RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr B. Pownall**

Respondent: **E.On Control Solutions Limited**

Heard at: **East London Hearing Centre**

On: **7-10 July 2020**

Before: **Employment Judge Massarella**

Representation
Claimant: Mr D. Brown (Counsel)
Respondent: Mr T. Cordrey (Counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is that: -

1. **the Claimant's claim for breach of contract is not well-founded, and is dismissed;**

2. **the Claimant's claim of unfair (constructive) dismissal fails, and is dismissed;**

3. **the Respondent's counter-claim for breach of contract succeeds;**

4. **the Claimant shall pay to the Respondent the sum of £22,662.80 (£4,322.60 in respect of the first refund, and £18,340.20 in respect of the second).**

REASONS

This has been a remote hearing, which has not been objected to by the parties. The form of remote hearing was V (CVP). A face-to-face hearing was not held, because it was not practicable and all issues could be determined in a remote hearing. The documents that I was referred to consisted of a bundle of documents of some 840

pages; a bundle of witness statements; and written closing submissions from both parties' Counsel.

Procedural history

1. By a claim form presented on 6 June 2018, after an ACAS early conciliation period between 23 March 2018 and 7 May 2018, the Claimant, Mr Ben Pownall, claimed unfair (constructive) dismissal, unauthorised deduction from wages, and breach of contract. The Respondent's ET3 included an employer's contract claim in respect of tax refunds made by HMRC to the Claimant in the 2016/17 and 2017/18 tax years. The Claimant's case was originally presented alongside a case brought by Mr Simon Caspall, his former line manager; that claim was subsequently dismissed.

2. A preliminary hearing for case management of both cases took place before EJ Allen on 19 September 2018. The Judge resolved an issue relating to the ACAS early conciliation procedure, and permitted the Claimant's claim to proceed; he dismissed on withdrawal the Claimant's claim for unauthorised deduction from wages. In October 2018, the Claimant provided further information about his constructive dismissal claim; at the same time he submitted a response to the Respondent's counterclaim.

The hearing

3. I had an agreed bundle of some 840 pages. I heard evidence from the Claimant (who provided a statement and a supplemental statement); Mr Matthew Brown (the Respondent's Managing Director and Chief Financial Officer); and Ms Michelle Roberts (the Respondent's Senior Financial Accounts Manager).

4. I also had a witness statement from Mr Caspall, which was 85 pages long. Mr Brown (Counsel for the Claimant) confirmed that much of it concerned matters relevant to Mr Caspall's case, but not the Claimant's. I asked Mr Brown to make arrangements for it to be edited and re-submitted. This was done, but I was then told that Mr Caspall would not be attending to give evidence; I was asked to have regard to his statement, giving it such weight as was appropriate in the circumstances. I concluded that, in view of Mr Caspall's decision not to attend (without further explanation), I could attach little weight to his evidence. No reliance was place on it by Mr Brown in his written or oral closing submissions.

5. There was an agreed list of issues of sorts, which had been prepared some time before, but which was unclear. Mr Brown and Mr Cordrey (Counsel for the Respondent) worked together to revise it, and resubmitted it on the second day of the hearing. They continued to disagree as to whether certain matters were pleaded in relation to the constructive dismissal claim. I asked them whether that dispute needed to be resolved before I began to hear the evidence; specifically, whether either of them would be prejudiced in dealing with the evidence in relation to the disputed issues. They assured me that they would not. They proposed to make submissions in closing, and invited me to determine the dispute then.

6. After the case management discussion on the morning of the first day, during which a timetable for the remaining days was agreed, I spent the rest of the day reading the witness statements and a short list of essential documents, to which Counsel referred me. I would like to record my thanks to both Counsel for the high standard of advocacy they maintained throughout the hearing.

Findings of fact

7. The Respondent provides energy management services. The Claimant commenced employment with the Respondent, which was then called Matrix Control Solutions Ltd, on 11 September 2006. On 3 April 2018 the Respondent changed its name to E.On Control Solutions Ltd. It is now wholly owned by the utility company E.on, but continues to operate as a separate legal entity. It describes itself as a relatively small company, which employed around 360 employees during the Claimant's employment.

The Claimant's contract of employment

8. A letter dated 25 July 2006 from the Respondent to the Claimant contained the offer of employment, and a statement of terms and conditions. His job title was Project Engineer. Paragraph 24 of the terms and conditions provided:

> 'Alterations of Terms and Conditions
>
> One month's prior written notice will be given to you by the Company of any significant changes to your terms and conditions of employment. This may be given by way of individual notice or a general notice to all employees. You will be deemed to have accepted such changes unless you give notice to the Company, in writing, before expiry of one-month period.'

The Groningen project

9. In around December 2015, the Respondent secured a new project ('the GRQ project'), which was based in Groningen in the Netherlands, whose purpose was to enable its client to build a new data centre, with the Respondent providing the building's energy management system. The Claimant was approached, and asked if he would work on the project. The Respondent engaged Deloitte LLP and Deloitte Netherlands ('Deloitte') to deal with the tax implications for employees engaged on the project.

10. On 14 December 2015, the Claimant and other colleagues flew out to Groningen, returning on 21 December 2015.

11. In an email from of 18 December 2015, Deloitte wrote to the Respondent [*original format retained in all extracts from contemporaneous documents*]:

> 'From a UK perspective the main areas that you may wish to consider providing support are given below. These are based on the understanding that you intend to tax equalise the individuals. To confirm, tax equalisation means that the individual is no better or worse off from a tax perspective as a result of being on assignment. Essentially, the individuals are held to the same UK tax liability that they would have had had they not undertaken the assignment and Matrix pays any additional

> UK or Dutch taxes that may arise as a result of their movements. Under tax equalisation, the tax relief that we discussed relating to temporary workplace provisions would benefit Matrix rather than individuals. Where the company pays additional assignment related allowances which would be taxable in the UK but would not normally be items that the individual would be expected to suffer the UK tax and social security cost on, this will increase the tax liability for the company (subject to reliefs).
>
> The alternative approach would be for the individuals to be responsible for their own taxes. This can lead to cash flow implications for the individual where income tax withholding (PAYE in the UK will continue) falls due in both countries but does mean that they potentially benefit from lower tax regimes in the Netherlands and temporary workplace relief in the UK. This is rarely an approach adopted by companies due to the practical and administrative implications. Also, it tends to mean that secondees focus on their tax position disproportionately.'

12. In an email dated 22 December 2015 from Mr Lewis (the Respondent's Managing Director, before Mr Brown assumed the role) to Mr Percival, Mr Lewis wrote:

> 'PAYE tax issues: we will put agreement in place for tax support for our staff to ensure not penalised by local tax issues.'

13. The Claimant returned to Groningen on 4 January 2016 to commence work in earnest. Throughout the material period, the Claimant's line manager was Mr Simon Caspall, who acted as the Project Director; he in turn was managed by Mr Phil Middlebrook, who acted as the Regional Director.

14. On 7 January 2016 the Claimant emailed Mr Middlebrook seeking advice on the tax implications:

> 'Simon explained to me that Deloitte have been employed to Matrix to review the Tax implications on employees working on the GRQ2 job. Has anything been sorted on this or can any advice be given? As you are aware, we have had to fill in and apply for a BRN no at the town hall and have been granted a temporary one for a period of up to 4 months. After this we have to apply for a full one from the town hall. Once we do this we will be "visible" to the Dutch authorities and as such be then liable for tax I would presume. Any advice would be appreciated as I am getting concerned that I will liable for possible tax over here or mess up my tax back home.'

15. I find that the Claimant's primary concern in this email was to ensure that he would not be liable for tax in the Netherlands, and that there would be no impact on his UK tax liability.

<u>The secondment letter of January 2016</u>

16. By letter dated 12 January 2016, Ms Lois Long (HR Manager for the Respondent) wrote to the Claimant, setting out a variation to his terms and conditions of employment as a result of the secondment. Among other things the letter dealt with the length of the secondment (initially for one year), his

salary during it (£80,000), and his shift pattern. It also contained the following statement:

> 'the company will provide support with issues relating to personal taxation and working abroad such that you will be no better or worse off from a tax perspective as a result of the secondment.'

17. The letter was not received by the Claimant until it was sent to him by email on 26 January 2016. He did not return a signed version of the letter until 10 August 2016, when he was prompted to do so by Ms Long. He made a number of annotations in manuscript on his signed copy, of which the longest said:

> 'Notes:
>
> - Travelling time not explained to us at time. In fact we can get up at 3am. Arrive at lunch time and then work until at least 5.30-6pm. This makes the days hrs significant.
>
> - It was explained to us that we could only work 8 hr days due to Dutch law. We are currently doing 10+'

18. The only annotation which relates to the tax issue is next to the word 'support' in the extract set out above (at para 16). The Claimant wrote: 'what does support mean?'

Steps taken to clarify the tax position

19. By email dated 26 January 2016 from Mr Caspall to Mr Middlebrook, Mr Caspall had written: 'What does not better or worse off mean regarding tax in the letter sent out?' In an email dated 29 January 2016, Mr Brown replied:

> 'Matrix will 'tax equalise' the staff working in NL so they are no worse off than if they had been working in the UK regarding tax. They will also provide a general group briefing on personal tax implications and individual advice.'

20. It is clear to me from the totality of the correspondence in the bundle that Mr Caspall and the Claimant worked closely together, whenever they considered it necessary to query their working arrangements, sharing with each other the information that they gleaned. I have no doubt at all that Mr Caspall communicated this information to the Claimant at the time, and that the Claimant understood that the arrangement that had been put in place was a tax equalisation arrangement. Although this email does not contain the phrase 'no better off', I find that, read together with the explicit reference in the original secondment letter, it was clear to the Claimant that the agreement was that he would be neither better nor worse off from a tax perspective as a result of the secondment than if he were working in the UK.

The shadow Dutch payroll and the 30% facility

21. The GRQ project staff remained on UK payroll. They had PAYE deducted from their gross salary in the usual way, just as if they were working in the UK. However, tax was due in the Netherlands. This was dealt with by way of a shadow payroll, which operated in accordance with Dutch rules. Salary

information for the seconded employees was entered into the system and Dutch tax rules applied to it. I accept the Respondent's evidence that this was a purely administrative exercise, set up to determine how much tax was due in the Netherlands, so that the Respondent could then discharge that tax liability on behalf of the seconded employees. Any foreign tax credits due in respect of the tax paid by the Respondent in the Netherlands would be claimed by the individuals concerned when they submitted their UK tax returns.

22. Under Dutch tax law there existed what was referred to in these proceedings as the '30% facility'. The effect of this was that an employee who was subject to Dutch tax, to whom the 30% facility was applied, would only be liable for Dutch social security contributions and tax by reference to 70% of their gross, Dutch salary. The reality of the situation, was that the Dutch salary was purely notional: the Claimant remained on the UK payroll, and all the Dutch tax liability was paid by the Respondent. However, to enable the facility to be claimed, the affected employees had to signal their consent to the arrangement, by signing an addendum to their contract of employment, which set out the operation of the 30% facility, and how it would affect them in the circumstances. I return to that document, and its meaning, later in this judgment.

23. The Respondent accepts that it had had no previous experience of operating such a complex cross-border tax arrangement, and there is no doubt that there were points at which the intricacies of the arrangement were not well explained to the Respondent by its advisers, Deloitte. That in turn gave rise to some poor communication from the Respondent to its employees, including the Claimant. By way of example, the terms 'tax protection' and 'tax equalisation', which have different meanings when used as terms of art, appear sometimes to have been used interchangeably on occasions. Nonetheless, I have no doubt that at all material times, the Claimant understood that the final outcome, however it was achieved technically, was that he would be 'no better or worse off from a tax perspective' than if he were based in the UK; the secondment agreement made that abundantly clear, in plain language.

24. Several months into the secondment, on 22 June 2016, there was a telephone conference between GRQ staff and Deloitte to discuss the outstanding questions in relation to their tax position. The content of that discussion was summarised by Mr Caspall in an email and attachment of the same date. One of the questions put by a member of staff was:

> 'Q from Matrix PAYE: we understand 30% ruling will mean that our salary will be reduced by 30% and reimbursed as an expense. This in effect means, that if were subject to paying 40% tax in UK (taxable income £43,001 to £150,000) that would be equal to paying 52% in NL tax but with 30% ruling would be the equivalent of paying 36.4% tax?'

25. Deloitte replied: 'Correct'. The next question was:

> 'Q from Matrix PAYE: The project we are working on here in the NL, the client is providing disbursement costs towards travel and accommodation as part of the tendered work which are not direct expense paid by Matrix.

> Can you confirm this won't taxed against a PAYE and in fact that we will gain the full 30% reimbursement as a non-taxable item?'

26. Deloitte replied: 'Correct'.

27. On 23 June 2016, Ms Roberts wrote to Deloitte asking for clarification:

> 'Following on from the call with the Deloitte tax team in the Netherlands, please could you provide some guidance on the 30% ruling in reference to PAYE employees?'

28. Deloitte replied to Ms Roberts on 24 June 2016, inserting the following comment as a bullet point reply to the above question

> 'The 30% ruling will mean that an employee's salary will be reduced by 30% and reimbursed as an expense. This in effect means, that if an employee is subject to paying 40% tax in the UK (taxable income £43,001 to £150,000) that would be equal to paying 52% in NL tax but with the 30% ruling would be the equivalent of paying 36.4% tax – this was explained and confirmed on the call.'

29. However, in the covering email Deloitte qualified this as follows:

> 'From our understanding of the 30% ruling there is no need to do anything different in the UK other than pay the individuals their normal salary and pension payments. The adjustments mentioned below are more what will happen from a Dutch reporting perspective […]'

30. Ms Roberts then forwarded that explanation to Mr Caspall. For reasons I have already given, I have no doubt that he shared that information with the Claimant.

31. On 29 June 2016 the Respondent provided Deloitte with the necessary documentation for registration with the Dutch tax authorities.

32. In a letter dated 26 July 2016 from Mr Lewis to the Claimant, Mr Lewis wrote that the Respondent would:

> 'take responsibility for all costs and any reimbursement related to the variation in tax position between the two countries … In addition to this undertaking Matrix will also engage the tax advisors, Deloitte, to provide advice and to support you in the completion of your annual UK self-assessment tax returns, plus make all necessary submissions to the Dutch tax authorities.'

33. As I have already recorded, the Claimant did not sign and return the secondment variation to his terms and conditions until 10 August 2016, when he made the manuscript comments which I have recorded above.

<u>The Addendum to the Claimant's contract of September 2016</u>

34. On 2 September 2016 the Claimant signed and returned the Addendum to his contract, regarding the Dutch 30% tax facility. It provided as follows:

> '(a) If and to the extent the 30% facility, as meant in the Dutch Wage Tax Act 1964, is applied and the employee receives a maximum tax-free

> allowance of 30% for extraterritorial costs, the employee, by signing this addendum, agrees that the wage from present employment will be reduced and/or split in case of such remuneration in kind in such a way that the 100/70 of the reduced or split taxable pay from present employment equals the pay from present employment before the reduction or split. However, the reduced wage from present employment will not be set at an amount lower than the minimum wage for eligibility of the 30% facility as mentioned in the 1965 Wages and Salaries Tax Implementation Decree in any calendar year.
>
> (b) if and to the extent that part (a) is applied, the employee shall receive from the employer a reimbursement for extraterritorial expenses equal to 30/70 of the thus agreed wage from present employment. However, the reimbursement for extraterritorial expenses will not exceed the amount of the originally agreed wage from present employment minus the reduced wage from present employment under article (a).
>
> (c) The "agreed wage from present employment" as described in part (a) includes the total sum of all wage from present employment, paid or provided to the employee, as described in the Dutch Wage Tax Act 1964 and the provisions based on it.
>
> (d) If the employee is employed or assigned based on a net salary payment or tax equalisation policy, the maximum tax-free allowance of 30% is deemed to be part of the net or tax equalised remuneration as agreed upon between the employee and the employer.'

35. On 10 October 2016 Ms Roberts wrote to Deloitte: 'Please can you confirm your interpretation of "tax protection agreement" and "tax equalization agreement" so that we can confirm the tax approach that should be used'.

36. On 18 October 2016 Deloitte wrote to Ms Roberts:

> 'The intention behind tax equalisation is [to] leave the employee no better or worse off in tax terms as a consequence of being sent to a country with a higher or lower tax rate… [under a tax protection agreement an employee is] allowed to be better off'.

37. In an email dated 6 November 2016 from Ms Roberts to Deloitte, she wrote: 'Please take this as confirmation that the tax approach that we are taking for employees is tax protection'. I deal with the relevance of that exchange in my conclusions below (at para 115).

<u>The end of the Claimant's secondment</u>

38. By letter dated 16 January 2017, Mr Lewis wrote to the Claimant confirming that his secondment would be extended to the end of 2017, his salary would increase to £87,758 from 1 January 2017, he would receive a bonus payment of £5,000, and an overtime payment of £3,076.90. He wrote:

> 'All other terms of your secondment remain the same as stipulated in my letter to you dated 12th January 2016.'

<u>The tax refund in 2017</u>

39. On 23 January 2017, the Claimant submitted an amended tax return for 2015/2016. On 28 January 2017, HMRC informed him that he was due a tax refund of £4,322.80.

40. In an email dated 14 February 2017, Deloitte wrote to the Claimant, stating that he would be required to repay the tax refund to the Respondent:

> 'Following the submission of your 2015/16 UK tax return to HMRC, we expect that they will shortly, if they have not already, be issuing you with a refund of taxes from your tax return. So you are aware, it is likely that most, if not all, the refund that was generated on the tax return came about as a result of the foreign tax credit claim was made. This claim was for tax relief on income that has been taxed in both the UK and in the Netherlands, so as to avoid double taxation.
>
> As Matrix made these tax payments on your behalf in the Netherlands, the benefit of this claim will be payable back to Matrix by yourself. However, under the terms of the tax protection arrangement which we understand applies, we will ensure that the refund of taxes back to Matrix does not leave you in a worse off position […]
>
> As such, we would advise that you retain the tax refund you have received / will receive from HMRC as the refund is likely to be payable back to the company […]'

41. The Claimant accepted in cross-examination that he understood from this letter that any tax refund belonged to the Respondent, not to him. He further accepted that he took no steps to challenge that letter. I find that this was because the letter did not come as a surprise to him; he was never expecting that he would be entitled to retain the tax refund, because he knew that to do so would make him better off from a tax perspective.

42. I note that in this email the term 'tax protection' is used, even though the substance of the email is that the Claimant could not benefit from a tax refund which was due to the Respondent, which would have the effect of leaving him better off from a tax perspective (i.e. tax equalisation). This email is an example of the loose language I have referred to above. In any event, the mere fact of a reference to 'tax protection' in an email which postdates the two contractual variations cannot be relevant to my construction of them, for reasons I will return to below.

43. On 26 April 2017, Mr Caspall told the Respondent that the Claimant had decided to leave the secondment in the week of 1 May 2017. The Claimant returned to the UK on 2 May 2017.

44. On 5 May 2017 Deloitte informed the Respondent of the tax refunds owed by all GRQ secondees. In an email dated 18 May 2017, Ms Roberts wrote to the Claimant, providing Deloitte' final reconciliation calculation for the 2015/16 tax year. She wrote:

> 'Please see attached the calculation which confirms the monies that you owe to Matrix for the 2015 – 2016 tax year. The reconciliation calculation has been provided to ensure that under the tax protection arrangement the refund to Matrix does not leave you in a worse off position as a result

> of working in the Netherlands. I can confirm that the monies owed to Matrix is £4615.27. Please can you ensure that you paid these monies over to Matrix at your earliest convenience via BACS transfer?'

45. Between 18 and 19 May 2017 a series of emails passed between the Claimant and Ms Roberts, in which the Claimant disputed that the tax refund should be repaid to the Respondent. In his email of 19 May 2017, the Claimant wrote:

> 'If you can recall prior to starting the secondment back in Oct/Nov/Dec 2015 I asked Matrix for some advice about the tax situation whilst working in Holland. I was advised that Matrix would be sorting it and that we would be no better or worse off. I put my faith in this "statement" and tried to put to the back of my mind and get on with the project'.
>
> […]
>
> To conclude, I would remind you that Matrix have deducted monies from my salary each month and these should have been paid to the relevant authorities. These deductions were calculated by Matrix. Any tax overpayment is solely down to Matrix and not myself. If Matrix have overpaid them perhaps they should have employed Deloitte a bit sooner to get this sorted earlier in the correct figures deducted from my salary every month. Any credit that is due for overpayment of tax is due to myself that it has already been deducted on a monthly basis.'

46. I note that in this email, although the Claimant raises a number of concerns in quite general terms, he positively relies on the fact that he was given an assurance that he would be 'no better or worse off'.

47. The Claimant commenced work in the UK at the Respondent's head office in Bury on 1 June 2017.

48. On 8 June 2017, Mr Brown wrote in an email to the Claimant, Mr Caspall and others, confirming that they had been paying tax in the UK, and the Respondent had borne all Dutch tax liabilities:

> 'In simple terms you have paid UK taxes through UK payroll. This is the commitment that Matrix made to you, that you would be 'tax protected' and not in a worse position by going to work in Netherlands. You did not pay Dutch tax, Matrix paid this on your behalf. The refund from HMRC is related to the double taxation treaty between UK and Netherlands – as you did not pay Dutch tax, you are not entitled to keep the refund. The refund in all cases is lower than the actual tax paid by Matrix on the behalf (i.e. Matrix has taken on the additional tax liability as promised) […]'

49. On the same day, Ms Roberts wrote to the Claimant, confirming that he was required to repay £4,615.27 by 30 June 2017.

> 'Following on from my email below and a further explanation from Emily (Deloitte) sent to you on 19th May 2017, I would like to again request the monies you owe to Matrix in relation to your Dutch tax obligation for the 15/16 tax year. Please find attached an additional breakdown provided by Deloitte which confirms the value you owe is £4,615.27 and also

> provides further clarification on the value owed based on the refund received from HMRC.
>
> It was confirmed to you in the email attached from Tom (Deloitte) on 14th February 2017 that the refund you received from HMRC was a result of the foreign tax credit claim for working in the Netherlands and it was also reiterated to you that most if not all of this refund would be payable back to Matrix for paying the Dutch taxes on your behalf.
>
> As per the commitment from the company at the start of the GRQ project Matrix has ensured that you have remained 'tax neutral' which means that you are no worse off from a monetary/tax perspective from working in the Netherlands and that the tax you pay will be the same as you have paid had you remained working in the UK. You have only paid UK taxes via PAYE and as a result of working in the Netherlands you received a refund from HMRC in relation to your UK taxes. The refund that you have received from the HMRC is the mechanism for Matrix to reclaim some of the Dutch taxes that the company has paid on your behalf. The value of the refund does not reflect the total amount of Dutch taxes due – it is restricted to a value that ensures that you are no worse off from a tax perspective for working in the Netherlands.
>
> Please can you ensure that you pay these monies over to Matrix by 30th June 2017 via bacs transfer and that you confirm when you have sent the monies to Matrix by receipt of this email? Please can you reference 'Dutch tax and your name' when making the transfer. Bank details are below.'

50. On 13 June 2017 the Claimant sent an email to Mr Middlebrook, still insisting that it was he who was out of pocket. In the days leading up to 27 June 2017, the Claimant discussed the issues directly with Deloitte, who summarised the conversation in an email as follows:

> 'Ben found the concept a little bit more difficult to understand – he seemed to understand where the amount had arisen which we had claimed as foreign tax relied on his UK tax return however didn't necessarily agree with the fact that he needed to 'top this amount up', as the refund he had received from HMRC had been reduced as a result of a tax liability arising on his personal income (£292). I am hoping that when he responded to him with the comments on the Dutch tax allowances he will be able to confirm his agreement to the calculation (he agreed with the numbers involved but felt that his personal liability was for him to settle with HMRC, and shouldn't be 'mixed in' with the payment due to Matrix).'

51. I find that the reference to £292 is to the fact that the tax rebate from HMRC in relation to the tax year 2015/16, which came to a total of £4615 included a figure of £292.40 which did not relate to the Dutch tax credit, rather it related to the Claimant's personal tax liability. The Claimant accepted this in the course of cross-examination. He further confirmed that the amount which related to the Dutch tax credit was £4322.60 (£4615 minus £292.40). I shall refer to this sum as 'the first refund'.

52. By email dated 28 July 2017 to Mr Brown (not copied to the Claimant), Ms Roberts wrote that:

> 'It is worth noting that Deloitte have had calls with all of the individuals and it appeared that they agreed with the calculations produced and could understand where the calculations had come from, the reason they had received a refund from HMRC and why this was due to the company.'

53. I find that it is clear from this email that the Claimant was at least telling Deloitte by this point that the first refund was payable to the Respondent. However, within a matter of days he appears to have had a change of heart, writing in an email dated 1 August 2017 to Mr Caspall and Mr Middlebrook:

> 'The payment from HMRC is a foreign tax credit claim for working in NL… So in effect this £4.5k Matrix are stating I owe them is mine, paid already to the UK tax man.'

54. Later the same day Mr Brown wrote to the Claimant:

> 'I have spent more time on the phone this morning with Deloitte just to triple check my understanding of the situation. I can confirm that everything that has previously been communicated with to the personal tax position for GRQ staff is correct and consistent. Please let me summarise below:
>
> - Individuals will be kept tax neutral by Matrix. This means no one will be better or worse off (tax wise) as a result of working in NL on behalf of the company than they would have been had they remained employed in the UK.
>
> - The tax each individual has actually paid has been deducted via Matrix UK payroll PAYE and is based upon HMRC rules (i.e. personal allowance and the different UK tax bands).
>
> - Matrix has taken full responsibility for paying NL personal tax on behalf of individuals and providing accompanying supporting information. This has been done via shadow NL payroll and the equivalent of NL payroll and the equivalent of PAYE payments to NL tax authorities. No NL tax return is required as a result.
>
> - The rebate from HMRC is due to the double taxation treaty. This is set up to avoid individuals duplicating tax by paying tax in 2 countries. For GRQ staff this is not an issue as they have not paid the NL tax.
>
> - If the individuals want to keep the rebate they would have had to pay the NL tax themselves (they would have been worse off as the NL tax paid is higher than the rebate).
>
> - The NL tax paid is dictated by NL tax law (in terms of what is and isn't tax free if the 30% ruling is in place). You cannot cherry pick on what is and isn't paid. You are free to take the NL tax authority to a

> judicial review! Anyhow, the NL tax paid is irrelevant to the individuals as Matrix has paid this on your behalf!
>
> - There is absolutely no NL BIK included in the UK tax you have actually paid.
>
> - The time spent working on GRQ in NL is NOT tax free for individuals!
>
> I hope this clarifies the situation and addresses your points.'

55. On 4 August 2017, the Claimant was informed by HMRC that he was due a further tax refund of £6,834.28, in relation to the 2016/17 tax year.

56. On 11 August 2017, the Claimant wrote again to Mr Brown about tax issues, stating that:

> 'I still do not agree that I should be reimbursing Matrix for additional tax liabilities in Holland. I am therefore unable to pay the full amount that you are requesting'.

57. On 22 September 2017, Deloitte UK wrote to the Claimant, explaining that they had now received the information from Deloitte Netherlands, and were able to finalise the figure for his tax return in relation to the foreign tax credit claim. The document then set out the position, which the Claimant was advised to report to his accountant, in some detail. I find that it was a helpful and constructive email.

58. On 4 October 2017 Mr Middlebrook wrote to the Claimant:

> 'Hi Ben – we need to have a chat regarding the long-running GRQ tax issues so we can quickly resolve this as it's now getting serious. I explained the situation to all out at GRQ without any issues and with everyone clearly understanding and accepting that Matrix have operated a correct process and so on. It's just you and Simon now to sort and he is in effect finished careerwise for many reasons. We can either discuss on phone or hang out or meet if better for you?'

59. The meaning of the reference to Mr Caspall as being 'finished careerwise' was not further explained in evidence before me. In any event, I reject Mr Brown's submission that this was a 'veiled threat' to the Claimant. While it is plain that the email expresses a degree of frustration on Mr Middlebrook's part that the issue has not yet been resolved, it is otherwise an amicable communication.

60. A phone call then took place between the Claimant and Mr Middlebrook on 5 October 2017 to discuss these issues. Mr Middlebrook recorded the content of that call in an email the following day, noting that Claimant:

> 'accepts that he has a sum to pay back to the company from the UK tax rebate he received and accepts he did not pay or qualify for [it]. Ben will make the repayments for this sum once the outstanding issues noted above are explained, documented and resolved. Ben is also aware that this whole issue of tax rebate the monies payable back to the company is in effect for one quarter of an annual year and that the next tax equalisation process will be for a full year with some four times greater

> than this current issue (£20k plus). Ben agrees that these next monies payable by the UK tax rebate process would be better to be payable directly to the company to avoid this transferring between scenario providing that the outstanding issues noted above are satisfactorily cleared up within this current process. Ben was sign over [his] acceptance of this once the issues are cleared.'

61. In a reply later the same day, the Claimant confirmed that he had read through Mr Middlebrook's summary of the meeting, and that he was generally content with it. However, he picked up on the question of whether any future rebate could be paid directly to the Respondent, rather than through him and then on to the company. He wrote:

> 'I do not recall us speaking about this and furthermore agreeing to it. I appreciate that 2017 tax rebate will be paid at some point by the HMRC. However, I do not see how these can be paid to Matrix directly. Deloitte do not submit my tax return, nor do they have the authority to act on my behalf with HMRC. If they were to do so then this is against my will. Forbes Dawson deal with my tax return and as such I pay them a fee to do so. Now don't get me wrong here… I am not saying that the 20k will not be repaid. I'm saying that I cannot see how the monies can be repaid to Matrix direct. It will have to come to me and then to Matrix.'

62. This email was not included in the bundle. The Claimant referred to it in the course of cross-examination; he appears to have called up on the screen he was using to access the Tribunal hearing; at my direction, it was then disclosed and included in the bundle. I find that this is the clearest possible evidence that, after his prevarications recorded above, by 5 October 2017 at the latest, the Claimant had accepted that refunds on Dutch tax, paid to him by HMRC, had to be paid on by him to the Respondent, and that he had undertaken to do so.

63. In an email of 12 October 2017, Mr Brown wrote to the Claimant: 'In terms of HMRC being able to pay the rebate directly to Matrix – it is possible for this to be paid directly to the company… [with] your consent'. The Claimant emailed Mr Brown on 19 October 2017, stating that: 'I appreciate it would be good for the monies in question to come direct back to Matrix', but went on to say that his accountants had said this is not practicable in his circumstances.

64. On 23 October 2017 Ms Roberts wrote to the Claimant:

> 'Please can you provide me with an update on how your 16/17 tax return is progressing?
>
> As you are aware, due to the foreign tax credit (FTC) from paying tax in both the UK and Netherlands there should be a large tax rebate due from HMRC. As already discussed this will payable back to Matrix as the company has paid the Dutch taxes on your behalf. Please see below a summary which is only based on the amount of Dutch tax paid and the amount owing to the company based on your employment income only. As your final tax return has been completed by your own accountant, please can you confirm the amount of foreign tax credit (FTC) that was used on your tax return? – this may differ slightly from the maximum FTC

> below depending on any other items that may have been included on your tax return. Matrix will be looking to claim back from you the foreign tax credit amount less the tax paid on the beneficial loan.'

65. In his witness statement (at paragraph 37) the Claimant stated that this email was:

> 'the last straw and convinced me that Matrix was not listening to me and that no matter what I said would not stop hounding me for the monies that they were requesting. It was at this point that I began to think about my future at Matrix and how things were becoming. I replied to Matrix on 19 October 2017 and advised them that I was unable to comply with their request.'

66. That evidence is problematic in a number of respects: firstly, as I have already found, the Claimant had already agreed that the refunds were repayable; and secondly (and self-evidently) the Claimant cannot have replied to an email dated 23 October 2017 on 19 October 2017. In any event, there was no email of 19 October 2017 in the bundle. The Claimant's reply to Ms Roberts' email of 23 October 2017 came around seven minutes later on the same day. In his reply, he simply passed on some figures which his accountant had provided to him, without a word of protest about her request. Ms Roberts replied, thanking him for the update and for responding so quickly.

67. In paragraph 38 of his witness statement, the Claimant continues: 'then on 1 December 2017 I advised Matrix that I was unable to continue with my employment with them'. He gives no explanation for the delay between 23 October 2017, when he maintains that he decided to resign, and 1 December 2017, when he informed the Respondent of this. In fact, the Claimant has, in my judgment, deliberately omitted mention of correspondence between him and the Respondent between those two dates, because it is inconvenient to his case.

68. On 9 November 2017 Ms Roberts wrote a very brief email to the Claimant asking whether his 2016/17 tax return had been submitted. The Claimant replied equally briefly saying:

> 'Hi Michelle. Not yet, they are working on it. They don't have to be in until end of Jan though do they. As soon as it gets submitted I will let you know.'

69. In an email dated 10 November 2017 from Mr Brown to the Claimant, Mr Brown wrote:

> 'We have chased Deloitte again and they assure us that the NL equivalent P60 is being worked on and should be with you soon. Did you go back to your accountants to clarify the other points (3 and 4 below)? Is there anything that is now preventing you from paying back the HMRC tax rebate to ensure that you are in a tax neutral position?'

70. The Claimant replied the same day:

> 'Hi Matt. That sounds good re the P60 equivalent. Quick question. Will this be two documents covering each tax year or one covering both? I

> would reiterate that it needs to be an official accepted Dutch document rather than just a spreadsheet or statement. If it is anything else it will not hold up to scrutiny by the HMRC or Dutch tax authorities should it be needed in the future. Once I have had chance to pass this on, it has been reviewed and the figures add up, I will be in a position to pay back the initial HMRC refund for 2016. My second tax return has not been submitted yet and probably won't be until nearer to the deadline in January. So the large lump sum had yet to be received.'

71. There is no indication in these entirely amicable exchanges that the Claimant was still resisting repaying the refund to the Respondent. On the contrary, I find that he is reiterating his willingness to do so.

72. The Claimant alleges in his witness statement (at paragraph 39):

> 'I even experienced forms of bullying and intimidation from the managing director and the chief financial officer who suggested: "Oh look here comes the Dutch tax expert!"'

73. The Claimant gives no date for that incident, although its position in the statement suggests that it occurred around this time. On the balance of probabilities, I find that the remark was made, in a joking fashion, and that the incident occurred before the Claimant's decision to resign.

74. In dealing with his resignation in his witness statement the Claimant also gave the following evidence:

> 'In addition, I was placed on a Matrix project in Hull which took an approximate 2.5 hours each way to get to. Making my travelling day a total of five hours. They then asked me to go full time on this project and stay over, despite the fact I had just returned from working abroad for 15 months in Holland and the reason I had to come home in the first place was to be there for my family who needed me.'

75. By email dated 1 December 2017, the Claimant submitted a brief letter of resignation, giving one month's notice. He concluded:

> 'I have enjoyed my time with Matrix and wish everybody continued success in the future'.

76. The effective date of termination of his employment was 31 December 2017 but, taking into account accrued holidays, his last working day was 14 December 2017.

77. Later the same day, in an email to Darren Chenery, Mr Allen wrote:

> 'A little Friday afternoon resignation letter for us… Main reason for leaving is the Dutch tax issue.'

78. By email dated 4 December 2017, Mr Lewis wrote to Mr Brown and Ms Long:

> 'understand the GRQ tax is the issue'.

79. Ms Angela Hayhoe of HR wrote to the Claimant on 6 December 2017, accepting his resignation. The Respondent considered deducting the first tax

refund from the Claimant's last payslip, but decided not to do so. The Claimant did not discover this until after he had submitted his resignation, and so it cannot have formed part of the reason for his resignation.

80. In a letter dated 12 December 2017 from the Claimant to Ms Long of HR, which has all the hallmarks of being a letter before action, the Claimant wrote:

> 'I would advise that I disagree with your reasoning … In reviewing my formal employment contract, I see no reference to the deduction of monies for tax purposes whilst working on a secondment in a foreign country. In reviewing my secondment letter I see no formal advice that monies would become due to Matrix for tax purposes. In addition, the secondment letter does not provide any advice as to the procedures that have been adopted by Matrix.'

81. On 15 December 2017, HMRC notified the Claimant of a further tax refund of £18,340.20 ('the second refund').

82. The Claimant's employment terminated on 31 December 2017.

83. The Claimant accepted in cross examination that a further tax refund was paid to him by HMRC in the sum of £5,989.80, relating to the 2017/18 tax year, in relation to Foreign Tax Credit arising from the secondment ('the third refund'). For reasons which were entirely unclear, he could not say exactly when he received that payment, although he believed it was around February 2019. He disclosed no documents which would confirm the relevant date.

The law

Breach of contract

84. The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 provides at paragraph 4 that:

> **Proceedings may be brought before an employment Tribunal in respect of a claim of an employer for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if […] (c) the claim arises or is outstanding on the termination of the employment of the employee against whom it is made […]**

85. In *Peninsula Business Services Ltd v Sweeney* [2004] IRLR 49 the EAT considered this provision and held at [50] that:

> **'a claim will only be 'outstanding' at such date [the EDT] if it is in the nature of a claim which, as at that date, was immediately enforceable but remained unsatisfied […]'**

The EAT noted that the ET had concluded that a claim for sales commission which at the date of termination was contingent did, nonetheless, fall within Reg 4. The EAT held at [53]:

> **'With respect, we regard that reasoning as defective. If a payment is only contingently due, it is not possible to claim payment until the contingency has happened. Before then, all that can be claimed is a declaration of entitlement to the payment if and when the contingency does happen, but a claim of that sort is not within reg. 3.'**

86. The construction of a contract does not depend upon the subjective views of the parties as to its meaning; it must be approached objectively. The correct approach was summarised by the House of Lords in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 912-913, *per* Lord Hoffmann:

> **'The principles may be summarised as follows:**
>
> **(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.**
>
> **(2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.**
>
> **(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.**
>
> **(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax (see *Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd.* [1997] 2 WLR 945).**
>
> **(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *The Antaios Compania Neviera S.A. v. Salen Rederierna A.B.* 1985 1 A.C. 191, 201:**
>
> > **". . . if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."'**

87. Chitty on Contracts, at [13-065], states that it is an elementary aspect of contractual construction that:

> **'Every contract is to be construed with reference to its object and the whole of its terms, and accordingly, the whole context must be considered in endeavouring to interpret it, even though the immediate object of inquiry is the meaning of an isolated word or clause'.**

88. Chitty also states as follows [13-044]:

> **'Further it has long been accepted that the courts will not approach the task of construction with too much concentration upon individual words to the neglect of the contract as a whole. "The common and universal principle ought to be applied: namely, that [an agreement] ought to receive that construction which its language will admit, and which will best effectuate the intention of the parties, to be collected from the whole of the agreement, and that greater regard is to be had to the clear intention of the parties than to any particular words which they may have used in the expression of their intent" (*Ford v Beech* (1848) 11 Q.B. 852, 866)".'**

89. In *Wickman Machine Tools Sales Ltd v L.G. Schuler AG* [1974] A.C. 235 at 251, Lord Reid said:

> **'The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result, the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make their intention abundantly clear.'**

90. Mr Brown relied on a passage in Chitty at [2-195], which discusses the issues arising from vague language:

> **'Another factor relevant to the issue of contractual intention is the degree of precision with which the agreement is expressed. It has been held that a husband's promise to let his deserted wife stay in the matrimonial home had no contractual force because it was not "intended by him, or understood by her, to have any contractual basis or effect". The promise was too vague: it did not state for how long or on what terms the wife could stay in the house… For the same reason, "letters of intent" or "letters of comfort" may lack the force of legally binding contracts. The assumption in all these cases was that the parties had reached an agreement, but lack of contractual intention prevented that agreement from having legal effect. Vagueness may also be a ground for concluding that the parties had never reached an agreement at all… On the other hand, the agreement may satisfy the requirement of contractual intention, yet be too vague to enforce. An example, of the latter situation is *Dhanani v Crasnianski*. There Ramsay J. held that an agreement to set up a private equity fund satisfied the requirement of contractual intention but nevertheless lacked contractual force because it was "in essence an agreement to agree" on terms which were "essential for such an agreement to be enforced" and "[w]ithout such further agreement the fund could not be set up".**

91. In that context, Mr Brown also referred me to the case of *Pena v Dale* [2003] EWHC 1065 (Ch), in which the Court observed at [96] that:

> **'the sentence requiring QTM to endeavour to issue these options or equivalent in the most tax-efficient manner to DSP Holdings is vague and may be so vague as to be unenforceable. I agree that there are a variety of tax saving schemes which might be available in relation to options.'**

92. A term may be implied in circumstances where it is necessary to do so. Chitty at [14-006] states:

> **'The requirements which must be satisfied before a term will be implied into a contract as a matter of fact have been stated in various ways over the years. At a high level of principle it may be said that the implication of a term as a matter of fact depends upon the intention of the parties as collected from the words of the agreement and the surrounding circumstances. The court will not make a contract for the parties but will be prepared to imply a term if there arises from the language of the contract itself, and the circumstances under which it was entered into, an inference that the parties must have intended the stipulation in question. Traditionally, an implication of this nature may be made in two situations: first, where it is necessary to give business efficacy to the contract,**

> **and, secondly, where the term implied represents the obvious, but unexpressed, intention of the parties. Both are predicated to depend on the presumed common intention of the parties. Such intention is, in general, to be ascertained objectively and is not dependent on proof of the actual intention of the parties at the time of contracting.'**

93. A helpful summary of the principles now applied by the courts when considering whether or not to imply a term into a contract as a matter of fact was given by Lord Hughes, giving the judgment of the Privy Council in *Ali v Petroleum Company of Trinidad and Tobago* [2017] ICR 531 in the following terms:

> **'It is enough to reiterate that the process of implying a term into the contract must not become the re-writing of the contract in a way which the court believes to be reasonable, or which the court prefers to the agreement which the parties have negotiated. A term is to be implied only if it is necessary to make the contract work, and this it may be if (i) it is so obvious that it goes without saying (and the parties, although they did not, *ex hypothesi*, apply their minds to the point, would have rounded on the notional officious bystander to say, and with one voice, 'Oh, of course') and/or (ii) it is necessary to give the contract business efficacy. Usually the outcome of either approach will be the same. The concept of necessity must not be watered down. Necessity is not established by showing that the contract would be improved by the addition. The fairness or equity of a suggested implied term is an essential but not a sufficient pre-condition for inclusion. And if there is an express term in the contract which is inconsistent with the proposed implied term, the latter cannot, by definition, meet these tests, since the parties have demonstrated that it is not their agreement.'**

Unfair (constructive) dismissal

94. S.94 of the Employment Rights Act 1996 ('ERA') provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed by his employer. S.95(1) ERA provides that he is dismissed if he terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct ('a constructive dismissal').

95. If there is a constructive dismissal, s.98(1) ERA provides that it is for the employer to show that it was for one of the permissible reasons in s.98(2) ERA, or some other substantial reason. If it was, s.98(4) ERA requires the Tribunal to determine whether the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee.

96. The employee must show that there has been a repudiatory breach of contract by the employer: a breach so serious that he was entitled to regard himself as discharged from his obligations under the contract. The Claimant relies in part on a breach of express terms of the contract (actual or anticipatory); and in part on a cumulative breach of the implied term of trust and confidence. In relation to the latter, the applicable principles were reviewed by the Court of Appeal in *London Borough of Waltham Forest v Omilaju* [2005] IRLR 35 (at [14] onwards):

> **14. 'The following basic propositions of law can be derived from the authorities:**
>
> > **1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: *Western Excavating (ECC) Ltd v Sharp* [1978] 1 QB 761.**

> **2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example, *Malik v Bank of Credit and Commerce International SA* [1998] AC 20, 34H-35D (Lord Nicholls) and 45C-46E (Lord Steyn). I shall refer to this as "the implied term of trust and confidence".**
>
> **3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract see, for example, per Browne-Wilkinson J in *Woods v WM Car Services (Peterborough) Ltd* [1981] ICR 666, 672A. The very essence of the breach of the implied term is that it is calculated or likely to *destroy or seriously damage* the relationship (emphasis added).**
>
> **4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in *Malik* at page 35C, the conduct relied on as constituting the breach must "impinge on the relationship in the sense that, looked at *objectively*, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer" (emphasis added).**
>
> **5. A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. It is well put at para [480] in Harvey on Industrial Relations and Employment Law:**
>
> > **"[480] Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the 'last straw' which causes the employee to terminate a deteriorating relationship."**
>
> **15. The last straw principle has been explained in a number of cases, perhaps most clearly in *Lewis v Motorworld Garages Ltd* [1986] ICR 157. Neill LJ said (p 167C) that the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence. Glidewell LJ said at p 169F:**
>
> > **"(3) The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term? (See *Woods v W. M. Car Services (Peterborough) Ltd.* [1981] ICR 666.) This is the "last straw" situation."**
>
> **16. Although the final straw may be relatively insignificant, it must not be utterly trivial: the principle that the law is not concerned with very small things (more elegantly expressed in the maxim "*de minimis non curat lex*") is of general application.**'

97. The Court of Appeal gave further guidance in *Kaur v Leeds Teaching Hospitals NHS Trust* [2018] IRLR 833 (at [55]):

> **'(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?**
>
> **(2) Has he or she affirmed the contract since that act?**
>
> **(3) If not, was that act (or omission) by itself a repudiatory breach of contract?**
>
> **(4) If not, was it nevertheless a part (applying the approach explained in *Omilaju*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the *Malik* term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)**
>
> **(5) Did the employee resign in response (or partly in response) to that breach?'**

98. In determining whether there has been a breach of the implied term, the question is not whether the employee has subjectively lost confidence in the employer but whether, viewed objectively, the employer conducted itself, without reasonable and proper cause, in a manner which was likely to destroy, or seriously damage, the trust and confidence which an employee is entitled to have in his employer: *Nottinghamshire County Council v Meikle* [2005] 1 ICR 1 (at [29]).

99. It is important to apply both limbs of the test. Conduct which is likely to destroy/seriously damage trust and confidence is not in breach of contract if there is 'reasonable and proper cause' for it: *Hilton v Shiner Ltd Builders Merchants* [2001] IRLR 727 (at [22- 23]).

100. A constructive dismissal may arise where the employee leaves in response to an anticipatory breach, that is a situation where the employer evinces an intention not to perform his part of the contract: *Harrison v Norwest Holst Group Administration Ltd* [1985] IRLR 240 (at [17-18]). Where there is a genuine dispute between the parties about the terms of a contract of employment, it is not an anticipatory breach of the contract for one party to do no more than argue his point of view. The mere fact that an employer is of the opinion, even mistakenly, that there is something to be discussed with his employee about the contract is a very long way from the employer taking up the attitude that he is not under any circumstances at all going to be bound by it: *Financial Techniques (Planning Services) Ltd v Hughes* [1981] IRLR 32 (at [18] and [21]).

101. Where there are mixed motives for the resignation, the Tribunal must determine whether the employer's repudiatory breach was an effective cause of the resignation; it need not be the only, or even the predominant, cause: *Meikle* (at [29]).

102. The employee must not delay his resignation too long, or do anything else which indicates affirmation of the contract: *W.E. Cox Toner (International) Ltd. v Crook* [1981] ICR 823 at 828-829.

Submissions

103. Both Counsel provided very helpful skeleton arguments, which they supplemented orally, and which I have taken into account. I will not summarise

their arguments, which are a matter of record, in what is already a long judgment. I will refer to specific points in context below.

Conclusions: the construction of the secondment letter and the Addendum

104. It is common ground between the parties that the secondment letter dated 12 January 2016 amounted to a variation to the Claimant's contract of employment; that the Addendum to the Employment Contract, signed by the Claimant on 2 September 2016, also amounted to a variation to his contract of employment; and that the Claimant's secondment income qualified for the Dutch 30% tax facility whereby Dutch income tax was paid by the Respondent in respect of 70%, rather than 100%, of the Claimant's income.

105. The underlined subheadings below are extracted from the parties' list of issues.

Is the provision in the letter dated 12 January 2016 that "[…] you will be no better or worse off from a tax perspective as a result of this secondment" [407] ("the Clause") an enforceable contractual term?

106. I accept Mr Cordrey's submission, on behalf of the Respondent, that this was a clear and enforceable agreement between the parties. Its language is plain, and its meaning unambiguous: the parties agreed, that while on secondment in the Netherlands, the Claimant's take-home pay, after tax, would be the same as if he were working in the UK. The 'no better or worse' clause remained in force throughout the duration of the secondment, and was expressly confirmed by the letter dated 16 January 2017 from Mr Lewis to the Claimant, in which certain other of his terms were varied.

107. Mr Brown submits that the fact that the agreement is silent as to the mechanisms by which this outcome would be achieved is a 'fatal error and the Employment Tribunal is not entitled to fill the void.' I do not accept that submission. In my judgment, it is sufficient that the agreed outcome is certain; it is not necessary that the mechanism by which it is to be achieved is spelt out in the agreement. I agree with Mr Cordrey that, if the position were reversed, the Claimant would have no hesitation in rejecting as spurious an argument that the silence as to the mechanism whereby the Respondent would ensure that he was not better or worse off from a tax perspective by working in the Netherlands, absolved the Respondent of any contractual obligation to give effect to the agreement.

108. Taking the *Pena* case, to which Mr Brown referred me, as an example, the parties in that case agreed to endeavour to achieve tax efficiency, but the agreement did not identify a specific tax-saving scheme. I suggested to Mr Brown in the course of oral submissions (and he accepted) that different tax-saving schemes achieve different outcomes: they may all be efficient, but to different extents. An agreement of that kind, which does not specify the agreed end result, may be so vague as to be unenforceable. However, that is not the position here: the precise outcome is specified in the agreement. The secondment agreement was no mere letter of intent; it was, in my judgment, intended to have contractual effect.

109. Mr Brown further submits that, not only was there no mechanism specified in the secondment agreement as to how the Claimant should repay any

overpayment, there was no obligation on him to do so. Mr Brown submitted (in his oral submissions) that the secondment agreement 'does not provide what the Claimant must do if he is better off … it does not say that he must cooperate in relation to taxation'.

110. I agree that the agreement contains no express obligation on the Claimant. However, the agreement must be construed by reference to its object, and in such a way which will best effectuate the intention of the parties (see the extracts from Chitty cited above). I have already found, the intention of the parties, and the object of the agreement, were clear: that the Claimant would be no better and no worse off from a tax perspective as a result of working in the Netherlands.

111. I accept Mr Cordery's submission that, in the absence of express words, the Tribunal may imply a term to ensure the business efficacy of the agreement. I infer from the language of the secondment agreement itself, and the circumstances in which it was entered into, that the intention of the parties must have been that both the Claimant and Respondent were obliged to cooperate with each other in giving effect to their agreement that the Claimant should be neither better nor worse off from a tax perspective. In my judgment, that term satisfies all the prerequisites of an implied term: it is so obvious that it goes without saying; it is necessary to make the agreement work; and it is not inconsistent with any express term of the contract.

112. Any other construction of the agreement would, in my judgment, lead to an unreasonable result: the Respondent would be deprived of tax refunds which rightfully belonged to it; and the Claimant would receive very substantial windfalls, which did not belong to him. That cannot have been the parties' intention. If such an unreasonable result had been their intention, they would have had to make it abundantly clear (see *Wickman* above at para 89); they did not do so.

113. I conclude that this was a tax equalisation clause, as opposed to a tax protection clause. I consider that the best evidence of the distinction between the two is the email from Deloitte of 18 December 2015 (see above at para 11), which explains that 'tax protection' ensures that the employee is no worse off from a tax perspective; whereas 'tax equalisation' ensures that he is 'no better or worse off from a tax perspective'. That is precisely the phrase adopted by the Respondent in the secondment agreement, after receiving that explanation from Deloitte.

114. I accept Mr Cordrey's submission (with which I do not understand Mr Brown to disagree) that the subjective views of the witnesses as to what a specific clause means is of limited relevance in the construction of the relevant contractual terms. Moreover, nothing which was said after the contractual variation took place can throw light on what the intentions of the parties were when the agreement was made.

115. Mr Brown submits that the Claimant cannot be taken to have agreed to a tax equalisation clause, because of his manuscript annotation on the secondment agreement: 'what does support mean?' I do not accept that submission: it was not a query about, or in any way a challenge to, the principle that the Claimant would be no better or worse off from a tax perspective; it was a query (and no

more than that) about the nature of the professional support he would receive, rather than the substantive outcome, to which he made no objection. In any event, I find that the Claimant had already accepted the secondment agreement: firstly, he had not objected to it within one month, as his 2006 contract provided that he must (see above at para 8); further, or alternatively, he had accepted it through his conduct, by working under it for eight months. It cannot reasonably be argued that the insertion of that query at that late stage vitiated the agreement.

116. The Claimant also relies on the fact that Ms Roberts, in her email of 6 November 2016 (above at paras 35-37) indicated to Deloitte that the Respondent wished to adopt an approach of tax protection, rather than tax equalisation, and that the intention was that he could be better off from a tax perspective. I reject that contention. The exchange in question postdates the secondment agreement by many months, and is incompatible with its express terms. A view expressed by Ms Roberts in November 2016 can have no relevance to the construction of an agreement concluded in January 2016. In my judgment, it merely reflected a degree of confusion on her part. Her view is irreconcilable with the express words of the secondment agreement.

What is the contractual effect of the terms contained in the Addendum?

117. The terms of the addendum are set out above (at para 34).

118. Clause (a) provides that, if the 30% tax break is applied for and received, the employee's gross salary will be reduced by 30%. Clause (b) then provides that, if (a) is applied, the employer shall reimburse the Claimant for extraterritorial expenses equal to the 30% reduction in gross salary.

119. Taking those two clauses on their own, they provide for a give and take between employer and employee: the employer reduces (and the employee surrenders) 30% of the employee's gross salary, and he receives a 30% tax-free sum in return.

120. However, it is plain from the terms of the Addendum, that the benefit to the employee identified in Clause (b) only accrues 'if and to the extent that part (a) is applied'. I agree with Mr Cordrey's submission that the only coherent interpretation of that provision is that Clauses (a) and (b) must relate to the same salary and it must be a real, not a notional, salary; it would be nonsensical if the Claimant received an 'actual' 30% of his salary, tax-free, in exchange for surrendering a 'notional' 30% through a shadow payroll.

121. There was no evidence before me that the reduction in Clause (a) was applied. Indeed, the Claimant accepted in the course of his oral evidence that, as a matter of fact, the Respondent did not reduce his gross salary by 30%. Consequently, Clause (b) does not come into play at all, and the Claimant is not entitled to the reimbursement referred to within it.

122. If I am wrong about that, both Clauses (a) and (b) are subject to Clause (d), which provides:

> 'If the employee is employed or assigned based on a net salary payment or tax equalisation policy, the maximum tax-free allowance of 30% is

> deemed to be part of the net or tax equalised remuneration as agreed upon between the employee and the employer.'

123. Mr Brown submitted in his closing submissions:

> 'The word 'if' indicates that employees assigned on a tax equalisation clause are to be treated differently from those who are not. The only plausible construction of Article (d) is that an employee subject to a tax equalisation clause does not receive the benefit of the 30% ruling. It must follow that, in the absence of a tax equalisation clause, the Addendum provides for the employee to receive the benefit of the 30% ruling. Otherwise Article (d) would be otiose.'

124. I agree with that analysis. However, because I have already found that the Claimant was assigned based on a tax equalisation clause (in the secondment agreement), I conclude that the Claimant cannot receive the benefit of the 30% ruling. Clause (d) provides that, where (as here) there is a tax equalisation clause, the 30% allowance is 'deemed to be part of the net or tax equalised remuneration as agreed upon between the employer and the employee.' The remuneration expressly agreed upon in January 2016 was the same remuneration as the Claimant would have received, had he been working in the UK. Thus, any entitlements due under Clauses (a) to (c) were deemed to be part of that remuneration. Because the Claimant was deemed to have received them by Clause (d), the 'reimbursement' sought by the Claimant, pursuant to clause (b), would have amounted to double payment.

125. In my judgment, Clause (d) puts beyond doubt that any benefit flowing from the 30% ruling would not lead to any further benefit to the Claimant. As Mr Cordrey put it: it expressly preserves the 'no better or worse off' term in the secondment contract.

126. Mr Cordrey makes three further submissions, each of which I accept. Firstly, the construction argued for by the Claimant is incompatible with an express term of the secondment contract: if he was reimbursed 30% of his gross salary as a tax-free sum, in circumstances where his actual gross salary had not been reduced by 30%, that would be a breach of the agreement that he should be 'no better or worse off from a tax perspective'. Secondly, if the parties' intention was to remove the 'no better or worse off' term of the secondment contract, the addendum would have had to address that intention explicitly, which it did not do. Thirdly, the Claimant's construction would lead to a very unreasonable result: the Respondent would be deprived of a tax refund, which was properly due to it, as the party which had paid the tax in the first place. In my judgment, and absent a statement making it abundantly clear, the parties cannot have intended such an unreasonable result.

Conclusion: the Respondent's contract claim

<u>If so, was the Claimant in breach of the Clause [in the secondment letter] by receiving tax rebates relating to Foreign Tax Credits in relation to the 2015/16, 2016/17 and 2017/18 tax years but failing to transfer the rebates to the Respondent (the Respondent contends that this left the Claimant "better off" in breach of the Clause)?</u>

127. The Claimant accepted in cross-examination that, as a matter of fact, his take-home pay remained the same; at no stage did he pay Dutch taxes. It was the

Respondent, not the Claimant who had paid tax on his salary in the Netherlands.

128. I am entirely satisfied that it was the Respondent who was entitled to the benefit of any relief on tax paid by it in the Netherlands. It so happened that the refunds due on the Dutch tax were reclaimed by the Claimant through his UK tax return; indeed, he was resistant to the suggestion that it should be otherwise (see his email of 6 October 2017 at para 61 above).

129. By retaining the refunds, the Claimant put himself in a position of being substantially better off from a tax perspective. I conclude that, by refusing to pass the refunds on to the Respondent, he breached the agreement in the secondment letter that he should be no better or worse off from a tax perspective as a result of the secondment; and breached the implied term, which I have found existed, that he must cooperate with the Respondent in giving effect to that agreement.

Conclusions: the Claimant's contract claim

Was the Respondent in breach of the terms of the Addendum on the basis set out in Paragraph 6, above? If so, did the claim for breach of contract arise, or was it outstanding, upon the termination of the Claimant's employment (Article 3(c), Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 ('the 1994 Order'))? To the extent that the Claimant's contract claim is one the ET has jurisdiction over, what remedy is appropriate?

130. For the reasons I have already given, there was no breach of the Addendum by the Respondent.

Conclusions: constructive unfair dismissal

Did the Respondent commit an actual or anticipatory breach of the express terms of the Claimant's employment?

131. The Claimant relies on the following conduct of the Respondent as an actual or anticipatory breach of the Addendum: following 2 September 2016, indicating that he would not receive any sums in relation to the 30% ruling (Issue 14(A)); and failing to reimburse him in accordance with the terms of the Addendum (Issue 14(B)).

132. For the reasons I have already given, there was no breach by the Respondent, actual or anticipatory, of the Addendum.

Did the Respondent breach the implied term of mutual trust and confidence?

133. As for the breach of the implied term, I will deal first with the elements of the alleged breach which the Respondent accepts were referred to in the claim form.

134. I accept Mr Brown's submission that there was lack of clarity at certain points during the secondment as to the details of the tax arrangements (Issue 15(A)). I also accept Mr Cordrey's submission that this was despite strenuous efforts on the Respondent's part in seeking clarification from Deloitte. While it is plain that the lack of clarity gave rise to some frustration on the Claimant's part, I conclude that, viewed objectively, it was not sufficient seriously to damage, or

to destroy, the relationship of trust and confidence. There was never a lack of clarity about the central principle: that the Claimant would be no better or worse off from a tax perspective.

135. The only point at which the Claimant might have formed an (erroneous) belief that he would receive a tax-free sum, in accordance with the 30% ruling (Issue 15(B)) was a brief period in June 2016 (see above at paras 24-28). However, that impression was immediately corrected in correspondence a few days later (see paras 29-30). Moreover, I conclude that had the Claimant paid careful attention to and/or taken advice on the terms of the Addendum, and in particular Clause (d), he must have realised that he would not be entitled to the benefit of a refund on tax paid on his behalf by the Respondent.

136. In any event, the Claimant was further disabused of his belief that he was so entitled in February 2017 (see para 40 above). He did not resign at that point and, even if, viewed objectively, there was any damage to the relationship of trust and confidence as a result of any earlier lack of clarity, he waited too long before resigning in response to it, thereby affirming the contract. If I am wrong about that, Mr Brown set the position out in even more simple, and explicit, language on 1 August 2017 (above at para 54), yet the Claimant still did not resign for a further four months.

137. Because I have concluded that the Respondent's interpretation of the secondment contract and the Addendum was correct, the Respondent had reasonable and proper cause for telling the Claimant that he was not entitled to additional payments pursuant to the 30% facility, and any sums refunded to him by HMRC in respect of that facility, would have to be paid onto the Respondent (Issue 15(C)).

138. Similarly, the Respondent had reasonable and proper cause for not 'reimbursing' a tax-free sum to the Claimant (Issue 15(D)) for the reasons I have already given: no such reimbursement was due to him.

139. It also follows from my findings and conclusions above that the Respondent had reasonable and proper cause for seeking to recover the first refund from him (Issue 15(E)), and for seeking to recover and/or indicating that it would seek to recover further refunds received by him from HMRC (Issue 15(F)).

140. I turn now to the elements of the breach of the implied term, which the Claimant seeks to rely on, and which the Respondent contends are not part of his pleaded claim. I consider that the Claimant should be allowed to rely on these matters: it is not unusual for further information in relation to a course of conduct amounting to an alleged breach of the implied term to be clarified later in proceedings; the Respondent is partly responsible for any lack of clarity, as it did not take steps to agree a satisfactory final list of issues earlier in the proceedings; in any event, Mr Cordrey accepted that he could deal with all of these issues in evidence, and so the Respondent is not prejudiced by my permitting the Claimant to rely on them.

141. Dealing first with the allegation that the Respondent failed to provide proper advice about or clarity in relation to foreign tax matters from December 2015 onwards (Issue 15(A)), while it is plain that there was some confusion (on both sides) as to the complex workings of Dutch tax law, I do not accept that the

Claimant was unclear in relation to the central fact of the tax position, which was that he would not be neither better or worse off as a result of the secondment. Further, as I have previously indicated, if there was any residual lack of clarity, it was resolved by the advice given to him by Deloitte in February 2017, and again by the advice given by Mr Brown on 1 August 2017. I find that, by delaying so long before resigning, the Claimant affirmed the contract, and waved his right to claim constructive dismissal.

142. By the time of the exchange between the Claimant and Mr Brown on 4/5 October 2018, the Claimant had expressly accepted that he must pay on the refunds to the Respondent. Even if that is taken as the last date of 'confusion/lack of clarity' (and for the reasons I have given in the previous paragraphs, I do not think it was), the Claimant delayed a further month. In the meanwhile, his communications with the Respondent did nothing to indicate that he considered that there had been a repudiatory breach of contract, or to reserve his right to claim constructive dismissal. On the contrary, they indicated that he was in the process of cooperating with the Respondent in reaching a jointly agreed outcome, which was the transfer of the tax refund to the Respondent.

143. For the reasons I have already given I also reject the allegation that the Respondent failed to deal with the tax dispute in a reasonable or proper manner (Issue 15(G)). Nor did the Respondent 'pressurise' the Claimant to transfer funds to it (Issue 15(G)). No improper pressure was exerted on the Claimant; requests were made to him in a professional and courteous manner. There was nothing inappropriate in the email sent to the Claimant on 22 September 2017: the Claimant cannot reasonably complain on the one hand about not being given clear information, and then take exception to an email which gives extremely clear information. As for the email from Mr Middlebrook to the Claimant on 4 October 2017, I have already found that this email did not constitute, as the Claimant suggests, a 'veiled threat'; it merely expressed a degree of frustration.

144. I have already found that the comment 'oh here comes the Dutch tax expert' was made (Issue 16(I)). I reject the Claimant's evidence that he perceived this as bullying and intimidation; in my judgment, that evidence was exaggerated and self-serving. This was nothing more than a light-hearted, mildly sarcastic comment in the context of what appears to have been a friendly working environment. I find it inconceivable that the Claimant would have referred in his resignation letter to having enjoyed his time with the Respondent, if he genuinely considered that he had been subjected to bullying and intimidation. Moreover, I reject any suggestion that the Claimant resigned in response to this remark. If he had, it would have been an absurd overreaction to such a minor incident.

145. As for asking the Claimant to agree to sums being transferred directly from HMRC to the Respondent (Issue 16(J)), that was a reasonable request, to which the Claimant's only objection at the time was a practical one. Viewed objectively, it cannot possibly have destroyed, or seriously damaged, the relationship of trust and confidence.

146. By way of summary, I have concluded that some of the conduct relied on by the Claimant as amounting to a breach of the implied term did not occur as

described; alternatively, that when it did occur, there was reasonable and proper cause for it; alternatively that, viewed objectively, it was not likely to destroy or seriously damage the relationship of trust and confidence; alternatively, that the Claimant waited too long before resigning in response to it, and so affirmed the contract. Accordingly, there was no breach of the implied term of trust and confidence, in response to which the Claimant resigned in a timely manner.

147. If I am wrong in my conclusions above, I conclude that the Claimant did not resign, even in part, because of the conduct which he alleged amounted to a breach of the implied term. He accepted in cross-examination that:

> 'I did not resign because I was being asked to repay rebates; the conversation was going nowhere, it just broke down; I was working in Hull; no matter what I asked for it was being chucked in my face; it took ten months to get the information.'

148. Counsel for the Respondent also asked whether he had resigned when he did because it would make it harder for the Respondent to recoup the refunds paid to him; the Claimant denied this.

149. I conclude that the Claimant did not resign because he was being asked to repay the refunds. By the time he resigned, he had accepted that he had an obligation to do so. Nor do I accept his evidence that he resigned because 'the conversation was going nowhere' or that the Respondent was being in any way uncooperative with him. On the contrary, the 'conversation' had effectively concluded, and the correspondence at the time suggested that he and the Respondent were working constructively together to iron out the last outstanding details, at which point he would transfer the refunds to it.

150. I conclude that the reason the Claimant resigned when he did was a combination of two factors: he no longer wished to work in Hull, which was extremely inconvenient for him, and interfered with his family life; I further conclude, on the balance of probabilities, that the Claimant believed that, if he resigned, it might be harder for the Respondent to claw back the tax refunds, which by then were very substantial.

151. For the avoidance of doubt, I reject the Claimant's evidence that Ms Roberts' email of 23 October 2017 provided him with a 'last straw', such as to revive any previous adverse conduct on which he relied. There was nothing objectionable in that email.

Conclusions: jurisdiction and remedy

<u>If so, to what extent (if at all) is the Respondent's contract claim one which arose, or was outstanding, upon the termination of the Claimant's employment (Article 4(c) of the 1994 Order)?</u>

152. The first and second tax refunds, notified to the Claimant on 28 January and 15 December 2017, were ascertainable, and not contingent, as at the effective date of termination of the Claimant's employment on 31 December 2017. The Tribunal has jurisdiction to hear the Respondent's claims for breach of contract in respect of them.

153. There was no evidence before me that the third refund was received by the Claimant before the termination of his employment. I decline jurisdiction in relation to that refund.

To the extent that the Respondent's contract claim is one the ET has jurisdiction over, what remedy is appropriate?

154. The Respondent is entitled to damages in the amount of £4,322.60 in respect of the first refund; and £18,340.20 in respect of the second.

Next steps

155. There is an outstanding costs application by the Respondent, which will require a hearing, unless it can be resolved by agreement. The parties shall provide their dates to avoid (from December 2020 onwards) for a three-hour hearing by CVP no later than seven days from the date on which this judgment is promulgated.

Employment Judge Massarella

2 November 2020

APPENDIX: PARTIES' LIST OF ISSUES

Contractual construction of the secondment letter

1. It is common ground between the parties that the letter dated 12 January 2016 [407], signed by the Claimant on 10 August 2016 [404] amounted to a variation to his contract of employment [67].

2. Is the provision in the letter dated 12 January 2016 that "[…] you will be no better or worse off from a tax perspective as a result of this secondment" [407] ("the Clause") an enforceable contractual term?

3. If so, was the Claimant in breach of the Clause by receiving tax rebates relating to Foreign Tax Credits in relation to the 2015/16, 2016/17 and 2017/18 tax years, but failing to transfer the rebates to the Respondent (the Respondent contends that this left the Claimant "better off" in breach of the Clause)?

Contractual construction of the Addendum to the employment contract

4. It is common ground between the parties that the Addendum to the Employment Contract [81-82] ("the Addendum"), signed by the Claimant on 2 September 2016, amounted to a variation to his contract of employment [67].

5. It is common ground that the Claimant's secondment income qualified for the Dutch 30% tax facility whereby Dutch income tax was paid by the Respondent in respect of 70%, rather than 100%, of the Claimant's income.

6. What is the contractual effect of the terms contained in the Addendum?

    a. *The Claimant contends that in view of paragraph 5 (above), the Respondent was obliged to reduce his secondment salary (£80,000 in 2016 and £87,758 from 1 January 2017) by 30% and transfer the equivalent sum (30%) to him, tax free.[1] The Respondent accepts that it did not do so but denies that any such obligation arose under the terms of the Addendum;*

    b. *The Claimant contends that there was an implied term to the effect any sums due to the Claimant in accordance with the terms of the Addendum would be paid within a reasonable period of time and, in any event, on or before the termination of his employment with the Respondent. The Respondent denies that any such obligation arose under the terms of the Addendum[2].*

Claimant's breach of contract claim

7. Was the Respondent in breach of the terms of the Addendum on the basis set out in Paragraph 6, above?

---

[1] The Claimant says that this interpretation of the Addendum was pleaded at paragraph 14(b) of the GOC, paragraphs 1(c) and 1(m) of the Claimant's Further and Better Particulars, paragraph 6 of the Response to Counter Claim, the Respondent disputes that this is the case

[2] The Respondent disputes that this contention has been pleaded

8. If so, did the claim for breach of contract arise, or was it outstanding, upon the termination of the Claimant's employment (Article 3(c), Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 ('the 1994 Order'))?

9. To the extent that the Claimant's contract claim is one the ET has jurisdiction over, what remedy is appropriate?

Respondent's contract claim

10. Was the Claimant in breach of the Clause on the basis set out above at Paragraph 3?

11. If so, to what extent (if at all) is the Respondent's contract claim one which arose, or was outstanding, upon the termination of the Claimant's employment (Article 4(c) of the 1994 Order)?

12. To the extent that the Respondent's contract claim is one the ET has jurisdiction over, what remedy is appropriate?

Constructive unfair dismissal

13. Did the Respondent commit an actual or anticipatory breach of the express terms of the Claimant's employment?

14. The Claimant relies on the following conduct of the Respondent as an actual or anticipatory breach of the Addendum:

    a. following 2 September 2016, indicating that he would not receive any sums in relation to the 30% ruling;

    b. failing to reimburse him in accordance with the terms of the Addendum;

15. The Claimant relies on the following conduct of the Respondent as a breach of the implied term of mutual trust and confidence[3]:

    a. failing to provide proper advice about or clarity in relation to foreign tax matters from December 2015 onwards;[4]

    b. leading him to believe that he would receive a tax-free sum in accordance with the 30% ruling;[5]

    c. following 2 September 2016, indicating that he would not receive any sums in relation to the 30% ruling;

    d. failing to reimburse him in accordance with the terms of the Addendum;

[3] The Respondent's position is that the Claimant should be held to the three acts relied on in the Agreed List of Issues (agreed by the Claimant's then counsel and solicitor **[54 – 58]**) which would exclude Paragraph 15 a., g, h., i. and j.
[4] paragraphs 8-10, 18, 21, 33 GOC, paragraphs 1(b), 1(i), 1(j) FBPs
[5] paragraphs 14(b), paragraph 1(c) FBPs

e. seeking to recover £4,615.27 from him;

f. seeking to recover further sums and/or indicating that it would seek to recover further sums received by him from HMRC;

g. failing to deal with the tax dispute in a reasonable or proper manner;[6]

h. pressuring the Claimant to transfer sums to the Respondent;[7]

i. comments such as 'oh here comes the Dutch tax expert';[8]

j. asking the Claimant to agree to sums being transferred directly from HMRC to the Respondent.

16. To the extent that any or all of the above conduct took place, did that conduct, whether taken individually or cumulatively, constitute conduct by the Respondent which, objectively viewed, was calculated or likely to destroy or seriously damage, without reasonable or proper cause, the relationship of trust and confidence between the Claimant and the Respondent?

17. If any breach of contract is established, was it repudiatory?

18. Was the contract affirmed following any such breach or was any such breach waived?

19. If the contract was affirmed or any breach waived, was there a 'final straw' which revived the original breach?

20. Did the Claimant resign in response to a repudiatory breach of contract (taking into account any final straw)?

21. If the Claimant was constructively dismissed, was the dismissal fair or unfair in accordance with the provisions of section 98 Employment Rights Act 1996?

Constructive dismissal – remedy

22. If the constructive dismissal was unfair, did the Claimant contribute to his dismissal by culpable and blameworthy conduct?

23. Was there an unreasonable failure to comply with the ACAS Code on Disciplinary and Grievance Procedures (2015)?

24. Is it appropriate to make any reduction in accordance with the principles established in *Polkey v A E Dayton Services Ltd* [1987] IRLR 503 (HL)?

25. What compensation is appropriate in light of the above?

[6] paragraphs 1(j), 1(k), 1(m), 1(n) FBPs
[7] paragraph 1(j), 1(k) FBPs
[8] paragraph 1(k) FBPs