EMPLOYMENT TRIBUNALS

Claimant: Matthew Acton Davis

Respondent: Ebury Partners UK Limited

Heard by: CVP **On**: 10 September 2021

Before: Employment Judge Nicolle

Representation:

Claimant: in person but accompanied by his mother Lindsay Boswell QC.
Respondent: Mr P Skinner of counsel.

JUDGMENT

1. Following a hearing heard by CVP the Claimant's application for reconsideration of the Judgment dated 10 February 2021 (the Judgment) succeeds and the Judgement is revoked and will be re-promulgated as varied below.

REASONS

Procedural Background

1. Following an in person hearing between 9-11 December 2020 (the FMH) my reserved judgment was promulgated on 10 February 2021. The claims for constructive unfair and wrongful dismissal failed and were dismissed.

2. In an application dated 1 March 2021 the Claimant requested reconsideration of the Judgment (the Reconsideration Application). The Claimant set out the detailed grounds upon which his application was made.

3. The Respondent's solicitors replied in a letter dated 29 March 2021 setting out the reasons why the Judgment should not be reconsidered.

4. I decided that given the complexity of the issues in the Judgment and the 39 paragraphs in the Reconsideration Application it would be appropriate for there to be a further hearing at which the parties would be given the opportunity to articulate their respective arguments. The parties agreed with my proposal.

5. The Claimant submitted a 58-paragraph rebuttal to the Respondent's letter of 29 March 2021 on 4 September 2021 (the Claimant's Rebuttal).

The Hearing

6. 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.

7. 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 the hearing.

8. The parties were able to hear what the Tribunal heard.

9. The participants were told that it is an offence to record the proceedings.

10. From a technical perspective, there were no major difficulties.

11. I was provided with a bundle of relevant documents for the hearing comprising of 216 pages. However, I was also in possession of the bundle of documents from the from the FMH together with my notes.

The Law

12. I consider it appropriate to set out the relevant principles for a reconsideration application before considering the detailed grounds upon which the Claimant requests reconsideration.

13. Rule 70 of the Employment Tribunals (Constitution & Rules and Procedure) Regulations 2013 (the Rules) provides that on the application of a party a tribunal may reconsider any judgment where it is necessary in the interest of justice to do so. On reconsideration the original decision may be confirmed, varied or revoked. If it is revoked it may be taken again.

14. Reconsiderations are thus best seen as limited exceptions to the general rule that employment tribunal decisions should not be reopened and relitigated. It is not a method by which a disappointed party to proceedings can get a second bite of the cherry. In *Stevenson v Golden Wonder Ltd [1977] IRLR 474, EAT*, Lord McDonald said of the old review provisions that they were 'not intended to provide parties with the opportunity of a rehearing at which the same evidence can be rehearsed with different emphasis, or further evidence adduced which was available before.

15. Instead, a tribunal dealing with the question of reconsideration must seek to give effect to the overriding objective to deal with cases 'fairly and justly' - Rule 2.

16. This discretion must be exercised judicially.

17. I took account of the guidance from the relevant case law to include Flint v Eastern Electricity Board [1975] IRLR 277, that it was necessary to consider the interest of the

applicant for reconsideration, the party which was successful at the original hearing and the public interest in the finality of litigation.

18. In Council of the City of Newcastle Upon Tyne v Marsden [2010] ICR 743 Underhill J reviewed the case law and concluded that the "interest of justice" confirms a broad general discretion which should not be encrusted with too much case law, and that whilst the interests of finality in litigation remained important, this was not a conclusive argument.

19. Mr Skinner argued that the circumstances in which reconsideration, as opposed to an appeal, was appropriate our inherently limited. He referred to Trimble v Supertravel Limited [1982] IRLR 451 as authority for the use of reconsideration being inappropriate to correct a major error of law.

The Reconsideration Application

20. Mr Skinner in his submissions said that the Reconsideration Application contained seven grounds to which the Claimant added a further during his oral submissions. In summary the application is predicated on the Judgment being based on an erroneous interpretation of the relevant contractual provisions governing entitlement to commission and it being based on a case other than that pleaded by the Respondent.

21. With a view to keeping this judgment to a reasonable length it needs to be read in conjunction with the Judgment, the Reconsideration Application, the Respondent's letter of 29 March 2021 and the Claimant's Rebuttal.

22. I consider the most appropriate way of setting out my decision in relation to the Reconsideration Application is to deal with the various matters separately but setting out relevant passages from the Judgment and where necessary witness statements and documents from the FMH.

23. At the commencement of his submissions the Claimant said that contrary to assurances provided by Mr Lobato during the FMH (and is recorded at paragraph 109 of the Judgement) he had not been treated as a good leaver and nor had he received payment of Canadian $36,502.32 commission which the Respondent had acknowledged as owing. I emphasised that these were not matters which were relevant to my consideration on the Reconsideration Application.

Addressing the issues as they appear in the Reconsideration Application

Pleaded case

(Paragraphs 9-17).

24. At paragraph 9 the Claimant asserts that the Tribunal at the FMH had indicated that it was necessary to consider very carefully whether a specific case was pleaded. I should clarify that the indication I provided at the start of the FMH involved consideration of what the issues were before the Tribunal. As a matter of fact, there was no agreed list of issues. However, the Claimant had prepared a document entitled "Claimant's List of Issues" and the Respondent had prepared a document which included a list of issues.

25. I do not accept the Claimant's assertion that my initial remarks involved an approach pursuant to which there would be a rigid adherence to precisely what was in the respective pleadings. My comments were more generic in terms of establishing what the issues were rather than at a more granular level of asserting that a very prescriptive approach would be taken to the pleadings as they related to each potentially relevant point in dispute.

26. In relation to paragraph 10 it is necessary to consider the relevant extract from the Grounds of Resistance.

At paragraph 8: The Side Letter was expressed to be for a fixed period.

27. Mr Skinner refers to paragraph 4 of the Grounds of Resistance which is a standard denial stating, "save where it is expressly admitted or not admitted, each and every claim advanced by the Claimant is denied". He says that the onus was on the Claimant to plead his case and that the Claimant had failed to do so. Further, he says that whilst not advanced in the Grounds of Resistance the argument regarding the retention of residual discretion under the Claimant's contract of employment dated 26 October 2017 (the Contract) had been advanced both in cross examination and in closing submissions.

28. He refers to paragraph 12 in his submissions at the FMH which in which she stated that commission was discretionary, as set out at clause 1.12.1 of the Contract, and that the terms as to commission under clause 4(e) of the Side Letter dated 29 November 2017 (the Side Letter) is subject to and governed by the Contract.

29. I therefore consider that whilst the Respondent's defence of the claim undoubtedly advanced from what was contained in the Grounds of Resistance to the arguments put forward by Mr Skinner at the FMH that he was doing no more than relying on the contractual documents as they existed and the interpretation which the Tribunal should place on them. I do not accept that the failure by the Respondent to specifically refer to clause 1.12.1 of the Contract and clause 4(e) of the Side Letter in the Grounds of Resistance deprived it of the opportunity to seek to rely on the operative contractual provisions.

30. I do not accept the Claimant's contention that in construing the Side Letter and the Contract it is possible to confine the position as he asserts to clause 1.10.1 of the Contract (salary) and not consider the position in relation to clause 1.12 of the Contract (commission). The Claimant's arguments in respect of repudiatory breach and constructive dismissal concerned commission and not basic salary and therefore I consider it necessary to interpret what contractual entitlement existed for ongoing payments of commission and the extent to which the Respondent had retained a contractual ability to vary such entitlements.

31. In relation to paragraph 16(a) I do not accept the Claimant's assertion that the Respondent's position as set out in paragraph 19 of the Grounds of Resistance is necessarily inconsistent with it having retained a residual discretion to make amendments to his entitlement to commission payments.

32. I consider it relevant to consider the totality of what was discussed between the Claimant and Mr Lobato at the meeting on 10 May 2019. This did not solely relate to

entitlement to commission payment but rather considered the overall terms of the Claimant's remuneration to include his receiving an increased basic salary, a discretionary bonus based on the Canadian business and eligibility for being granted equity.

33. In relation to paragraph 17 whilst it is acknowledged that an issue before the Tribunal involved whether the Claimant agreed to the changes at the meeting on 10 May 2019 that does not represent the totality of the matter. I do not consider it inconsistent to reach a finding on the one hand that the Claimant did not agree to unilateral changes but to then find that the changes did not give rise to a breach of an express contractual term given the interpretation reached in relation to the overall effect of the operative contractual provisions.

<u>The proper interpretation of the terms of the Contract as specifically amended by the Side Letter</u>

34. I consider that paragraphs 18-20 have already been addressed above and therefore I will not repeat.

35. In relation to paragraphs 21-24 I have reconsidered the totality of the operative contractual provisions and remain of the view as to the interpretation I reached in the Judgement. I have placed limited weight as to exactly what the Respondent put to the Claimant in cross examination but rather consider that the question of contractual interpretation represents an objective matter for the Tribunal to interpret.

36. In relation to paragraph 25 the Claimant may well be correct that he did not request that clause 4(e) of the Side Letter be inserted. Nevertheless, it is material that there was a significant process of negotiation as to its terms between the Claimant and the Respondent between 3 November 2017 and 29 November 2017, during which various amendments were made, prior to the Side Letter being finalised.

37. It is relevant that version one of the Side Letter did not make any reference to commission payments. Version two and the final version included: "You will continue to receive commissions due to you on UK accounts and receive 10% commissions on new business from Canada for the duration of this one-year secondment".

38. In paragraph 100 of the Judgment, I emphasised what I considered to be the significance of the express limitation of the entitlement to commissions on UK business to a one-year secondment as provided for by clause 4(e) of the Side Letter.

39. In relation to paragraph 28(b) I accept that there was no amendment to the provisions for commission at clause 1.12 of the Contract. Nevertheless, it is relevant that at clause 1.12.4 of the Contract the Respondent reserves the right to amend its commission policy from time to time. Therefore, the Side Letter, as read in conjunction with the Contract, provided the Respondent with a residual discretion to vary the terms of the commission policy. This residual discretion was not vitiated by the Side Letter.

40. At paragraph 31(d) it is acknowledged that the Respondent did not make a generic variation to its commission policy in relation to its UK Sales Team. However, I do not consider that this precluded the Respondent's ability to make a variation specific to the circumstances of the Claimant given that the first 12 months of the Side Letter had

expired, and the Respondent was seeking to vary his overall terms of remuneration to introduce terms, which it says would have been no less favourable and, in all probability, more advantageous, to reflect his position as a Country Manager.

41. More generally in relation to paragraph 31 if the Claimant's assertions as to correct contractual interpretation are correct the effect would be that save with his express agreement the Respondent would be precluded from discontinuing his entitlement to UK commission until such time as all payments relating to UK business had ceased which would involve a period of five or more years. I consider this to be inconsistent with the express provision in clause 4(e) of the Side Letter that his entitlement to receive commission due on UK accounts was for the duration of "this one-year secondment". It is relevant that clause 4(c) of the Side Letter provides that its terms shall apply for 12 months and will continue on a rolling basis until the parties agree otherwise.

42. At paragraph 32(c) I do not accept the Claimant's contractual construction that the limitation for the duration of the one-year secondment is confined to the 10% commissions on all new business from Canada but that the entitlement to receive commissions from UK accounts was intended to apply indefinitely. Had that been the parties' intention the clause would have been drafted differently and unambiguous language would have been used that for the duration of the secondment the Claimant would retain an absolute entitlement to UK commission payments. This would further have necessitated an amendment to those provisions in the Contract and SOP pursuant to which the Respondent retained a discretion to amend the Claimant's entitlement to commission.

43. In relation to paragraph 32 it is acknowledged that the Claimant's entitlement to UK commission payments continued after the expiry of a one-year period from the commencement of the Side Letter. I accept that this is a relevant consideration. I accept that there are grounds for the Claimant to assert that the Respondent had by its conduct accepted the rollover of the UK commission entitlements beyond the initial 12-month period of the secondment.

Claimant's Rebuttal Letter

44. To the extent not already covered above I address additional points as set out. In relation to paragraph 19 I do not accept the Claimant's argument (and repeated elsewhere) that the effect of clause 4(e) of the Side Letter was to include the ongoing entitlement to UK commission payments as part of the Claimant's basic salary which had been payable pursuant to clause 1.10.1 of the Contract. Whilst the drafting of the Side Letter could have been improved by the Respondent, I nevertheless do not consider that the reasonable interpretation of the relevant provisions in their entirety was that UK commission payments hence forward formed part of salary.

Further consideration of the relationship between the Side Letter and the Contract

45. It is relevant that the opening paragraph of the Side Letter provides that it is subject to and governed by the Contract which was attached as schedule one.

46. Whilst I found in the Judgement that the Respondent had the residual contractual entitlement to vary, or discontinue, entitlement to UK commission I will for completeness consider what the position would have been had I not made this finding. Mr Skinner's

argument is that the outcome would almost certainly have been the same given my findings in relation to there not having been a breach of the implied term of trust and confidence as set out in paragraph 103 of the Judgment.

47. Not every unilateral variation by an employer of an express contractual term necessarily constitutes a repudiatory breach of contract. For example, an employee may have a contractual entitlement to payment of commission calculated pursuant to a particular formula, but the employer may decide that for business/commercial reasons an alternative basis of incentivising employees is more appropriate and unilaterally discontinue the existing scheme but replace it with an alternative which is not inherently less advantageous from the employee's perspective. In these circumstances an employee may have a subjective perception that the terms are less favourable but whether the variation constituted a repudiatory breach would need to be considered from both a subjective and an objective perspective.

48. What I consider to be important is the effect of any actual or proposed change on the employee. If the Claimant's contention were to be accepted that he had an ongoing entitlement to UK commission until such time as all outstanding payments had ceased, and this could only be varied with his consent, it would still be necessary to consider what the effect would be of the Respondent unilaterally replacing entitlement to commission payments with an alternative.

49. Whilst I found in the Judgment that the Claimant did not agree to the revised terms, I nevertheless found at paragraph 103 that the Respondent's approach in seeking to consolidate terms and conditions for its Country Managers, to include the cessation of commission payments from 1 May 2019, did not give rise to a breach of the implied term of trust and confidence.

Interpretation of Clause 1.12 of the Contract

50. One issue I did not consider in the Judgment is whether the Respondent reserved entitlement to amend its commission policy would apply to introducing a new policy going forward or whether it would extend to varying, or potentially discontinuing, the entitlement of employees to what in effect was already earnt commission but where it had not yet been drawn down. There is clearly a potential distinction between these scenarios. Nevertheless, I consider that the crucial question is not whether there is a variation but whether any variation gives rise to materially less advantageous terms from the perspective of the employee, both from a retrospective and prospective basis.

51. The Claimant's argument would in effect mean that for an employee who is transferred to a different country they would automatically have an ongoing entitlement to UK based commission earnings for a period of five or more years. The argument being that this would apply regardless of what alternative terms the Respondent may propose in relation to the new place of business. I consider that it is reasonable for the Respondent in the circumstances to be able to argue that it has a discretionary ability to vary the terms of its incentive-based remuneration providing that when looked at objectively the revised terms are no less favourable than those which previously existed.

Variation of the Judgement

52. I have decided that it would be appropriate to reconsider certain elements of the Judgement with the effect that the outcome is varied.

Approach taken

53. In reaching this decision I have carefully considered the case law as to the circumstances in which reconsideration would be applicable. I have looked at the position in its totality to include reviewing the witness statements, relevant documents within the bundle for the FMH, the parties' submissions and my notes of the evidence.

54. I have sought to avoid an overly prescriptive approach as to exactly what was contained in the pleadings and what was argued in the submissions at the FMH and looked at matters in the round. I consider that this is the only sensible way of approaching matters given that there are voluminous arguments and grounds of application made by the Claimant and counter arguments advanced by the Respondent as to why the Judgment should stand.

55. Specific paragraphs within the Reconsideration Application which I consider directly applicable to my decision to vary the Judgement include 30, 31, 32 (b) and (e), 34 and 35. I also took account of paragraphs 30, 34, 38, 39 and 44 in the Claimant's Rebuttal. I refer to these paragraphs by way of indication of the more significant arguments I considered pertinent but nevertheless approached my review and reconsideration based on the totality of the material before me and the arguments advanced.

Prejudice to Respondent

56. I do, of course, appreciate that this decision will cause considerable prejudice to the Respondent particularly in circumstances where it represents a reversal of a decision made eight months earlier. Nevertheless, in circumstances where I have concluded that there is no evidence of the Claimant's agreement to a variation of his terms as they existed as of 30 April 2019, and the subsequent unilateral imposition of remuneration payments substantially to the Claimant's disadvantage without alternative remuneration proposals being documented, the Judgement is no longer sustainable and should therefore be substituted with a finding that the Claimant's dismissal was both unfair and wrongful.

Summary of the grounds for the variation

57. This summary is intended to be read in conjunction with the revised judgement which is promulgated on even date.

58. Whilst most of the findings of the Judgment remain extant, I have nevertheless concluded on reconsideration based on the arguments advanced by the Claimant, and following careful reflection, that my conclusion that he resigned in circumstances that did not entitle him to resign because of a repudiatory breach of an express or implied term of the Contract should be revoked. This is for the reasons as set out above but set out in more detail in the paragraphs to be inserted by substitution or addition to the Judgement.

59. Whilst I retain my conclusion that the Respondent had the express contractual right under the Contract to make variations to the commission arrangements, I nevertheless consider that given the parties' conduct in connection with the Side Letter, and specifically the continuing payment of UK based commission to the Claimant after the initial 12 months of the secondment was such to give rise to an expectation of the claimant that the existing terms would continue unless varied by consent. It was incumbent upon the Respondent, pursuant to the implied term of trust and confidence, to replace such arrangements with terms which looked at overall were no less favourable to an individual employee. In other words, a change, albeit one pursuant to a retained discretion, would nevertheless require either the consent of the employee or the change should be so obviously no less favourable that looked at objectively it would not breach the implied term of trust and confidence.

60. Absent a finding that the Claimant agreed to revised terms as proposed, whether at the meeting with Mr Lobato on 10 May 2019 or otherwise, there were no proposed alternative terms against which a comparison could be made as to whether they were, or were not, comparable to those which the Claimant benefited from prior to 1 May 2019. What happened was that the Respondent with effect from 1 May 2019 unilaterally replaced the Claimant's existing terms, to include the cessation of entitlement to UK commission payments. This only became fully apparent to the Claimant on receipt of his payslip on 27 June 2019.

61. Whilst Mr Lobato says that the Claimant would as a Country Manager have had the opportunity to earn substantial bonuses and be granted equity which would have the effect of potentially making him "very wealthy", this was without tangible evidence. The Claimant had not received a formal proposal as to what the terms would comprise. I consider that it would have been appropriate for the Respondent to have fully documented the revised terms and discussed them with the Claimant.

62. Obviously in these circumstances the Claimant would have had the option of accepting the revised terms, seeking to negotiate them, or rejecting them and stating that he wished to remain subject to the existing contractual terms.

63. In these circumstances the Respondent may then have said that the option of remaining on the existing terms was not acceptable. It could then have offered the Claimant the opportunity of continuing employment on the revised terms. In circumstances where he rejected those terms and resigned a tribunal would have had to consider whether the offer of the new terms breached an express contractual provision and/or whether their imposition without the Claimant's agreement breached the implied term of trust and confidence. The Respondent could potentially have relied on some other substantial reason to justify the unilateral imposition of the new terms, but this would have been subject to giving the Claimant notice under the existing contract and offering continuing employment on the revised terms.

64. What I find happened is that the Claimant remained in a state of limbo between his meeting with Mr Lobato on 10 May 2019 and his resignation on 3 July 2019.

65. I therefore consider it appropriate to substitute the following paragraphs in the Judgment by way of reconsideration.

66. Paragraph 102 should be substituted and replaced by the sequence of paragraphs set out below.

67. New paragraph 102:

> I find that when read in totality the terms of the Contract, the SOP Commission and the Side Letter did not provide for an indefinite ongoing entitlement to the payment of commission for the duration of the Claimant's secondment to Canada as Country Manager. Nevertheless, I accept the Claimant's analysis that contrary to the Respondent's assertion the secondment was not for a fixed period. Whilst it contains reference to a one-year term it was self-evidently envisaged by the parties that it would continue a rolling basis until terminated by the parties or varied by their agreement.

68. New paragraph 103:

> I consider that given the parties' conduct in connection with the Side Letter, and specifically the continuing payment of UK based commission to the Claimant after the initial 12 months of the secondment was such to give rise to an expectation of the Claimant that the existing terms would continue unless varied by consent. It was incumbent upon the Respondent, pursuant to the implied term of trust and confidence, to replace such arrangements with terms which looked at overall were no less favourable to him. In other words, a change, albeit one pursuant to a retained discretion, would nevertheless require either the consent of the Claimant or the change should be so obviously no less favourable that looked at objectively it would not breach the implied term of trust and confidence.

69. New paragraph 104:

> I find it to be significant that after the initial 12-month period of the secondment on 26 October 2018 the Claimant continued to be employed on the existing terms notwithstanding that clause 4(e) of the Side Letter provides that entitlement to receive commissions due to the Claimant on UK accounts and receive 10% commissions on new business from Canada was for the duration of the one-year secondment.

70. New paragraph 104:

> I accept the Claimant's contention that there is potential ambiguity as to the meaning of this clause as in whether the reference to a one-year secondment was to commission on Canadian business alone or whether it also applied to commission on UK accounts. However, the reality is that by the course of conduct in the rollover of the terms beyond the initial 12-month period the parties' demonstrated an intention that those terms remained operative, and would continue to be operative, subject to the overarching terms of the Contract. This would continue until a variation was agreed between the parties as provided for by clause 4(c) of the Side Letter, and as reflected in clause 9, that there should be no variation of the Side Letter unless it is in writing and signed by the parties. No such variation took place and there is no evidence of any documentation to this effect.

71. New paragraph 105:

I do not accept the Claimant's assertion that the wording of clause 1.10.1 of the Side Letter had the effect that commission payments to which he was entitled, whether on UK accounts or on new business from Canada, became "salary" as per clause 1.10.1 of the Contract. Whilst it is true that all elements of remuneration, to include commission payments, fall within the broad umbrella of salary I do not consider that the effect of the Side Letter was to convert what were otherwise commission payments, and thereby subject to the Respondent's retained overarching discretion, to fixed salary payments.

72. New paragraph 106:

The Claimant asserts that the entitlement to commission under clause 1.12 of the Contract relates to a debt which was already in existence and due to him at the date of the Contract. I do not accept that this necessarily precluded the Respondent's ability to make changes to the terms at its discretion but nevertheless I consider that a distinction exists between a variation to already accrued, or in the process of being accrued, commission and making a variation solely in respect of the terms upon which future incentivisation would be provided. Commissions are regarded by the Respondent as earned or locked in when booked. This creates a distinction from purely discretionary payments but rather a situation where there is an expectation of an employee such as the Claimant that there would be commission payments made in accordance with a pre-agreed formula based on trades over previous years. In other words, this is a factor making it even more important that the Respondent carried out a proper process of consultation with the Claimant prior to the implementation of such a change and either obtained his express consent to the varied terms or imposed the terms having given a notice of its intention to do so.

73. New paragraph 107:

I therefore find that the cessation of the payment of commission, without a detailed written proposal of alternative terms being provided to the Claimant and either agreed by him, or rejected without good reason, constituted a breach of the express and implied terms of his employment, based on an interpretation of the Side Letter in conjunction with the Contract, but also considering the implied term as to how the Respondent should affect any variation to existing terms based on the parties' conduct of the relationship and their expectations based on their course of conduct. I therefore find that the unilateral imposition of the revised terms gave rise to a repudiatory breach of contract entitling the Claimant to resign and claim constructive dismissal.

74. New paragraph 108:

Whilst I have found that the Respondent retained an overarching discretion to make amendments to its commission arrangements, I nevertheless find there was an implied term that any such variations would be made following appropriate consultation with the Claimant given that the commission element of his remuneration was significant and by the parties' course of conduct of continuing its payment after the initial 12 months of the secondment and thereby

giving rise to a legitimate expectation of the claimant that it would continue until revised by consent or at least following detailed proposed alternatives and negotiation. Whilst I do not find that the Respondent was precluded from making such changes, I do find that it was necessary for the Respondent to consult with the Claimant and provide him with written specifics of the alternative remuneration proposals intended to replace those which were extant as of 30 April 2019. The Respondent failed to do so.

75. New paragraph 109:

What in effect took place was that Mr Lobato, and more generally the Respondent, assumed that the Claimant had acquiesced to the change but without having provided anything more than very general assurances that the Country Manager remuneration would provide him with significant upside potential. As set out above the process should, in my view, have entailed notification being given to the Claimant that the change would take effect from a specified date and his written consent being requested and obtained to the revised terms.

76. New paragraph 110:

I consider it to be significant that the Respondent's letter of 17 June 2019 setting out the revised salary did not include a replacement Side Letter and/or Contract and made no reference to a cessation of existing commission arrangements nor their replacement by any alternative scheme of incentive-based remuneration.

77. New paragraph 111:

At no time after the review meeting on 10 May 2019 did the Respondent set out in writing any proposed variation to the Side Letter or the Contract. No offer of employment on standard Country Manager terms, including specific provisions for bonuses, quarterly or annually and equity was made to the Claimant.

78. New paragraph 112:

What I find happened is that the Claimant remained in a state of limbo between his meeting with Mr Lobato on 10 May 2019 and his resignation on 3 July 2019.

79. New paragraph 113:

I consider that receipt of his statement of earnings of 27 June 2019 was significant in the Claimant's realisation of what was in effect a unilateral change to his remuneration. It is relevant that Aliz Simon confirmed that the Claimant had not been paid commission from both the UK and Canada of $ 21,575.92. It is therefore incontrovertible that there was a very significant reduction in the Claimant's monthly earnings in June 2019 without any tangible replacement being offered or agreed.

80. New paragraph 114:

Whilst I accept that the Respondent's practice may have been that Country Managers only continue to receive commission based on UK business for a finite period, typically between 12-18 months, I nevertheless find that this would have been a change requiring consent or the imposition of revised terms but needing to be documented. Absent documentation it could not be assumed, as the Respondent appeared to do, that the Claimant had acquiesced to the changes.

Paragraph 103 of the judgement and the implied term of trust and confidence

81. Whilst I acknowledge that the Claimant has not sought reconsideration of my findings at paragraph 103 of the Judgment, I nevertheless consider that my conclusion that there was no breach by the Respondent of the implied term of trust and confidence can no longer stand given my finding in relation to the construction of the express contractual terms and the conduct of the parties and the Claimant's reasonable expectations. I have found that whilst the Respondent retained an overarching discretion to make changes to the commission terms that the Claimant had a reasonable and continuing expectation that the existing commission payable on UK business would continue notwithstanding the initial one-year period of the Canadian secondment having expired until such time as it was replaced by agreement or with the Respondent giving notice of the imposition of revised terms from a specified date.

82. In these circumstances I find that the change was unilaterally imposed and that this was in breach of both the express contractual terms but also the implied term of trust and confidence. As such whilst the Claimant did not seek reconsideration of paragraph 103 it follows automatically in view of my finding as to the prevailing express contractual position as of 30 April 2019 that the findings in relation to some elements of the application of the implied term can no longer stand and are accordingly revised.

83. In view of the above I do not consider that paragraph 103(b) remains sustainable and should be substituted to read:

    The Claimant undoubtedly had a subjective perception that the proposed change was to his detriment. Whether the proposed Country Manager terms would, or would not, have been equivalent to those the Claimant currently enjoyed is incapable of being answered as it solely involves the assertion of Mr Lobato that other Country Managers enjoyed extremely generous terms pursuant to which they became very wealthy. This may well have been the case. However, the Claimant was entitled to receive properly particularised proposed alternative terms which he could review and as appropriate seek to negotiate. No such opportunity was provided before the Respondent imposed a variation to the prevailing terms and I consider that in doing so the Respondent breached the implied term of trust and confidence.

84. Paragraph 103(c) should be substituted to read:

    It is necessary to consider the alleged repudiatory breach from an objective perspective. In considering whether the Respondent conducted itself without reasonable and proper cause I need to consider the proposed change in the

context of the framework of contractual documents. Whilst I find that proposing to move the Claimant to what the Respondent says was a standard Country Manager's package was a reasonable and proper cause, I nevertheless find that doing so unilaterally without his consent was in breach of the implied term of trust and confidence.

85. Paragraph 103(d) should be substituted to read:

The Claimant was undoubtedly surprised to receive his payslip on 28 June 2019. This showed a significant reduction in his overall remuneration to include the failure to pay any commission. I find this to have been evidence of the Respondent's unilateral imposition of new terms and conditions in circumstances where there had been no unequivocal agreement from the Claimant to the revised. Whilst Mr Lobato may well be correct in asserting that he believed the Claimant was happy with the revised terms there was nevertheless a failure to properly document what was proposed. The Respondent's letter to the Claimant dated 17 June 2019 advising that his salary had been increased to $202,800 was insufficient as it merely increased his basic pay but not to a sufficient extent to be commensurate with the foregone UK and Canadian commission payments. At no point had the Claimant provided his agreement to this and certainly not in written form. I consider that given the potential magnitude of the change as it existed, and without the proposed new terms having been documented that his written consent was required.

86. Paragraph 103 (f) should be deleted.

87. A new paragraph should be added after that concerning affirmation to read:

Given that that the financial impact of the unilateral change to the Claimant's remuneration only became apparent to him on 28 June 2019 I do not consider that sufficient time had elapsed for him to have affirmed the Contract in the absence of any positive actions pursuant to which his affirmation could be construed.

88. Paragraph 108 should therefore be substituted to read:

I therefore find that the claims for constructive unfair dismissal and wrongful dismissal succeed.

Remedy hearing

89. Mr Skinner argued that it would be prejudicial to the Respondent, and use valuable Tribunal time, if there needed to be a further remedies hearing. I do not accept this. The delay between the FMH and the reconsideration hearing is not the Claimant's fault. Indeed, it was partly delayed because of Mr Skinner's non availability for a significant period in the early summer of 2021 and further because of my absence on holiday.

90. I do not consider it would be appropriate for remedy to be determined based on evidence given at the FMH. There would be a real risk of findings and conclusions being made which did not properly reflect the evidence given the

lapse of time. I therefore consider that it would be in accordance with fairness to both parties, and the overriding objective, for a remedy hearing to be listed if the parties cannot reach agreement.

91. For the avoidance of doubt the Judgment will be re-promulgated, together with this judgment on reconsideration, to reflect the changes set out above. The date of the Judgment will be of even date with this judgment on reconsideration.

92. The Judgement is therefore revoked and replaced by the judgement dated 3 October 2021.

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Employment Judge Nicolle

3 October 2021

Sent to the parties on:

04/10/2021.

For the Tribunal: