EMPLOYMENT TRIBUNALS

Claimants: **(1) Simon Marriott**
(2) Bonnie Marriott

Respondent: **Betfan Ltd**

Heard at: **Nottingham**

On: **11, 12 & 13 November and 16 & 17 December 2019**

Before: **Employment Judge Jeram (sitting alone)**

Representatives

Claimants: **Ms Millen (Counsel) on 11, 12 & 13 November 2019;**
In person on 16 & 17 December 2019
Respondent: **Mr Maratos (consultant)**

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is as follows:

1. The First Claimant was unfairly dismissed by the Respondent on 29 December 2018. The complaint of unfair dismissal is therefore upheld.

2. Had a fair procedure been followed, the First Claimant would have been fairly dismissed within 4 weeks after 29 December 2018.

3. It would be just and equitable to reduce any relevant award to be made to the First Claimant as a result of his contributory fault by 100%.

4. The First Claimant's claim that he was wrongfully dismissed in breach of contract is dismissed on withdrawal.

5. The Second Claimant was unfairly dismissed by the Respondent on 29 December 2018. The complaint of unfair dismissal is therefore upheld.

6. Had a fair procedure been followed, the Second Claimant would have been fairly dismissed within 6 weeks after 29 December 2018.

7. It would be not be just and equitable to reduce any relevant award to be made to the Second Claimant as a result of her contributory fault.

8. The Second Claimant's claim that she was wrongfully dismissed in breach of contract is dismissed on withdrawal.

REASONS

Introduction and Issues

1. By a claim forms presented on 5 and 6 February 2019, the First and Claimants respectively brought claims of unfair and wrongful dismissal against the Respondent for unfair dismissal.

2. By order of REJ Swann, the claims were consolidated and a response filed on 31 May 2019 in which the Respondent denied all liability to the Claimants.

3. The Claimants, having withdrawn the wrongful dismissal claims, the issues that fall to be considered are:

    a. Whether the facts known to, or beliefs held by, the employer which constituted the reason, or if more than one the principal reason, for dismissal? Were they, as the Respondent alleges, related to the Claimants'' conduct?

    b. Having regard to that reason, did the employer act reasonably in all the circumstances of the case:
        i. If it held a genuine belief, was it based on having reasonable grounds after a reasonable investigation?
        ii. In following a fair procedure
        iii. In treating that reason as sufficient to warrant dismissal?

    c. If it acted fairly substantively but not procedurally, what are the chances that it would still have dismissed the employee if a fair procedure had been followed?

    d. If the dismissal was unfair, has the employee caused or contributed to the dismissal by culpable and blameworthy conduct?

Preliminary matters

4. The matter was listed for a three-day hearing, but subsequently extended by a further two days.

5. The Claimants were represented by Counsel Ms Millen on 11, 12 and 13 November 2019, but the Claimants acted in person at the reconvened hearing on 16 and 17 December 2019.

6. So as to minimise any disadvantage to the Claimants, perceived or otherwise, arising from this, the Claimants, when giving their evidence, were not restricted to the case put on their behalf during cross-examination of the Respondent's witnesses. Furthermore, as set out below, two of the Respondent's witnesses were recalled so as to allow the First Claimant to put his case to them on matters he believed had been omitted in their earlier cross-examination.

7. On day 4, after a reminder to the First Claimant that he was not compelled to give evidence that may incriminate himself, he resiled from the suggestion that he, or his suggestion that the Respondent, was carrying on a practice known as 'back proofing'.

Documents

8. I had regard to a bundle comprising of 472 pages. Out the outset of the hearing, pages 216a-m were submitted by the Respondent by agreement, as clearer copies of the data at pages 216-8.

9. On day 2 of the hearing, the First Claimant sought to add 5 sets of documents to the bundle; after discussion between the parties' representatives and some modification of one of the documents, they too were inserted into the bundle at pages 473-485.

10. I have made reference in the course of my deliberations to those documents to which I was referred in witness statements or during the course of the hearing. Any reference in this Judgment to a page number is a reference to the relevant page within the agreed bundle.

Witnesses

11. In the course of the hearing I heard from the following witnesses:-

- On day 1 Stephen Gwaltor (SG), co-Director of the Respondent gave evidence.

- On day 2 the evidence of SG was completed. Simon Toefield (ST), co-director of the Respondent gave and completed his evidence.

- On day 3 evidence was taken from John McNiven (JMcN), IT manager for the Respondent. The witness statement of Martin Jones (MJ), Administration Manager for the Respondent was read. The Claimants' case commenced with evidence from Nicholas Field (NF) and the statement of Darren Moore (DM) was read.

- On day 4 evidence was heard from Simon Marriott, the First Claimant.

- On day 5 the First Claimant's evidence was completed and evidence was given by Bonnie Marriott, the Second Claimant. Both ST and JMcN were recalled to allow the First Claimant to formally put matters to them that he considered had been omitted.

Credibility of the Witnesses

12. The First Claimant gave evidence with palpable frustration towards SG but took noticeably less issue with either SG or JMcN or their evidence. Even factoring in such matters as difficulties communicating his case through his Counsel about the sometimes technical nature of the subject matter, it was difficult to reconcile how, if his answer to the allegations was as simple as he suggested (he had not just assumed he had authority to carry out the activities he was being accused of, but he had had conversations with, and secured the express approval of both directors in respect of all but one allegation), how his case was so frequently and easily lost. Similarly, his claim that his knowledge and expertise of the betting industry was superior to that of SG was lost to his apparent determination to undermine SG personally. In assessing his credibility, I had regard to the fact that he held himself out to as a Chief Executive of a business that he himself recently valued as a multimillion pound business. I found his evidence difficult to follow; on occasion it verged on being shambolic. Where the evidence of the First Claimant and any of the live witnesses for the Respondents diverged, I preferred that of the Respondent's witnesses.

13. By contrast, the Second Claimant gave her evidence in a reasonably straightforward and direct fashion.

14. Like the First Claimant, SG made for witness with a forceful personality. Whilst there were occasions when I considered that he slightly overstated his knowledge of, or conviction in respect of, the details of the acts of misconduct alleged of the First Claimant, on each of those occasions, his evidence was supported by that of ST and JMcN. Unlike that of the First Claimant, the evidence given by SG had the advantage of being coherent, logical and consistent.

15. ST is clearly a much more reserved personality; he gave his evidence in an unassuming manner and was all the more compelling for it.

16. I considered JMcN to be an impressive witness; I accepted his evidence without qualification. He gave his evidence in a forthright, unreserved fashion, qualifying his evidence and making concessions where appropriate and without hesitation.

17. I attached very little weight to the written evidence of MJ (for the Respondent) or DM (for the Claimant), which evidence was not tested by way of cross-examination and, in the case of DM, had limited relevance to the issues in the case. I attached limited weight to the evidence of NF, whose statement contained only personal criticism of SG which was surprising given his claim that he was very familiar with the practices of the betting industry.

FINDINGS OF FACT

18. The Respondent is a private limited company, incorporated in 2010. Its founding members included Mr Stephen Gwaltor (SG), Mr Simon Toefield (ST), and the Claimants, as well as others. At the time of the events in issue, the directors of the company were SG and ST only, although they and the Claimants were shareholders.

19. It was an agreed fact that the Claimants were, from the outset, employees of the Respondent. Neither Claimant had a written contract of employment.

20. The Respondent is a tipster management company. It hosts tipsters who provide tips to members of the public in respect of various sporting events, in exchange for a subscription fee. At any given time, the Respondent could host hundreds of tipsters.

21. The Respondent operated entirely online, and directors and those who worked for the Respondent were located far and wide, from Surrey through to Wales and up to Glasgow, with the effect that they rarely, if ever, met in person.

22. At the relevant time, the Respondent consisted of the two directors, the two claimant employees and two contractors, JMcN and MJ.

23. SG's role included the carrying out a range of administrative tasks to set up a new tipster on the Respondent's system. Those tasks included the identification of the subscription fees for the tipster in question and designating whether the tips from the new service are to be uploaded automatically or manually. ST's role was to design websites for tipsters; JMcN was engaged as an IT Manager and his role was to ensure that the site was operative. The First Claimant was, in accordance with a title given to himself without objection from the directors, the Respondent's Chief Executive. His role was to promote the new service both before and after launch. The Second Claimant is the wife of the First Claimant and her role was to act as a personal assistant to the First Claimant.

24. The main meetings between the SG, ST and the First Claimant took place weekly on a Monday and were conducted via a Skype audio call. In those calls, such matters as the launching of new tipsters was discussed, as were more routine matters such as staffing and holidays. All exchanges that are relevant to the issues in this case took place with both directors present with the First Claimant, neither party suggesting otherwise. Other exchanges could take place between individuals during the week and could take place via Skype calls and Skype text chats; in either case, individuals were organised in groups, so that Skype exchanges could take place with all, or only some, members of the group present online. At all times individuals were capable of having private Skype calls or chats with other individuals.

25. Tipsters could include and did include, entirely permissibly, individuals employed by, or otherwise connected to, the Respondent, including the First Claimant and MJ. Both were acting as tipsters for the Respondent at the relevant time. Subscription fees received by the Respondent were divided between: the tipster subscribed to; any affiliate who was identified as promoting the service; the Respondent. Commission for sums in excess of £25 was paid every Monday. Wages and commission paid to either Claimant was sent to a bank account held in the Second Claimant's name.

Proofing and Back Proofing

26. Unsurprisingly, tips are required to be uploaded onto the Respondent's platform before the sporting event in question. Some organisations, such as the Racing Post, provide a data feed from tipsters that causes tips to be uploaded automatically prior to the event in question. In other circumstances, such as with other types of sporting events, tips are required to be uploaded manually. The only two people within the Respondent who had the technical capability of uploading tips were JMcN and MJ. There can be the very occasional instances when a tip is legitimately uploaded soon after the sporting event has taken place, although those circumstances were not in issue before me. In any event, however and whenever a tip is uploaded to the system, the system automatically date and time stamps the precise moment it was uploaded.

27. Tipster Planet is a platform created by the Respondent some 5 years ago. Since its implementation, all tipsters who wish to be hosted by the Respondent are required to be *'on Tipster Planet'* i.e. have the success rates of their tips scrutinised for three months. There can be several hundred tipsters *'on Tipster Planet'*. In short, its function was to verify tipsters hosted by the Respondent.

28. The success rate of a tipster is described as its 'proofing'. Proofing is accessible to the subscriber.

29. The greater the apparent success rate of a tipster, the more likely it is to attract fee paying subscribers.

30. The Respondent's unchallenged case was that the practice of uploading tips the event, so as to create a false, or falsely inflated, impression of the rate of success of a tipster as 'back proofing'.

31. Furthermore, the Respondent's case was, and NF (witness for the Claimants) accepted, that back proofing would have the effect of making tipsters appear more attractive to fee paying subscribers, thereby increasing the chances of personally gaining a share of a subscription fee that they might not otherwise have secured. I therefore find that that is either the actual or potential effect of back proofing.

Relationships

32. In or around November 2017, the First Claimant approached the directors with an offer that they buy out 'his' shareholding for £750k. It is likely, although it was never clarified, that that offer was in respect of both Claimants' shares, although the distinction is not relevant to the issues before me. The offer was declined; the Respondent considered the suggestion fanciful. Approximately a year later, the First Claimant suggested they buy his shares for £250k; that offer too was rejected.

33. The parties agree that there came a point in 2017 when the relationship between the First Claimant and the directors cooled, so that the weekly Skype call meetings became irregular. Each party attributes that faltering of communication to the other. The Claimant attributes the deterioration in communication to the Respondent for allegedly refusing to disclose to him the company bank accounts. SG simply describes the alleged withdrawal by the Claimant as 'sudden' and 'odd'. I find, as per the agreed evidence, that by 2017 the First Claimant wished to relinquish his shareholding in the business that he had helped set up, and to leave the business; in the First Claimant's own words, he was looking for other streams of income, he was 53 years old and he needed an 'end game'.

34. I further find that the irregularity in the Monday meetings came about because of a reluctance on the part of the First Claimant to engage with the directors, simply because it was not in the interests of the directors to disengage with the First Claimant, when, operationally, they were heavily reliant upon him.

35. The precise date when the dynamics changed, or which party had caused that change, is only relevant insofar as it is agreed that by the time of the events in issue in this case, the relationship was evidently significantly strained.

36. On 8 September 2018, in a private Skype text chat between the First Claimant and MJ, the First Claimant wrote (page 260):

> *C1: just a way we can <u>combine our best bets</u> <u>for max profits</u>*
> *MJ: sounds like a plan*
> *C1: but we both need the money and <u>fed up with doing it for everyone else</u> and we know we can get proofing together courtesy of value finder winking inside edge winning way etc*
> *C1: Just need the right angle and ideally something we can keep profitable*
> *C1: I will look though those results next few days see if any idea catches the eye*
> *MJ: great stuff, and I will get the proofing together <u>once decided which way we go</u>.*
>
> (emphasis applied)

Each Way Investor

37. In or around November 2018 the First Claimant was involved in tipster services with MJ, that had been set up by SG, had been verified on Tipster Planet and were hosted by the Respondent, such as Winking, Inside Edge, Winning Way.

38. In November 2018, SG's attention was drawn to an excessive amount of marketing in relation to a tipster service called 'Each Way Investor'. The promotional drive was of a magnitude that was twice what would be expected of a service. It was due to launch the very next day. SG did not recognise the service and he should have recognised the service if, as was the usual practice, he had set it up and discussed with the First Claimant plans to launch and market it. Neither had the service spent three months being verified on Tipster Planet. The individuals behind Each Way Investor were the First Claimant and MJ.

39. I accept that the First Claimant may have mentioned the service by name to the directors at some stage, amongst the tens or more services that would fall for discussion between them. I accept the Respondent's evidence that the significance of the names would not have struck a chord, because, as the First Claimant clearly felt, it was him, and not they, that was familiar with the details of each service.

40. SG charged JMcN with the task of looking into Each Way Investor; he asked JMcN to check 'in the back office' to see if there was anything unusual about the data.

41. In fact, JMcN was well aware of Each Way Investor, because the First Claimant had asked him to set up the service. I have no difficulty accepting JMcN's evidence that, whilst the First Claimant did not instruct him to keep his request a secret, it had not crossed his mind that there was anything untoward about the request: to his mind, SG, ST and the First Claimant had equal roles and held equal authority in the business. He did not question what he was being told to do by the First Claimant and nor would he have any reason to do so – the First Claimant was the Chief Executive. JMcN had not in fact met the First Claimant until the Tribunal hearing and had only ever met SG once before; his confusion when informed that the First Claimant was not a director during his evidence was obvious. It was against that background that JMcN mentioned nothing of his involvement in setting up the service, or indeed the setting up an 'early bird offer' at the First Claimant's request in order to promote Each Way Investor to SG; he was yet to *"connect the dots".*

42. For the avoidance of doubt, I find that whenever the First Claimant asked JMcN to carry out work in relation to the matters in issue in this judgment, he did so on the basis that JMcN would not question what he was being asked to do.

43. Although the data was not produced at Tribunal, I accept the unchallenged evidence of both SG and JMcN that the data in relation to Each Way Investor showed that the tips for each bet had been consistently entered after the sporting event had taken place; in fact, mostly some 3 months or so after the event in question.

44. Having obtained the information requested of JMcN, SG shared it with ST.

45. SG and ST arranged a Skype audio call with MJ on 21 November 2018. During that call, MJ said, variously: that it was his idea to set up the service; when challenged about the logistics of doing so without the knowledge of a member of senior management, he admitted to working with the First Claimant; that he was doing what he had required him to do.

46. SG and ST immediately thereafter called the First Claimant.

47. SG told the First Claimant that he was aware of Each Way Investor and that he had spoken to MJ about it. They told the First Claimant that MJ had admitted to back proofing the service, and furthermore had claimed that he had done so with the First Claimant's knowledge. SG told him it was unacceptable, and used the word 'fraud'. He told the First Respondent *'if this is what it is, backfitted, you can't be doing it'*. (Having heard evidence from both ST and the First Claimant, I find that both were using the phrases 'back proofing' and 'back fitting' interchangeably). I accept ST's evidence that the tone of the call was not accusatory, indeed the Claimant's own evidence was that the participants to the call left *"on very good terms".*

48. The Claimant became angry with SG and said accused him of being 'jealous' because he, the First Claimant, was earning more than them.

49. The First Claimant told the directors that this was the merging of two separate, live, services, that belonged to the First Claimant and MJ.

50. Neither SG nor ST told or suggested to the First Claimant that he should remove the data.

51. The call lasted 1 hour and 10 minutes and finished at 17.24.

52. At 17:31 the same day, the First Claimant had a Skype text chat with MJ, in which he said:

> *"MJ just had a call with guys and we are shelfing launch of EWI – if you can remove all proofing please from Each Way Investor and <u>just leave the proofing from when we started sending tips through Tipster Planet</u>. Got to <u>make sure everything on there is 100% cosha</u> and <u>perhaps not best idea to take it from a couple of services</u> so delay launch until we have proper history on there. May pay to actually change the name thinking about it as well cos that might suddenly look odd. Just call it SM Racing for now which can just be a project name on tipster planet."*
>
> (Emphasis applied)

53. That text chat took place in a chat group called 'Admin Only/MJ'. There are 4 members of the group, being the First Claimant, MJ, SG and ST. I reject the First Claimant's claim that the directors were active online in the group when the text exchange between the First Claimant and MJ took place and therefore, by implication, were present when he asked MJ to remove the data.

54. The proofing for Each Way Investor was taken down by MJ at the First Claimant's request.

Suspension

55. A letter suspending both Claimants was sent but not received; a second set of letters were sent on 9 December 2018 and received. No reason for the suspension was given in the letters, save to say that the decision had *"been taken based on recent discoveries that are now pending investigation".*

56. SG and ST carried out further investigations into the First Claimant's conduct.

The Formula

57. SG asked JMcN to carry out on all other services a similar exercise to that which he had carried out on Each Way Investor. Save for a few individual tips uploaded after the event, there was only one other service whose data bore a pattern similar to that of Each Way Investor - a service by the name of 'The Formula'. Unlike Each Way Investor, this service was already operative, having launched two months ago, on 21 September 2018. Since its launch, £55k worth of subscriptions had been received by the Respondent. Weekly invoices had been raised by, or on behalf of, the First Claimant and paid. For the period 24 September 2018 until 11 November 2018, the First Claimant had received £3,812.98 by way of commission.

58. Like Each Way Investor, The Formula had not been set up by SG. They were the only two services that, to the knowledge of the directors, had not been set up by SG.

59. Like Each Way Investor, the Formula had not spent 3 months being verified on Tipster Planet. As with Each Way Investor, its tips were date and time stamped as having been uploaded long after the event (some 5 months or so); this was the case in respect of each and every tip, until the launch date when the tips were uploaded in advance of the sporting event. Again, the tipsters were the First Claimant and MJ.

60. I accept ST's evidence (which generally accorded with that given by SG and JMcN) that Each Way Investor and The Formula appeared to have an unusually high number of double bets, something that subscribers would consider to be an attractive feature.

61. SG asked JMcN to back up a copy of the data in respect of The Formula.

<u>Back proofing of Each Way Investor and The Formula</u>

62. After lengthy and detailed evidence given by SG during the first day of the hearing, the First Claimant accepted only at the commencement of the second day, that both Each Way Investor and The Formula had been 'back proofed'.

Results Combining / ICE

63. The First Claimant's case was that he had agreed with MJ, that Each Way Investor and The Formula would be proofed by way of *'results combining'*, a practice that he claimed was legitimate. He described results combining as the practice of combining the success rates of two or more pre-existing *services* (each with their own proofing), to create a success rate that is attributed to an altogether new *service* (how, precisely, was not explained). He said the subscriber would then sign up to the new service with a proofing that may – or may not - reflect or coincide with any of the services from which it was drawn. This, he said, was entirely acceptable and regarded as legitimate within the betting industry. When pressed, he accepted that the lack of transparency in the proofing of the newly formed service was *"a grey area".*

64. Whatever the truth of the concept, from the date it was launched, the tips provided by The Formula were uploaded individually and 'live', that is to say, as one might expect, in advance of each sporting event. When asked why he and MJ had decided to change from a 'results combining' approach to a 'live uploading' approach once The Formula had launched, the First Claimant answered:

"I guess there was a conversation along the lines about how ethical we thought results combining was as part of the general conversation we had".

65. When pressed to describe the *'ethical dilemma'* that arose, the First Claimant eventually replied:

"on reflection, there is no ethical dilemma when results combining, if done correctly".

66. The First Claimant maintained that 'results combining' was not only an acceptable practice (as he described), but one applied currently by the Respondent in respect of a package of services it offers, named 'ICE'. ST was recalled to answer the point.

67. ST, in his supplementary evidence, described ICE as being a 'package deal' services that is, and always was, a deal explicitly offered to subscribers to allow them access to 4 discreet and individually proofed services, for a price that would allow the customer to save money when compared to the cost of otherwise subscribing to all 4 services individually.

68. Despite the obvious difference between what ST was describing and what the First Claimant had earlier advanced as 'results combining' the First Claimant claimed that that the package deal offered by ICE was what he had described in his evidence as 'results combining' and, by implication, what he understood MJ was doing in relation to Each Way Investor and The Formula.

Back proofing of Each Way Investor and The Formula

69. I reject the First Claimant's claim that he had instructed MJ to proof Each Way Investor by way of 'results combining'. I find that the First Claimant was knowingly involved in the back proofing of both services. My reasons are set out below.

70. The services were, in fact, back proofed, as the First Claimant accepts.

71. As the First Claimant accepts, he entered into a plan with MJ to launch Each Way Investor and The Formula. Whilst MJ had the technical ability to back proof tips, the service could not be launched or marketed without the First Claimant's involvement.

72. At the relevant time, both the First Claimant and MJ were active tipsters. They therefore had data in respect of historical sporting events which they could claim as 'their own'. Whilst there is no suggestion that those other services were themselves back proofed, page 260 evidences an intention to use tips *('best bets')* from those services to set up a new service; it does not suggest that whole services were to be combined. The use of individual tips is consistent with the back proofing that in fact occurred in relation to both Each Way Investor and The Formula.

73. Services are ordinarily always set up by SG. In respect of these services, the First Claimant asked JMcN to set up them up. JMcN did so, in ignorance of the fact that the directors were unaware of the request. The First Claimant gave no reason why he departed from the usual rule that SG sets up new services. He did not tell the directors that he had asked JMcN to set up Each Way Investor. I find that requested JMcN to set up the service because he did not have the capability to do so himself, and knowing that JMcN would not, as his junior, question his request. I find that he did not tell the directors that he had asked JMcN to set up the services because he wanted to avoid, or at least minimise the risk, their existence coming to the attention of directors. Insofar as casual mention may have been made of either service, that was not in any earnest attempt to furnish them with the detail, or the truth, of the matters.

74. Both services were to be launched in quick succession, and at a time when on the First Claimant's own account, he was becoming disillusioned by the work he was doing in order to make a profit *'for the directors'*. Both services involved the same two people.

75. Page 260 evinces an intention on the part of MJ he would move forward with an agreed plan *("once decided which way we go")*; there is nothing in the exchange which, on the face of it, suggests that MJ was to depart from that agreed plan.

76. The suggestion that MJ went 'went rogue' in relation to the only two services that SG has not set up, that the directors had no knowledge of, and twice, at

that, without the First Claimant's knowledge or involvement is inherently unlikely.

77. When he was called by the directors, the First Claimant did not claim to be shocked or seek clarification about what he was told. The First Claimant was told that MJ had not only admitted to back proofing Each Way Investor, but had implicated him in the process. Given that this was the first time he was told that he was, if he is to be believed, unknowingly and wrongly implicated in an act of dishonesty the lack of any query, request for clarification or evidence, is wholly at odds with his claim of innocence. His expressed anger, however, is consistent with his efforts being thwarted.

78. The First Claimant's contact with MJ was even more confounding, if I were to accept his evidence. His first contact with MJ, minutes after the call from the directors, is captured in a text chat exchange (page 215). The First Claimant did not seek clarification, express shock or concern about, or even for that matter *repeat*, the information that SG had shared with him. Instead, he simply told MJ to remove the data for Each Way Investor. I cannot accept that was the response of someone who had been told only minutes before that he had been wrongly and unwittingly implicated in back proofing by a junior member of staff.

79. Notwithstanding the length of the telephone call, the First Claimant did not tell the directors about The Formula. Factoring in that it was the only other service that had been set up without discussion with SG, that it had recently launched, that he was now receiving income from it, and that it too was a service involving MJ, I find that he did not tell the directors about The Formula because he wished to suppress information about it, in full knowledge that that service, too, had been back proofed. The First Claimant's failure to seek any reassurance from MJ about The Formula in the exchange at page 215 confirms my finding.

80. A curious aspect of the First Claimant's witness statement is that MJ is anonymised. MJ is described in his statement as *"the other tipster*" and *"a colleague".* The First Claimant was able to give no good reason as to why he had anonymised MJ, in circumstances where he accepted that the directors had told him that it was MJ who implicated him. I consider that the First Claimant would not, on balance, have done that if the truth of it was that MJ had dishonestly implicated him.

81. I reject the Claimant's initial description of 'results combining', insofar as it is claimed to be a legitimate practice. If his explanation were correct, the success rate of the new service could very well be a complete fiction, reflecting none of the success rates of the underlying services. That not only lacks the transparency that a platform like Tipster Planet is set up to create; it would mislead the subscriber. That is the very 'ethical dilemma' that I find the First Claimant was referring to in his evidence. He knew whatever he and MJ had agreed to was not *"100% cosha".*

82. Furthermore, the First Claimant gave no proper explanation as to why, having gone to the trouble of setting up a combined service (which ones, how and

over what period remained unexplained), he and MJ decided to move to 'live updating' on the very same day that the service launched, if, as he claimed, results combining was a recognised and legitimate method of proofing a service. I find that the change in approach to be consistent with luring subscribers to the service with fictional proofing, before live updating on its launch.

83. The claim that what he, the First Claimant, had described to the Tribunal was in substance the same as the description provided by ST in relation to ICE was nothing short of bizarre. They are patently different things value and his claim of similarity is all the more unacceptable bearing in mind that he was, on a day to day basis, operationally responsible for ICE.

84. For all the reasons above, I find that the First Claimant was knowingly involved in the back proofing of Each Way Investor and The Formula. In the absence of any reason advanced to the contrary, I also find that he was involved in the back proofing of those services in order to gain financially or increase his chances of financial gain.

Customer Database

85. During the investigation into First Claimant's conduct, a concern arose as to the extent to which he had sought, and acquired, access to R's customer database, for his own personal use.

    On 1 December 2017, in a Skype text chat with SG and ST, the First Claimant requested permission to access and use an old account (the 'BetKudos' account) containing customer email addresses (or 'leads') for his own gain (by sending affiliate links, or creating 'click back' products) (page 299). The account held older leads, and were therefore less valuable in terms of marketing opportunities. The First Claimant told the directors that he thought the account contained approximately 15,000 addresses and he said that he would pay the costs associated with unfreezing the account. The directors agreed to the request. The First Claimant asked JMcN to upload emails that he had had 'cleaned' to the mailing programme, Get Response. JMcN, being aware of the discussion between the First Claimant and the directors thought nothing more of it and did as he was asked. In fact, he did the same on two further occasions, being 11 February and 8 May 2018. JMcN did not check the contents of the data he uploaded to the account on any of those three occasions. In fact, the first tranche of data comprised of in excess of 20,000 email addresses: in total, the three tranches of data comprised of 69,101 leads; the whole, or substantially the whole of the Respondent's leads.

86. It was not easy to follow the First Claimant's response to this allegation, although in summary his case was that he used the addresses for his own purposes with the director's express permission. He advanced the case that when he logged into the BetKudos account, it contained in excess of 30,000 addresses. That was twice the number he had estimated to SG and ST, although he accepted that he did not return to SG or ST to tell them as much.

87. In any event, if, as was suggested, he had had the data 'cleaned ' i.e. non-valid addresses removed (which ones, or all of them, was never clarified), the number of email addresses could only logically decrease, not increase.

88. When asked what the relevance of pages 482-3 were to the First Claimant's case that he had in fact secured oral permission to use emails the First Claimant via his Counsel was unable to explain. No particulars of when the oral permission had been given was put to the Respondent's witnesses, despite being sought by the Tribunal, and instructions visibly being taken on the point. In his own evidence at the reconvened hearing, the First Claimant stated that the oral permission was given *"within a week or two . . the same week [of the Skype chat], actually".* I found it difficult to understand why, if that was the case, the point could not have been articulated that simply by him or on his behalf, sooner.

89. The First Claimant stated, however, that he did *not* request JMcN to upload three tranches of data, as JMcN had claimed in his evidence. Because his evidence on the point had gone unchallenged, JMcN was recalled to respond; he maintained the accuracy of the contents of his statement and provided further detail to underscore the point.

90. I consider it inherently less likely that both directors would have either forgotten that they gave the First Claimant such all-encompassing permission, or alternatively that they were both being dishonest about having done so. I have considerable sympathy for the Respondent's case that the First Claimant's suggestion that it gave him open ended permission to use the whole – or substantially the whole – of the Respondent's database for his own personal use was *"farcical".*

91. A second feature of this part of the case was the First Claimant's insistence that there had been 'a gentlemen's agreement' that he could recover those email addresses that he brought with him to the company when it was incorporated, in the event that he left the company. He produced, at the outset of day 2 of the hearing, sample spreadsheets containing email addresses that he claimed *"belonged to [him]".* I accept SG's evidence that, on the face of those documents, the email addresses appear to have been acquired in 2012, i.e. after the incorporation of the Respondent and that 8 years later. I also accept his evidence that page 476 evidences an entirely separate Get Response mailing account.

92. I expressed concern that, quite aside from such considerations as to how to enforce such an agreement practically speaking, or whether there was any intention to create a legally binding agreement, even on his own case, the trigger event (him leaving the company) had not yet occurred. Nevertheless, the First Claimant's insistence on pursuing this line of argument in his own evidence at the reconvened hearing served to underscore my general impression that this was yet another distraction from what was likely to be the true position, i.e. that he had in fact accessed and used leads beyond those agreed to by the directors and he had done so out of a sense of entitlement – put another way, the point at which he considered himself obliged to the directors had long passed.

93. I find that the Respondent gave the First Claimant permission to use only one account, the Bet Kudos account, which it understood contained approximately 15,000 older, and therefore less valuable, customer leads. I find that the directors did not give him oral permission to access any further database. I find that the First Respondent required JMcN to upload three tranches of data, collectively amounting to 69,101 leads, so as to enable him to further his own financial interests.

94. I accept the Respondent's unchallenged evidence that their investigation revealed that emails had been sent, ostensibly from the Respondent, with affiliate links embedded in the emails, diverting leads to Tipster Champions, Wap Tipster and to the Second Claimant's bank account.

Tipster Champion

95. In March 2017, the Respondent purchase domain names for 'thetipsterchampions'. On its website is an area called 'Tipster Champions' which highlights the Respondent's best services.

96. During its investigation into the actions of the First Respondent, the Respondent came across an affiliate account with the Respondent called 'Tipster Champions'. JMcN was against asked to investigate although, again, he was familiar with its existence, having created its website at the First Claimant's request. The website gave the Respondent's address as its own address. The affiliate account registered with the Respondent was linked to an unnamed individual at a PO Box address. It bore the First Claimant's mobile phone number, as did Tipster Champion's Paypal account.

97. In agreed evidence, emails sent out by the First Claimant on behalf of the Respondent bore the appearance of being sent out on behalf of the Respondent. However, certain emails contained affiliate links that would generate commission which would be paid directly to Tipster Champions Ltd via its Paypal account.

98. Upon discovery of the matters above, the Respondent froze payments in respect of the affiliate link, pending verification. On 24 December 2016, an email was sent, ostensibly from Connor Hanlon, the First Claimant's stepson, but in actual fact written by the First Claimant, querying the non-receipt of monies due and asking why his was *"the ONLY affiliate being asked"* to verify his account. Details were nevertheless provided:. the name provided was that of Connor Hanlon; a mobile telephone number was given that was not that belonging to the First Claimant. In fact, no reference was made to the First Claimant's involvement at all in this email.

99. SG replied *"This means we now have two different names linked to this account. We know who the previous number belongs to and that is not you".* Only in his response, again ostensibly in Connor Hanlon's name, did the First Claimant email with some details of his own involvement, stating that SG was "*fully aware of the situation".*

100. In his statement, the First Claimant goes further and alleges that the directors were "*fully supportive of it as an idea and could clearly see the benefits it presented to Betfan in promoting its products .. . nothing about Tipster Champions . . .was ever hidden"*.

101. The First Claimant relied on page 303 to support his case. That is a text message, undated, which states *"I've created a couple of identities for my affiliate promotions so if you get emails or see them its me . . So got Simon – The Serious Punter and Connor – Tipster Champions"*

102. When asked why, if he had told the directors of the existence of Tipster Champions, the First Clamant corresponded with SG he did so in the guise of Connor, he said: *"this was after I was suspended, I wrote this with Connor, I had no idea what was going on. I thought it was better coming from Connor".* I find this to be illustrative of why the First Claimant's evidence was generally unreliable; the exchange commences as a pretence, with Connor Hanlon's details being given; once he was confronted with the fact that SG was aware of his involvement, the First Claimant claimed SG was 'fully aware' of a situation which, on closer inspection was a passing mention in a Skype chat.

103. Nevertheless, I do find that the First Claimant told the Respondent of the fact that Tipster Champions was an affiliate link of his own. I find that it was, as the First Claimant claims, an affiliate only, there being no information before me suggest it was anything else, much less that it was a tipster management company in competition with the Respondent.

104. For the avoidance of doubt, however, I reject the suggestion in the First Claimant's witness statement that there was any more engagement such that the directors were 'fully supportive of it as an idea' as not untypical hyperbole. I remind myself that this was taking place during a time when relationships were strained, the First Claimant was disengaging from the directors, and it was not in his interests to give more information than was strictly necessary; as the First Claimant himself was keen to point out, marketing emails were likely to come to the directors attention ('*if you get emails or see them it's me'*).

Wap Tipster

105. Wap Tipster is a tipster management company, like the Respondent. Also, like the Respondent, it hosts tipsters in the sports betting industry.

106. The First Claimant assisted Nial Harrison, an 18-year old at the time, and the son of the First Respondent's best friend, David Harrison to set up the company. Nial Harrison had no experience of the betting industry but, the First Claimant said, wished to work in the betting industry, and in tipster management in particular. He had demonstrated great interest in it, so the First Claimant taught him about the business, assisted him in setting up the business, and advised him how to go about running the business.

107. As both he and the Second Claimant said in evidence, he had a *"small interest"* in it.

108. All of this, the First Claimant said, was done on one condition, that every new lead was given a Betfan offer. This, he said, meant that Wap Tipsters was working in conjunction with, and not in opposition to, the Respondent.

109. The First Claimant accepts that he did not tell the directors what he was doing or what he had done. He claimed it was *"a marketing decision"* and did not fall to be discussed with the directors.

110. I find that the Claimant assisted Nial Harrison to set up a tipster management company that competed in the same industry as the Respondent. The suggestion that his decision to assist in the setting up of Wap Tipsters was a marketing decision about which he need not inform the directors, is a suggestion that is verging on the fantastic. On his own case, without his help, Nial Harrison could not set up or run a tipster service in the same, sporting, market.

111. The First Claimant's failure to share his actions with the directors cannot have been inadvertent. He consciously, I find, withheld the information because, as the Respondent suggests, he knew that his actions were not in its best interests, only his own best interests. The setting up of Wap Tipsters is entirely consistent with the First Claimant's own evidence that he was looking for other streams of income, and that at 53 years of age, he was looking for an end game.

112. Notwithstanding my findings above, I have considered, whether Wap Tipsters was, in the short term, a marketing *opportunity* that was 'working in conjunction with and not in opposition to' the Respondent, as the First Claimant claims. I do not find in favour of the First Claimant on this point, because of the evidence that was put before me, was evidence that affiliate links embedded in the Respondent's emails were linked so as to benefit Wap Tipster; the suggestion that the arrangement was reciprocated was based on nothing pure assertion, and I have already made observations about the general unreliability of the First Claimant's evidence. but also because the First Claimant was using the Respondent's database, impermissibly. I find that if Wap Tipsters was a marketing opportunity for the Respondent and if, with or without the First Claimant's small interest in it, posed no competitive threat, there was nothing to prevent him sharing that information with the directors. He did not do so because he sought to conceal its very existence from them.

The Actions of the Second Respondent

113. The Second Claimant was employed to work as a personal assistant to her husband, the First Claimant. She undertook her role by "writing down voice mails and spell checking his emails". This is, I find, the height of any tasks that she undertook: she did not have a job description to work to. I accept her evidence, there being no evidence to the contrary, that she was

unaware of her husband's activities generally. I accept that she was unaware of what invoices were being sent out in his name: whether monies paid by the Respondent entered her own account, or whether the First Claimant's was also an account holder, I accept she was unaware of what income he received, in fact she was unaware of whether he was underpaid, overpaid or paid at all because he looked after their finances. By extension, she did not know of her own income, or commission received in her name.

114. I accept her evidence that the First Claimant set up an affiliate account in her name and that whilst she may have been aware of its existence, his failure to inform the directors of it was something she was unaware of.

115. Notwithstanding the fact that she was employed by the Respondent, I accept the Second Claimant's evidence that her loyalty was unfailing to her husband and not to the company, she having had no contact with either director since the company's inception. Indeed, she perceived him to 'be Betfan'.

116. I reject her evidence that, upon her husband's dismissal, that the Respondent could have found her other work to do; there was no other role for her to fill and she did not advance the case that there was.

Dismissal

The First Claimant

117. The First Claimant was summarily dismissed in a letter dated 29 December 2018. The letter is lengthy and repetitive, but states the reasons as being, in summary:
    a. The launching of 'a fraudulent service' The Formula, in respect of which he is said to have benefitted to the sum of £5,000;
    b. An attempt to launch 'a second fraudulent service', being Each Way Investor;
    c. The setting up of Tipster Champions and Wap Tipsters in direct competition with the Respondent;
    d. The use of a confidential customer database containing over 66,000 addresses to advertise the First claimant's own businesses, Tipster Champion and Wap Tipsters without the consent of the Respondent;
    e. 'Coercion' of more junior staff of the Respondent to help design and launch the new companies.

The Second Claimant

118. The Second Claimant was also summarily dismissed on the same day by letter. The reasons given were:
    a. That she had failed to fulfill any duties despite being paid and employed by the Respondent;
    b. that she had not been administratively supportive so as to justify being employed by the Respondent;
    c. Affiliate links to the Second Claimant were found, that should have been directed to the Respondent.

119. No right of appeal was given to either Claimant in writing or verbally; neither Claimant attempted to appeal.

The Relevant Law

Unfair Dismissal

120. Section 94 Employment Rights Act 1996 ("ERA 1996") creates the right not to be unfairly dismissed.

121. Section 98 deals with the general provisions with regard to fairness and provides that one of the potentially fair reasons for dismissing an employee is conduct. The burden rests upon the employer to satisfy the Tribunal on that question if it is in dispute.

122. Assuming that the employer is able to do so, the all important test of reasonableness, which bears a neutral burden, is then set out at section 98(4) ERA 1996 and provides as follows:-

a. *"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)-*
    1. *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*
    2. *shall be determined in accordance with equity and the substantial merits of the case."*

123. At this stage a Tribunal must consider whether the employer held a genuine belief, based on reasonable grounds, having conducted as much investigation into the circumstances as was reasonable: British Home Stores Limited v Burchell[1980] ICR 303n, as subsequently qualified by Boys & Girls Welfare Society v McDonald[1997] ICR 693.

124. An Employment Tribunal hearing a case of this nature is not permitted to substitute its judgment for that of the employer. It judges both the employer's processes and decision making by the yardstick of the reasonable employer and can only say that the dismissal was unfair if either falls outside the range of responses open to the reasonable employer. Put another way, could it be said that no reasonable employer would have done as this employer did?

125. When assessing standards of fairness for unfair dismissal purposes it is relevant to have regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures ("the Code").

126. I have reminded myself of the provisions at s.119 and in particular s.122(1) of the 1996 Act which reads:

"Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly".

127. I have reminded myself of the decision in Polkey v A E Dayton Service Limited[1988] ICR 142, the guidance given by Elias J in Software 2000 Limited v Andrews[2007] ICR 825/EAT, and the guidance from Langstaff P in Hill v Governing Body of Great Tey Primary School[2013] IRLR 274 in respect of the Polkey assessment.

128. I have reminded myself of the provisions of section 123(1) which reads:

"....the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer".

129. Section 123(6) permits a reduction in a compensation on account of an employee's conduct, to the extent that it caused or contributed to the dismissal. Nelson-v-BBC (No2)[1980] ICR 110 held the conduct under s123(6) must be culpable and blameworthy and it must be just and equitable to make a reduction.

130. The more serious the allegation, the more cogent the evidence must be in order to be satisfied that the event occurred, on the balance of probability.

ANALYSIS AND CONCLUSIONS

The First Claimant - Unfair Dismissal

131. I accept that the Respondent has established that the facts or beliefs held by it causing it to dismiss the First Claimant was conduct.

132. Only two of the three limbs of the Burchell test were met; I accept that the Respondent held a genuine belief in the conduct of the First Claimant and that it did so on reasonable grounds. It failed, however, to carry out a reasonable investigation as was reasonable in the circumstances, but I find that was only insofar as it had failed to interview the Claimant to obtain his response to the allegations.

133. Furthermore, as Mr Maratos for the Respondent properly accepted, there was no, or no substantial, adherence to the ACAS Code of Practice. There was a wholesale failure on the part of the Respondent to inform the Claimant

of the problems it had identified, or permit him an opportunity to put their case, allow him to be accompanied or allow him the opportunity to appeal the dismissal.

134. I find the dismissal of the First Claimant to be unfair within the meaning of s.98(4) ERA 1996.

The First Claimant - Polkey

135. I consider what would have happened had a fair procedure taken place.

136. In relation to the First Claimant, I consider that there is ample evidence that this employer could have fairly dismissed him, had a fair procedure been carried out.

137. I note that it was not part of the First Claimant's case that the Respondent had failed to carry out any particular investigation. Therefore, when I consider what would have happened, had the Respondent addressed the procedural failings identified above, I have little doubt that the First Claimant would have essentially maintained the case he did before me, albeit with less time and opportunity to prepare his case, or indeed obtain legal advice and assistance, to present his case.

138. I therefore find that, on the balance of probability, a fair hearing, would have led to the same or substantially the same findings of dishonesty and that accordingly, dismissal was a sanction that fell comfortably within the band of reasonable responses open to an employer acting reasonably.

139. Taking into account the fact that external services would have had to have been secured, I find that the First Claimant was, on balance, likely to have been dismissed within 4 weeks of 29 December 2018.

The First Claimant - Contributory Fault

140. I find that the following acts to amount to acts of dishonesty, carried out to enable the First Claimant to gain financially:

a. The setting up of back proofed services (Each Way Investor and The Formula) so as to gain financially, or increase the chances of gaining financially;
b. The impermissible use of the Respondent's customer database (beyond that which was expressly agreed to) for personal gain;
c. The setting up of Wap Tipster in competition with the Respondent without the knowledge or consent of the directors and with a view to his own personal gain;
d. Using his seniority to direct a more junior member of staff, JMcN, to assist him by setting up of Each Way Investor; creating the website for Tipster Champions; uploading the customer database to the mailing software to enable him to utilise the Respondent's leads.

141. I find that each of the acts amount to conduct that is blameworthy and culpable within the definition provided for in Nelson. Each of the matters identified above caused, or contributed to the First Claimant's dismissal. I find the first three matters could, in fact, each have individually caused his dismissal.

142. I find that it would be just and equitable to reduce the compensatory and basic awards. I find that the First Respondent was wholly to blame for his own actions, and I therefore reduce his award by 100%.

The Second Claimant - Unfair Dismissal

143. I find that the Respondent has discharged the burden of proving that it dismissed the Second Claimant because of her conduct. It is a low hurdle to surpass, and I accept that the Respondent held a belief that she had not been administratively supporting the Respondent so as to justify her continued employment; she had had no contact with the Respondent at all in 8 years and it would have no reason to believe that she was carrying out anything other than the minimal tasks that she described in her evidence. For the avoidance of doubt, I note here that Mr Maratos made reference to the effect that for dismissal was, or may have been, for Some Other Substantial Reason, but I did not understand him to be going behind the issues that were defined at the outset of the hearing was whether the Claimants (that is, both of them) were dismissed for conduct; rather, I understood him to dealing with the Polkey issue, as to which see below.

144. I find that the Burchell test was not met; whilst the Respondent may have had a genuine belief, it was not based on reasonable grounds (there being no job description for the Second Claimant to work to); nor was there any investigation.

145. As Mr Maratos for the Respondent properly accepted, there was no, or no substantial, adherence to the ACAS Code of Practice. There was a wholesale failure on the part of the Respondent to inform the Second Claimant of the problems it had identified, or permit her an opportunity to put her case, allow her to be accompanied or allow her the opportunity to appeal the dismissal.

146. I find the dismissal of the Second Claimant to be unfair within the meaning of s.98(4) ERA 1996.

The Second Claimant - Polkey

147. In light of (a) the fact that the Second Claimant's role was assist the First Claimant, (b) my finding that the First Claimant would have been fairly dismissed within 4 weeks of 29 December 2018 and (c) there was no other vacancy for the Second Claimant to be employed in, I find that the Second

Claimant also would have been dismissed fairly and by reason of redundancy within 6 weeks of 29 December 2018, to allow for a period of consultation.

148. For the avoidance of doubt, I find that in any event, her continued employment in any capacity given the dishonest acts of the First Claimant and her unfailing loyalty to him over and above that of the Respondent would have made her unsuitable for any role, even if it did exist. In the sense that that was the Some Other Substantial Reason that Mr Maratos referred to in his submissions, I accept that argument.

The Second Claimant - Contributory Fault

149. It was the Respondent's responsibility to ensure that the Second Claimant had clearly a clearly defined role and clearly defined responsibilities, as well as a method by which to monitor and manager her compliance with them. They did not do so, for the whole of the period of her employment, and I therefore find that the Second Claimant to any extent caused or contributed to her own dismissal; I make no deduction.

Summary of Conclusions

150. In summary, I find:
    a. The First Claimant was unfairly dismissed, but that having regard to his acts of dishonesty, he would have been fairly dismissed in any event, even if a fair procedure been carried out, and that it is not just and equitable to make any award;
    b. The Second Claimant was unfairly dismissed, but that having regard to the lack of alternative employment, she would have been fairly dismissed within 6 weeks of 29 December 2018. She did not cause or contribute to her dismissal and it is not just and equitable to make any deduction.

_____

Employment Judge Jeram

Date: 17 March 2020