EMPLOYMENT TRIBUNALS

Claimant: Mr C McCooey

Respondent: Elopak UK Limited

Heard at: Manchester (by CVP) **On:** 5,6(pm only) 7, 23(pm only) June 2023 and (in chambers) on 31 July 2023

Before: Employment Judge Leach.

Representatives
For the claimant: Mr D Brown (counsel)
For the respondent: Ms L Gould (counsel)

JUDGMENT

1. The respondent was in breach of contract in failing to reimburse the claimant fully for his employment related expenses.

2. The claimant was unfairly (constructively) dismissed.

REASONS

A. Introduction

1. The claimant has claimed that he was constructively and unfairly dismissed by the respondent. He has alleged that the respondent's actions over a period of years, broke the essential term of trust and confidence (defined and referred to below as the "Implied Term").

2. The claimant also brought a complaint of unauthorised deductions from his wages in that he was not fully reimbursed for his expenses. This was amended to

a breach of contract complaint on the morning of the first day of this hearing as explained below.

B. The Hearing and the claimant's application to amend the claim.

3. Mr Brown applied to amend the claim, substituting a complaint that there had been unauthorised deductions from wages to a compliant that a failure to fully reimburse the claimant for his fuel expenses, amounted to a breach of contract. Mr Brown recognised that expenses are not included in the definition of wages for the purposes of Part II of the Employment Rights Act 1996.

4. On behalf of the respondent, Ms Gould did not raise any objection.

5. I asked Mr Brown to identify the contractual term that, according to the claimant, had been breached. Mr Brown identified it as the Implied Term.

6. After the evidence had been heard and in his submissions Mr Brown put forward arguments that relied on another contractual term. He did so, having had the benefit of the respondent's evidence and also having been able to consider the case of **Benyatov v. Credit Suisse Securities Limited [2023] EWCA Civ 140.** I note that the decision in this case is dated February 2023 and appeared in the law reports after then.

7. The alternative contractual term that the claimant wanted to rely on was an implied term that the respondent would fully reimburse the claimant's fuel costs genuinely incurred by him in respect of business travel. Mr Brown also noted that an amendment to the existing claim was not required, it was always clear what the breach was and. Further, a breach of the alternative term would also amount to a breach of the Implied Term.

8. The respondent objected to this second amendment application.

9. Having considered submissions from both parties, I have decided that the claimant does not need to apply to amend his complaint in order to rely on a term by which the claimant would be fully reimbursed for his expenses.

10. As from the morning of day one of the final hearing, the claim included a complaint that the respondent was in breach of contract because (according to the claimant) it failed to fully reimburse his fuel costs. During Mr Brown's cross examinations of Mr Brassard and Mr Van Willegen, both accepted the respondent should ensure that the claimant was not "out of pocket" in funding business travel. The claimant has done no more than clarify the breach of contract claim in the light of this evidence.

11. Further, it is clear that such a term was implied into the claimant's employment contract. In the last paragraph of his judgment in Benyatov, Underhill LJ referred to an *"uncontentious implied obligation of an employer to indemnify the employee against expenses and liabilities incurred in the course of the employment."*

12. A breach of this uncontentious implied obligation might give rise to a breach of the Implied Term. It will be necessary therefore when considering whether or not there has been a breach of the Implied Term to have regard to the uncontentious implied obligation. It would be an impossible task to refuse to take in to account arguments about whether the implied obligation to indemnify against expenses had been breached and yet to reach a fair decision about whether the Implied Term had been breached. It would be an artificial distinction between the 2 in the circumstances of this case. For these reasons I see the points raised by the claimant as points of clarification rather than requiring formal amendment.

13. If I am wrong and an amendment to the claimant is necessary to enable the claimant to rely on this uncontentious implied obligation, then I would allow it. The amendment application was made at a very late stage but was perhaps inevitable given the evidence provided at the hearing.

14. Further, the respondent was informed by letter dated 12 April 2021 (page 430) that this was an argument being deployed by the claimant. In that letter solicitors acting for the claimant state this*:-"We would respectfully submit that the cost of fuel for business purposes is entirely the responsibility of the Company's and no employee should be responsible or out of pocket for a business cost such as fuel. On that basis we are of the view that the Company is in breach of Mr Cooey's contract of employment by failing to fully reimburse him for business fuel expenses."* I am satisfied that the respondent has not been prejudiced by the late amendment (assuming amendment is required). Relevant evidence has been provided to enable me to make a fair and informed decision on complaints in this case including a complaint that the uncontentious implied obligation has been breached.

C. The issues

15. I need to decide whether the claimant was dismissed. The claimant's case is that.

a. the respondent breached the contract of employment;
b. that was a fundamental breach;
c. that was a reason for the claimant's resignation;.
d. that he did not affirm the contract before he resigned.

16. In the event that I make a finding that there was a dismissal, the respondent does not try to rely on that dismissal being for a potentially fair reason. It would therefore be unfair.

17. I also need to decide whether the respondent was in breach of contract in not paying the claimant an amount to fully cover his expenses. That is a separate claim for damages and not dependent on the breach of contact being a fundamental one.

18. It was agreed that issues relevant to remedy would be determined separately, in the event that I made findings that there had been an unfair dismissal and/or a breach of contract. Such must include consideration about how much (if anything)

the respondent has failed to pay to the claimant in reimbursement of expenses and (assuming the claimant seeks a remedy of compensation) what unfair dismissal basic and compensatory awards should be made having regard to the terms at sections 118 to 124A Employment Rights Act 1996.

D. The Facts

19. At all relevant times, the claimant was employed by the respondent as a field services engineer. This required the claimant to attend the sites of various customers of the respondent in Northern Ireland and the Republic of Ireland (ROI) to mend and maintain industrial machinery that those customers had bought or leased from the respondent.

20. The claimant had carried out substantially the same role since his employment began in 2006.

21. The respondent was part of a large international group of companies. Its UK based business was relatively small. As is apparent from the relevant facts however, various employees employed by the wider group (particularly in other European countries) have responsibilities within the UK business.

<u>The claimant's contract of employment.</u>

22. A written contract was provided at the start of the claimant's employment in 2006. (pages 50-54). These written terms do not refer to expenses. There is reference to a grievance procedure.

23. The written terms note that the claimant is based at home but required to travel to any of the respondent's offices or factories. Whilst not express, this must also mean the offices and factories operated by the respondent's customers; that was what the claimant spent much of his working time doing.

24. The respondent operates an expenses policy. I refer to this below.

25. In 2018 some of the expenses arrangements changed. These changes affected the claimant. They were as follows:-

a. A reduction in an overnight allowance.

b. Changes to payments for fuel used on work related journeys. .

<u>Travel for work</u>

26. The claimant's role required him to visit various locations mainly if not wholly in the Republic of Ireland (ROI). He was provided with a company car.

27. Until about 30 June 2017, the claimant was also provided with a fuel card. The company made payments for fuel bought with the fuel card. The claimant did not therefore have to pay for fuel.

28. Sometimes fuel cards are provided to employees so that they can purchase fuel for private use as well as work related travel. HMRC regard a fuel card provided for all travel (business and private) as a taxable benefit (see further below).

29. Whilst the claimant may (or may not) have received a fuel card for both business and private fuel earlier in his employment, what is clear is that, by the start of the 2015 tax year, the fuel card that he was provided with was not intended as a benefit; simply as a means by which the company paid for the fuel used by the claimant for his business travel. It meant that the claimant did not have to pay and then reclaim the cost of fuel as a business expense.

30. However, the claimant did not want this fuel card to be regarded as a taxable benefit. Therefore, by arrangement between the claimant and respondent, the claimant recorded the amount of private mileage and reimbursed the respondent for the cost of fuel used for private mileage. Reimbursement was at the rates determined by HMRC as fuel costs per mile. These rates are called HMRC Advisory Fuel Rates and depend on the type of fuel used and size of vehicle engine. I refer to these as HMRC Rates.

31. These arrangements were in place with most of the respondent's field service engineers.

32. In early 2017, the arrangements came to the attention of the respondent's UK Financial Controller, Louise Hartley (LH). Her attention was particularly drawn because the respondent had been audited by HMRC and they were critical of the arrangements.

33. HMRC identified that some of the engineers had not paid the respondent for their private mileage (or at least had not paid promptly for their private mileage) and had to make back payments for private mileage incurred in one tax year in the subsequent tax year. Under HMRC rules, these amounts had to have been paid within the same tax year that the private miles were driven. If that did not happen then the fuel card could be treated by HMRC as a taxable benefit.

34. Given the risk that the respondent had not been compliant with tax legislation, it reviewed and made changes to the fuel payment methods.

35. These changes were set out in an email dated 23 June 2017 headed *"changes to the Private and Business Mileage Claim Expense Policy for business travel within the UK and Ireland"* which was distributed to UK employees early in the 2017/18 tax year. This provided for the following:-

a. That it applied to employees in the United Kingdom (including the claimant therefore) and also employees in the Republic of Ireland (ROI).
b. That for company car drivers who did not use a fuel card, business mileage would be reimbursed:-
    i. where the destination postcodes were provided on a business expense claim form, and;

ii. by using the HMRC Rates, and;.
iii. where the mileage claim was supported by a fuel purchase VAT receipt.

36. It is not in dispute that the new expense policy provided an alternative arrangement (and left it for individual employees to choose which option they preferred) of being provided with a fuel card and for the employee recipient of that card to use it to pay for both business and private mileage. The 2 employees based in the ROI took this option. It was apparent from the evidence provided by the claimant that his colleagues in ROI considered the tax arrangements in ROI made this option attractive. It was beneficial for the ROI based employees to have a fuel card and to use it to buy fuel for both business and private mileage.

37. All UK engineers including the claimant, decided not to take the fuel card option (even though they could have used it to purchase fuel for private mileage) but instead to make claims for the payment of business mileage under the Expense Policy. There is no dispute that the tax payable on a fuel card was considerable and made the option unattractive.

38. In his evidence, the claimant said that in June 2017 the respondent announced the removal of the company fuel card that the claimant had been using. This is not correct. The respondent continued to offer the claimant the option of retaining and using the fuel card for business and private mileage. The claimant did not want that option. He preferred the other option because he decided that the UK's tax treatment of fuel cards made the option uneconomic for him. That was accepted by the respondent to be the case. The respondent did not dispute that the fuel card option was uneconomic for the claimant and the other UK engineers. That is why the alternative arrangement was provided. The alternative arrangement was intended to fully reimburse the UK based engineers for their expenses.

39. To help ensure that no private mileage was being paid for (or was seen to be paid for) as a tax-free expense the respondent decided that it needed to reverse the arrangements that had been in place up to June 2017. Rather than declaring private mileage and paying for that at HMRC rates; employees would now declare business mileage and be paid for this, also at the HMRC rates.

40. Louise Hartley's evidence (provided in response to questions from Mr Brown) was that, as well as the issue of not having received payments for private mileage from some of the engineers, there were other concerns about the fuel card arrangements previously in place. Some of the engineers, particularly the claimant, spent a lot of their working time with one or 2 customers. This put in jeopardy the tax-free status of payments made for travelling to and from a regular customer. There was a risk that the extent to which the claimant travelled to and from a particular customer was such that HMRC might regard that as travel to and from a normal place of work and therefore any payment to cover those expenses would be taxable. This concern was not referred to in Louise Hartley's witness statement. There is evidence that the claimant was made aware of this concern in discussions about the changes. It is referred to in email exchanges dated March

2018 (pages 109/110) and in a slide presentation of March 2018 (pages 101 to 108)

The HMRC Advisory rates.

41. HMRC provides rates for repayment of fuel for business mileage where an employee is using a *"company car"* and putting forward an expense claim for the fuel used in travelling for work purposes.

42. These rates are designed to reimburse the cost of fuel only, the other costs of running the car already being met by the employer.

43. The HMRC Rates vary according to the engine size of the vehicle and type of fuel used. They are reviewed and updated quarterly to take account of fluctuating fuel prices.

44. As the name indicates, the rates are advisory. An employer can depart from these rates although a reasonable employer would only look to do so where there is evidence that a departure was necessary in order to ensure an employee was adequately compensated for fuel expenses.

45. This occurred in February 2018 8 months or so after the respondent moved over to the new expense arrangements. Prior to June 2017 (in other words under the previous arrangements) many of the engineers (including the claimant) had opted for company vehicles with diesel engine capacities of 1998cc or thereabouts. HMRC advisory rates had a category of diesel vehicle from 1401 to 2000cc and another category which started at 2001cc which had higher rates than the category 1401-2000cc.

46. As many of the engineers had vehicles with engines right at the top of the category then a decision was made in February 2018, to add an extra penny on top of the HMRC advisory rate. This included the claimant who at the time was driving a Volvo car with a 1998 cc diesel engine.

47. The arrangement was intended as temporary. The intention was to encourage engineers to choose their next company vehicle with fuel efficiency being a key factor for selection.

Claimant's complaint in 2018.

48. Initially the claimant did not consider the new arrangements as being disadvantageous to him. He explained in his witness evidence that fuel prices were quite low, he was receiving a reasonable mileage rate and he was satisfied that the HMRC advisory rates were covering the cost of the business mileage incurred when using the Volvo.

49. The claimant started to raise issues in early 2018, which was the same time that Mr Peacock (MP) commenced employment with the respondent and became the claimant's manager.

50. On 8 February 2018 the claimant raised with MP that fuel costs were rising and yet the HMRC Rates were not. The claimant's email and MP's reply are at page 93/94. The claimant provided various figures which he said showed that it was at that time costing him about £113 per month to subsidise his work travel.

51. The claimant also set out his complaint in an email of 26 February 2018. The claimant seemed to be of the view that the changes in expenses arrangements were introduced so that the respondent could save money. I accept the evidence of the respondent's witnesses (LH for example) that this was not the case. The changes were brought in to ensure tax compliance. I note particularly that the respondent continued to be willing to provide the field service engineers (including the claimant) with a fuel card and to pay for all business and private mileage. However, it could not do anything about the tax that would then be applied to this benefit.

52. MP replied to the claimant, telling him that the advisory rates would be reviewed by HMRC that month (February) and if they did not increase then the respondent would look at adding 1p per mile on to the mileage rate, on top of the HMRC advisory rate.

53. That is in fact what happened. It came as part of a wider review of the expenses arrangements for UK employees. Affected employees were given a presentation, a copy of which is at 101 to 108. An updated expenses policy document was introduced shortly after then, effective 1 June 2018 (page 116 – 118). It included the following note about mileage rates for those employees who opted not to have a company fuel card and instead claimed expenses for business miles:-

> *The following mileage rates are used;*
>
> - *Diesel less than 1600cc HMRC Advisory Fuel Rate*
> - *Diesel 1601cc - 1900cc HMRC Advisory Fuel Rate*
> - ***Diesel 1901cc - 2000cc HMRC Advisory Fuel Rate + 1 pence per mile***
> - *Diesel over 2000cc HMRC Advisory Fuel Rate*
>
> *HMRC's Advisory Fuel Rates are updated regularly and can be found at;*
> *https://www.gov.uk/government/publications/advisory-fuel-rates*

(my emphasis)

<u>The claimant's new company car – early 2019.</u>

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54. The claimant became eligible for a new company car in late 2018/early 2019.

55. He was helped to select a new make and model of car by information provided by LH and MP. However, it was up to the claimant to choose his preferred vehicle, within spend parameters allowed under the terms of his employment. LH gave evidence was that the claimant could choose from over 900 makes and models of vehicle. The spend parameters provided allowed an employee to pay a little bit extra towards a vehicle per month should they prefer a

vehicle with a higher specification. That extra amount (which could be up to an additional 10%) would then be deducted from monthly pay.

56. LH provided the claimant with costings for various vehicles, including the amount that the claimant would be taxed.

57. MP and LH also had discussions with the claimant about choice of car. The claimant told MP that the Volvo he had was ideal for his height and seating position. The claimant also told MP and LH that he suffered from neck pain. He made clear that he could not manage with a small car as that would make his driving position cramped and would worsen his condition (see for example email at 211).

58. The bundle includes a considerable amount of email correspondence relevant to the claimant's selection of a new car. Having reviewed this:-

a. I have no criticism of LH's correspondence to the claimant upon hearing of the claimant's neck condition. She was aware that the respondent had a private health policy with BUPA, for the benefit of employees and that there was an obligation to disclose pre-existing conditions.
b. I find that the respondent assisted the claimant in his selection of a new vehicle and, together with the vehicle leasing company used, provided him with costings for a range of vehicles. It is clear from the correspondence that the claimant had difficulty making a decision and the respondent (and vehicle leasing company) patiently worked with the claimant to provide details of various different vehicles.
c. I do not accept MPs evidence that the claimant knew that the fuel consumption for the Peugeot would be low but that he would be willing to pay towards the fuel. The claimant did discuss the bik rate of new vehicles. However, he did not choose a vehicle knowing that it would not be efficient. See also my comments at 61,62 below.

59. The claimant opted for a Peugeot car with a 1500cc diesel engine. It was not long after he took delivery of this car that he was in contact with MP complaining that the fuel efficiency was not as good as he had expected. Initially he raised his concerns verbally.

60. LH responded to these concerns by email dated 1 April 2019

Hi CoIm,

I hope you are well.

I understand that you have a dispute re your business mileage claim.

As you know our expense policy is that employees can either;

• have a fuel card and the company will pay for all fuel including private fuel. However under this option a fuel benefit will then be added to the employees Plld.

or

• pay for mileage themselves and claim business mileage through expenses at the HMRC Advisory Fuel Rates.

I understand that in December last year you selected a Peugeot 3008 5DR 1.5 Blue H Di GT Line 19 Manual as your new company car, from a list of +950 vehicles, of which 581 were more fuel efficient than the one you selected.

I have attached the list with the more fuel-efficient vehicles highlighted.

As we can do nothing re the fuel efficiency of the vehicle you selected, your choices now are to either opt for a company fuel card (with associated Plld benefit, for 2019/2020 this would be £6,989) or to continue to claim business mileage at the HMRC Advisory Fuel Rates, currently 10 pence per mile for a diesel vehicle with engine size 1400cc-1600cc. I believe that your vehicle has an engine size of 1500cc.

61. The claimant's evidence is that, whilst accepting that there were more than 500 vehicles that he could have chosen that were more fuel efficient, they were considerably smaller. I accept that many of the alternative choices were. I also note that many of the 581 vehicles that LH identified as more fuel efficient than the one selected by the claimant, were marginally so and some even have the same fuel efficiency as the Peugeot.

62. The respondent's witnesses, in evidence, accepted that the choice of vehicle was not inappropriate. It is a medium sized family car, suitable for the claimant's work and home use. It has a published fuel consumption rate of 67 miles to the gallon which is better than or similar to many other vehicles that the claimant could have selected. Had the claimant experienced fuel consumption that was closer to the figure advertised, he would not have complained or had cause to complain.

63. It was not until January 2020 that the claimant raised a formal grievance. However before then he complained on various occasions to MP that fuel for the car was costing him personally.

64. MP did not ignore the claimant's complaints. He asked the claimant for better evidence than he was receiving from the claimant, particularly evidence from the car's own computer record of fuel consumption and also evidence of mileage achieved from a full tank of fuel. The claimant provided information he obtained from his own calculations, using the cost of fuel against the amounts being reclaimed by him for the business miles. He regarded the difference between the 2 to be more than he should be paying for his private mileage.

65. In March and early April, the claimant and MP exchanged some WhatsApp messages. These include:-

a. (13/3/19) (only 2 months or so after the claimant had been provided with the Peugeot) Claimant to MP "*I am totally raging about the fuel. 0.10p crap!!! I was pushed towards a cheap and cheerful Peugeot*

Martin! OK bik will be great – then get hit with less mileage … seems Elopak do not want me to break even, blame HMRC but they are guidelines".

b. (13/3/19) Claimant to MP "*I shouldn't be out on company fuel – that's the bottom line here".*

c. (13/3/19) Claimant to MP*. "They can put 0.12p to 0.13p so likewise they can put 0.10 to 0.11p its just so typical of the way things r at the moment."*

d. (1/4/19) Claimant to MP "*Please sort this fuel mess out for me – I can't continue to be out £40 a month on company business. It's not fair - you wouldn't be having it …I can't concentrate on anything cause my mind is solely on this fuel thing. My heads wrecked I can't focus on my work".*

e. (3/4/19) Claimant to MP: "*did you manage to get someone to speak to further about this fuel thing? This is all any of us that is affected by this want to talk about at service meeting. It's not justifiable to offset a cheaper BIK to [pay company fuel. Thanks*" and *"It affects Chris and Jerry and the other lads too so we need to be all together for a proper open discussion."*

f. MP to claimant*: Also look at the bigger picture too in that you are often driving whilst on overtime do hopefully this helps with the 40p per hour you are losing out on……I understand that not all companies pay for the first hour of driving.* The claimant's response to those points was that overtime was not there to subsidise expenses. He also noted to MP that MP had not got back to him with a formal grievance procedure.

g. MP replied that he would discuss the issue with him at the national team meeting and Gerrard would be there to discuss with him too. He also said, specifically in response to the claimant's comment about a grievance procedure "*can escalate to Gerard or Robert Marcus is our HR."*

h. Some pictures (not included in the bundle) that the claimant sends in response to questions from MP about what the car has recorded as average mileage. MP asked these questions as the claimant told MP he was only getting 42 miles per gallon of diesel. "*42.8mpg does not sound good. What does your car say is average at the moment and when was this reset?"*

i. A note from MP (in response to a photo attachment that I have not seen) *"Thanks for the photo. It would be good to see a longer interval so hopefully your car takes overall trip until reset."*

66. In his witness evidence MP stated

> *"To enable justification of deviating from the HMRC we had to collect evidence of low efficiency and put a case forwards. I had tried to get* [the claimant] *to provide evidence of the longer-term fuel economy of his car from the onboard computer and also over several tank-to-tank fill ups so that we could discuss further. However he was not forthcoming with this information and just kept saying that its costing him money and that [*the respondent] *had made up his mind.*

67. This does not fairly portray the claimant's efforts at the time to provide information. I note particularly the text exchange above. I have not seen anything to show that the claimant provided statistics from a longer interval. I have not seen evidence that the respondent asked again for this information. I have seen plenty of evidence of the claimant providing the respondent with his own mileage and fuel usage calculations. The claimant did continue to say that the expense policy was costing him money and he continued to back up the complaints with evidence.

68. MP also provided the claimant with some calculations showing that the claimant was overall better off with the new vehicle than he had been with the Volvo (pages 281/2). However those savings were because the claimant paid more tax on the Volvo than the Peugeot (which I presume is because the Volvo was a higher value vehicle when new). That also explains the reference to "bik" (meaning benefit in kind) referred to in the text exchange of March And April. I accept the claimant's position, that it is wrong to look at things "in the round" in this way. The claimant was right to focus on whether the expense policy was fully reimbursing the claimant for his fuel expenses. He did not have the benefit of a higher value vehicle (in terms of comfort, space, prestige and whatever other ways a vehicle's benefits are measured). HMRC recognised that and applied a lower tax rate.

69. I also make the following findings:-

a. That the claimant was the only field engineer raising complaints about fuel costs. Although the claimant said in these messages that other employees were affected, I have seen no evidence of this. The claimant also gave evidence at the tribunal that other engineers did not raise complaints because they looked to recover the additional costs in other ways, for example booking time that they did not work or increasing the mileage claims to more than actual mileage. I have not seen any direct evidence of this either. However given some of the solutions provided to the claimant by the respondent (particularly adding on time to his working day) and the absence of any denials from the respondent that this was what other engineers did, it is likely that such practices did occur.

b. The claimant made clear that he wanted to raise a formal grievance. MP replied by telling the claimant that the issue could be escalated to GVW. The claimant did that in April 2019 – see below.

70. By email dated 1 April 2019 (page 284) the claimant raised his concerns with a more senior manager, Gerard Van Willegen (GVW) a technical manager for the respondent's group, based in the Netherlands. The extract from the email relevant to the position with the Peugeot is as follows:-

> *Then I got my new car a 1.6 diesel Peugeot 3008, it is very easy on fuel but now ELOPAK say they can only pay me back l0p per mile so I'm in the situation where it's costing me £40 a month to travel on ELOPAK business.*

Is it fair I should be helping pay ELOPAK's fuel bill ???

Why can all my fuel receipts each month not be paid back in full and then any private mileage I do get deducted ? I think that's a reasonable fair suggestion,

71. GVW replied on 11 April 2019, to note the respondent's policy but that he would speak with the claimant in the following week. Unfortunately, the claimant was then absent due to sickness.

72. The claimant raised matters again with GVW at the end of October 2019. He provided a spreadsheet showing the business mileage that he had travelled during October, noting that he had ended the month with an empty tank and calculating a shortfall for that month of £48.

73. A few days later, on 5 November 2019 the claimant wrote to MP in the following terms:-

I have been waiting for almost 2 years now for a resolution to this fuel repayment shortage, This is greatly affecting my mental health which I brought to your attention earlier this year.

Due to the fact there has been no suitable resolution to this that's why I've felt I need to escalate this further. Company policy of following HMRC guidelines doesn't work for me, I contacted HMRC and there is nothing stopping ELOPAK reimbursing me this shortfall each month as long as my mileage etc match my diesel receipts etc as it does. I don't want to make money from this but I think it's unfair to ask me to pay for business mileage.

I do enjoy my job and my daily duties but this weighs heavily on me each day and with each month rising fuel costs.

Hope this can be brought to a speedy satisfactory resolution.

74. At this stage, GVW looked more closely into the claimant's complaint. He discussed the issue with MP and (eventually) with the claimant. The respondent took too long in responding to the claimant. On 2 December 2019, The claimant had to chase for a reply to his correspondence to GVW or his most recent correspondence to MP. Understandably he expressed disappointment at having not had a response (page 319).

75. MP contacted the claimant with solutions that he thought would work within the HMRC rates. He raised with the claimant that a route planner would provide a slightly higher mileage to some destinations than the claimant was claiming. The claimant dismissed this as it would not give him much more and he wanted to put down a truthful mileage – going the best roads that he knows from his house.

76. GVW discussed the issue with the claimant at a meeting on 19 December 2019. He proposed a solution of the claimant rounding up his time, that the

claimant could add on another 5 minutes or so to his working day – beyond his actual finish time. The claimant was not prepared to accept this as a solution. He wanted a more straight forward (and, arguably, honest) solution which was to be reimbursed for all of his fuel costs.

The claimant's grievance.

77. The claimant raised a formal grievance on 30 January 2020 (page 326) . He addressed this to GVW. The claimant added to the detail in this email with a document headed "fuel grievance" (undated but at page 377)

78. In his email of 30 January 2020 the claimant noted an increase in fuel costs for the car.

> *I'm out of pocket £83 this month alone due to HMRC lowering the fuel pay back mileage rate from l0p to 9p, I know we had a meeting a month ago and spoke of ways to get around this but at that moment it was approx £20 a month I was losing, now with rising fuel costs and hmrc lowering this to 9p I really can't afford to run this car. I haven't got a spare £100 at the end of the month to hand back to elopak, I have a wife and 2 kids and house to keep, my wife had a good job which she had to quit due to the unsociable and unpredictable nature of my job with elopak.*
>
> *I can no longer run this car, the excel sheet on the original car list stated the car would do 67mpg, its doing less than 47mpg*.

79. In his fuel grievance document the claimant also proposed solutions. In summary:-

a. Provide a fuel card again and deduct private mileage as before.
b. Repay the money that he has actually incurred in fuel costs.
c. Change the car to a more economical one.
d. Let the claimant buy and run his own vehicle.
e. Adjust the fuel rate from 9p to 10p.
f. Changing the arrangements with the company car so that it is a vehicle that is to be used for work purposes only and not for private purposes.

80. By this stage the claimant had the benefit of advice from his trade union, including tax advice.

81. A grievance meeting was set up for 4 March 2020. An earlier meeting was not considered possible as the respondent's head of HR in Europe was on holiday for most of February.

82. Unfortunately the grievance hearing was delayed. I accept GVW's evidence that the reason for the delay was the coronavirus pandemic; the extent to which that stopped business travel and meetings and the urgent emergency measures that the respondent's managers (including GVW) needed to work on to ensure that the respondent's activities continued. I do not accept that this adequately explains the extent of the delay.

83. The grievance hearing took place on 24 July 2020. It took place as a video meeting, via Microsoft Teams.

84. By this stage GVW had received information about the claimant's shortfalls. There was some dispute about whether the claimant provided the same spreadsheet of mileage and mileage claims that he provided at this Tribunal ("Spreadsheet"). What is clear from GVW's evidence is that he had information that this spreadsheet provided (at least for a significant part of the time covered by the Spreadsheet). He recognised that the claimant had calculated shortfalls in the mileage claims but also that there was a significant discrepancy in the amounts of the shortfall. However, he accepted during the grievance process (and also at this Tribunal hearing) that the claimant was not being fully reimbursed for the fuel that he was using for business travel.

85. The claimant attended the grievance hearing with his union representative. At the hearing, the claimant repeated the solutions of providing him again with a fuel card (but for him to pay for his private mileage so avoiding it being a taxable benefit) or adjusting the mileage rate or allowing him to return the company vehicle and use his own car.

86. A further grievance meeting took place on 20 September 2020. At this meeting GVW made clear his findings that the actual fuel costs were not being covered fully by the HMRC rates. He proposed a solution of paying the claimant an additional 2p per mile, based on average mileage calculated every 6 months.

87. In the discussions in this reconvened grievance hearing, there was an assumption that this additional 2p per mile could and would be paid without deduction of tax as it was a payment to reimburse an expense, rather than a benefit. In the time between that meeting and communicating the outcome in writing the UK business (particularly LH) intervened and made clear that the claimant should not be receiving these payments on a tax-free basis.

88. Therefore, when the claimant was given the written grievance outcome – which was sent (to him and his union) towards the end of October 2020 – it made clear that tax would be deducted. It also noted that the reimbursement would be backdated to 1 January 2020.

89. The claimant's union representative responded on 29 October 2020, noting 2 problems – (1) that the 2p per mile would not cover his losses as that month (presumably October) they were £59 over 2000 miles. 2p per mile would only add £40; (2) taxing it meant that the claimant was being taxed twice on that amount.

90. The claimant was offered a right of appeal which he exercised. But first he put forward a proposed compromise (email of 2 December 2020 at page 379.) The compromise he proposed:-

a. For the fuel mileage rate to be put up by an additional 2p per mile (but as an expense repayment and not taxed);

b. For the compensation to be backdated to the date that he was provided with the Peugeot. He calculated the backdated reimbursement to be £712.63.

91. He again provided the respondent (GVW and the European based head of HR) with information from the HMRC website to show that an employer could select rates which were higher or lower than the HMRC rates to better reflect actual fuel cost. He noted that he had detailed records of the fuel bought.

92. If the Spreadsheet had not been provided earlier, I find that it was attached with this email.

93. GVW decided to reject the claimant's proposed compromise but pointed him to an appeal.

Appeal

94. The claimant's appeal is dated 11 December 2020 and is at page 386.

I wish to appeal the decision not to refund all my out of pocket fuel costs 'tax free' on the following points.

1. That I have already paid tax when I bought the fuel and I should not be taxed twice for fuel for use in a company car for company miles,

2. As an employee I should not be penalised by paying for fuel for a company car and then having to wait over 2 years to get some of this money back.

3. These actions are totally unfair and unjust expecting an employee to fund the running costs of a company car for company miles

95. Volker Brassard (VB) heard and decided on the claimant's appeal. In doing so though he relied heavily on information provided about the UK tax position, particularly from LH. The appeal hearing took place on 5 February 2021.

96. VB then held an appeal outcome hearing on 4 March 2021. VB decided to add another penny per mile, on top of the 2p already proposed. However the additional 3p per mile was to be subject to tax. VB also confirmed that the amounts should be backdated to January 2020 but not earlier than this.

97. The appeal outcome also required the respondent to review the arrangements for the payment of fuel and if that review was able to identify a company fuel card that can replace the arrangements then in placed, it would be introduced.

98. Whilst the claimant did not reply directly to the appeal outcome, he made clear his disagreement by the following behaviour:-

a. By email dated 11 March 2020 (timed at 11.37am) he emailed GVW and MP to ask how long his notice period was as "An opportunity locally has arisen and I may have to move fast."

b. Later on 11 March (timed at 17.55) the claimant emailed GVW, MP and 2 other colleagues to apologise for not attending a meeting (being held by video or telephone conference) earlier that afternoon. However, in the same email he also noted that missing from the agenda for that meeting *"Martin I see you must have missed to put my fuel shortage of £1500 on the AOB again. I don't know any team where 1 member has to pay close to €100 per month on the company fuel costs."*

99. GVW expressed frustration at the claimant's comment by sending the following reply:-

"Colm; why put your personal grief on general working document for the department. This is part of a separate procedure.

I guess everyone is sick and tired of your personal issue. This crap has to stop. I will contact you personally next, to explain what I mean.

BR Gerard."

100. GVW quickly realised that he should not have replied to the claimant in that tone. The following day (12 March 2021) he sent an email to the claimant on the following terms:-

"First my apologies for my reaction via the email. Very unprofessional and I shouldn't have done it. I think its better to talk through these kind of situation instead of my primitive reaction.
I would suggest we have a call on Monday alone with me or if you want for Marti9n P. to join as well. So I can at least explain what my views on the matters are and to define the way forward."

101. Even though GVW apologised the next day, the claimant was adversely affected by the initial response. He became absent due to sickness a few days later and remained off work until his resignation on 14 May 2021 (notice of resignation having been given on 18 April 2021).

102. The claimant did respond directly to GVW by email dated 15 March 2021, the opening line of which was "Thank you for your email and subsequent apology for your unprofessional outburst." The email went on to make clear that the claimant remained aggrieved and was seeking further advice.

103. During the sickness absence, the claimant, with the support of his trade union and their appointed legal advisers, continued to attempt to find a solution to the fuel grievance. The solicitors wrote a detailed letter on 12 April 2021 (page 430onwards) and the claimant's union representative contacted the respondent directly on 14 April 2021 to offer to discuss the issues further. At a resultant meeting dated 16 April 2021 the claimant's union was told that the respondent would "defend all legal claims" but were open to another "off the record" discussion.

104. This stance was confirmed in a formal written response to the claimant's solicitors dated 16 April 2021. It included the following "the company's position is unchanged/ We believe Mr McCooey has been paid all that he is

entitled to receive and any claim in this respect will be defended. It reiterated the option of taking a company fuel card and being taxed accordingly. It is clear from the terms of this letter that the company considered the claimant to be to blame for the shortfall in expenses given his choice of vehicle and considered the matter closed.

105. The claimant resigned 2 days after the respondent's response.

Other findings relevant to grievance and appeal processes.

106. The claimant brought his grievance so that he could be adequately compensated for his fuel costs. He was not attempting to profit.

107. The information provided by the claimant showed different levels of losses over the months. Whilst there is consistently, a shortfall each month, there is no consistency in the shortfalls claimed.

108. The contrast in positions between the claimant and his ROI based colleagues, emphasised to the claimant how unfair the arrangements were. At times he raised an option of being employed in ROI but did not at any time seriously follow this up. In raising his grievance he sought full reimbursement of his fuel (however achieved) not the same arrangements as his ROI colleagues.

109. It might have assisted the grievance outcome to have received more accurate information. However by the time of the grievance and appeal outcomes, GVW and VB had accepted that there was a shortfall in the claimant's expenses. They did not undertake any detailed investigation/calculation in to precisely what the shortfall was. In April 2019, MP asked the claimant for some additional statistical information from the vehicle. The claimant provided some information in response. The respondent then had ample time (particularly given the considerable delays to the grievance and appeal) to have sought more information from the claimant or from third parties such as a motoring organisation or Peugeot.

110. Although both VB and GVW accepted, in general terms, that the claimant had not been reimbursed all of his expenses, others within the respondent MP believed that the claimant was wholly or mainly responsible for the shortfall that he perceived he had. The claimant's driving style was sometimes referred to (email of November 2019 from MP to GVW in which MP refers to the claimant "rally driving." There are also comments which indicate that the claimant was responsible for the shortfall between fuel used and expenses claimed, as he had made an unwise car choice. (See comments by MP in the same email of 7 November 2019 and LH's email to the claimant dated 1 April 2019 (see paras 60-62 above). having considered the evidence, I find that there was an "undercurrent" view on the part of LH and MP particularly, that the claimant was to blame for the shortfall in expenses. This undercurrent contributed to the delays in this case and also had some influence on the outcome. Had LH accepted the claimant's shortfall as due to the performance of the Peugeot in the conditions it was driven and accepted that the claimant was not driving the Peugeot unreasonably, she might have been more willing to consider an increase in the

non-taxable mileage rate. Had MP acted on the claimant's grievance more quickly (from April 2019) rather than proceeding on the assumption that the claimant was to blame for the fuel consumption he was receiving, the grievance would have proceeded more quickly.

111. Both GVW and VB accepted that there was a shortfall and both wanted to put in place arrangements that adequately compensated the claimant. Their proposals of an uplift to the mileage rate and agreement to backdate the payment, were genuine attempts at resolution. However their proposals were also to an extent guided by the views of the UK based employees, particularly LH.

112. According to the claimant's spreadsheet, the uplift of 3p per mile would have made good the shortfall. Whilst I have already noted the inconsistency in monthly shortfall amounts; I also note the overall shortfall whilst using the Peugeot to be £867.58. According to the figures provided in the spreadsheet, the claimant travelled 49550 business miles in the Peugeot. Had the claimant received an additional 1.8p net (3p gross) for each of those 49,550 business miles, which would have provided an extra £891. This broadly equates with the loss the claimant says he has incurred whilst using the Peugeot of 867.58.

113. The 3p (gross) uplift per mile, broadly equates with the amount that the claimant said would be acceptable to him (2p net). The claimant found this element of the proposal to be unacceptable because he considered that it should be paid to him without deduction of tax.

114. The grievance and appeal outcomes were those of GVW and VB but, as noted above, that they had been influenced by information and opinions provided by the UK business and particularly LH and MP. In his evidence at the Tribunal VB stated that he thought at the time he made the decision that backdating to January 2020 was "not inadequate" but that he may not have sufficiently considered the position at the time.

115. The parties were frustratingly close to an agreed outcome. Had the claimant looked beyond the respondent's decision that the uplift should be taxed and calculated what the uplift would have actually provided him, he would have seen that (according to the claimant's own calculations) it provided a solution to the ongoing shortfall he was suffering. Had VB sufficiently considered the extent of the backdating, the respondent might have been prepared to change its position.

Reasons for the claimant's resignation

116. The claimant gave written notice of resignation by email dated 18 April 2021. These are the stated reasons for his resignation:-

> *"It is extremely regrettable that I find my position within Elopak untenable. As a direct result of the treatment I have received from the company senior managers over the last 3 years in relation to my ongoing fuel reimbursement and tax non-compliance issues; I find I can no longer work within the Company's toxic environment; which has ultimately taken*

a significant toll on my mental health. The impact t6hat this entirely avoidable situation has had on my mental health has been well documented and shared with you prior to my resignation."

117. I find that the reference to both the ingoing fuel reimbursement and tax non-compliance issues to be a reference to the fuel grievance. When the claimant referred to tax non-compliance, that was a reference to the respondent's decision that any uplift to the mileage rate had to be taxed.

118. In his claim form, the claimant raised 2 additional issues as contributing towards the breach of the Implied Term

a. A decision made in 2018 to reduce an overnight allowance from £10 to £5.
b. A response to concerns around Covid precautions.

119. I find that neither of these matters contributed to the claimant's decision to resign. This finding is supported by:-

a. The terms of the claimant's resignation letter
b. The absence of any complaint about these matters during the claimant's employment
c. (in relation to the reduction of overnight allowance) the fact that the incident occurred some 3 years before the resignation.
d. The terms of Mr Brown's submissions; particularly paragraph 49 of his written submissions which makes clear the actions/inactions which breached the Implied Term all relate to the issue of business fuel and the handling of the claimant's grievance about this (including GVW's email).

120. If I am wrong about this, I note my findings of fact on the 2 issues, having considered the evidence of LH in relation to expenses and MP in relation to the respondent's response to Covid risks.

121. I accept that a focus of the wider expenses review in 2018 was to tighten up the policy and focus on the reimbursement of expenses actually incurred. The overnight allowance was paid on top of actual expenses such as hotel and meal costs. It was part of a process of ensuring compliance and I do not criticise the respondent for this.

122. I accept the evidence provided by MP that sometimes the respondent had difficulties sourcing protective equipment for use by the engineers when on site. I also accept that MP went through Government guidance with the engineers and that included comments about the definition of a close contact for the purposes of isolation. MP wanted to provide the engineers with assurances that engineers should not need to be in close contact with anyone on a site they are working on. The government definition included "sexual partners" and this led to a comment that engineers would not be having sex on site. The claimant was not embarrassed at this remark. It was not an unwanted remark as far as he was concerned. More importantly through, it had no relevance to his decision to resign.

E. Submissions

123. I received helpful written and oral submissions from Mr Brown and Ms Gould. I have read and re read their documents. They have helped my findings of fact and also made references to the legal precedent and guidance which I refer to below. I provide a brief summary of the submissions on the evidence-

124. The respondent's submissions included the following:-

a. I should take care to consider and decide on the case as pleaded and not a wider, changed position that Mr Brown attempts to put.
b. That the claimant was aggrieved about the difference in treatment between himself and those employees of Elopak based in the ROI. But such grievances were irrelevant as the respondent was required to provide terms of employment (and deduct tax) in accordance with the law in the jurisdiction in which employees were employed.
c. The previous expenses regime (of allowing the claimant a fuel card and reimbursing private mileage) cannot be regarded as a contractual term.
d. That LH acted appropriately and on advice received and paying the advisory fuel rates was the best way to reduce risk to both company and employees of incurring additional tax liabilities.
e. That the respondent tried on various occasions to explain the expenses system and why it was introduced
f. That the respondent tried to explain to the claimant why his figures were not necessarily accurate and also tried to assist him to take steps to reduce fuel consumption
g. That the respondent provided the claimant with other solutions, by which he could increase his income with the authority of the respondent acting by its senior employees (GVW and VB). This evidence showed further that the respondent was not trying to cut costs in relation to expenses.
h. Whilst it is accepted that there were delays to the grievance process, given the circumstances of the pandemic, this did not amount to the respondent acting without reasonable and proper care. Also, the respondent was willing to look at a compromise to be backdated until the commencement of the grievance.
i. The claimant is a member of a trade union and knew about the respondent's grievance procedure. He chose not to raise a grievance until he did and therefore it was reasonable for the respondent to try to compromise the issue by backdating until the grievance was formally made. I note here that this does not takes no
j. The comment made by GVW on 11 March 2021 did not form part of the reasons for the claimant's resignation. He was already looking for alternative employment and had asked about his notice period.
k. The claimant affirmed his contract by engaging in the grievance and appeal processes. continuing in his employment after the grievance and appeal outcomes and communicating to GVW that he accepted his apology.

l. Whilst GVW's comment was not ideal, the circumstances must be looked at as a whole and it does not reach the threshold of a breach of the implied Term.

125. The claimant's submissions included the following:

a. For the first 11 years the respondent me in full the cost of the claimant's business travel (fuel).
b. It is common ground that the change in the way that expenses were paid, resulted in a shortfall. The claimant did not receive amounts that fully covered fuel used for business mileage; yet the respondent did not intend the claimant to be worse off as a result of the changes in 2017. GVW confirmed this.
c. The claimant frequently complained about the shortfall and also that the issue was impacting his health.
d. Whilst acknowledging the shortfall, the respondent did not (until the grievance outcome) offer to pay any additional sum to make up the shortfall. Other solutions, such as adding time to timesheets were proposed instead.
e. The grievance outcome was that the claimant suffered a shortfall and he was not at fault for it. Yet it did not adequately address the shortfall.
f. Other than referring to the pandemic, no clear explanation has been offered for the delay in dealing with grievance and appeal.
g. VB believed that anything above the HMRC Advisory rate had to be taxed. Yet plainly that was wrong and others in the respondent knew it to be wrong.
h. The grievance and appeal outcomes were inadequate. The proposals did not properly address the shortfall, did not appear to have been based on any proper calculations and may not have fully reimbursed the claimant in the future.
i. The comment by GVW on 11 March was not only crass; it caused the claimant to have a breakdown.

F. The Law

Constructive and unfair dismissal

126. The claimant claims (1) that his resignation amounted to a constructive dismissal and (2) that this dismissal was unfair under s98 of the Employment Rights Act 1996 (ERA).

127. Dismissal for the purposes of s98 includes the circumstances stated at s95(1)(c). *"…..an employee is dismissed by his employer if…….the employee 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."*

128. In considering the issue of constructive dismissal, an Employment Tribunal is required to consider the terms of the contractual relationship, whether any contractual term has been breached and, if so, whether the breach amounts

to a fundamental breach of the contract (*Western Excavating (ECC) Limited v. Sharp [1978] QC 761*).

129. It is an implied term of every employment contract 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. BCCI [1997] IRLR 462* at paras 53 and 54). ("the "Implied Term").

130. In considering the Implied Term, Browne-Wilkinson J in *Woods v WM Car Services (Peterborough) Limited [1981] ICR 666* (Woods"), said that the tribunal must *"look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it."*

131. A course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a "last straw" incident, even though the "last straw" is not, by itself, a breach of contract: *Lewis v Motorworld Garages Limited [1986] ICR 157 CA.*

132. In the judgment of the Court of Appeal in *Omilaju v Waltham Forest London Borough Council [2005] 1 All ER 75.* Dyson LJ stated as follows in relation to the last straw.

> *"A final straw, not in itself a breach of contract, may result in a breach of the implied term of trust and confidence. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase "an act in a series" in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach although what it adds may be relatively insignificant."*

133. The Court of Appeal decision in *Kaur v Leeds Teaching Hospitals NHS Trust [2018] IRLR 833* ("Kaur"), commented on the last straw doctrine. The judgment includes guidance to Employment Tribunals deciding on constructive dismissal claims. At paragraph 55 of the judgment, Underhill LJ states:-

> *"In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:*
>
> *(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 [*LB Waltham Forest v. Omilaju [2005] ICR 481*] *of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the* [implied term of trust and confidence]*? ……*

(5) Did the employee resign in response (or partly in response) to that breach?

None of those questions is conceptually problematic, though of course answering them in the circumstances of a particular case may not be easy.

134. In *Cantor Fitzgerald International v. Callaghan [1999] ICR 639*, the Court of Appeal distinguished between a deliberate refusal to provide an employee their full remuneration entitlement (which would generally be a repudiatory breach of contract) and an inadvertent reduction in pay – which was unlikely to be.

135. In *WA Goold (Pearmak) Limited v. McConnell [1995] IRLR 516* the EAT decided that employers should reasonably and promptly afford a reasonable opportunity to the employees to obtain redress of any grievances they might have.

136. Once repudiatory breach of contract has been established, it is necessary to consider the part it played in the claimant's decision to resign. The following passage from the judgment of the Court of Appeal in Nottinghamshire County Council v. Meikle [2004] IRLR 703 (Meikle) , is helpful:

"33. *It has been held by the EAT in Jones v Sirl and Son (Furnishers) Ltd [1997] IRLR 493 that in constructive dismissal cases the repudiatory breach by the employer need not be the sole cause of the employee's resignation. The EAT there pointed out that there may well be concurrent causes operating on the mind of an employee whose employer has committed fundamental breaches of contract and that the employee may leave because of both those breaches and another factor, such as the availability of another job. It suggested that the test to be applied was whether the breach or breaches were the 'effective cause' of the resignation. I see the attractions of that approach, but there are dangers in getting drawn too far into questions about the employee's motives. It must be remembered that we are dealing here with a contractual relationship, and constructive dismissal is a form of termination of contract by a repudiation by one party which is accepted by the other: see the Western Excavating case. The proper approach, therefore, once a repudiation of the contract by the employer has been established, is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It must be in response to the repudiation, but the fact that the employee also*

objected to the other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the acceptance of the repudiation."

137. When an Employment Tribunal decides that the termination of a claimant's employment falls within s95(1) the employer must show the reason for dismissal and that the reason for dismissal was a potentially fair one under s98(1) and (2) ERA. In a constructive dismissal claim, the reason for dismissal is the reason why the employer breached the contract of employment (*Berriman v. Delabole Slate Limited [1985] IRLR 305* at para 12).

G. Discussions and Conclusions

138. In reaching my decision as to whether the claimant was constructively and unfairly dismissed, I have addressed a series of questions. I set out these out below (tailored to the findings of fact that I have made) and my decision under each question.

Did the respondent breach the contract of employment?

139. From early 2019, the respondent did not have in place arrangements that adequately compensated the claimant for his expenses. I am satisfied that in 2018, the respondent had recognised that the HMRC Advisory Rates were not adequately compensating the engineers and made adjustments. Those adjustments did not apply to the claimant once he took possession of the Peugeot in early 2019.

140. The respondent became aware of the claimant's concerns about a shortfall in late March 2019. Initially (but without any evidence) it considered that the claimant was to blame for the shortfall. It criticised him for his choice of vehicle and considered that he was a poor driver. These criticisms are not supported by evidence.

141. In April 2019 the claimant also told the respondent that he wanted to raise a grievance. It was not until October 2020 that he received an outcome to his grievance and March 2021 that he received an outcome to his appeal. Based on timescales alone, the respondent failed to reasonably and promptly redress the claimant's grievance.

142. The outcomes did not fully address the claimant's stated shortfalls. The solution regarding future mileage rate was intended to address the cost per mile shortfall and the solution arrived at on appeal (3p per mile but taxed) would have done so. The solution about the historical position was not intended to fully address the claimant's shortfall. It was intended to only address the shortfall back to January 2020 and therefore the respondent knew (or ought to have known) that the claimant would not be sufficiently compensated for his expenses.

143. The claimant should not have emailed GVW on the terms that he did on 11 March 2021. The position was much more nuanced by then in that the respondent had made clear its intention to reimburse the claimant for much (but

not all) of the shortfall . However the claimant's email does not justify GVW's reply dated 11 March 2021.

144. The respondent has not made up the shortfall – even based on the appeal outcome.

145. The failure to address the shortfall is a breach of contract. The relevant contractual term is the implied obligation to fully reimburse the claimant for his expenses.

146. A less straightforward question is whether this was either by itself or when considered together with other acts, a breach of the Implied Term.

Was there a beach of the Implied Term?

147. I have decided that there was because of a combination/accumulation of the following:-

a. The length of time that it took the respondent to address the grievance and appeal. As my findings of fact make clear, it is not just ineptness, the pandemic or a combination of the 2 that caused this delay. I have referred to the undercurrent of blaming the claimant and I am clear – on the evidence provided – that this was (1) unfair (2) a significant factor in the delay as well as the outcome.
b. The shortfall that remained following the grievance and appeal outcome. Realisation on the part of GVW at the Tribunal was very telling. Having been able to consider the full position and without the influence of the UK based employees, he recognised that further compensation should have been provided.
c. The email from GVW dated 11 March 2021 and the decision not to consider further the position (as set out in the letter dated 16 April 2021) were effective last straws. Neither of these acts would by themselves have amounted to a repudiatory breach. However, when viewed cumulatively with conclusions a and b above, the Implied Term was breached.

148. The respondent had no reasonable and proper cause for their actions /omissions. They had reasonable and proper cause to ensure that all tax due was recognised and paid. I also see no issue in the respondent adopting a cautious approach from a tax perspective and taking the amounts to be paid to the claimant – as long as the net effect is to reimburse the claimant for his expenses. However their actions/omissions went beyond those necessary for this reasonable and proper cause. Further, once the claimant had alerted the respondent to the shortfall, the respondent became aware that the claimant was not receiving all monies due to him, yet knowingly persisted with the arrangements.

149. I am also satisfied that the respondent behaved in a way that when viewed objectively was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent. Once alerted to the claimant's grievance about a shortfall in expense payments. they should have

treated it seriously and investigated it promptly. To be clear, by "grievance" I refer here to the claimant's complaints dating back to March 2019.

Was there a fundamental breach of contract?

150. There was a breach of the Implied term. That is in itself a fundamental breach of contract.

Was the fundamental breach of contract a reason for the claimant's resignation.

151. Yes. Further, I am satisfied that it was the principal reason for the claimant's resignation. The claimant tried very hard to agree a solution with the respondent. He liked his job and did not want to leave their employment. it was only after he had exhausted completely all possible avenues – other than legal proceedings – that he decided he needed to resign. The claimant may well have been looking for other employment opportunities by March 2021; but he was only doing so because of the respondent's ongoing refusal to properly address his grievance. (Also see here reference to Meikle at paragraph 135 above).

152. I have also considered carefully the respondent's submissions that the claimant's main complaint was that he was treated differently to his colleagues in ROI. He was. Understandably (and particularly given that he was working with many clients in the ROI) he compared his position to theirs. However, I am satisfied that the claimant's main and abiding concern was to be fully reimbursed for his fuel expenses and no more.

Did the claimant affirm the contract before resigning, by delay or otherwise? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.

153. He did not. The claimant made clear his ongoing dispute with the respondent up to and including the terms of his resignation. Persisting with his grievance (making clear at all times that he sought redress for his grievance) did not amount to an affirmation of his contract. Thanking GVW for his apology did not amount to an affirmation of the contract.

H. Remedy – to be decided.

154. This case will now be listed for a hearing to consider and determine remedy. I note here:-

a. My understanding that the claimant has not been reimbursed any of the amounts that would be due under the grievance and appeal outcome. Failure to reimburse the claimant his expenses is a breach of contract and these amounts (and more to take account of earlier period dating back to March 2019) must be paid.
b. If disclosure of all documents relating to remedy for unfair dismissal (including documents relating to mitigation) have not been disclosed by

either party then that disclosure must take place within 21 days of receiving this judgment.

Employment Judge Leach

4 September 2023

JUDGMENT AND REASONS SENT TO THE PARTIES ON

2 October 2023

FOR THE TRIBUNAL OFFICE