



EMPLOYMENT TRIBUNALS

Claimant: Mr S Maurel

Respondent: Beesmart International Ltd

Heard via CVP On: 22, 23, 24, 25 February 2021

Before: Employment Judge Davidson

Representation

Claimant: Mr G Graham, Counsel

Respondent: Mr J Brotherton, Consultant

RESERVED JUDGMENT ON LIABILITY

The claimant's complaints of constructive wrongful dismissal and constructive unfair dismissal succeed.

The respondent's counterclaim for breach of contract fails and is hereby dismissed.

Remedy will be considered at a Remedy Hearing to be heard on 22 March 2021.

REASONS

Procedure

1. *CVP hearing*

- a. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under rule 46. The parties agreed to the hearing being conducted in this way.

- b. In accordance with Rule 46, the tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net. No members of the public attended.
- c. The parties were able to hear what the tribunal heard and see the witnesses as seen by the tribunal. From a technical perspective, there were some connectivity issues but the hearing was able to continue without significant difficulties.
- d. The participants were told that it was an offence to record the proceedings.
- e. Live evidence was heard from six witnesses. The witnesses, who were all in different locations, did not all have access to the relevant written materials but these could be seen, where necessary, by using the 'share screen' function. I was satisfied that none of the witnesses was being coached or assisted by any unseen third party while giving their evidence.

2. Evidence

- a. The tribunal heard from the claimant, on his own behalf and from Mr Cothias (CEO), Chrystelle Boyer (Sales Executive), Sebastian Wilkinson (Sales Executive), Maud Lafourcade (Data Scientist/Production Manager) and Simon Street (formerly Head of Lead Generation) on behalf of the respondent. Only Mr Cothias had produced a witness statement in respect of these proceedings. The other witnesses relied on their statements which were produced as part of the grievance investigation.
- b. There were witness statements in the bundle from Sonia Dardano (HR and Admin Manager), Patrick Tordeur (Technical Director), Julien Saudax (Technical Director) and Pierre Galiegue (Deliverability Engineer) which had also been produced for the grievance investigation, primarily as character references for Mr Cothias. None of these individuals appeared before the tribunal and I gave little weight to these statements.
- c. There was a bundle of documents of approximately 400 pages. Further documentary evidence came to light during the hearing comprising text messages sent between the claimant and Mr Wilkinson and between the claimant and Chrystelle Boyer and these were before the tribunal. These messages were in French but the parties mutually agreed the English translation.
- d. At the start of the second day of the hearing, the respondent's representative asked if Ms Boyer and Ms Lafourcade could have the assistance of a French interpreter. He acknowledged the lateness of the request and the tribunal was unable to procure an interpreter at short notice. I am satisfied that Ms Boyer and Ms Lafourcade

understood the questions put to them and they were advised to raise any concerns regarding any interpretation issues.

Issues

3. The issues for the hearing were as follows:

Constructive wrongful dismissal

Liability

1. Did the respondent's conduct place the respondent in repudiatory breach of the claimant's contract of employment?
2. The claimant relies on the following alleged conduct in that regard:
 - a) On 16 August 2019, the respondent falsely informed the claimant that the new contract would be identical save for a change of employer (paragraph 5 of the Particulars of Claim).
 - b) The respondent promised, but failed at any point thereafter, to provide the claimant with two letters from Ms Dardano explaining the variation process (paragraph 5 of the Particulars of Claim).
 - c) The respondent's conduct at the meeting of 21 August 2019, as set out at paragraph 6 of the Particulars of Claim, including:
 1. falsely informing the claimant that there were no changes to his terms and condition; then referring the claimant to the change of job title but no other changes;
 2. requiring the claimant, and/or placing undue pressure on the claimant, to sign the variation letter immediately and/or within an unreasonable timeframe (paragraph 6); refusing the claimant's request for more time to consider the document;
 3. adopting an aggressive and/or threatening manner in the meeting;
 4. chasing the claimant out of the room, shouting at the claimant that he must sign the letter and return to his office immediately.
 - d) requiring the following changes to his contract:
 1. change of job title and/or job role from "Managing Director and Business Developer" to "Business Developer"; and/or changing the duties (paragraphs 9.1 and 9.2 of the Particulars of Claim)
 2. change of remuneration in respect of commission (paragraph 9.3 of the Particulars of Claim)
 3. change of employer (paragraph 5 of Particulars of Claim)
 - e) backdating the effect of the changes (paragraph 10)
 - f) failure to consult with the claimant on the changes, or to allow sufficient time for consideration
 - g) on 22 August 2019, the respondent terminated the claimant's access to his work emails and online drives (paragraph 11)
 - h) the respondent told staff not to have any contact with the claimant (paragraph 13.5)
 - i) the respondent failed to set up the grievance meeting within one week (paragraph 12)

- j) the respondent failed to appoint a sufficiently impartial grievance officer (paragraph 13.1)
- k) Insufficient investigation into the claimant's grievance (13.1)
- l) coercion of witnesses and/or not allowing staff to give full, honest and accurate accounts to the investigation (paragraphs 13.3 / 13.4)
- m) failure to seek to interview/gain evidence from previous employees or existing shareholders (paragraphs 13.4 / 13.11)
- n) Mr Cothias and Ms Dardano provided false accounts of the private meeting of 21 August 2019 (paragraph 13.6)
- o) by appointing Face2Face to determine the grievance appeal, failing to appoint a sufficiently impartial grievance appeal officer (paragraph 14)
- p) instigating an investigation into the claimant as a diversion and/or a means to cover up the respondent's actions and/or to pressurise the claimant to drop his complaints and to agree to comply with the respondent's demands
- q) inviting the claimant to attend a disciplinary investigation meeting
- r) failing to specify the details of alleged conduct (paragraph 14)
- s) by appointing Face2Face to run the same, failing to appoint a sufficiently impartial individual (paragraph 14)

3. The claimant relies on the following terms:

- a) The implied term of trust and confidence
- b) Clause 1.1 of the claimant's contract of employment dated 16 February 2017 ("the Contract")
- c) Clause 2.1 of the Contract
- d) Clause 3.1 of the Contract
- e) Clause 28.3 of the Contract
- f) Section 2 of Appendix 3 to the Contract

Remedy

- 4. What damages should be awarded? The loss pursued by the claimant is the difference between the sick pay he received and what he should have received by way of notice pay (and benefits).
- 5. The claimant also pursues an ACAS uplift based on the respondent's failure to comply with the ACAS Code on Grievances.

Constructive unfair dismissal

Liability

- 6. Did the respondent's conduct place the respondent in repudiatory breach of the claimant's contract of employment? The claimant relies on the same alleged conduct and terms referred to above.
- 7. Did the claimant resign in response to the breach?

Remedy

- 8. What basic award should be made for unfair dismissal? Matters to consider include:

- a) Should a reduction be made under s122 on the basis of conduct? The respondent seeks to rely on “the Claimant unreasonably cut short the meeting and negotiation on the 28 August 2018 by unreasonably leaving the meeting”.
 - b) The claimant pursues an ACAS uplift based on the respondent’s failure to comply with the ACAS Code on Grievances.
9. What compensatory award should be made for unfair dismissal? Matters to consider include:
- a) Should a reduction be made for contributory fault? The respondent seeks to rely on “the Claimant unreasonably cut short the meeting and negotiation on the 28 August 2018 by unreasonably leaving the meeting”.
 - b) Should a reduction be made on Polkey grounds? The respondent relies on the matter set out at paragraph 7.24 of the Amended Response, namely “If the tribunal was to find a procedural flaw in the process ie negotiation in respect of an anticipatory breach of contract which is denied, then subject to how it is framed the respondent reserves the right to rely on a Polkey Reduction”.
 - c) The claimant pursues an ACAS uplift based on the respondent’s failure to comply with the ACAS Code on Grievances.

Respondent’s counterclaim for breach of contract

10. Did the claimant act in breach of his contract of employment? The respondent relies on the following alleged conduct: the claimant undertook work for “StylePilot”, whilst employed by the respondent, without authorisation from the respondent and without the respondent’s knowledge.
11. If so, did the respondent thereafter affirm the contract and/or waive the breach?
12. If the claim is upheld, what (if any) damages should be awarded for the breach of contract?
13. Matters for consideration include:
- a) Do any specific losses in fact arise from the alleged breach?
 - b) Did the respondent comply with the duty to take reasonable steps to mitigate any alleged losses?

Facts

4. The tribunal found the following facts on the balance of probabilities:
- 4.1. The respondent is a premium marketing agency working in a number of countries. It worked very closely with another company, Mail Expertise LLP (MAEX), both companies being under the effective control of Jean-Claude Cothias.
 - 4.2. Mr Cothias’s wife, Sonia Dardano also worked in the business as his PA, with responsibility for HR and administrative matters. Mr Cothias has a business partner, Nicolas Toulliou whose life partner, Maud

Lafourcade is also involved in the business.

- 4.3. Many of the individuals working in these businesses (including the claimant) are French speakers and conversations generally took place in French if no English speakers were present. All formal documentation is in English.
- 4.4. Prior to 2016, the respondent was called D Media Solution Ltd and was owned by Thomas Thiollier, until it was acquired MAEX, who changed the name to Beesmart Ltd in 2016. Mr Thiollier remained as nominee shareholder and director and he was also the Managing Director.
- 4.5. In January 2017, Mr Thiollier resigned with immediate effect as he was leaving the country for personal reasons. The respondent wanted to replace him quickly and Mr Thiollier introduced Mr Cothias to the claimant. There was an interview and the claimant was offered the position.
- 4.6. He was offered the role of "Sales Executive" on a salary of £30,000. The claimant negotiated a higher starting salary of £40,000 and wanted to use the expression "Business Developer" rather than "Sales Executive". He became the nominee shareholder and director of the respondent. He asked for the term 'director' to be included in his job title, so Mr Cothias included the title Managing Director in his contract so that his job title was "Managing Director/Business Developer".
- 4.7. There was a delay in providing the claimant with a contract of employment and the first draft given to him to sign did not include the commission arrangements. The claimant pointed this out and a new version was given to him which he signed.
- 4.8. The contract included a provision regarding Variation as follows:

28. Variation

28.1 The Employer reserves the right to make any reasonable changes to terms and conditions of employment set out in this document from time to time.

28.2 You will be notified of minor changes of detail by way of a general notice to all employees affected by the change and any such changes take effect from the date of the notice.

28.3 You will be given not less than one month's notice of any significant changes which may be given by way of an individual notice or general notice to all employees. Such changes will be deemed to be accepted unless you notify the Employer of any objection in writing before the expiry of the notice period.

- 4.9. Ms Dardano drafted a job description to go with the contract. This included a number of tasks which related to the role of Managing Director rather than Business Developer. Mr Cothias, in his evidence,

says that the claimant never did these tasks and they were only included to placate the claimant. I find Mr Cothias' evidence on this point to be inconsistent. If, as he says, there was no intention for the claimant to perform the role of Managing Director and it was a courtesy title only, then those tasks would not have been included in the job description. There is no evidence that the claimant had any input into the job description, which was drafted by Ms Dardano. It was intended that the claimant would replace Mr Thiollier, who had been nominee director, nominee shareholder and Managing Director. The claimant became nominee director, nominee shareholder and it is not surprising, therefore, that he also became Managing Director.

- 4.10. There is a conflict of evidence regarding the duties that the claimant undertook. It is accepted that his main role was in Sales and he was successful in that role. The claimant says he also worked on strategy and targets for the business but he accepts that Mr Cothias made most of the decisions. The claimant's email signature referred to him as 'Managing Director'. Mr Cothias says that the claimant's role was limited to sales and he had no input into finance, recruitment and dealings with the Board, all of which were part of Mr Cothias's role as CEO. I find that the claimant was not engaged in a Managing Director role for the most part, his skills and energies being focussed on the Sales aspect. However, I find that he had the job title of Managing Director, as distinct from simply being a nominee director, and this signified his importance to the business and he performed a number of duties consistent with the Managing Director role as set out in his job description.
- 4.11. Before he joined the respondent, the claimant had his own business, a men's lifestyle platform called StylePilot. With the knowledge and consent of the respondent, he continued to work with this platform including joint presentations with the respondent, which was able to benefit from the reach provided by StylePilot.
- 4.12. The claimant complains of a bullying culture in the business from early 2018 onwards. He relies on examples of Mr Cothias being aggressive towards inanimate objects and an excessive degree of monitoring by Mr Cothias. He does not allege any violent conduct on the part of Mr Cothias to himself or other employees. There are no contemporaneous documents to assist me but, having heard witness evidence, I find that the workplace was a pressured environment with high expectations and employees being put under a certain amount of stress to perform, as might be expected in a small business in this industry which was effectively being run by Mr Cothias alone. Some people thrive in such an atmosphere while others find it difficult. I find that there were tensions in the workplace and occasional bursts of temper but there is insufficient evidence for me to find a 'bullying culture'.
- 4.13. In late 2018, Mr Cothias decided to restructure the business. This involved the TUPE transfer of the claimant and the other employee of the respondent, Simon Street, to MAEX so that all the sales staff would be employed in the same entity. As the claimant was transferring from

the respondent, Mr Cothias told him that he would have to give up his nominee shareholding and nominee directorship, which he agreed to.

- 4.14. MAEX was advised by its employment advisers that any changes to the claimant's contract should be finalised before the TUPE transfer took place. He signed the relevant forms for being removed as nominee shareholder and nominee director.
- 4.15. There is a dispute regarding the issue of whether the claimant was told that the Managing Director role would be removed or just the nominee director role. I find that if Mr Cothias told the claimant that the Managing Director role would be removed, he was not sufficiently clear and the claimant did not understand that this would be the case. There was a rationale to removing him as a nominee director and a nominee shareholder in a company which he would no longer be employed by. The same does not apply to the Managing Director role as he could perform that role for MAEX. I also note that Mr Cothias's evidence was that the claimant had requested either 'director' or 'managing director' to be included in his job title at the start of his employment and all parties agreed that this was separate from the nominee directorship, and Mr Cothias had agreed to that request. It is likely, therefore, that the claimant would still want this status reflected in his job title so Mr Cothias would have been aware that the claimant was unlikely just to accept the removal of that title without query.
- 4.16. I accept that this is a small business and communications are carried out informally. However, there is no evidence that proper consultation took place in relation to the change to the claimant's job title and job description. Mr Cothias accepted that there is a difference between being a nominee director and a Managing Director and I find that any discussions regarding the nominee directorship cannot be relied on in relation to the Managing Director role. Mr Cothias's evidence was inconsistent on this issue as he stated that the claimant was not doing the role of Managing Director and therefore there was no change to his role but he also stated that he consulted with the claimant regarding the changes to his role after the TUPE transfer.
- 4.17. On 16 August, Mr Cothias and Ms Dardano held a meeting with the claimant and Simon Street regarding the TUPE transfer. There is a conflict of evidence regarding what happened at that meeting. The claimant states that he and Mr Street were told about the TUPE transfer and that nothing would change except the identity of the employer. The claimant was told that he would receive two letters regarding the changes to his contract. He did not receive these. Mr Cothias's account of the meeting refers to the claimant's previous agreement to the change in the job title which he thought was uncontentious since there would be no change to his work or his remuneration and commission plan. Mr Street's evidence was that the meeting was short and they were both told about the TUPE transfer. His witness statement (which was drafted by Mr Cothias) refers to the claimant having a change in his 'functions' which needed to be signed before the TUPE could take place but in oral evidence he was unable to confirm this as he could not

remember the details of the meeting which took place 18 months ago.

- 4.18. On 21 August 2019, the claimant was invited to a meeting with Mr Cothias and Ms Dardano and given a letter headed 'Variation to Contract' from Maud Lafourcade, Managing Director, but not signed by her. This was the first time the claimant saw that she was now the Managing Director of the respondent (although it appears from her evidence before the tribunal that she was not aware that she had been given this role). It is clear that she had nothing to do with drafting this letter and it had been drafted by the respondent's employment advisers on the instructions of Mr Cothias. Ms Lafourcade had become the nominee shareholder and director and, like Mr Thoillier and the claimant before her, was also given the title Managing Director. This letter set out that the claimant's new job title as "Business Developer" and it listed changes to the job description and set out the Commission arrangement including a new provision that commissions will only be payable while the claimant was in employment. This would result in a financial loss to the claimant as commissions are only paid once the customer has paid the invoice, which could be after the termination of employment date. The new terms were stated to be effective from 1 August 2019.
- 4.19. The claimant was told that there were no changes to the contract and he was asked to sign the letter to signify his acceptance. He asked if he could compare it with his existing terms, which were at home. Mr Cothias said that it was just a formality for him to sign. The claimant and Mr Cothias raised their voice, the claimant became upset and left Mr Cothias's office. Mr Cothias then offered to discuss the changes but by this time the claimant was too upset and he still wanted to compare the new contract with his existing terms. He felt pressured and was suspicious due to Mr Cothias insisting that the document was signed before he could check it. His colleagues who were in the office saw that he was visibly upset. He collected his belongings and left.
- 4.20. I accept the claimant's account that the variation letter was something he was not expecting and that it had not been discussed before. The consensus opinion of those present is that the claimant was shaking and was clearly upset by what had gone on in the room. There is no suggestion that this reaction was fake. I conclude that the claimant would not have reacted in that way if signing the documents was a formality and something he had been aware of in advance, even if he was not happy at the changes.
- 4.21. I find that Mr Cothias was not physically aggressive as claimed by the claimant. The claimant accepts that it was his perception and he was clearly distressed by being asked to sign a document he had not had a chance to review. He accepts that he was the first to raise his voice. I find that the claimant genuinely felt nervous of Mr Cothias but this was more to do with his previous experience of Mr Cothias's behaviour (showing aggression to inanimate objects) and his perception of his aggressive nature rather than any physical threat from Mr Cothias in this particular meeting.

- 4.22. It subsequently came to light that there had been a security breach connected with the claimant's computer. Mr Cothias asked Julien Saudax to investigate and, in the meantime, the staff were told that they must not have any contact with the claimant. Mr Saudax reported that a remote instruction to delete files had been triggered manually between 16.55 and 17.00 on 21 August 2019 from the claimant's computer, which is located in the office. The claimant showed the tribunal a print-out which established that he was en route to his home on a motorway at the relevant time, having left his office shortly before that, as evidenced by those present in the office at the time. Mr Cothias suggested that the data breach could have been done on his mobile phone but this is not part of Julien Saudax's report and he did not attend the tribunal to give evidence on this matter. The witness statement submitted by Mr Saudax does not address the data issue. None of the witnesses to the incident on 21 August suggest that the claimant did anything at his computer before leaving.
- 4.23. Later that day, the claimant exchanged text messages with Chrystelle Boyer who told him that she had an undated resignation letter in her bag in case she decided to leave and that she had three job interviews for the following day. She understood from the claimant that the respondent had tried to make changes to his contract, including commission. She was anxious that there would be changes to her commission as she is dependent on her commission earnings to support her family. She asked to meet Mr Cothias to clarify her position and he satisfied her that there were no changes to her arrangements.
- 4.24. The claimant also had text exchanges with Sebastian Wilkinson, who had not been in the office on 21 August. The claimant told Mr Wilkinson that the respondent had changed his contract and forced him to sign it on the spot, to which Mr Wilkinson replied that it seemed like their style. He went on to say that the claimant was right to leave the 'toxic environment to cool down'.
- 4.25. The claimant submitted a grievance the following day, 22 August 2019, complaining of proposed changes to his contract which he was pressured into signing and a history of bullying and verbal abuse in the office.
- 4.26. The respondent consulted their employment law advisers, Croners, who told the respondent that they had a division which dealt with such matters (Face2Face). A Face2Face consultant, Debbie Ramsden, was asked to conduct the grievance investigation on behalf of the respondent.
- 4.27. Her investigation consisted of a detailed interview with the claimant which took place at a neutral venue and which was recorded and transcribed. Ms Ramsden did not meet with Mr Cothias face to face and conducted the interview over the telephone. When asked in cross examination about this, Mr Cothias could not remember everything that he had discussed with Ms Ramsden although he confirmed she put the claimant's allegations to him. There is no record of her interview with

Mr Cothias so it is hard to know exactly what was put to him and how it was put to him.

- 4.28. Ms Ramsden was also supplied with a number of witness statements, unsolicited by her, from other members of staff. She did not interview any of these individuals and took the statements at face value and relied on them in reaching her conclusions. She did not ask the claimant if there was anyone that he thought she should interview as part of her investigation, nor did she invite him to submit any witness statements in support of his case.
- 4.29. The outcome of her investigation was not to uphold the grievance, other than in relation to the change to the commission arrangement, and she considered that the claimant's allegations were 'vexatious'. One of her recommendations was that employees who persistently raise unfounded or vexatious should be subject to disciplinary sanction. Her report was passed to Mr Cothias who adopted its findings and rejected the grievance. Despite acknowledging that the change to commission payments on termination of employment was a variation, Mr Cothias concludes: "*There will be no detriment to you as your take home salary, commission payments and other contractual benefits have not changed under the updated contract of employment. The only change is to your job title, as referenced above. There is no financial impact as a result.*" This grievance outcome letter was therefore self-contradictory.
- 4.30. The claimant appealed against the grievance outcome on 25 September 2019 on the grounds that the investigation was flawed, the investigator was not impartial, the witness evidence was coerced and unreliable and there had been a change to his commission structure to his detriment.
- 4.31. On 27 September 2019, the claimant was invited to an appeal hearing, to be conducted by another consultant from Face2Face on 1 October 2019. On the same day, the respondent invited the claimant to attend an investigatory meeting relating to his conduct, to take place on 1 October, also to be conducted by the Face2Face consultant. Mr Cothias confirmed it was the same consultant for both meetings. Although the letter did not specify the conduct in question, the respondent was investigating the deletion of emails from the claimant's computer and the claimant's engagement in StylePilot work during his working hours for the respondent.
- 4.32. The claimant declined to attend either of these hearings as he had no confidence in the respondent's processes and motives. He therefore submitted his resignation on 30 September 2019, giving two months' notice. His employment ended on 29 November 2019. He was on sick leave during this period and received statutory sick pay.
- 4.33. In the light of his resignation, the respondent did not continue with the disciplinary investigation.
- 4.34. The grievance appeal was held in the claimant's absence and the

appeal was not upheld.

Law

5. The relevant law is as follows:

5.1. An employee is regarded as dismissed by his employer where the employee terminates the contract of employment (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

5.2. In certain circumstances, an employer is permitted to make a counter-claim alleging breach of contract by the employee. The tribunal will consider whether the employee's actions amount to a breach of the employment contract.

Conclusions

Credibility

6. This case involves a number of direct conflicts of evidence and there is very little contemporaneous documentation to assist in resolving these conflicts. Therefore, the credibility of the witnesses is crucial and I make the following observations regarding credibility:

6.1. I found the claimant to be a credible witness. His evidence is supported by contemporaneous documentary evidence (his text messages and his grievance submitted very soon after the events took place) and his account has been consistent throughout all the documentation, his witness statement and his verbal evidence.

6.2. I found that, in relation to much of the contested evidence, the respondent's witnesses were unreliable. In particular, Mr Cothias's evidence contradicted itself when suggesting that the meeting on 21 August was a 'formality' and also suggesting that it was an opportunity for the claimant to discuss the issues. His evidence regarding the claimant's role was confused in that he said that the claimant had never had the Managing Director role, only the title so there would be no change to his job function yet he did remove a number of duties from the job description, which suggests that these were tasks that had been done but which were no longer going to be done. If he was not doing those tasks, the job description could have remained unchanged with those tasks remaining there but not being done by the claimant, as Mr Cothias suggests was the case before the TUPE transfer.

6.3. Mr Cothias also told the tribunal that all the statements given by the staff to the grievance investigator were unsolicited and in their own words. This was contradicted by Simon Street who confirmed he had been given a pre-written statement to check and sign, to which he added his own paragraph. Sebastian Wilkinson confirmed that Mr Cothias had asked him to provide a statement. It is clear that those individuals were told what issues to address as, in their statements, they refute the claimant's grievance allegations

even though they had not seen the grievance and they were not aware exactly what allegations had been made.

6.4. I found Ms Boyer's evidence to be confused in relation to the time she arranged job interviews and the circumstances of her undated resignation letter. Her evidence that she arranged job interviews in the morning was not supported by the text messages where she mentions these on the previous evening.

6.5. I did not accept Mr Wilkinson's interpretation of the wording in his text messages as not having its obvious meaning. I find that he meant that it was the respondent's style to require a signature quickly and that the environment could be described as toxic. I was not convinced by his attempt to provide a different explanation for these messages.

7. I determined the issues as follows:

Constructive dismissal

Liability

7.1. I find that the respondent's conduct amounted to a repudiatory breach of the implied duty of trust and confidence in the following ways

- a) On 16 August 2019, Mr Cothias falsely informed the claimant that the new contract would be identical save for a change of employer whereas the new contract included a new job title, new job description and a variation to the commission entitlement. Even if I were to accept the respondent's position that the claimant was aware of the changes to the job title and job description, it is admitted by the respondent that the commission entitlement was less favourable because it excluded commissions which fell to be paid after the termination of employment and this had not been brought to the claimant's attention. This was a material change and it was to the claimant's detriment. I do not accept that this change fell within the provisions of clause 28 of the contract (Variation) as it was not 'minor'. This was exacerbated by the respondent pressurising the claimant to sign without giving him a chance to check whether there were any changes. Further, the respondent attempted to backdate the effect of the changes to 1 August 2019 without explanation.
- b) In relation to the grievance investigation, Ms Ramsden did not attend to give evidence to the tribunal and Mr Cothias took full responsibility for the content of the grievance report. I find that the grievance investigation was flawed in a number of ways.
 - i. The report is flawed in that there is no record of the interview with Mr Cothias. This is in contrast to a detailed transcript of the interview with the claimant. It is therefore difficult to tell what allegations were put to Mr Cothias in order to determine whether the allegations were properly investigated.

- ii. Too much reliance was put on the staff witness statements by Ms Ramsden. She did not speak to any of these individuals herself, nor did she make any enquiry of the circumstances in which these statements were given. The very fact of that number of statements addressing matters the witness cannot have known about should have raised a query in her mind as to the reliability of this evidence.
 - iii. Ms Ramsden did not carry out any of her own investigations with other staff, such as Emily (another employee of the respondent who left after a short time with the respondent), from whom she might have found an alternative description of the workplace. The claimant signposted her to previous employees having resigned but she did not follow up despite acknowledging that his evidence gave a 'bit of background'.
 - iv. Ms Ramsden appears to have accepted the evidence of Mr Cothias in all cases where it conflicted with that of the claimant without explaining why.
 - v. While I do not find that it is necessarily the case that an external investigator with a link to the respondent's employment advisors is an unreasonable choice of investigator, it is important that the investigator shows themselves to be impartial and neutral if the grievance investigation is to be robust. In the case of Ms Ramsden, in addition to the defects in her investigation set out above, she went further than her brief by describing the claimant's allegations not only as unfounded but as vexatious, going on to suggest that employees who raise vexatious grievances should be subject to discipline.
- c) I accept that a detailed analysis of many such procedures will throw up flaws. However, in this case I find the flaws to be substantial.
- d) I also note that the final decision maker was Mr Cothias even though grievance was against him. He did not consider whether anybody else in the business, for example his business partner, could have been the decision maker.
- e) I find that it was inappropriate to appoint the same person from Face2Face to conduct the grievance appeal and the disciplinary investigation. In the event, the grievance appeal took place in the absence of the claimant and the disciplinary investigation was not continued. I do not find that it was a breach of any implied term to invite the claimant to an investigation meeting without giving details of the allegations. However, given that the investigation was not continued, I find that the respondent cannot reach a reliable or fair conclusion regarding the claimant's culpability in relation to those allegations without having informed the claimant of the allegations and given him an opportunity to answer them.

f) I find that the claimant was entitled to decline to attend the grievance appeal since the appeal would be conducted by someone from Face2Face and the grievance outcome was sufficiently flawed for the claimant to lose confidence in the process and in that organisation.

7.2I also find that there was an anticipatory breach of the express terms in the claimant's contract of employment relating to job title and commission entitlement. The respondent demonstrated an intention to change the contract terms unilaterally in future.

7.3I find that the claimant resigned in response to the breaches.

Respondent's counterclaim for breach of contract

7.4I find that the claimant did not breach his contract of employment by virtue of his activities with StylePilot. It was apparent from the witness evidence and the 'media packs' that the claimant's connection with StylePilot was known and accepted and had a benefit to the respondent. This is supported by the evidence of Simon Street. The evidence that the claimant did these activities during working time amounts to a small number of emails sent a few minutes into the working day. Those that were sent from his StylePilot email were copied in to his Beesmart.io email address, and vice versa.

7.5I do not find sufficient evidence of any breach of contract by the claimant and the respondent's counterclaim fails.

8 Remedy

A remedy hearing will take place on 22 March to consider the issue of remedy.

Employment Judge Davidson

Dated 2 March 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

02/03/21

FOR EMPLOYMENT TRIBUNALS