



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr A Vanburen  
**Respondent:** John Parker & Sons Ltd

**Heard at:** Ashford **On:** 26-28 March 2019

**Before:** EMPLOYMENT JUDGE CORRIGAN  
Sitting Alone

## Representation

**Claimant:** Mr M Cole, Counsel  
**Respondent:** Mrs M O'Hara, Solicitor

## RESERVED JUDGMENT

1. The Claimant was not constructively dismissed and his claims for unfair dismissal and wrongful dismissal are therefore dismissed.
2. The Claimant's complaint of unlawful deduction of wages is not well-founded and is dismissed.
3. The Respondent's claim for the cost of course fees and associated costs due under the training contract succeeds and the Claimant is ordered to pay £10,424 to the Respondent.

## REASONS

1. By his claim dated 5 September 2017 the Claimant brings complaints of constructive unfair dismissal, wrongful dismissal and unlawful deduction of wages against the Respondent.
2. The Respondent has a counterclaim to recover cost of course fees and study days.

3. The issues were discussed with the parties and agreed to be as follows:

**Constructive dismissal**

4. Did the following matters listed at paragraphs 27 a) – h) of the claim occur:

4.1 The Respondent's refusal to provide the Claimant with any reasoning as to why the Respondent chose not to pay him company sick pay;

4.2 The decision to move the Claimant out of his private office and re-locate him to an open plan office without any explanation;

4.3 Mr Parker's aggressive telephone call to the Claimant in which the Claimant was sworn at;

4.4 Mr Parker's email to the Claimant following the above telephone call in which Mr Parker threatens to reduce the Claimant's responsibilities and benefits if the Claimant's stress is a problem, including the possibility of dismissing the Claimant without offering any assistance to aid the Claimant in overcoming his stress;

4.5 Excluding the Claimant from the recruitment process for a senior member of staff in his team when the Claimant had been involved with recruitment in the past;

4.6 The sudden removal of support for the Claimant's MBA without any consultation, warning or reasoning (which was also in breach of the agreement and therefore an express term of his contract);

4.7 notifying the Claimant that his company car's MOT and insurance had expired the evening before he was due to travel to a work sponsored training event and proceeding to refuse to reimburse the Claimant's expenses incurred as a consequence; and

4.8 failing to provide the Claimant with any support upon his return to work following sickness absence due to work related stress.

5. Did they amount to conduct, without reasonable and proper cause, likely to destroy or seriously damage the relationship of trust and confidence?

6. Did the Claimant resign in response? The Respondent argues that the Claimant resigned because his performance was under scrutiny.

7. The Respondent does not rely on affirmation by the Claimant.

8. If the Claimant was constructively dismissed was there a potentially fair reason for dismissal? The Respondent relies on performance/capability.

9. Was dismissal reasonable in all circumstances?

10. Is there a chance there would have been a fair dismissal in any event at some stage?

11. Did the Claimant reasonably mitigate his loss?
12. Should there be a decrease in any award to reflect any failure to follow the ACAS Code?

### **Wrongful dismissal**

13. The Respondent accepts that if the Claimant was dismissed he was entitled to three months' notice. The Claimant also argues he should receive a contractual bonus, which is disputed.
14. Did the Claimant reasonably mitigate his loss during his notice period?
15. Should there be a decrease in any award to reflect any failure to follow the ACAS Code?

### **Unlawful deduction of wages**

16. This relates to pay which the Respondent has withheld pursuant to the training agreement relied on for the counterclaim. This claim stands or falls with the Respondent's counter claim.

### **Employer's contract claim**

17. Does the Respondent's claim for repayment of training fees and study days come within the Tribunal's jurisdiction?
18. Is the training agreement enforceable?
19. Was the Respondent in fundamental breach of the employment contract as a whole?
20. Was the Respondent in fundamental breach of the training agreement?
21. Was the contractual term that the Claimant repay the training costs triggered?
22. Is it just and equitable to charge the Claimant the full amount?

### **Hearing**

23. I heard evidence from the Claimant on his own behalf. I also heard evidence from Mrs N Sorrell (former Management Accountant) and Mrs Charlene Butcher (former Finance Manager) on behalf of the Claimant.
24. I heard evidence from Mr Guy Parker (Managing Director) and Mr Dylan Alexander (Commercial Director) on behalf of the Respondent.

25. There was an agreed bundle. Both representatives prepared written submissions and I also heard oral submissions.
26. In the facts which follow I refer to other staff by their job title as they have not participated in the proceedings and this Judgment will be publicly available online.
27. Based on the evidence I heard and the documents before me I find the following facts.

## **Facts**

28. The Claimant commenced employment for the Respondent as Financial Controller on 1 November 2007. At the time he left his salary was £65,000. The Claimant was part of the Senior Management team and reported to the Group Finance Director. Mr Guy Parker was Managing Director and then became Chairman from 2016, which is when Mr Alexander became Managing Director, although he had already been working in the business in a different role.
29. The Respondent is an independent family run steel stockholder and processor based in the South East of England employing around 500 employees. It has £100 million turnover. It supplies steel and non-ferrous metals to the trade and DIY. It has sites in Canterbury, Shoreham, Cambridge and Andover. The Head Office is in Canterbury. It has what the Respondent refers to as a “sister company”, Builders Beams Ltd based in Crawley. There is also a car dealership in Canterbury.
30. The Claimant commenced an MBA with the Open University on 3 May 2014, funded by the Respondent, at his request. He had presented a detailed business case for the sponsorship at pages 211-221 and discussed the matter with the then Finance Director (page 222). In his business case he emphasized that the MBA at the OU allows study to be easily integrated into working life and there is flexibility to stop and start if work commitments become a priority (page 213). He said that although the course is very demanding, he would make sure that it did not compromise his responsibilities at work (p219). He anticipated that the Respondent might wish to agree terms in respect of his continued tenure once the course is completed, and the repayment of any contribution should he leave within an agreed timeframe and the terms under which he would repay the contribution, should he leave the organization prior to the timescale as agreed (page 221).
31. Following this he signed a training agreement with the Respondent on 19 May 2014 (pages 223-224). That states:

“This agreement is additional to your Statement of Main Terms and Conditions of Employment and specifically relates to the [MBA, Open University, Distance Learning 3 year course (ending 2017)].

The Company is committed to training you, so that you can advance your career. This involves a major investment in you by the Company. If you leave the Company’s employment within 3 years of completing the training (as a result of you giving notice or the Company giving you notice because of your conduct or performance) or you withdraw from the training programme without the consent of your immediate Manager, you must refund the cost of the training in accordance with the following

scale”. Although a scale is mentioned it is then made clear that 100% of costs are to be repaid on the Claimant “leaving within 3 years of completing the training”. It clarifies that the costs of training include course fees, exam fees, time off work to attend the course or sit exams and travel expenses.

There is a note in bold at the bottom of the first page “You will not be required to reimburse the Company any outstanding costs under this agreement if you leave the Company as a result of redundancy”. It also states that if the Claimant did not pass after one re-sit 75% of the fees would be repayable. It goes on to say “...you...authorise the Company to deduct from your monthly salary such sums as may fall due to the Company under this agreement....If your employment with the Company is ending, the outstanding amount will be deducted in whole or part from the final salary or other payments due to you on termination of employment....If there remains a balance due to the Company after such a deduction you agree that this balance remains a debt owed by you to the Company...”

32. The Claimant claims he was not aware of the extensive clawback initially, but he had proposed one on page 221. He says he was aware it is common to have a pay-back clause but with diminishing amounts over time. Yet he did not propose this in his business plan, nor take issue with the agreement once he was aware of the proposed terms. The course is modular, and the fees paid per module and therefore fees are paid in stages. He signed the agreement shortly after starting the first module and took no issue with the terms but carried on with the course, doing subsequent modules, and allowing the Respondent to pay for them. The course was undertaken entirely at his own volition. For the avoidance of doubt, in the absence of substantiating evidence I do not accept that the only way for the Claimant, at his salary level, to do the MBA was if the Respondent paid for it. The fees were paid per module and the Claimant had 7 years to complete the qualification.
33. The Claimant unsuccessfully applied for the Group Finance Director role in 2015. The successful candidate began in June 2015 and became the Claimant’s new Line Manager.
34. The Claimant had a 360° appraisal on 24 May 2016 (pages 350-369). This involved elements of self appraisal, peer appraisal and management appraisal. It was positive, and the Claimant himself identified a need to “get out of the office to interact more with team members to gain better understanding”.
35. Both Mr Parker and Mr Alexander believe that subsequent to this the Claimant’s performance deteriorated in the second half of 2016. The Claimant disagrees. His position is that there was a lot of change with people leaving his team impacting his workload.
36. In October/November the Claimant spent some time voluntarily in the open plan office as Ms Butcher had given notice and he wanted to be familiar with her role. This was also consistent with the intentions expressed in his 360° appraisal.
37. On 25 November 2016 the Claimant was offered a temporary position as Financial Director on his existing salary at Builders Beams Ltd but the Claimant turned it down. Despite the job title Builders Beam had a much smaller turnover so this was not a promotion but a more straightforward role than the Claimant’s existing role. Mr

Parker felt it might resolve the concerns about the Claimant's performance to move him to the Company with the smaller turnover. He saw it as a quick temporary fix and beneficial in that the Claimant could move into the post straight away. The Claimant however was concerned he might be undermined by his Line Manager in his absence and rejected the offer, which Mr Parker accepted. In confidential discussions with Mr Parker the Claimant did raise concerns about the Group Finance Director asking the Claimant's team to report direct to him not the Claimant and other aspects of his role including concerns about job security on his return if he did take the position (pp414-416). A Management Accountant in the Claimant's team ended up taking the Builders Beams position from February 2017.

38. Mr Alexander explains in his statement that as a result of the Claimant asking that staff report to him directly towards the end of 2016, this was then actioned (paragraph 11 Mr Alexander's statement).
39. Both parties agree that the Claimant did not finalise monthly accounts for November 2016 to January 2017. The Claimant says he did this on the instruction of the Group Finance Director (his Line Manager). This is supported in relation to the November accounts by his email of 17 February 2017 at page 119 where he stated that they had been ready since before Christmas but that the Finance Director had asked him not to close the ledgers. He did not say the same there for the December results, nor did he then provide the November results. The absence of these accounts left the business without key information and in breach of covenants with the bank as monthly accounts are to be sent to the bank within 28 days of the month end.
40. Mr Parker does not consider the Claimant's explanation adequate as producing accounts is fundamental to the role of Financial Controller. He does not accept the Group Finance Director would have given such an instruction but in any event the Claimant was responsible for doing his job. He says the Claimant was fully aware that the Senior Managers were chasing the accounts. The Claimant's explanation does not explain why he did not produce the two page reports for the bank as required. The budgets were also the Claimant's responsibility. He said the Claimant had done these for 9 years and the Group Finance Director had only been in post a year. He believed the Claimant just was not doing the work in a timely fashion.
41. Dylan Alexander also believes there were performance issues. He was new in post of Managing Director in November 2016 but said he had a Financial Controller (the Claimant) who could not give him "numbers" which were fundamental to his role. He believes the Claimant did not have management accounts ready.
42. There is some evidence from the Claimant's witnesses that the Finance Director was undermining the Claimant, for example excluding the Claimant from meetings and being critical of him (though this is not part of the Claimant's allegations). The Finance Director has not given evidence, but I accept the evidence of the Respondents' witnesses that they were not aware of any such conduct, and that as far as they were aware from their knowledge of the Claimant and the Group Finance Director working together they saw nothing untoward. The Claimant as a member of the Senior Management Team was clearly able to raise concerns as he has done repeatedly, in the discussions in respect of the Builders Beam move and as set out below. I accept Mr Parker's evidence that if he had become aware of something untoward he would have spoken to the Group Finance Director about it.

43. In particular, Ms Butcher says the Group Finance Director complained about the Claimant's performance and having to do the accounts because the Claimant "faffed" and took too long. Whilst indiscrete and inappropriate, this is not one of the Claimant's allegations. It is also supportive of the Respondent's case about performance issues, and is not supportive of the Claimant's case that the Finance Director was the cause of the management accounts being late.
44. Ms Butcher left at the end of 2016 and so had no knowledge of the matters in 2017 leading to the Claimant's resignation. She describes being asked by the Group Finance Director whether she thought the Management Accountant who eventually moved to Builders Beams could take the Claimant's place as he thought the Claimant would leave. She also reports having a conversation with the Group Finance Director about whether the Claimant would leave as he had the MBA training agreement and reports the Group Finance Director saying he thought he would leave any way. This is presented as evidence the Group Finance Director wanted to push the Claimant to leave. These conversations were indiscrete but, as this was prior to the move to Builders Beams, this is not inconsistent with the plans to move the Claimant, and then the Management Accountant, to Builders Beams. I find that the only move the Respondent had in mind at the end of 2016, was the potential move by the Claimant to Builders Beams which was discussed with the Claimant but he then rejected.
45. On 3 February 2017 there was a meeting between the Claimant, Mr Parker and the Group Finance Director to discuss the concerns and the performance of the Claimant's department on 3 February 2017. Mr Parker's evidence was that by this meeting he had had enough of the issues with finance. He wanted the Claimant to "sort it out". He said he was "tired of messing around and everyone's excuses". He gave the Claimant a "directive to fix it", otherwise there was going to be change. The Claimant says this meeting was not to discuss his performance. However his own correspondence addressing the issues raised at pages 118-120 does suggest there had been a meeting where performance was challenged as it reads as a defence. In particular, that Mr Parker was concerned and raised the delay in the monthly accounts with the Claimant is also supported by the same email. Mr Parker and the Group Finance Director's view is recorded at page 165, namely that it was a primary role of the Claimant's position to produce the management accounts and that the Group Finance Director had been reiterating the need to produce them on a regular basis.
46. The Claimant sent an email about a salary review for his team to Mr Alexander on 6 February 2017 (p427-428). In that he was seeking to renegotiate the terms of his own training agreement. The email and the attachment suggest that at this stage he was very mindful of his ongoing commitment at that stage to repay £10,634 training costs. He was seeking to move to a different repayment model where the repayment reduced to 50 % in the second year after a particular module was completed. Page 428a shows that even in the improved scenario he recognized that fees would be repaid in full if the employee left during the period of study. Mr Alexander's prompt reply was to say "given your long list of critical tasks to do at present, I would see this as nowhere near the top. As a matter of urgency, could you provide a priority list of your daily/ weekly/monthly tasks and duties against a timeline, so we can better focus your efforts going forwards" (p427). This in itself confirms that concerns about the Claimant's performance were being discussed.

47. The Claimant was absent on 8 February 2017 and then went on a period of work related stress absence, initially for two weeks from 13 February to 27 February and then extended to 10 March 2017. The Respondent accepted this was genuine absence due to stress at work.
48. On 13 February 2017 the Claimant printed out a breakdown of his course record with the Open University (p247). At some stage it was annotated by the Claimant to state that the training agreement had been signed after the course start date shown there. The Claimant says that this was added after he left but he had no explanation for why the document was dated 13 February 2017. It was put to the Claimant that this was because during his sick leave he was seeking to see how he could get out of the obligations in the training agreement to repay the sum if his employment ended. The Claimant says he was seeking to renegotiate the terms, but in fact he had already sent that email the week before (6 February 2017). Whatever the reason, I find it likely that the Claimant did have the potential consequences of the training agreement well in mind throughout this period and did want to reduce his liability.
49. The Claimant's email at pages 118-120 was sent during his absence and included the task list which had been requested. It set out his response to some of the criticisms including the impact of staffing changes on his workload. He said he was working 10 hour days and was lucky to have a break which was having an adverse effect on his studies (p119a).
50. On 17 February 2017 Mr Alexander wrote to the Claimant saying that he, the Group Finance Director and Mr Parker would cover the tasks and feedback to the Claimant. He said that unfortunately they could not sanction sick pay (page 127). The Group Finance Director also wrote (16 February 2017) to say company sick pay would not be paid on page 113.
51. The Company sick pay policy is at pages 84-85 of the bundle. Sick pay is discretionary. The policy states:
- “At the Company's absolute discretion, you may be paid sick pay as follows:
- No more than 3 spells of sickness (including the current spell) in the last rolling 12 months
  - No more than five days...total sick absence in the last rolling 12 months
  - Where the current spell takes an employee over the 5 days ...the remaining days will be at the discretion of a Director
- ....
- Any payment for sickness absence in excess of the above will be at the discretion of a Director.”
52. There then follows a statement that the maximum period for which an employee will be paid at the absolute discretion of the Company will be 12 weeks' sick pay and 4 weeks' half pay for those with over three years' service. It states that these are maximum periods and should not be considered entitlement.
53. The Claimant had had 6.9 days' absence in the preceding 12 months (p112a).



54. The Respondent's witnesses' evidence was that the Respondent does not tend to pay sick pay unless there are exceptional reasons such as terminal illness (although the Claimant had received sick pay for shorter absences in the past). I accept the starting point is not to pay sick pay for sickness which falls outside the situations listed above at paragraph 51. They also say the Claimant was aware that Mr Parker decides whether sick pay should be paid.
55. On 19 February 2017 (p124) the Claimant responded saying the decision saddened him and it was a departure from existing custom and practice when his previous sickness absences had been paid. He asked for the rationale. He said it seemed punitive, especially as he was off with work related stress. He said in evidence that when he wrote this he had forgotten his earlier sickness within the last 12 months, taking him over the 5 days. In the same message he said "clearly feedback at your earliest opportunity on how [the Management Team] intend to work with me to resolve these issues is material to my recovery..." This was a reference to needing feedback on the issues raised in his email of 118-120 to aid his recovery.
56. He did not initially get a reply to that message. On 27 February 2017 he chased a reply (page 121) but his focus was on the proposed course of action to address the points he had raised about the cause of his stress (ie the feedback in relation to pages 118-120).
57. Feedback on those points was then provided by Mr Alexander on 2 March 2017 (pages 126-127). He reported on new recruitment to positions that would report in to the Claimant and gave an update on the existing workload. That showed the November and December accounts were now closed. There is a reference to the Claimant being asked to take responsibility for the car franchise accounts. Mr Alexander did not address the sick pay decision further.
58. The Claimant had resisted responsibility for the car franchise accounts in his email (p119a) saying he felt he was "being set up to fail". This disagreement about the extent of the Claimant's responsibilities was another area of concern to the Respondent's witnesses.
59. On 7 March 2017 the Claimant wrote back again about various work issues in anticipation of his return on Friday 10 March 2017. At the end of that email he reminded Mr Alexander that he had asked for the rationale for the sick pay decision but also said he had in fact been paid in full for that month. He said he was bringing it to Mr Alexander's attention and wanted clarification as he was confused as to the position (p136). It is correct therefore that he reverted to his question about rationale but combined this with a query about what he had been paid, and the emphasis was on the latter.
60. Mr Alexander replied on 7 March 2017 to address the various work issues and at the end said "in terms of sick pay, and as you know given your management experience, these deductions/payments are made a month in arrears, therefore will be adjusted in March/April payrolls". Although this did not address the rationale, it did clarify the Claimant's question about why he had been paid in full for February.
61. On 10 March 2017, the date the Claimant indicated he would return, there was to be a strategy day. The Claimant was anticipating he would attend. On 8 March 2017

Mr Alexander emailed the Claimant to ask him to come to the office and help close off January's results, saying that would be a better use of the Claimant's time. He said the Finance Director had made a start and would provide a handover of what was required by "close of play Friday". He said he would do the Claimant's return to work that afternoon.

62. The Claimant replied on 9 March 2017 saying in fact he had been signed off until 10 March 2017 and so he would return on the Monday. He offered some input into the strategy day. The Claimant's evidence was that he would have returned if it was the strategy day but he did not because he was asked to go to the office, and he said no Senior Manager would be in the office to support his return.
63. It was not until his reply of 9 March 2017 that he then clearly chased a response to his email dated 19 February 2017 asking for the rationale for not exercising the discretion on paying sick pay whilst he was unfit due to work related stress.
64. Mr Alexander responded saying it was disappointing the Claimant could not have clarified his return date earlier. He attached the Company Sick Pay Policy without further explanation. He believed the Claimant as an experienced manager was familiar with how the policy would be applied in his circumstances (including his sickness record over the past 12 months).
65. During his absence the Claimant had been sent a reminder about his company car MOT and insurance expiring, which he had not seen. It was his responsibility to renew these. On 10 March 2017 at 17.05 the Group Finance Director sent an email to the Claimant's personal email saying the MOT and insurance had expired so his car should not be driven. The Claimant went to an Open University session on Saturday 11 March 2017, which he says had been in his work calendar. It was an inconvenience therefore that the MOT and insurance had expired. He had to use alternative transport to get there.
66. During the Claimant's absence further issues had arisen as others on the management team took over his work. Mr Parker says he discovered that the Claimant had allowed insurance premiums to increase, though the Claimant disputes this. In 2017 they were £950000. Mr Parker says in 2019 they will be less than £700000 due to more rigorous scrutiny. The Claimant disputes that he had allowed premiums to increase. Through an auditors' annual review of management accounts (usually the auditors were handled by the Claimant) other short comings were raised, which caused questions to be raised about previous years, and which Mr Alexander said were embarrassing to the Respondent (again disputed by the Claimant). I do not consider it necessary to resolve these disputes, save to find that the Respondent had genuine concerns about the Claimant's performance and the Claimant disagreed, and considered there were other explanations for some of the concerns.
67. Instead of seeking further clarification in relation to the sick pay decision on his return, for example through a face to face conversation, the Claimant lodged a grievance with the Group Finance Director on the evening of 12 March 2017, the day before his return. He complained both about the decision not to pay the sick pay and for failing to provide the rationale for the decision despite "several requests". He then listed the correspondence between himself and Mr Alexander. In my view he made it look like he had asked clearly for the rationale more frequently than in fact he had, given the findings made above about the correspondence of 27 February 2017 and 7 March

2017. He said he had looked at the policy and could not see any circumstances which would preclude him from receiving salary. Again his evidence was he had forgotten his absence record had included more than 5 days in the previous 12 months.

68. The Claimant then returned to work on 13 March 2017 and his return to work meeting was completed on 15 March 2017. At that meeting it was agreed that the Claimant was able to complete all the tasks required, but there were to be daily task planning meetings at 9am, as needed, with a weekly longer catch up and progress review. The situation was to be reviewed after one month (p.115).
69. The recruitment to the Claimant's team had carried on in his absence with a view to assisting with the staffing issues. The Claimant complains that on his return a candidate was being shown around and was not introduced to him, when normally he would be involved in the process, which he thought "strange". It is likely this was in relation to the Senior Management Accountant role. The candidate was not appointed. Noone had been appointed to that role by the time the Claimant left. It was not a candidate to replace the Claimant.
70. The Claimant's grievance was acknowledged and he was invited to a grievance meeting with the Group Finance Director on 21 March 2017. He received the letter at pages 188-189 on 20 March 2017.
71. On 20 March 2017 Mr Parker asked the Claimant and another colleague to recruit an administrator/accountant to work both in the car dealership showroom and on accounts reporting to the Claimant for that aspect (p141). He wanted a person in post ideally by 1 May 2017 but not later than 1 June 2017. He also, by separate email, asked the Claimant to provide roles, responsibilities and task lists for three members of the purchase ledger team so that he could see how temporary assistance could be best provided to the team by another temporary staff member (page 143). He asked for a reply the same day. The Claimant replied to this request by the end of the day.
72. The Claimant began working on creating a combined job description for the administrator/accountant. On 21 March 2017 the Claimant's colleague expressed his doubts to the Claimant about whether it would be possible to find one person to fulfil the dual administrator/accountant role (page 146).
73. At the grievance meeting on 21 March 2017 the dates of the Claimant's sickness absences were reviewed and the Claimant has noted them at page 193, including that he had had more than 5 days' in the preceding 12 months. It does appear from the Respondent's record that at that time the Claimant was querying the validity of the decision not to pay sick pay during absence which was due to work related stress (p192).
74. The grievance outcome was sent to the Claimant on 27 March 2017 (196-197). It stated that sick pay is at the Company's absolute discretion and is not automatically awarded based on long service or good attendance. It said there was no obligation to provide rationale (and still did not provide any further detail such as highlighting the previous absences of more than 5 days or addressing the fact the absence was for work related stress). The letter stated the Claimant had been invited to discuss in person with the "Managing Director" (by which he meant Mr Alexander) and no meeting had taken place, although in fact that invitation had been

about the work issues generally and not the sick pay decision. That said, the Claimant could have asked about it face to face in any event. By this time the Claimant had been reminded of both his sickness absence record and the sickness policy. In evidence he accepted that his record justified withholding sick pay under the policy. At this point it should therefore have been apparent that he fell outside the circumstances when sick pay was usually paid.

75. Also on 27 March 2017 the Claimant's colleague dealing with the administrator/accountant contacted the Claimant to say he had had first interviews with two prospective candidates the week before and wanted the Claimant to do a second interview (p152). One of them was described as very good. She was also available to start straight away. As a result of this candidate "coming to the fore" Mr Parker went to speak with the Claimant to ask him to set up an interview the following lunchtime as the candidate had indicated she could start the following Monday which would allow the transfer of an experienced colleague to the Finance Department full time to help alleviate the delays with the management accounts. The Claimant thought this was unreasonable though he left Mr Parker with the impression he would do as asked.
76. On 28 March 2017 the Claimant replied to his colleague, copying in Mr Parker, saying he was still working on understanding the joint role and completing the job description. He also asked for sight of the candidate's CV (p152). He produced the job description on 29 March 2017 which was approved by his colleague later that day. He received the CV on 29 March 2017. On 30 March 2017 he asked his colleague to organize advertising the role and to arrange for the two candidates to attend for interview (pages 158-159). The Claimant was not acting with the urgency that Mr Parker had requested and had not followed the instruction to arrange the interview for 28 March 2017.
77. Also on 28 -29 March 2017 were emails between Mr Parker and the Claimant about a Management Accounts Time Table, or what Mr Parker refers to as a time and motion study (153-157). This was to look at the resource required for the team. Mr Parker suggests that the study suggested there was sufficient resource in the team to complete the work required, despite what the Claimant was saying about understaffing.
78. The Claimant had been trying to arrange to meet Mr Alexander in response to the invitation to do so back on 2 March 2017. On 28 March 2017 he requested an urgent meeting (p198). He also continued to chase the name of the person who made the original decision in respect of sick pay with the Group Finance Director (p199).
79. The Claimant was then invited by Mr Alexander to a meeting the next day at 4pm using an electronic calendar. The Claimant did not accept the appointment (though he believed he had). Mr Alexander then sent a message to cancel it at 3.40pm when the Claimant had not responded to accept the appointment (pp150 – 151 & 194-195). He accepts that he was frustrated at the Claimant's lack of reply. The Claimant nevertheless turned up at Mr Alexander's office and was told by Mr Alexander he could no longer see him. Mr Alexander was on a telephone call.
80. On 30 March 2017 Mr Parker called the Claimant about the recruitment of the administrator/accountant. He was very frustrated that the Claimant had not yet

organised the interview he had asked him to do quickly and that the Claimant said to him he had not read the CV. He accepts that he swore. He says he does swear at work. I accept that he used the language alleged by the Claimant including saying "He's not your fucking lackey" (about the Claimant's colleague involved in the recruitment) and "I asked you to fucking do it Tuesday". This was recorded in the Claimant's email written that evening. Ms Sorrell witnessed the call. She was not party to Mr Parker's request to the Claimant which had not been fulfilled but says that no matter if Mr Parker was frustrated it did not justify the degree of frustration she overheard. She left the room embarrassed but could still hear it in the next room. She says the Claimant was visibly shaken.

81. The Claimant objected to the tone and language in his email and set out robustly his disagreements with Mr Parker's approach to the post and the recruitment (pp169-171). He also explained how he believed his resources had been reduced without consultation and referred to a backlog which had resulted in management accounts being unachievable in the time scales required. He said he was concerned that Mr Parker still expected them to be delivered by certain timescales without giving the Claimant the level of resource needed (page 170). He referred to his sick leave with work related stress and said that as he had not been allowed to use recruitment agencies he was being disadvantaged and set up to fail.

82. This elicited a lengthy and frank response from Mr Parker by email dated 31 March 2017 (pp163-168). The email was written just hours after the Claimant's email and is over 5 dense pages long. The Claimant says this email was threatening and mentioned possible dismissal. The email references that the Claimant is well paid with enhanced benefits, that the Respondent is funding his MBA and that he is in line for the company bonus scheme that can pay as much as 25% of salary. It explains the importance and seniority of the Claimant's role, and that he has asked to be considered as a future Finance Director, before saying:

"I have recently become totally frustrated with your lack of understanding of your role, performance in this role, apparent commitment to this and your lack of urgency in completing simple or even important tasks. Your departments lack structure, process and direction. Your inability to solve problems and provide solutions is a real problem...the lack of finance information available to me or the other Directors is a major concern to us...."

83. He then turned to address each of the points raised by the Claimant. With respect to swearing he said:

"I do not particularly remember using the words you quoted but I do swear and you have not objected in the past 10 years, I will not do so in the future". He gave his account of the recruitment position and in response to the Claimant having said that his colleague had not set up the interview therefore it had not taken place he said "my comments that [the colleague] is not your lackey remain". He asked the Claimant to complete the task with the utmost urgency.

84. He used terms like "deliberately frustrate the process" (in respect to the Claimant's lack of progress in the recruitment) and said that the Claimant's "comment that this is a strategically misaligned direction of travel is uninformed, irrelevant and without substance". With reference to the management accounts he said he was "flabbergasted" by the Claimant's comments in this area. He said that "the production

of accounts to a regular time table is not optional, it is an absolute necessity. Failure to do this on a regular ongoing basis will constitute a gross failing of [the Claimant's] responsibility". He explained how he considered the Claimant had sufficient resources to perform the task going forwards, based on the figures from the Management Accounts Time Table.

85. The final page does address the Claimant's stress related illness. He said

"I totally understand your need to manage this and we are in total support of this. What we need to come to agreement on is the cause and what the possible options are to resolve/remove these...

We have over time changed as a business and we have grown. I have been concerned in recent discussions this year and late last year and your lack of understanding in areas of your responsibility and also for you to provide solutions when problems arise. It is also apparent that the documentation and controls of the smooth functioning of your department are not in place or complete. ...

This does indicate to me that you are now struggling to carry and cope with the responsibilities of your position which may be the cause of the work related stress that you are currently suffering, if this is the case then we must look at reducing your responsibilities, if possible, to reduce/remove the stress to avoid recurrence. This will of course require a change in benefits. If we cannot find a suitable role this may require that our relationship comes to an end.

If you believe this is not the case and that there are other reasons...then we need to discuss these and resolve accordingly. Please would you consider this and come back to us next week when you return from holiday.

However if there are no other reasons we will have to consider the simple fact that you are no longer performing to the requirements of the role...and we will have to introduce a performance enhancement program for you. I would be concerned here about the impact on your current stress related illness and your ability to manage this. I will need assurance from you and your Doctor that you are capable of dealing with this process. ...." (pages 163-168).

86. Mr Parker also asked to speak with the Claimant in his office that day. He asked if the Claimant had read his email, which at that time he had not. He said he had spent 5 hours drafting it, that he had never received anything like the Claimant's email before and he was "fuming". It was agreed the Claimant would go away and think about what he had written. The Claimant replied that evening asking if they could meet to discuss the week of 10 April 2017.
87. The Claimant says that around about 31 March 2017 he was also told to move to the open plan office which he inferred was a demotion and a very public reduction in status. He also says that the Group Finance Director had said that the way things were going he might also be joining the Claimant downstairs and he would have the only available office. The Claimant says his computer was moved, though the Respondent's witnesses dispute this. Mr Alexander says he had to clear the Claimant's "stuff" out of his office when the Claimant left and his computer is still there now. The Respondent's witnesses say sitting in the open plan was his choice. They

say there were offices available if he had wanted. In any event even on the Claimant's case there was no reduction in the Claimant's status and he had previously been sitting in the open plan office by choice.

88. The Claimant appealed the grievance outcome on 31 March 2017 (page 201) and, despite his sickness record and the policy, challenged the decision not to grant sick pay and give a rationale. He also took issue with the failure to state who had made the decision. He described himself in that appeal "as a manager.....who has always ...exercised the discretion to grant paid sickness absence where the specific criteria outlined in the sickness policy do not apply". As said above, in evidence he now accepts that the specific criteria in the policy did apply to his record. He did not mention that he felt he should have received pay because he was on work related stress absence.
89. On 3 April 2017 the Claimant was invited to an appeal meeting with Mr Alexander on 5 April 2017. In the appeal the detail of the Claimant's absence record was spelled out. The Claimant confirmed that the sickness criteria for not paying sick pay included number of sick days and instances. He confirmed he had had 6 days' absence in the last year and the current period in question was 22 days. He also complained that he had had to go through the grievance to get simple answers (pp205-208). The outcome was sent to the Claimant on the same day (pp209-210).
90. On the application of the policy it said "We believe this has been applied correctly as the decision not to pay you sick pay... was at the discretion of the Company. We discussed in depth the criteria involved in decision making, and equally your own experiences when making the decision on whether to pay or not. I have attached the sick pay policy."
91. It was still not spelled out how the Claimant fell outside of the criteria but as he had had 6.9 days absence in the last year and the absence was 22 days long he did, which he accepts. The outcome clarified that Mr Parker had made the decision, as he monitors all sick pay and has done for over 30 years. I accept the Respondent's witnesses' evidence that the Claimant was aware of this.
92. The Claimant says that on 7 April 2017 the Group Finance Director said the Respondent was withdrawing support for his MBA. He said this was unequivocal and was said 13 days before his exam and 4 weeks before the next modules were starting, with no explanation. I accept the Respondents' witnesses' evidence that it was not the Finance Director's decision and there had been no final decision from either Mr Alexander or Mr Parker to withdraw MBA support. They do agree there had been discussion that the Finance Director suggest the Claimant take a break until better placed to cope with the demands of the course, as in their view the Claimant was clearly struggling and had been recently absent for work related stress. Mr Alexander said he had had conversations with the Group Finance Director about this and how to handle it. Mr Parker had recorded all the Claimant's benefits including the MBA support on 31 March 2017. He also made reference to the Claimant's salary and other benefits and incentives continuing in their same form to the Claimant on 10 April 2017 (paragraph 96 below). His correspondence makes clear any change to benefits, if it was to occur, was going to be after discussion with the Claimant.

93. That there was a discussion as the Claimant describes is supported by the Claimant's email on page 180, recorded below at paragraph 98. He also refers to the conversation in his resignation letter on 11 April 2017 (paragraph 99) and his cover email to Mr Parker on the same date (p183). However even so I am not satisfied that it is more likely than not that the Claimant was told that a decision had been made to stop support completely, rather than that there was a discussion about taking a break. Firstly, if the Group Finance Director had had that discussion he would have been exceeding his authority. Secondly, the Claimant has not always recalled or recorded matters reliably. He says the meeting on 3<sup>rd</sup> February about performance was not about his performance (paragraph 45 above). He did not represent the correspondence about the sick pay accurately in his grievance (see paragraph 67 above). He says inaccurately in his resignation letter that there had been no issue about his performance before he raised a grievance. The context is that throughout he had in mind his obligations under the training agreement and was seeking to reduce or, by the time of his resignation, avoid them. When he did follow the conversation up in writing on 10 April 2017 (page 180), he presented it as a secondary matter to the issue of a £37 expense. Moreover, that the final decision had in fact not yet been made is supported by the Claimant's request in that email that the position be put in writing.
94. I prefer the evidence of the Respondent's witnesses that at most what was said was that the Respondent's management considered the Claimant should take a break from the course. That there had been no decision about any reduction of benefits including MBA support was clear from Mr Parker's emails of 31 March 2017 and 10 April 2017.
95. The Claimant provided his own detailed 5 page response to Mr Parker's email on 9 April 2017. He ended the email "In the end I guess what is required is clarity from you as to whether or not you wish me to remain within the business. Either way a logical and un-emotive discussion is required given my exemplary record during the years of loyal service that I have given" (pp175-179).
96. Mr Parker replied on 10 April 2017 (pp173-174). Again he went into the areas of disagreement. In answer to the Claimant's request for clarity about whether he was wanted in the business he said "For clarity on your position – I want you to remain in the business. There is a definite requirement, as you are aware, for this position. However you are well paid with other benefits and incentives and you need to justify these and perform accordingly if they are to continue in the same form".
97. The Claimant says that on 10 April 2017 he was told by the Group Finance Director that his expenses claim on page 432a would not be paid. This was for the purchase of milk costing £1.98 for the Boardroom and the mileage claim for attendance at his OU Course on Saturday 11 March 2017 prior to his return from sickness absence (though there is no explanation of this on the mileage claim). He says now it was also reiterated that the Respondent would no longer be supporting the MBA or any of his business expenses including milk. That is not supported by the email below at paragraph 98 and I do not find this occurred.



98. The Claimant responded to the Group Finance Director at 5.47pm on 10 April 2017. He said: "I am disappointed that the Company is unwilling to meet reasonable business expenses to attend the training course sponsored by the Company". He then explains the circumstances of his being advised about the MOT and insurance on his company car having expired the evening before the course before saying: "It seems to me non-payment of valid business expense is a punitive and unnecessary action". The total unpaid expenses amounted to £37.73. The travel policy states that company cars must be used for travel. A private car can be used provided permission is sought from the Line Manager prior to the journey, though this is not specified in the training agreement which covered this expense. Nevertheless I find that the expense was not paid because of the issue in respect of the Company Car. The Claimant's email does not support the contention in his evidence that none of his business expenses were to be paid. It is clearly just about the one expense. The Claimant went on in his email to say that the Finance Director had "mentioned to [him on 7 April 2017] that the company are no longer willing to support my ongoing MBA studies. I asked if this was the case that you confirm the company position in writing as I am due to commit to the next elective imminently. This change of approach by the company disappoints me". This email does not support the case that it was reiterated on 10 April, but that there was one conversation on 7 April 2017, which I have already addressed above.
99. No reply in writing was received prior to the Claimant's resignation the next morning 11 April 2017, at 8am. The Claimant resigned with immediate effect (p182). His reasons included:
- "1. Exclusion from decisions directly impacting my team structure.
  2. Inability as a senior manager to deploy my resources as I see fit without management override by the Finance Director and/or Chairman.
  3. Inability to deliver an effective finance function as a result of 1 and 2 above.
  4. Degrading and defamatory treatment and comments by the Chairman.
  5. Punitive treatment since my return from sickness absence due to work related stress including:
    - a. unpaid sick leave contrary to custom and practice that I have always previously experienced;
    - b. refusal to authorise payment of work related expenses;
    - c. withdrawal of support for my MBA qualification;
    - d. accusations by the Chairman of performance issues which have only been raised following my raising of a grievance".
100. The Claimant went on to say that he considered this to be "a fundamental/unreasonable breach of the contract" ... and that his position was "now untenable".
101. The Claimant sent a cover email with the resignation letter to Mr Parker, copying in Mr Alexander and the Group Finance Director. He referred to Mr Parker's response as selective. He took issue with a comment about recruitment at point 12 of Mr Parker's email saying he took exception to his defamatory and unprofessional innuendo which attacked his personal integrity. He took issue with Mr Parker having authorised or not authorised a number of issues, saying "my comment was not a request but an indication of how...I intended to deploy my staff...". He also said "On Friday [7 April 2017] I learnt from [the Group Finance Director] that the company is

unwilling to meet reasonable business expenses to attend the training course sponsored by the company at Gatwick. I also learned that the company has decided not to support my ongoing MBA studies meaning that I will not complete my MBA qualification. These are both punitive actions decided unilaterally without discussion with me...I find your approach to be threatening and aggressive and in the circumstances that have evolved I consider that the work environment you have created and your perpetual interference with staffing and resource management within the finance function makes it impossible for me to perform my role”.

102. On the same date (at 6.51pm) the Respondent placed an advert on Indeed for the Claimant’s position (page 484a). The Claimant questions the speed at which the advert to replace him came out. I accept that the Respondent needed to act swiftly as the Claimant had left without notice and, as reflected in Mr Parker’s letter to the Claimant, the position of Financial Controller was important to the business. I also accept that pulling together the advert is not difficult and that the Respondent uses existing templates and does it regularly as it is regularly recruiting. I also note that Mr Parker makes such decisions decisively and acts quickly, as can be seen to his approach to the Builders Beam position and the recruitment of the administrator/accountant role.
103. Mr Parker responded to the Claimant on 12 April 2019 (pages 185-6). He acknowledged the resignation. He pointed out that in his view the Claimant was in breach of the requirement to give three months notice which placed significant pressure on the department and the business, reserving his right to take action. He said the company had no choice but to recruit interim financial service provision and ultimately a replacement Financial Controller, as indeed the advert shows. He did not accept the fundamental breach. He said that “we were in discussion with you regarding a number of options however you have resigned before it has been possible to work through the various options or consider which may be the most appropriate way forward in all the circumstances”. He referred to the training agreement and the requirement to refund 100% of the training costs.
104. Page 247 shows the Claimant had completed 120 credits out of 180 as at 13 February 2017 (with presumably more to follow subsequent to the upcoming exam). He had until 3 May 2021 to complete the course.
105. Mr Alexander expanded on his perception in evidence. He said the Claimant’s performance was in question and that by the time the Claimant resigned the Respondent was going to start performance management. He said that he, Mr Parker and the Group Finance Director had all been chipping in to do the Claimant’s work while he was absent and they had managed to do 70% of the tasks, including pushing the recruitment to help him. He was getting fed up of what he perceived were requests that were not supportive of the business and he perceived as selfish. For example while he was dealing with the bank as a result of the issues with management accounts being late the Claimant asked about pay rises and to renegotiate the training contract. He disapproved of the Claimant’s “sudden attempt” to change the training agreement. He considered it “backhanded”. When the Claimant returned to work he received little work from him in 13 days. He felt the Claimant came back and gave “nothing but opposition” which he found “almost insulting”.

106. In respect of the disputes around staffing resources and recruitment, I accept Mr Parker's evidence that the combined administrator/accountant role was achievable and was achieved. I also accept the Respondent's oral evidence that the Finance Team is now running successfully with one less member of staff.
107. No bonus was ultimately paid out to any one in the Senior Management Team in the relevant period.
108. After the Claimant left he funded his studies by offsetting them as a business expense of his consultancy business.

### **Relevant law**

#### **Constructive dismissal**

109. Section 95 of the Employment Rights Act 1996 states:  
**(1) For the purposes of this Part an employee is dismissed by his employer if . . . \_**

. . .

**(c) 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.**

110. The leading authority is *Western Excavating (ECC) Ltd v Sharp* 1978 ICR 221. For section 95 (c) to apply the following must be shown:

110.1 a repudiatory breach of contract by the employer (i.e. a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract and which entitles the employee to leave without notice);

110.2 the breach caused the resignation; and

110.3 the employee did not delay so long before resigning that he is regarded as having affirmed the contract and lost the right to treat himself as discharged.

111. There was an implied term in the Claimant's contract of employment as described in *Malik v Bank of Credit & Commerce International* [1997] IRLR 462 that the employer shall not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.
112. A breach of the implied term involves conduct which seriously damages or destroys the trust and confidence between the employer and employee. Both sides are expected to absorb lesser blows (*Croft v Consignia Plc* [2002] UKEAT 1160\_00\_3009).
113. A series of actions culminating in a "last straw" can cumulatively amount to a breach

of the implied trust and confidence, but the “last straw” must contribute something to the breach, it cannot be entirely innocuous (*Omilaju v Waltham Forest LBC* 2005 ICR 35).

### **Unfair dismissal**

114. In relation to ordinary unfair dismissal is contained in section 98 of the Employment Rights Act 1996. Section 98 provides:

**(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-**

**(a) the reason (or, if more than one, the principal reason) for the dismissal, and**

**(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**

**(2) A reason falls within this subsection if it-**

**(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,**

**(b) relates to the conduct of the employee,**

**(c) is that the employee was redundant, or**

**(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.**

**(3) . . .**

**(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-**

**(a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**

**(b) shall be determined in accordance with equity and the substantial merits of the case.**

115. In applying section 98(4) the Tribunal are not to substitute their own view for that of the employer. The question is whether the employer’s decision to dismiss fell within the range of reasonable responses open to the employer, or whether it was a decision that no reasonable employer could have made in the circumstances.

**Counter claim**

116. Article 4 of Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 provides that an employer can bring proceedings in the Employment Tribunal for the recovery of damages or any other sum in certain circumstances. This includes a claim for a sum due under, or damages in breach of, a contract of employment or other contract connected with employment.
117. Express terms in training agreements requiring repayment of training costs in the event that the employee leaves during a defined period are recoverable as liquidated damages provided they are not a penalty (Harvey B [537]; *Cleeve Link Ltd v Bryla* [2014] IRLR 86; *MBI UK Ltd v Quigley* [2009] UKEAT 0061\_08\_0207). I note also the suggestion in *MBL UK Ltd v Quigley* UKEATS/0061/08 and *Cleeve Link Ltd v Bryla* [2014] IRLR 86 that where the employer seeks to recoup expenses that have actually been incurred, consideration of whether it is an unlawful penalty clause rather than liquidated damages may not arise.
118. Both parties referred to the case of *Cavendish Square Holdings BV v El Makdessi; ParkingEye Ltd v Beavis* [2016] UKSC 67 for the definition of a penalty clause, although it is not an employment case. At paragraph 13 the distinction was made between the primary contractual obligations themselves and clauses relating to their breach as follows:
- “There is a fundamental difference between a jurisdiction to review the fairness of a contractual obligation and a jurisdiction to regulate the remedy for its breach. Leaving aside challenges going to the reality of consent...the courts do not review the fairness of ...bargains either at law or in equity. The penalty rule regulates only the remedies available for breach of the party’s primary obligations, not the primary obligations themselves.”
119. The test for a penalty clause was stated to be as follows:
- “...The real question when a contractual provision is challenged as a penalty is whether it is penal, not whether it is a pre-estimate of loss. These are not natural opposites or mutually exclusive categories.... The question whether it is enforceable should depend on whether the means by which the contracting party’s conduct is to be influenced are ‘unconscionable’ or (which will usually amount to the same thing) ‘extravagant’ by reference to some norm.
- The true test of a penalty was whether the impugned provision was a secondary obligation which imposed a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation. The innocent party could have no proper interest in simply punishing the defaulter. His interest was in performance or in some appropriate alternative to performance” [paragraphs 31-32].
120. The Respondent provided the example in *Strathclyde Regional Council v Neil* [1984] IRLR 11 where the employer was entitled to recover from the employee a proportion of the training expenditure incurred under the employment contract which provided that, in consideration for being granted two years’ paid leave of absence and paying her course fees for training as a social worker (required under the employment contract), the employee undertook to remain in their employment for a minimum period of two years following completion of her course or to repay them a proportion

of the cost of putting her through the course. On the appeal *Neil v Strathclyde Regional Council* [1984] IRLR 14 it was found: ...”it was not extravagant and unconscionable for the respondents to stipulate that, if they paid the appellant’s course fees and gave her paid leave of absence for two years to obtain a social work qualification, she should thereafter remain in their service for two years or repay them a proportion of the cost of putting her through the course. That there was no fixed lump sum and the refund was variable, depending directly and proportionately upon how much of the minimum period of service the appellant had failed to fulfil, pointed strongly to the payment being proportionate to the likely loss and the specific words of the clause negative any notion of an enormous disparity between the refund claimed and the actual loss”.

## **Conclusions**

*Did the following matters listed at paragraphs 27 a) – h) of the claim occur? Did they amount to conduct, without reasonable and proper cause, likely to destroy or seriously damage the relationship of trust and confidence?*

*The Respondent’s refusal to provide the Claimant with any reasoning as to why the Respondent chose not to pay him company sick pay.*

121. The Claimant in evidence accepted that under the policy he was not entitled to sick pay, but wanted discretion to be exercised in his favour because of his long term service and the fact he was absent for work related stress. He described himself as a manager.....who has always ...exercised the discretion to grant paid sickness absence where the specific criteria outlined in the sickness policy do not apply. He was aware by the grievance meeting on 21 March 2017, when he was reminded of his attendance record, that in his case the specific criteria set out at paragraph 51 above did apply. Specifically he had had more than five days total sick absence in the last rolling 12 months.
122. It is right that the Respondent did not expressly state to the Claimant that he did not receive sick pay because he had previously exceeded the 5 days prescribed in the policy and that the starting point was not to pay discretionary sick pay, save in exceptional circumstances. However, the policy was provided and discussed with the Claimant in the grievance, along with his own sickness record. He confirmed his awareness of the policy and he himself made notes about having exceeded the 5 days in the policy. The Respondents’ management believed that the Claimant, as a member of the Senior Management Team, knew that the starting point was not to pay discretionary sick pay. I have found he did know this. The grievance decision informed the Claimant that long service and/or a good attendance record does not mean sick pay will be automatically awarded, which was in line with the policy and standard practice. Taking the process as a whole therefore the Respondent did not refuse to provide the Claimant with any reasoning. The Respondent’s witnesses did not understand what else the Claimant needed to know, given the Claimant’s knowledge of the policy, experience of applying it, and his own sickness record. The Claimant tried to suggest that he had been repeatedly requesting the information but this was not an accurate reflection of his messages, as I have set out at paragraph 67.

123. It is also right that the Claimant's view that he should have received sick pay because it was a work related stress absence was not explicitly addressed in the grievance outcome, though it is recorded in the grievance meeting notes along with other points. However this was not picked up by the Claimant in his appeal. His appeal was about inconsistent application of the policy and that he did not fall outside the specific criteria, which was not correct (pp205-208).
124. I do not find this conduct by the Respondent likely to destroy or seriously damage trust and confidence between the parties. A reasonable effort was made to explain the decision to the Claimant in circumstances where he accepts now he was not entitled to pay under the policy as the specific criteria he referred to did apply, as he had had more than 5 days' absence. His long service was addressed in the grievance outcome. He did not pursue on appeal the fact that he should have had sick pay due to the absence being due to work related stress. The Respondent was not clear what else the Claimant wanted to know when he was an experienced senior manager, sick pay was discretionary and usually not paid in circumstances falling within the listed criteria.

*The decision to move the Claimant out of his private office and re-locate him to an open plan office without any explanation.*

125. There is a dispute about whether the Claimant actually moved. However at most, the Claimant's case is he was asked to move and did so. He had previously expressed an intention to spend more time in the open plan office in his 360 appraisal. He had himself chosen to spend time there during Ms Butcher's notice period. The Claimant has demonstrated his ability to take issue with something he does not agree with. His own manager had indicated he might be moving down to use the office on the same floor. There was no suggestion that this was a demotion as the Claimant has suggested.
126. I do not find this conduct likely to destroy or seriously damage trust and confidence. The Respondent is entitled to make requests of staff in respect of where they sit and the Claimant had been willingly sitting there previously. There is no suggestion that the Claimant was demoted.

*Mr Parker's aggressive telephone call to the Claimant in which the Claimant was sworn at.*

127. Mr Parker did speak angrily on the telephone call with the Claimant and did say "He's not your fucking lackey" (about the Claimant's colleague involved in the administrator/accountant recruitment) and "I asked you to fucking do it Tuesday". He did so as he was frustrated with the fact that the Claimant had not done what he had been asked and agreed to do, namely hold an interview with a very good candidate with a view to her starting the following week in circumstances where Mr Parker believed this would address some of the Claimant's staffing concerns. The Claimant did not hold the interview when he was asked to do so and did instruct his colleague to do a number of tasks including providing the job description and arranging the interview for him, which Mr Parker considered the Claimant should have done himself. When the Claimant challenged him in the subsequent email Mr Parker said he would not swear again (page 164).
128. I accept that speaking angrily and swearing in this way damaged (and was likely to damage) trust and confidence to a degree, as indeed did the Claimant's failure to do

as asked in respect of the recruitment. However, in all the circumstances I do not consider Mr Parker's conduct in this call was sufficient to seriously damage or destroy trust and confidence. It does not excuse the anger and swearing, but Mr Parker was understandably frustrated with the Claimant. He promptly said he would not swear in future. The Claimant was also a member of the Senior Management Team and himself spoke his mind frankly and was critical of Mr Parker at times, as can be seen in the correspondence. Overall this was a "lesser blow" as envisaged by *Croft v Consignia Plc*.

*Mr Parker's email to the Claimant following the above telephone call in which Mr Parker threatened to reduce the Claimant's responsibilities and benefits if the Claimant's stress is a problem, including the possibility of dismissing the Claimant without offering any assistance to aid the Claimant in overcoming his stress.*

129. Mr Parker sent the lengthy email on 31 March 2017 (pages 163-168), described at paragraphs 82-85 above. Firstly, the email was in direct response to the detailed email from the Claimant at pages 169-171, which was also lengthy, frank and critical. The Claimant's email returned to the staffing issues and his sick leave for work related stress. Mr Parker's email is long and goes through a number of criticisms in response to the points made by the Claimant. It is clear there were disagreements between the two including as to whether the staffing issues were the cause of the Claimant's stress. He raised concerns with the Claimant's performance and that the situation needed to be addressed.

130. Mr Parker did emphasize the Claimant had an important senior role within the business and was paid and had benefits to reflect this. At the end he said:

"In amongst all of this is your stress related illness. I totally understand your need to manage this and we are in total support of this. What we need to come to agreement on is the cause and what the possible options are to resolve/remove these...

We have over time changed as a business and we have grown. I have been concerned in recent discussions this year and late last year and your lack of understanding in areas of your responsibility and also for you to provide solutions when problems arise. It is also apparent that the documentation and controls of the smooth functioning of your department are not in place or complete. ...

This does indicate to me that you are now struggling to carry and cope with the responsibilities of your position which may be the cause of the work related stress that you are currently suffering, if this is the case then we must look at reducing your responsibilities, if possible, to reduce/remove the stress to avoid recurrence. This will of course require a change in benefits. If we cannot find a suitable role this may require that our relationship comes to an end.

If you believe this is not the case and that there are other reasons...then we need to discuss these and resolve accordingly. Please would you consider this and come back to us next week when you return from holiday.

However if there are no other reasons we will have to consider the simple fact that you are no longer performing to the requirements of the role...and we will have to introduce a performance enhancement program for you. I would be concerned here



about the impact on your current stress related illness and your ability to manage this. I will need assurance from you and your Doctor that you are capable of dealing with this process.

You will appreciate that your position is an important one ..., given this and the recent disruption to the Finance function we cannot allow this to go on without tight timescales to resolve. Please give this your utmost consideration and we will discuss ....”

131. It does not go into specifics but it does recognize the need to support the Claimant in respect of the stress related illness. It mentions the need to understand the cause and the options to remove and resolve this. It suggests that the cause might be that the Claimant is struggling with the role and that if that is the case then the Respondent must look at the possibility reducing responsibilities to avoid recurrence, and that this would mean a consequent change in benefits. It does raise the possibility that, in the absence of a suitable role, this may require the relationship to end. It is clear overall that these matters are to be discussed with the Claimant and that if he believed there were different causes to the stress they would discuss them and seek to resolve them. He also mentions a performance enhancement program. The wording is a little unclear but I find the implication is that this was an alternative if the Claimant remained in the role and no other reasons for the stress were raised. It is clear that the Respondent had in mind that there needed to be care taken in going down this route because of the Claimant's stress related illness and medical advice would be sought. All of this was mentioned for the Claimant to consider and discuss.
132. This was not “a threat to reduce the role/benefits if the Claimant's stress was a problem”. It essentially refers to both the performance issues and the Claimant's stress related illness. There was an openness to consider different ways of avoiding stress in future, depending on the cause. One option to be discussed amongst others was to reduce responsibilities if the cause of the stress was that the Claimant was struggling with the role. Nor was it raising “the possibility of dismissing the Claimant without offering any assistance to aid the Claimant in overcoming his stress”. The dismissal was mentioned as a last resort and the Respondent was inviting discussion of alternative solutions if they would alleviate the stress.
133. I accept the point made by the Respondent in submissions that the context was that the Claimant had had support during his absence and upon his return, which I address below.
134. Mr Parker also spoke to the Claimant about the email and left the matter that the Claimant would consider it and return to discuss with him. He also reassured the Claimant that he did want him in the business on 10 April 2017 (p174) albeit at that point he said the Claimant was well paid with other benefits and he needed to justify these and perform accordingly (which does represent a shift in focus to a possible reduction in benefits due to performance and not as a result of a reduction in responsibilities to alleviate stress, though the Claimant does not rely on that email).
135. I do not find the suggestion, amongst others, of the possibility of reducing the role to alleviate stress or dismissal (as a last resort in the absence of a suitable role) to be conduct that was likely to destroy or seriously damage trust and confidence. At this stage a number of options were being considered and the Claimant was to have an opportunity to respond. There were performance issues which the Respondent

needed to address and the Claimant had also had a stress related absence giving the Respondent reasonable and proper cause to discuss the situation and various options. I do find that it was unhelpful to discuss these matters by lengthy email written in anger and that they would have been better discussed face to face as part of a process and not in the heat of the moment, especially as the Claimant had recently returned from a stress related absence. I acknowledge there was then due to be a meeting. Nevertheless, that they were raised in this way initially was likely to cause some damage to the relationship of trust and confidence. Again I consider this a lesser blow in the sense of *Croft v Consignia*.

*Excluding the Claimant from the recruitment process for a senior member of staff in his team when the Claimant had been involved with recruitment in the past;*

136. This is a reference to the recruitment process which was undertaken during the Claimant's absence and which continued on his return, when one unsuccessful candidate was shown around and not introduced to the Claimant. The Respondent was seeking to assist the Claimant by progressing the recruitment in his absence. No one was actually recruited to the role prior to the Claimant leaving. The Respondents' witnesses had no idea who the candidate was. This was not conduct that would be likely to destroy or seriously damage trust and confidence. For the avoidance of doubt there is no suggestion that the Group Finance Director was seeking to replace the Claimant (paragraph 31 of the Claimant's witness statement).

*The sudden removal of support for the Claimant's MBA without any consultation, warning or reasoning (which was also in breach of the agreement and therefore an express term of his contract);*

137. I prefer the Respondent's evidence that there was no decision to remove support. One expense claim of £37 was unpaid due to the means of transport concerned and it was suggested that the Claimant take a break from the MBA given his recent stress related absence and his concerns about pressure of work. Such a break was anticipated in the Claimant's own proposal when he requested that the Respondent fund the MBA. As said at paragraph 30 above, in his business case he emphasized that the MBA at the OU allows flexibility to stop and start if work commitments become a priority (page 213). He had also said that he would make sure that the MBA did not compromise his responsibilities at work (p219).

138. I do not find the suggestion to take a break sufficiently serious to be likely to destroy or seriously damage trust and confidence. Moreover, I find the Respondent had reasonable and proper cause to open a discussion about whether it would be a good idea to take a break.

*Notifying the Claimant that his company car's MOT and insurance had expired the evening before he was due to travel to a work sponsored training event and proceeding to refuse to reimburse the Claimant's expenses incurred as a consequence;*

139. The MOT and insurance was the Claimant's responsibility. The Claimant had been routinely emailed previously about the expiry of his car MOT and insurance but he had not received it due to his absence. He was signed off sick and his communication with the Respondent was that he was to return on Monday. The Respondent contacted him to inform him of the expiry so that he would not drive without insurance or a current MOT. The Claimant attended an OU study event for his course on the

Saturday but, whether or not it was in his calendar and viewable by his manager, the Claimant had said he was returning on Monday and so the Respondent was not aware he was planning to travel to that event. The Claimant's expenses were refused because the Claimant had not used his company car in accordance with the Company travel policy. I also note that the claim itself did not make clear what the event was or the reason for travel on a date prior to the Claimant's return from sick leave.

140. Informing the Claimant of the expiry of the MOT and insurance was supportive of the Claimant and ensured he did not drive illegally. I do consider the Claimant had basis to challenge the decision not to pay the subsequent expenses, by evidencing the course event and referring back to the training agreement which does not specify a particular means of transport. However, I do not find that refusal to pay expenses in the region of £37 based on the invoice at 432a to be conduct that is likely to destroy or seriously damage, or even damage trust and confidence, and the Respondent had reasonable and proper cause to challenge the travel aspect of the invoice, pending clarification by the Claimant.

*failing to provide the Claimant with any support upon his return to work following sickness absence due to work related stress.*

141. The Respondents' management completed a significant proportion of the Claimant's outstanding work prior to his return. The Claimant had a return to work meeting which set out a plan of support with a review in one month. He resigned prior to that review occurring. He did have daily meetings with his Line Manager. Mr Alexander attempted a meeting, but there was a misunderstanding about whether the Claimant would attend and it was to be rearranged. This had not occurred before the Claimant left. Mr Parker was working with the Claimant to look at the resourcing in his team. This was why Mr Parker wanted to recruit the administrator/accountant urgently. There was a disagreement about whether the Claimant's team was as under resourced as he believed, but nevertheless efforts were being made to recruit to the team. The Claimant's grievance about sick pay was addressed. The Respondents' management were frustrated with the perceived lack of work from the Claimant, including the failure to follow Mr Parker's request in respect of recruitment, and the fact that he was concentrating on the grievance and renegotiating terms of the training agreement (just prior to his sick leave) rather than urgent work priorities. The Claimant was raising his concerns in emails and Mr Parker replied. There were fundamental disagreements about the reasons for the performance issues and the Claimant's work related stress. It was not ideal that these matters were being addressed in lengthy emails and it would have been better to address them through a process or in face to face meetings. Mr Parker was due to have a face to face meeting to discuss the issues raised in the emails but the Claimant resigned before it occurred. Overall the Respondent was seeking to assist the Claimant and I do not find that the Respondent's conduct was likely to destroy or seriously damage trust and confidence.

*Did they amount to conduct, without reasonable and proper cause, likely to destroy or seriously damage the relationship of trust and confidence?*

142. For the avoidance of doubt, I do not find the Respondent's conduct overall to be likely to destroy or seriously damage trust and confidence. I have found that Mr Parker's speaking angrily and swearing in the telephone call, followed by addressing the issues by sending the lengthy email on 31<sup>st</sup> March, whilst still angry, rather than addressing the matters calmly in a process, were likely to damage trust and confidence to a degree, but I find these separately and together a lesser blow within the meaning of *Croft v Consignia*. I take into account that the Claimant was a Senior Manager who was able and did speak frankly to Mr Parker, and who was himself critical, and the context that Mr Parker was frustrated that the Claimant had not done as he had agreed in respect of the urgent recruitment, thereby delaying it, whilst complaining that understaffing was detrimentally impacting him.

*Did the Claimant resign in response?*

143. Having found that the Respondent had not breached the term of mutual trust and confidence it is not necessary to consider whether the Claimant resigned in response to the matters alleged at paragraph 27 a) – h) of the claim, nevertheless I have considered the reasons for the Claimant's decision to resign. I accept that all the matters alleged by the Claimant, to the extent I have found in the facts they occurred, relate to the period between his sickness absence and his resignation and that the resignation was in response to the course of events in that period. This includes those matters I have found to be a "lesser blow" within the meaning of *Croft v Consignia*.

144. However I do note that the reasons that the Claimant put in his resignation letter were as follows (paragraph 99 above):

- “1. Exclusion from decisions directly impacting my team structure.
2. Inability as a senior manager to deploy my resources as I see fit without management override by the Finance Director and/or Chairman.
3. Inability to deliver an effective finance function as a result of 1 and 2 above.
4. Degrading and defamatory treatment and comments by the Chairman.
5. Punitive treatment since my return from sickness absence due to work related stress including:
  - a. unpaid sick leave contrary to custom and practice that I have always previously experienced;
  - b. refusal to authorise payment of work related expenses;
  - c. withdrawal of support for my MBA qualification;
  - d. accusations by the Chairman of performance issues which have only been raised following my raising of a grievance”.

145. The cover email takes issue with a comment about recruitment that had been made by Mr Parker. There the Claimant said he took exception to Mr Parker's defamatory and unprofessional innuendo which attacked his personal integrity (which appears to be an expansion on point 4 in the above list).

146. This list is not the same list of conduct as the Claimant relies upon now. The first three items relate to management intervention in the running of his team and how that affected the Claimant's performance. These are not now relied upon.

147. Item 4 appears to relate to the comment about recruitment described in paragraph 145, also not relied upon now. Accusations of performance issues only following his raising a grievance are also not relied upon in this case (and it is not correct as the issues were first raised prior to the grievance).
148. The failure to pay sick leave is listed, but not any failure to give reasons for the decision, which is what the Claimant relies upon now.
149. The angry telephone call with Mr Parker and the swearing is not expressly mentioned, although it could arguably come within item 4. The email of 31 March 2017 and the suggestion within it that the Claimant's role be reduced if his work related stress is caused by difficulties with his role and the mention of dismissal is not expressly mentioned in this list, though arguably it falls within the raising of performance issues. Therefore, neither of the matters I have found to be a lesser blow were expressly mentioned.
150. Otherwise, the only overlap is in relation to the refusal to authorise the £37 expense claim in relation to his travel to the OU study day and the alleged withdrawal of support for the MBA (which I have found to be a suggestion he take a break).
151. There were therefore a number of other matters expressly mentioned which were more pressing on the Claimant's mind at the time of resignation than the matters complained of now, including the two lesser blows. The Respondent argues that the Claimant resigned because his performance was under scrutiny. I find that to a degree that is correct. The Claimant mentions the management intervention in his team (which related in part to management trying to support the Claimant and address the performance issues) and the raising of performance issues in the list of reasons given at the time.
152. I also find that the Claimant has been concerned throughout to reduce or avoid the obligation to repay the fees in the training agreement.
153. Nevertheless, although there were a number of other reasons that influenced his decision more, I still accept that those matters now alleged, to the degree that I have found that they occurred, played a part in his choice to leave.
154. There was no need to address the other issues in respect of unfair dismissal and it follows from this decision that the Claimant was not wrongfully dismissed.

### **Counterclaim**

*Does the counter claim for repayment of training fees come within the Tribunal's jurisdiction?*

155. The Claimant's representative sought to argue that the training agreement was not "a contract of employment or other contract connected with employment". In my view it clearly was part of the employment contract or a contract connected with employment. It states that it is additional to his Statement of Main Terms and Conditions of Employment but on page 224 stated that the Claimant "hereby accept[ed] the additional terms and conditions of employment". The Claimant asked the Respondent to support his course as his employer and the Respondent agreed to do so. The Respondent's support for the training was subject to the Claimant

repaying the cost of the training if he left the Respondent's employment within 3 years of completing the training. The agreement was only entered into because of the employment relationship. It also included authorisation to deduct sums owed directly from the Claimant's salary.

*Is the training agreement enforceable?*

156. The Claimant seeks to say the clause requiring repayment of 100% of the training costs if he left within three years of completion of the course is a penalty clause and not enforceable. The clause is set out at paragraph 31 above and states:

"If you leave the Company's employment within 3 years of completing the training (as a result of you giving notice or the Company giving you notice because of your conduct or performance) ...you must refund [100% of] the cost of the training". The anticipated costs were £14,000- £16,000 over three years, as set out in the agreement (page 223).

The primary terms of the agreement were therefore that the Respondent would pay for the MBA and associated costs (£14,000-£16,000) but the Claimant would repay the costs incurred if he left employment within three years after completing the course. The obligation on the Respondent was to pay for the course. The obligation on the Claimant was to repay the costs if he left within three years.

157. The course was not at the Respondent's request nor required for the performance of the Claimant's role. The Claimant, a Senior Manager, wanted to do the MBA to further his development and approached the Respondent to fund the course. He presented a detailed business proposal in which he recognized that in return for the funding there should be a minimum tenure and a repayment clause. His own proposal was that terms should be agreed in relation to his "continued tenure...once the course is completed and the repayment of any contribution should [he] leave within an agreed timeframe" and "the terms under which [he would] repay the above contribution, should [he] leave the organization prior to the timescale agreed". He freely agreed to the term of 100% if he left within three years without any objection at the time. There was no suggestion his employment depended on his agreement or on the training. I do not accept that this was the only way he could fund the MBA.
158. In my view it was a primary term that the Claimant would repay the fees if he did not remain in employment for the agreed period and this is therefore not a matter in which the Tribunal should intervene (applying Cavendish). Alternatively, as the Claimant was to repay the actual cost incurred by the Respondent in funding the Claimant's course it was neither a liquidated damages clause nor a penalty (applying the comments in Quigley and Cleeve Link Ltd v Bryla).
159. If I am wrong about the above, and the clause has the potential to be a secondary obligation which imposed a detriment on the Claimant for not remaining in employment for three years, then I do not consider it "out of all proportion to any legitimate interest of the [Respondent] in the enforcement of the primary obligation" or a suitable alternative. Nor was it an unconscionable or extravagant means of influencing the Claimant (the test in Cavendish).
160. The agreement was not proposed by the Respondent. The Claimant wanted to study for the MBA. He did not want to pay for it himself but wanted the Respondent

to fund it. It was a substantial expense to the Respondent. The overall sum envisaged was £14,000- £16,000. At the time of the proposal he recognized that there would need to be a minimum term of continued tenure once the course was completed and a term related to repayment of “any contribution” and under which he would “repay the contribution” (and not simply part of it). These were clearly proposed to persuade the Respondent to agree to fund the course and were successful. The Claimant anticipated that the course would take 3 years and this is the basis of the agreement (though in fact by the termination date the Claimant still had 60 credits to go). The agreement provided that the Claimant should remain in employment for 3 years after completion, or repay the course fees. I do not find this disproportionate to the length and expense of the course. I accept that 3 years is a long time, especially as the course was taking longer than the Claimant anticipated, thereby extending his commitment to the Respondent. I observe that given the course could take 7 years, the agreement had the potential to be an onerous way to fund the course, tying the Claimant to the Respondent for up to 10 years if he took the full time available and did not want to repay the fees. Nevertheless, he did always have the option of leaving and repaying the fees. The course was also a considerable expense to the Respondent. The course was essentially for the Claimant’s benefit, in that it was not in any sense required by the Respondent for the Claimant to fulfil his role. It was a legitimate interest to the Respondent that the Claimant remain in employment long enough to warrant such a significant investment (as the Claimant clearly acknowledged when he wrote the proposal). The clause was not in those circumstances unconscionable or extravagant. It was the basis on which the Respondent was prepared to make the requested investment in the Claimant. The Claimant did not have to agree to it. The Claimant could have sought to fund his course in another way and indeed did so when he left the Respondent.

161. The Claimant’s representative sought to argue it is unconscionable because it takes no account of the increasing benefit to the employer over time however the course was not a requirement for the Claimant’s role and the agreed purpose of the course was so the Claimant could advance in his career (not necessarily with the Respondent).

*Was the Respondent in fundamental breach of the employment contract as a whole?*

162. I have found the Respondent was not.

*Was the Respondent in fundamental breach of the training agreement?*

163. I have found the Respondent was not. There had been no decision to withdraw the MBA support. At most the Respondent had said the Claimant should consider taking a break due to his stress related illness and the issues at work. His own proposal had said the course was flexible and could be completed over 7 years if necessary, with the ability to “stop and start if work commitments become a priority” (page 213). No final decision had been taken about this either.

*Was the contractual term that the Claimant repay the training costs triggered?*

164. The Claimant’s representative seeks to say the repayment term was not triggered because the agreement on page 223 stated that the repayment term was triggered

if he left “within 3 years of completing the training” whereas the Claimant left before the training was even completed. However, the proposal from the Claimant was about his continued tenure after completion of the course and repayment should he leave prior to that. It may have been badly drafted but the intention of the parties was that the Claimant repay the sum if he left any time prior to three years after completion of the course. This is supported by page 428a. This was a document used by the Claimant when he tried to renegotiate the training agreement and shows that even in the improved scenario that he was then seeking he recognized that fees would be repaid in full if he left during the period of study.

*Is it just and equitable to charge the Claimant the full amount?*

165. The Claimant’s representative did not really pursue this issue in submissions. It is not clear on what basis I could find that it is not just and equitable to award the full amount. The Claimant’s obligation was to repay the costs if he left prior to three years after completion. He did so leave, and therefore the Respondent is entitled to repayment.

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Employment Judge Corrigan  
9 October 2019