at paragraph 392 -392 .01) including as the purpose of the rule contained in **Boston Deep Sea Fishing** is to protect an employer from an undisclosed rogue whose serious misconduct is only discovered after dismissal to the extent that it prevents such rogue from recovering compensation which would offend normal ideas of reasonableness and which can be justified as striking a fair balance.
- (6) By accepting the respondent's repudiatory breach the claimant accepted the termination of the contract which was a dismissal at common law under the elective termination doctrine in **Geys v Society Generale**.
- (7) The claimant has failed to provide any authority to support the contention that an employee who is guilty of gross misconduct and subsequently resigns his employment can claim his notice pay with impunity as no such authority exists and the argument is entirely misconceived

The conclusions of the tribunal regarding the claimant's wrongful dismissal claim

140. The Tribunal has considered first whether, viewed objectively, the claimant's conduct on 2 August 2016 amounted to a breach of the implied term of trust and confidence namely, whether the claimant without proper cause conducted himself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between him and the respondent/ committed gross misconduct.
141. Having given careful consideration to all of the above, the tribunal is satisfied that, viewed objectively, the claimant's conduct on 2 August 2016 amounted to a breach of the implied term of trust and confidence for the reasons explained at paragraphs 115 – 117 above.
142. For the avoidance of doubt, the tribunal is not satisfied, viewed objectively, that the fact that the claimant was certified by his GP as suffering from stress on 2 August 2016 or that the respondent has produced no evidence to the tribunal to show that the claimant had disclosed to a 3rd party or otherwise used to his own advantage any of the documentation which he took from the respondent on 2 August 2016 is sufficient defence (having regard to the other factors identified above) to justify the claimant's conduct as conduct falling short of a breach of the implied term of trust and confidence/ gross misconduct.
143. The tribunal has therefore gone on to consider the 2nd question namely whether the respondent is able to rely upon the principles contained in the Judgment of **Boston Deep Sea Fishing** (and also **Williams**) in defence of the claimant's claim for damages for breach of contract in respect of his agreed notice entitlement of 7 weeks.
144. The claimant pursues his claim for notice pursuant to Article 4 of the 1994 Order which entitles the claimant to bring proceedings before an employment tribunal in respect of a claim for the recovery of damages as permitted by such article including as identified at paragraph 3 (2) of the Employment Tribunals Act 1996 and provided that the claim arises or is outstanding on the termination of the claimant's employment. This Article therefore applies in circumstances where the contract is terminated by an employee (including in response to a repudiatory breach of the contract by an employer) as well as where the contract has been expressly terminated by an employer provided that the claim arises or is outstanding on termination. The pursuit of such a claim does not therefore require any "dismissal" by the employer.
145. The Tribunal is satisfied, as a matter of contract law, that notwithstanding that the claimant committed a repudiatory breach of contract in respect of his conduct on 2 August 2016 (of which the respondent was unaware until after the termination of his employment), the claimant's contract of employment continued until it came to an end by reason of the claimant's election on 24 February 2017 to accept the respondent's own admitted repudiatory breach of contract in respect of its letter dated 10 February 2017 relating to the provision of the claimant's

witness statement in respect of litigation against the respondent's former accountant (Item 12 of Amended List of issues).

146. Having given careful consideration to the Judgments in **Boston Deep Sea Fishing** and **Williams** the tribunal is satisfied that they establish the principle that if an employer discovers during a period of notice or after it has dismissed an employee that the employee acted dishonestly/in breach of the implied term of trust and confidence during his employment that the employer is entitled to rely upon such dishonesty/repudiatory breach of contract as justifying the employer's dismissal of the employee.
147. The tribunal is not however satisfied that the principles contained in **Boston Deep Sea Fishing** and **Williams** apply on the particular facts of this case as the claimant's contract of employment came to an end by reason of his election to accept the respondent's own admitted repudiatory breach of the claimant's contract of employment (Item 12 of the Agreed List of issues) rather than by dismissal by the respondent and the tribunal therefore prefers the claimant's submissions on this point.
148. For the avoidance of doubt the tribunal is not satisfied that the **Boston Deep Sea Fishing** and/or **Williams** judgments and/or the quoted extract from Harvey can properly be considered to support the respondent's contentions that those cases also extend to a situation where a respondent admits having committed a subsequent repudiatory breach of its own which results in the termination of the contract by the claimant (in accordance with the elective/ acceptance theory as explained in **Geys v Society Generale v** referred to above) in acceptance of such breach rather than by termination by the respondent.
149. The Tribunal fully appreciates that it has reached a different conclusion on the same facts in respect of the claimant's unfair dismissal claim and breach of contract claims. The Tribunal is however satisfied that this is explained by the fact that when determining the claimant's unfair dismissal claim the tribunal has to have regard to the clear statutory language of the Act which requires the tribunal to award what is just and equitable in all the circumstances pursuant to sections 122 (2)/ 123 (1) of the Act whereas when determining the claimant's breach of contract claim the Tribunal is required to apply strict contractual principles which have resulted in a different outcome.
150. In all the circumstances, the Tribunal is satisfied that the claimant, having elected to accept on 24 February 2017 the respondent's admitted repudiatory breach of contract of 10 February 2017 (item 12 of the Amended List of Issues) and thereby bring the contract of employment to an end, is entitled to damages in respect of his contractual notice entitlement of 7 weeks.

Employment Judge Goraj
Date: 30 October 2018

JUDGMENT SENT TO THE PARTIES ON
8 November 2018

FOR THE OFFICE OF THE TRIBUNALS

Online publication of judgments and reasons

The Employment Tribunal (ET) is required to maintain a register of all judgments and written reasons. The register must be accessible to the public. It has recently been moved online. All judgments and reasons since February 2017 are now available at: <https://www.gov.uk/employment-tribunal-decisions>

The ET has no power to refuse to place a judgment or reasons on the online register, or to remove a judgment or reasons from the register once they have been placed there. If you consider that these documents should be anonymised in anyway prior to publication, you will need to apply to the ET for an order to that effect under Rule 50 of the ET's Rules of Procedure. Such an application would need to be copied to all other parties for comment and it would be carefully scrutinised by a judge (where appropriate, with panel members) before deciding whether (and to what extent) anonymity should be granted to a party or a witness