EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4113630/2021

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Final Hearing Held in person on Tuesday and Wednesday 19 and 20 April 2022 at 10.00am

Employment Judge Russell Bradley

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Mr Steven Campbell	**Claimant** **Represented by:** **Ms S Brown –** **Lay Representative**
CBES Limited	**Respondent** **Represented by:** **Ms K Beattie –** **Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that: -

1. The claim of unfair (constructive) dismissal does not succeed; it is dismissed; and

25 2. The claim of breach of contract does not succeed; it is dismissed.

REASONS

Introduction

1. On 6 December 2021 the claimant presented an ET1. In it the claims indicated were of unfair (constructive) dismissal and for "*other payments*". The claims 30 were resisted. On 17 March 2022 the tribunal issued the notice for this final hearing. In error it set out that the claims were to be heard by a judge and two members. In my brief review of the tribunal file, I noted that two judges had earlier indicated that they could be heard by a judge alone. I explained this to the parties. The hearing proceeded on that basis.

2. For the start of the hearing an indexed joint bundle was prepared and lodged. It contained 151 pages. At the start of the second day and following reference to various papers on the first day it was agreed that **pages 152 to 157** should be added. Also at the start of the second day, the respondent sought to add two further documents which became pages **158 to 160**.

3. On the claim of constructive dismissal, the claimant explained that he intended to rely on a term which he described as the duty to carry out the procedure to determine what part of fuel use was "*business use*" as distinct from "*personal use*". He argued that the respondent was in breach of that term. From the tribunal forms, it was clear that the background to this argument was the provision to the claimant of a vehicle and fuel for it by the respondent and its predecessors.

4. On the claim for "*other payments*" the Grounds of Resistance set out that the respondent was not able to properly respond because the claimant had not provided details of the payment sought. In discussions prior to hearing evidence it became apparent that the claim was of breach of contract. The loss allegedly sustained by the claimant was for sums due by him to HMRC. In the course of the evidence the claimant helpfully detailed the amount as being £6297.20.

Issues

5. The issues for determination were:-

   a. In its actings in relation to he claimant's opt out on fuel benefit, was the respondent in significant breach of contract going to the root of the contract between the parties?

   b. If so, did the claimant resign in response to that breach, or did he wait too long?

   c. If the claimant was unfairly (constructively) dismissed in light of answers as above, to what remedy is he entitled? In particular what effect is there on any compensatory award of the claimant's approach to finding alternative employment?

d. If the answer to question 5a is in the affirmative is the respondent liable in damages to the claimant as a result?

e. If so, what damages are due to him?

Evidence

5 6. I heard evidence from the claimant. The respondent led evidence from James Muir (account manager), Mark Thomson (operations manager), David Sweenie (account manager), Darren Moore (HR manager) and Fraser Allan (managing director).

Findings in Fact

10 7. From the tribunal papers and the evidence I found the following facts admitted or proved.

8. The claimant is Steven Campbell. The respondent is City Building Engineering Services Limited. It is also known by the abbreviation CBES Limited. It employed about 600 staff in Great Britain. It provides construction
15 and refrigeration services predominantly to retailers. One of them is the Co-op.

9. At least by the time of this hearing, the claimant suffered from a heart condition. It has had an adverse effect on his ability to work.

10. On 9 December 2015 the claimant signed a written statement of terms and
20 conditions of employment (**pages 105 to 112**). It was issued by Integral UK Ltd ("*Integral*"). As per that statement; the claimant's employment with Integral began on 4 January 2016; he was employed as a mobile engineer; he was issued with a company vehicle specified as a standard estate as his entitlement; and he acknowledged receipt of a number of documents. One of
25 them was the employee handbook. It was produced at **pages 38 to 104**. The handbook provided that a number of its paragraphs summarised the main terms and conditions of employment. It also provided that a number of its paragraphs summarised non-contractual benefits, policies and procedures. At page 23 of the handbook (**page 61** of the bundle), Integral set out that while

it was in principle committed to maintaining the benefits set out in that section (or similar benefits) "*It must be understood that* it [Integral] *expressly reserves the right to withdraw or vary these or to substitute alternative arrangements at its discretion.*"

5 11. One of the non-contractual benefits' provisions related to Integral's private fuel reimbursement policy. It provided that employees who had been provided with a company car (including a standard estate) may voluntarily participate in "*the Private Fuel Reimbursement Scheme*." It further provided that; the scheme allowed relevant employees to demonstrate that they had reimbursed
10 Integral the cost of fuel relating to all of their private mileage; where the driver reimbursed that cost the taxable fuel benefit would not apply and would not be declared to HMRC; to participate, employees were required to submit monthly mileage returns which were to be check by Integral's HR/Payroll department; the policy could only be applied when Integral held satisfactory
15 mileage records for the full year for an employee; and the scheme did not apply to van drivers. The handbook further referred to the 'Private Fuel Reimbursement Policy' – PER 055. It was not produced. Nor was it referred to as one of the documents in the claimant's statement of terms.

12. The claimant's duties included repair and maintenance of electrical, power,
20 and lighting facilities at a number of retail outlets operated by his employers' clients.

13. While employed by Integral, the claimant was provided with a car as per his terms. While employed by them, he used the Private Fuel Reimbursement Scheme.

25 14. On or about 2 October 2017 the claimant's employment transferred from Integral to KB Refrigeration Ltd (KB) under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE). After his transfer, the claimant continued with his entitlement to a company car. After his transfer he continued his use of the Private Fuel Reimbursement Scheme.

30 15. Sometime after 5 April 2018 KB issued to the claimant a P11D form (**page 117**). It bears to have been prepared or printed on 16 June 2018. Of the

various possibilities within the proforma, the only detail included related to cars and car fuel. For "*make and model*" it says "*See Attached*". The attachment was not produced. The form records that the total cash equivalent or relevant amount of all cars made available in that tax year was £2391.00 The form records that the total cash equivalent or amount foregone in respect of fuel for all cars made available in that tax year was Nil.

16. On or about 14 May 2019 the claimant received a memo from Lisa Brady, an employee of KB (**page 114**). It was addressed to all car drivers. Its subject was fuel for private use. It enclosed an opt out form for paying for private fuel use. It suggested that the information from the completed form was to be used to prepare a P11D form for the tax year 2018/9, being the year ended 5 April 2019. The memo sought the return of the form if the employee wished to "*opt out and reimburse the company*" for private fuel. The memo advised that if it was not returned by 21 May; the assumption was to be that the employee would pay for private fuel through their tax coding; it would be declared on the P11D; and HMRC would adjust the employee's tax code to reflect the private fuel use as a benefit in kind.

17. On or about 23 May 2019 the claimant signed an agreement to reimburse KB for fuel for private use (**page 115**). The agreement is prefaced with an explanation for employees prior to signing it. That explanation sets out that; the Government had substantially increased the benefit in kind on fuel provided to an employee for private use; it was likely that a significant number of employees would be paying a tax on a benefit in kind "*well in excess of the value of the fuel they ha*[d] *actually used for private use*"; KB Group was prepared to offer employees the option of not receiving fuel for private use, instead receiving either £240, £360 or £600 through payroll (the amount depending on the number of private miles); the requirement to keep accurate mileage records; and a note that for KB engineers (such as the claimant) accurate mileage was already collected via their timesheets. The agreement signed by the claimant recorded the make, model, engine size and fuel type of his vehicle. In the agreement the claimant; agreed to reimburse KB for all fuel use for private mileage; estimated private miles in the following year to

be less than 3000; agreed to keep accurate records of total mileage split between business and private; agreed that the value of private fuel used could be deducted from his pay; understood that if his records were not accurate and verifiable he would be responsible for paying either direct to HMRC or to reimburse KB "*the full tax on the fuel benefit in kind.*" The agreement noted that at the end of the tax year the value of private fuel would be deducted from the claimant's wages (based on the manufacturer's mpg or average fuel price from Shell).

18. Sometime after 5 April 2019 KB issued to the claimant a P11D form (**page 118**). It bears to have been prepared or printed on 31 May 2019. Of the various possibilities within it, the only detail included related to cars and car fuel. For "*make and mode*l" it says "*Vauxhall Astra*". The form records that the total cash equivalent or relevant amount of all cars made available in that tax year was £5015.00 The form records that the total cash equivalent or amount foregone in respect of fuel for all cars made available in that tax year was Nil.

19. On or about 8 November 2019 the claimant's employment transferred from KB to the respondent under TUPE. On 7 November 2019, the claimant signed another agreement to reimburse KB for fuel for private use (**page 116**). It also estimated private miles in the following year to be less than 3000.

20. Prior to his transfer, the claimant met with Darren Moore and James Muir at KB's premises in Hillington. That meeting was one of several, the others being with other transferring staff in Scotland and in England.

21. The transfer of the claimant's employment to the respondent occurred because in 2019 the respondent was awarded a contract by the Co-op for it to provide mechanical and electrical services at the Co-op's food and funeral premises. The model referred to by the respondent to which the Co-op apparently agreed was called "*Tech and Van*". The model was attractive because it required engineers (such as the claimant) to drive a van to the Co-op's sites, the van carrying sufficient tools and equipment to allow most site tasks to be completed.

22. At the time of his transfer the claimant was driving a company car about 1500 miles per week in the performance of his duties. In the meeting with Mr Moore and Mr Muir the claimant referred to his contract with Integral. He referred to the fact that it entitled him to a car not a van. The respondent's wish was for the claimant to continue in his job but using a van. This was explained to him in the meeting. He did not agree to do so. After further discussion with both the Co-op and the claimant, the respondent agreed that the claimant could continue in his role with a car provided by the respondent. There was a discussion about the possibility of the claimant agreeing to use a van in exchange for a payment. That discussion did not result in an agreement.

23. In the course of his employment with the respondent the claimant was provided with five different cars at various times. All of them were leased. The claimant was given a fuel card. Its purpose was to allow him to draw fuel for the car which was then paid for by the respondent. Other service engineers who had transferred agreed to use a van.

24. In the course of performing his duties for the respondent, the claimant kept a note of the mileage done by him. An example is **page 155**. It is his timesheet for week ending 23 August 2020. It shows; his fuel card number; the start mileage (8380); the finish mileage (9163); the total mileage for that week (783); and his total hours for each of the five days of his work. It does not distinguish private mileage. In the course of his duties, the claimant kept another separate note of the mileage done by him each week. He did so in a diary. That note distinguished private from business mileage. The diary was available for the claimant's line manager to review. It was available for other employees of the respondent to review. The respondent did not record the claimant's private mileage as distinct from his business mileage. It did not refer to his diary to do so.

25. On or about 15 June 2020 the claimant received a letter from Catherine Airlie, a team leader employed by the respondent (**page 120**). It listed details of his P11D benefits in kind for the tax year 2019/2020. That year ended on 5 April 2020. The letter advised the claimant of the respondent's intention to present the information to HMRC on 29 June. It sought contact by 26 June if he had

any queries or disagreed with the figures. The letter detailed two amounts for "*cash equivalent of fuel*". They were (i) £2627.00 and (ii) £302.00.

26. Sometime after 5 April 2020 KB issued to the claimant a P11D form (**page 119**). It bears to have been prepared or printed on 18 June 2020. Of the various possibilities within it, it includes detail relative to cars and car fuel. For "*make and model*" it says "*Vauxhall Astra*". The form records that; that car was available to the claimant until 7 November 2019; and that the total cash equivalent or relevant amount of all cars made available in that tax year was £3329.00 The form also records that the total cash equivalent or amount foregone in respect of fuel for all cars made available in that tax year was Nil.

27. On or about 19 June the claimant replied by email to Ms Airlie. He said; he did not agreed the fuel figures, strongly disagreeing them; he used the car frugally for private purposes; and he was at a loss to understand how he could have used either amount of fuel for private use. He said that he needed clearer information. Relative to his reply, he made some notes of his understanding of what had happened in the period of his employment by the respondent in that tax year (**page 122**). His notes record that; from the start of his employment on 8 November 2019 until 19 February 2020 he used a Volkswagen Passat car; he understood the figure of £2627.00 to refer to that use in that period; from 20 March until 5 April 2020 he used a Skoda Octavia; he understood the figure of £302.00 to refer to that use in that period; he understood that he would be liable to 20% tax on each of these figures; he strongly refuted those figures. His note and email suggest that he did not seek to challenge the amounts shown as cash equivalents for the cars.

28. On or about 22 June 2020 Lisa Brady of KB issued a memo to the claimant (**page123**). It copied to him his P11D for the fiscal year to 5 April 2020. It is likely that its attachment was **page 119**.

29. Following his exchanges with Ms Airlie, the claimant took up the question of tax on private fuel with James Muir. Mr Muir in turn spoke to Ms Airlie about it. Her advice was that it was an issue which the claimant had to resolve with

HMRC. She advised him that other employees had done so. Mr Muir relayed that advice to the claimant.

30. It appears that nothing relevant to the question of tax on fuel was formally discussed between the parties again until 23 November 2020.

5 31. On 23 November 2020 the claimant emailed Darren Moore, copied to James Muir (**pages 126 to 127**). The subject heading was "*Tax on company fuel*". The email; referred to his last P11D from KB, and it evidencing that he was not in receipt of fuel benefit; noted that that situation was as per previous years based on an opt out; reminded that he had retained a company car *post* 10 TUPE; said that he owed a considerable sum to HMRC which he described as a major problem and stressful situation; suggested that the situation had come about as a result of the respondent advising HMRC that he was in receipt of fuel benefit; noted that he had been in touch with HMRC; asked the respondent to send revised information to HRMC based on their advice to 15 him; and set out that HMRC's further advice had been to "*bring in employers compliance*" and pass the matter to ACAS. Mr Muir considered that as far as he was aware the figures were extremely high and seemed incorrect.

32. By that time it appears that the claimant had received a letter dated 22 October 2020 from HMRC (**pages 156 and 157**). It states the claimant's tax 20 code for the tax year 6 April 2020 to 5 April 2021. It records his personal allowance of £12,500.00. It then records deductions totalling £22,816. One of those deductions is for fuel benefit of £6860.00. Another of them is for an estimate of tax said to be owed by him for that tax year of £9660.00. The note relevant to the former explains that it is the fuel the respondent provides for 25 him or his family for private use. The note relevant to the latter (note 8) is missing for the bundle copy.

33. After further exchanges and on 26 November Mr Moore advised the claimant (**pages 124 and 125**) that following reference to the respondent's fleet manager (Ian Summers) the respondent offered only two options. They were; 30 (one) Opt out, meaning employees such as the claimant pay for all vehicle fuel (business and personal) then claim back the cost of business mileage

and; (two) Fuel Card Option, meaning that the claimant would be issued with a fuel card to be used to buy all mileage (business and personal), paid for by the respondent but the claimant would have to pay additional tax for increased business in kind deductions and fuel benefit tax.

5 34. On 6 December the claimant emailed Mr Moore (copied as before) raising a grievance. In it he said he had "*no option*" but to involve ACAS and repeated the stress created for him by the situation.

35. Following an invitation letter (**page 129**) a grievance hearing took place on 15 December. Notes were taken at it (**pages 130 and 131**) by Amy Hanratty, 10 employed by *the* respondent as a planner. It was chaired by Mark Thomson. The notes appear to be a combination of a pre-prepared pro forma with questions and notes as prompts and typed inserts into it. The inserts appear to relate to the claimant's grievance. The notes record; the claimant said that he "*almost never*" used the vehicle for personal use; that use would be 15 reflected in his mileage sheet; the claimant kept an in-depth diary (also referred to as an in-depth log) with mileage recorded in it which was kept in case HMRC wished to check; the claimant's assertion that "*T&cs included excl fuel benefit? TUPE from previous employment*"; the claimant's assertion that no-one discussed differences with him when his employment with the 20 respondent started; that he disputed the figures proposed at about the time of the latest P11D but no-one responded to him; he asserted that HMRC wanted the respondent to notify it that he did not receive fuel benefit; the respondent did not offer that policy; and the claimant was of the view that he was being taxed on sums for which tax he was not liable.

25 36. On or about 24 December 2020 Mr Thomson wrote to the claimant with an outcome to his grievance (**pages 132 to 133**). It appears that the letter was emailed to the claimant on 5 January 2021 (**pages 134 and 135**). In the letter Mr Thomson recorded his understanding that when employed by KB he did not pay tax for personal fuel benefit because KB had agreed that he could 30 claim that he had used the company vehicle/fuel card for business use only. He said that the respondent was not able accommodate the same arrangement because when issuing a fuel card and company car for business

use only it was not possible to accurately monitor personal usage to enable the respondent to remain within HMRC guidelines. Instead, he provided three options being:-

a. Return the fuel card; then pay and reclaim business mileage;

b. Transfer to a van which could be used for business only or business and personal use, and if the latter then personal use would be taxed;

c. Continue with the status quo but be responsible for tax as required.

37. By email on 8 January the claimant said he wished to appeal the grievance outcome.

38. On 21 January 2021 the appeal was considered at a meeting chaired by David Sweenie. Notes were taken at it (**pages 136 to 139**). Again, the notes appear to be a combination of a pre-prepared pro forma with questions and notes as prompts and typed inserts into it. The inserts appear to relate to the claimant's appeal. In addition to replicating some of the notes from the first meeting, they record that; Mr Sweenie noted that KB had provided an allowance for fuel tax to employees as part of their contract which they contributed for them; the claimant pointed out that after initial reluctance the respondent agreed to him retaining an estate car after his TUPE transfer to it from KB; both noted that each company (KB and the respondent) had a different tax scheme and that there is no mention of a benefit for fuel allowance in the claimant's contract; the claimant advised that KB informed HMRC that he was not in receipt of fuel benefit and the respondent should be doing the same; the claimant felt he was being punished as a result of changes made to the leased cars provided to him; the claimant confirmed that in addition to his diary his previous employers had trackers in his cars; the claimant noted that the situation was now causing him stress and he felt that he was being passed from pillar to post and was getting to the point where he could not afford to work; and he further noted that for part of the time he was furloughed.

39. On 3 February 2021 Mr Sweenie wrote with an outcome to the appeal (**pages 140 and 141**). In it he confirmed that the respondent was unable to use the same "*process*" as the claimant's previous employer and therefore would not be responsible for monitoring his personal usage. He repeated *verbatim* the three options set out in the letter of 24 December. He added a fourth, being the provision of a company car (not leased).

40. For the pay period 5 June to 2 July 2021 the claimant received pay which included (in part) a payment of SSP (**page 148**). For the pay period 3 to 30 July 2021 the claimant's pay was only of SSP (**page 149**). For the pay period 30 July to 27 August 2021 the claimant's pay was again only of SSP (**page 150**).

41. On 23 August 2021 the claimant gave notice to end his contract. The parties agreed a termination date of 8 September 2021.

42. In an undated letter the claimant set out the reasons for what it called his early retirement/resignation (**page 144**). He noted the combined reasons of "*stress and tax implications*" and it being not financially viable to continue in the environment. He sought the opportunity to present himself to "*the director/MD*" to hear his grievance.

43. On 15 September Fraser Allan the respondent's managing director wrote to the claimant. He referred to his resignation and undated letter. Mr Allan summarised the exchanges on the issue of tax on fuel benefit up to the grievance appeal outcome letter. He confirmed that the respondent's position to that point was in accordance with its own policy and HMRC guidelines. He explained that for the respondent to be able to formally declare to HMRC that the claimant had used the fuel card only for business use it would have been necessary to have monitored the daily use of the vehicle and it is not the respondent's policy to do so.

44. At some time during the claimant's employment with the respondent he was issued with the respondent's "*Notes on Company Vans and Amended Tax Regulations – April 2007*" (**pages 152 to 154**).

45. The respondent's handbook contains provisions relevant to tax implications of company vehicles (**page 160**). The paragraph produced (numbered 15) distinguishes between vans and cars. On the latter, it says that; cars are provided for both business and private use; private use is presumed unless agreed in writing with the respondent's fleet department; and employees will be liable to HMRC benefit in kind taxation on private use.

46. The claimant has not sought alternative employment since 8 September 2021.

Comment on the evidence

47. The notes from both grievance meetings are not models of clarity. They are based on "*style*" *pro formas* which were then populated with pre-prepared questions for the claimant. The final versions appear to include abbreviated answers provided by the claimant in the course of the meetings albeit in some parts they are incomplete, or at least are difficult to make sense. Both notes suggest that the claimant should have been given the opportunity to read and sign them. It is clear that this did not occur at either meeting.

48. For completeness I record that **pages 121a to 121d** were added to the bundle at the start of the second day. By that time the claimant's evidence had concluded. None of the respondent's witnesses spoke to them. I have therefore disregarded them.

Submissions

49. Ms Beattie made an oral submission which she then provided in writing. I do not repeat it. In summary she; referred to section 95 of the 1996 Act (which I set out below) and to the well-known decision in the case of ***Western Excavating (ECC) Ltd v Sharp*** [1978] ICR 221. She set out what she said was a brief account of the relevant facts. She argued that there was no breach of either an express or implied term of the contract. On the question of express terms and while recognising that there had been a TUPE transfer she referred to the claimant's evidence (and reference to **page 95** of the bundle) that his ability to reimburse his former employer for personal mileage was derived from a non-contractual policy contained in their company handbook. And his

employment contract did not give him a right to declare that he had used his car for business only in order to avoid a tax liability. On the question of implied terms, she argued that there was no breach of the implied term of trust and confidence. Separately, she argued that his resignation was not in response to any breach but for other reasons. Separately yet still she relied on the question of delay. In short, the claimant was aware on 15 June 2020 of a tax liability yet did not resign until 23 August 2021 over a year later. In answer to the breach of contract claim and the claimant's claim for £6,270.20 she argued that there was no legal or contractual basis on which the claimant could recover it from the respondent. Finally she said that even if his unfair dismissal claim succeeded, he failed to discharge his duty to mitigate loss by (failing to) search for alternative employment.

50. The claimant made a very short oral submission. He sought a fair and reasonable decision. He reaffirmed the stressful impact that the situation had had (and continues to have) on his health. He disputed that there had been any delay when there is factored in the time taken for his grievance and the period thereafter during which he was absent by reason of illness.

The Law

51. Regulation 4(1) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 provides *"(1) Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee*." Regulation 4(2)(a) provides that "*Without prejudice to paragraph (1), but subject to paragraph (6), and regulations 8 and 15(9), on the completion of a relevant transfer—(a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee*." Paragraph 6 is not relevant in this case.

52. Section 95(1)(c) of the Employment Rights Act 1996 provides that *"(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only 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*." The "*Part*" of the Act referred to is Part X which governs the right to claim unfair dismissal. Subsection (2) is not relevant.

53. In 1977 in the Court of Appeal in ***Western Excavating*** Lord Denning MR describing "*the contract test*" (which he regarded as the correct test in a claim of constructive dismissal) said, "*If the employer is guilty of conduct which is 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, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract*." In 2016 in ***Ishaq v Royal Mail Group Limited*** [2017] IRLR 208 in the EAT, his Honour Judge Shanks said, "*The law on constructive dismissal is well established, ……. The basic principles come from … Western Excavation (ECC) Ltd v Sharp …*".

2. Article 3 of the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 provides that "*Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if—(a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in Scotland would under the law for*

the time being in force have jurisdiction to hear and determine;(b) the claim is not one to which article 5 applies; and(c) the claim arises or is outstanding on the termination of the employee's employment."

Discussion and decision

5 54. In his ET1 form, the claimant said that he assumed that his terms and conditions would remain the same because he had been "*TUPED*". In the form (**page 9** of the bundle) he continued "*City did not make me aware there were changes, I never received a contact from them. In my previous employment with Integral and KB I had opted out of fuel benefit due to tax*
10 *burden/implication and assumed they would carry over.*" The claimant was correct in his first assumption; Regulation 4 of TUPE effected the transfer of his contract from KB to the respondent so that after the transfer it was "*as if originally made between*" the claimant and the respondent. The fact that he did not receive a contract from the respondent is neither here nor there.
15 Logically extended, the only change to his employment was to the identity of his employer, but I accept that it is a matter of good practice for a transferee to issue a new statement of terms following a TUPE.

55. It is central to the claimant's written case (and his evidence) that the respondent made a change which removed his "*opt out of fuel benefit*". And
20 it central to his case that that removal was a breach of his contract. The fundamental difficulty with this argument is that the opt out is derived from Integral's Private Fuel Reimbursement Policy, a policy which is, expressly, a non-contractual one. Integral itself had an express right to withdraw or vary that Policy (see **page 61** of the bundle, referenced above). Regulation 4(2) of
25 TUPE transferred to the respondent that same express right. It was open to the respondent after the transfer to withdraw or vary the Policy. The change on which the claimant relies (the removal of his opt out of fuel benefit) was a change which was open to Integral and, by virtue of TUPE, open to the respondent. It appears to me that the respondent thus could not be in breach
30 of contract, let alone be in "*significant breach going to the root of the contract of employment*" if what it did in removing the opt out was a change expressly permitted by the contract. Separately albeit not crucial, I agree with Ms Beattie

that the claimant did not resign soon enough after he was aware of the conduct on which he ultimately relied as being the breach of contract. He was aware of the circumstances in June 2020. Even allowing for the period in which the grievance was being considered, the claimant was aware on about 3 February 2021 that the respondent was not willing to address his concerns in a way that was satisfactory to him. Yet he did not resign until 23 August, a period of almost seven months. While I appreciate that for part of that time he was absent by reason of illness, neither the nature of his illness nor that whole period of time can explain the fact that he did not resign sooner. There was no evidence of any other explanation for the passage of that time. In my view the respondent was not in breach of contract. Even if it was, the claimant left it too long and lost his right to treat himself as discharged.

56. The claimant's claim of breach of contract appeared to be based on the same alleged breach, that being of his right to have opted out of fuel benefit. As I have found that there was no term of contract which created such a right, it follows that there could be no breach by the respondent. There being no breach of contract, it follows that the respondent cannot be liable in damages to the claimant. The breach of contract claim is unsuccessful for this reason.

57. The claims therefore do not succeed. They are dismissed.

Employment Judge: Russell Bradley
Date of Judgment: 16 May 2022
Entered in register: 16 May 2022
and copied to parties