EMPLOYMENT TRIBUNALS

Claimant: Mr R Rawlings

Respondent: Pro Cam CP Limited

Heard at: Bury St Edmunds (CVP) **On:** 9 -11 June 2021

Before: Employment Judge S Moore

Appearances
For the Claimant: Mr D Hobbs, Counsel
For the Respondent: Mr M Duggan QC, Counsel

This has been a remote hearing on the papers to which the parties/consented did not object. The form of remote hearing was CVP. A face-to-face hearing was not held because it was not practicable and all matters could be determined in a remote hearing.

JUDGMENT

(1) The claim of constructive unfair dismissal succeeds.
(2) A remedy hearing will be held on 4 October 2021.

REASONS

Introduction

1. This was claim of constructive unfair dismissal. I heard evidence from the Claimant, and for the Respondent from Ms Diane Heath (DH), Managing Director, and Ms Wendy Edwards (WE), Head of HR. I was also referred to a bundle of documents comprising approximately 380 pages. On the basis of that evidence I make the following findings of fact.

Facts

2. The Respondent is an agronomy and crop production business which employs approximately 220 employees in Great Britain across a number of sites, one of which is in Winterbourne Monkton, Wiltshire. The Claimant is an agronomist, providing advice to farmers on the health of their crops and on methods to increase quality and yield. He was born on 23 January 1960 and at the time of the hearing was 61 years old. He was initially employed by the Respondent between 1997 and 2006 and, after a period of employment with another company, he entered into a new contract of employment with them in 2014.

3. His second period of employment with the Respondent commenced on 18 August 2014 under a written contract of employment dated 21 August 2014. His salary was £55,000 year and he was eligible to participate in the Respondent's bonus scheme; the rules of the scheme being a matter for the Respondent's discretion. The contract further provided that the Claimant reported to the divisional director, Mr Joe McNicholl (JM).

4. In February 2016 the Claimant was invited to a meeting with John Bianchi (JB), the then CEO of the Respondent. He was offered and accepted an additional role as a mentor to company trainees which had the title Regional Training Mentor ("the mentoring role"). A contract dated 11 March 2016 provides that the period of tenure for the role was "3 years in the first instance (subject to satisfactory review) with effect from 1 April 2016". The contract didn't refer to remuneration but an email of 11 April 2016 records it had been agreed that the role attracted a salary increase of £10,000 per annum.

5. In June 2017 the Claimant, together with a second agronomist and regional mentor, were invited to another meeting with JB. They were informed that the mentoring role was expanding to include the organization and training of junior agronomists and that they would receive a further £10,000 per annum to reflect this. They were also informed that a performance bonus of £5,000 per annum would be payable when certain criteria were met.

6. That offer was accepted by the Claimant (and the other agronomist) in a letter dated 5 July 2017 headed, "Confirmation and acceptance of role change and remuneration". That letter provides:

   "…We accept the increased remuneration of £10,000 each per annum and understand that a further sum of £5,000 may be available providing certain performance criteria are met, our performance to be reviewed after year one by the regional directors.

   We understand that our positions have been agreed for a period of three years, after which they may be extended or withdrawn by agreement."

7. On 14 July 2017 the Claimant received an email from JB (90), which stated:

   "I am pleased to inform you that the proposal to increase your individual mentor payments from £10,000 to £20,000 p.a. has been accepted by the Board.
   Myself, and the Regional Directors have yet to agree the performance related criteria necessary for the calculation of an additional bonus (up to a maximum

of £5,000 p.a.) but once we have had the opportunity to do so I will forward details.
The agreement will run from 1 July 2017…"

8. Despite the second sentence of the above, no bonus details were ever forwarded and the Claimant was never paid a bonus in respect of his mentoring role.

9. As regards the supposed review "after year one", there was no separate review of the Claimant's mentoring role and the arrangement continued beyond it's one year anniversary (which was in July 2018). The Claimant did, however, have annual performance reviews every November between 2015 and 2017 conducted by JM which covered both his agronomy and mentoring role. During those meetings the Claimant was given the chance to check his sales figures from the previous year and was told his bonus. He was never criticized for his performance as regards either his agronomy or his mentoring role.

10. In or about September 2018 JM and two other Regional Directors were made redundant. In November 2018 DH became the Managing Director of the Respondent, replacing JB who nevertheless remained employed with Respondent during the period of the Claimant's employment. In view of JM's redundancy, and that of the other Regional Directors, DH was the Claimant's line manager.

11. The Claimant did not receive a performance review in November 2018, although he did receive a bonus (in respect of his agronomy work).

12. On 5 April 2019 the Claimant received an email from WE with the subject heading "catch up", asking the Claimant to meet with DH on Monday 15th April "for a catch up". The Claimant had had no other meetings with DH other than one in November 2018 in respect of which I heard little evidence when he explored the possibility of applying for a Team Leader's position. The request to attend this meeting therefore came out of the blue.

13. The Claimant replied to WE the same day, stating that he could attend the meeting and asking, "Is there anything specific that I need to prepare for ahead of the meeting?"

14. WE answered, "Nothing to prepare. See you on the 15th."

15. The Claimant did not know at this juncture that in a report prepared for shareholders in March 2019 DH had described the Claimant as "a marginal performer", nor that DH had asked WE to arrange the meeting to discuss concerns about the Claimant's performance. In this respect DH had identified that whereas the Claimant's total sales had been £580,710 in the 2015/2016 cropping year (which runs from 1 July through 30 June) and £580,634 in 2016/2017, they had fallen to £520,088 in 2017/2018 and were falling again in the current cropping year to the region of £480,000. This fall was also reflected in the Claimant's bonus which had been £15,736.33 in 2017, £10,368.22 in 2018 and was estimated to fall further in 2019. DH considered that if the

Claimant was performing satisfactorily she would have expected the Claimant's annual bonus to be in the region of £15,000-£20,000.

16. In her witness statement DH stated that at the meeting she wanted to explore why the Claimant was underperforming and what "we" could do to facilitate an improvement in his performance. Similarly, in her witness statement WE stated that they wanted to explore with the Claimant what factors might be responsible for his shortfall in performance and what steps could be taken to support and assist him in improving. However, both agreed in cross examination that prior to the meeting no potentially supportive steps such as the introduction of new sales leads, monthly meetings and/or performance improvement plans were considered. They stated the reason for this was that first they wanted to understand what was impacting the Claimant's sales performance and how much he was distracted by his other roles. By "other roles" it is plain they meant the Claimant's mentoring role, both from the fact that the mentoring role was the only role in respect of which the Claimant was employed other than his agronomy role, and from the way in which the meeting actually progressed. Moreover, it is plain from DH's witness statement that she and WE had determined before the meeting that they would discuss with the Claimant scaling back his mentoring role. It is also plain that DH's motivation for doing so was not merely to allow the Claimant to focus on his agronomy work but because she considered he was overpaid. In this respect an email from DH to JB of 17 April 2019 (the day after the meeting) describes the Claimant as being "way overpaid with the mentor role added on".

17. As regards the meeting itself, both DH and WE made notes, but given that the meeting lasted about 45 minutes those notes are woefully scant. At the outset, the notes record under the heading Mentor/Training, a discussion about the Claimant's role in the delivery of events known as LAMMA and Groundswell. Under the heading "agronomy", the notes record a discussion as regards the decline in the Claimant's agronomy business and that the Claimant stated the decline was because he had lost 1000 acres on 3 accounts but that he was now in the business of rebuilding that business. There was no exploration of the reasons why the Claimant had lost those acres.

18. There was, however, a discussion as regards the amount of time the Claimant spent on each of his roles. In evidence the Claimant accepted that in the meeting he had agreed with DH and WE that his mentoring work had recently decreased because some of the trainees whom he mentored were now self-sufficient while others who were improving didn't need as much of his time. Although the Claimant said in evidence that he described the division of his time in terms of days per week, rather than percentages, the notes record that the Claimant spent about 80 % of his time on agronomy and 10% "maybe 5% now" on his mentoring role and events.

19. In both his witness statement and in cross-examination the Claimant said that DH and WE then told him that trainees were no longer going to be recruited and suggested because of this, and their concerns over his declining sales performance, he should give up his mentoring role. In their evidence DH and WE denied they said in the meeting that trainees were no longer being recruited and asserted that it was the Claimant himself who suggested he should give up

his mentoring role in order to focus on his agronomy role. I do not accept the evidence of DH and/or WE in these respects.

20. The Claimant was adamant that DH put to him that his mentoring role was getting in the way of his agronomy role and that he responded by stating that while he was primarily an agronomist he managed both roles side by side. The suggestion that it was the Claimant who effectively volunteered to give up his mentoring role is not anywhere recorded in the notes and was not part of the Respondent's pleaded case. Further, since it is clear that DH and WE had determined to discuss with the Claimant scaling back his mentoring role prior to the meeting, and the Claimant was strongly opposed to such a course of action, it is logical that DH and WE would have been the ones to raise the matter. As regards whether or not DH and WE also stated that the Respondent no longer intended to recruit trainees, I note that the letter of 16 April 2019 (see below) contains the statement "I would like to make clear that we are still committed to bringing on board trainee agronomists or those at a stage where they are qualified but need to build their sales". Furthermore an earlier draft, not sent to the Claimant, also included the following incomplete addition at the end of that sentence, "going forward we will adopt a slightly different". A natural inference from the fact of that sentence having been included in the letter, together with the (incomplete) draft addition, is that its purpose was to correct or qualify something that had been said in the meeting.

21. Although the notes record that the Claimant was paid £20,000 for his mentoring role, there was in fact no discussion of the Claimant's salary in the meeting or how the change to his mentoring role would affect that remuneration. The notes do however record that at the end of the meeting the Claimant "did not ask" for a proposal but was told that DH and WE would make one. It was also agreed by DH and WE in cross examination that during the meeting there was no discussion of any potentially supportive steps to improve the Claimant's performance of the kind set out in paragraph 16 above.

22. Overall, the Claimant stated, and I accept, that he felt he had been "ambushed" by what was effectively a performance review in respect of which he had been given no notice and in the course of which it was inferred that he was not doing his job and it was made plain to him that DH was considering scaling back or removing his mentoring role.

23. The following day, 16 April 2019, a letter was sent to the Claimant that had been drafted by WE on the instructions of DH. It provides as follow:

    "Dear Richard
    Thank you for your time yesterday and for travelling to Cambourne to see us.
    As promised I have considered the points raised in our meeting and then what is fair to both you and to the Company and I would now like to propose the following:

    - With effect from 1 August 2019 you relinquish your role as mentor. The element of remuneration (£20,000 per annum) linked to these responsibilities will be removed on this date.
    - For the successful delivery of the Groundswell and LAMMA events plus any other agreed ad hoc projects you will receive £5,000 per annum. Ad

hoc projects could involve other events or assisting with training as needed. This arrangement will be regularly reviewed with you.
- With immediate effect you will focus your efforts on maintaining and increasing your agronomy business.

I would like to make it clear that we are still committed to bringing on board trainee agronomists or those at a stage where they are qualified, but need to build their sales. Thank you for the contribution you have made as a mentor in recent years.
Please feel free to contact either Wendy or myself if you wish to discuss further, alternatively if you have no questions please sign and return a copy of this letter as acceptance of my proposal."

24. The letter contained an addendum for the Claimant to sign and date, accepting the terms outlined above.

25. In evidence, DH stated that she regarded the terms of the letter, in particular continuing to pay the Claimant his mentoring salary until 1 August 2019 to be "generous".

26. On 17 April 2019 she emailed the letter to JB (see paragraph 16 above), for his information, stating:

    "Richard's remuneration is ca £85K/annum (£55K base, £10K bonus and £20K mentor).
    His GP has reduced and is expected to be ca £126K for 2018/2019 – so he is way overpaid with the mentor role added on."

27. JB replied the same day stating, "Richard needs to pull his socks up or face the consequences!"

28. The Claimant did not have sight of this email exchange between DH and JH until after he had resigned. Nevertheless he says he considered the letter of 16 April 2019 to be a statement of intent. Although he accepted in cross-examination that the letter of 16 April 2019 was not expressed in terms of a decision to change unilaterally his terms and conditions of employment he said he felt a decision had been made to reduce his role in the company and pay him less, and he no longer trusted the people he was working with. The terms set out in the letter reduced his salary by approximately 25% which "horrified him", but he considered that if he refused them "anything could have happened" and, in particular, he feared he would be made redundant similar to the three regional directors who had been made redundant 6 months earlier.

29. On 23 April 2019 the Claimant contacted a recruitment firm in the agronomy sector and on 7 May 2019 he had a meeting with both a representative of that firm and Mr Murray Mackay (MM), a director of a company called Zantra Ltd.

30. Following that meeting the Claimant was contacted by MM and asked to attend for an interview for a position with Zantra Ltd.

31. On 20 or 21 May 2019, WE called the Claimant and asked if he had signed the letter or had any questions about it. The Claimant told her that he was "taking advice".

32. On 12 June 2019 the Claimant had another interview with Zantra Ltd at which a potential offer of employment was outlined.

33. On 13 June 2019 WE called the Claimant to ask again if had signed the letter. WE's evidence was that the Claimant told her he had signed it. The Claimant denied this and said he told WE that he "was dealing with it", deliberately adopting a neutral form of words because he knew both that he had no intention of signing the letter and that he was intending to resign from the Respondent. Again, I prefer the evidence of the Claimant. There is no reason why the Claimant would have told WE that he had signed the letter when he had not done and had no intention of doing so. It is possible that WE misunderstood the Claimant's statement that he was "dealing with" the letter to be mean that he had signed it.

34. On 14 June 2019 the Claimant resigned. His letter of resignation states:

    "I feel that I am left with no choice but to resign in light of your decision to unilaterally change my terms and conditions and to reduce my salary and responsibilities with effect from 1 August…I also consider your conduct to amount to a breach of mutual trust and confidence. When Wendy Edwards, HR Consultant, invited me by email dated 5 April to the meeting with you of 15 April she said it was just a catch up. When I enquired whether there was anything that I should prepare ahead of the meeting, I was advised that there was not. This clearly was not the case and at the meeting on 15 April you proceeded to advise me that my responsibilities relating to training would be withdrawn. At no time did you inform me at that meeting on 15 April that my salary would be reduced. It only appeared in the subsequent letter dated 16 April 2019."

Conclusions

35. The Claimant's case is that the letter of 16 April 2019, read in the context of the facts and circumstances of the meeting of 15 April 2019, amounted to an anticipatory breach of the express terms of his contract; namely that a reasonable person would have concluded, as the Claimant had done, that the Respondent intended to remove his mentoring role and stop his associated salary from 1 August 2019. Alternatively, that the facts and circumstances of the meeting 15 April 2019 and the letter of 16 April 2019, amounted to a breach of the implied term of mutual trust and confidence. Further the breaches were sufficiently serious to constitute a repudiatory breach of contract in response to which the Claimant resigned.

36. The Respondent's case is that the letter of 16 April 2019 was merely a proposal which was open for discussion and in those circumstances not capable, whether considered alone or with the meeting of 15 April 2019, of amounting to either an anticipatory breach of the express terms of the Claimant's contract or the implied term of mutual trust and confidence. Even if there was a breach of

contract, since the letter was merely a proposal any such breach was not repudiatory. Further, the Claimant waived any breach by waiting two months before resigning. Finally even if the Claimant had been constructively dismissed, the dismissal was for a potentially fair reason of capability or underperformance and fair in all the circumstances.

37. Although the issues were identified at an earlier Preliminary Hearing it is convenient to take them slightly out of order and clarify from the outset how the Claimant's case dovetails with his contractual position.

38. As set out above, as of April 2019 the Claimant was employed under two discrete contracts: his agronomy contract and his mentoring role contract. His case as regards anticipatory breach (of the express terms) of his contract plainly pertains to his mentoring role contract, since it is the terms and conditions of that contract which are the subject of the letter of 16 April 2019.

39. The first issue is therefore whether the letter of 16 April 2019, read in the context of the facts and circumstances of the meeting of 15 April 2019, amounted to an anticipatory breach of the express terms of the Claimant's mentoring role contract which contained no mechanism for termination earlier than 30 June 2020.

40. In a nutshell, the Claimant's case is that the letter of 16 April 2019 was not a proposal at all, but rather a statement of intent to cut the Claimant's mentoring role on 1 August 2019, whatever he said or did. The Respondent's position is that the letter of 16 April 2019 was indeed a proposal: there was an informal meeting, followed by a letter that set out a proposal; there was no expressed or unexpressed intention to change unilaterally the Claimant's terms and conditions, there was no ultimatum and the matter remained up for discussion.

41. As regards anticipatory breach, Chitty on Contracts provides at 24-022:

    "If before the time arrives at which a party is bound to perform a contract he expresses an intention to break it, or acts in such a way as to lead a reasonable person to the conclusion he does not intend to fulfil his part, this constitutes an "anticipatory breach" of the contract and entitles the other party to take one of two courses. He may "accept" the renunciation, treat it as discharging him from further performance, and sue for damages forthwith, or he may wait until the time for performance arrives and then sue."

42. Mr Duggan QC also relied on para 11.64 of IDS Contracts of Employment which provides:
    "Vague or conditional proposals of a change in terms, conditions or working practices will not amount to an anticipatory breach and will not therefore justify an employee's resigning and claiming constructive dismissal. In *Sangarapillai v Scottish Homes* EAT 420/91, for example, S was given a different job title in a salary review and resigned before the completion of that review. The EAT upheld an employment tribunal's finding that there had been no fundamental breach of contract at the time of the resignation. Although S had been given a different job title, that did not amount to a clear indication from his employer that his salary or status was to be downgraded."

43. In this case the question is whether the Respondent (through DH and WE) acted in such a way as to lead a reasonable person to the conclusion that it intended to breach the Claimant's mentoring contract by requiring him to step down from his mentoring role, and stopping his mentoring salary with effect from 1 August 2019. Or, in the language of *Sangarapillai v Scottish Homes*, whether the Claimant was given a clear indication by his employer that his salary or status was to be downgraded.

44. As a preliminary point, I accept that this is what the Claimant genuinely believed to be the case. That is why he immediately began to search for an alternative job.

45. Further, I consider it to be plain from all the circumstances, including the email exchange between DH and JB, that DH considered the Claimant to be underperforming and overpaid and that she intended to reduce his salary. I also note, in this respect, her evidence that she considered the terms of the letter of 16 April 2019 to be "generous".

46. However the test is an objective one, i.e. that of a reasonable person (rather than the Claimant himself) knowing what the Claimant knew at the relevant time (which does not include the email exchange between DH and JB, or DH's evidence in these proceedings).

47. Accordingly I have to consider whether the letter of 16 April 2019, read in the context of the facts and circumstances of the meeting of 15 April 2019, would lead a reasonable person to the conclusion that the Respondent had formed an intention to take away the Claimant's mentoring role and stop paying him the associated salary with effect from 1 August 2019. That is to say, whether, notwithstanding the language of "proposal" and the last sentence stating the Claimant should "feel free" to contact either DH or WE "if [he] wish[ed] to discuss further", the letter was a clear indication that the Claimant's salary and status was to be downgraded which realistically he could not refuse.

48. I have come to the conclusion that the letter of 16 April 2019 was, in the circumstances, such a clear indication, and that a reasonable person, knowing what the Claimant knew at the time, would regard it as so.

49. These are my reasons:

    (i) The Claimant had been invited to a "catch up meeting", which was effectively a performance review meeting for which he had no opportunity to prepare, despite having specifically asked if there was "anything he should prepare". Any reasonable person placed in that in that position is likely to feel that they had been "ambushed".
    (ii) At that meeting it was made clear to the Claimant that DH considered his performance in respect of his agronomy sales to be poor and needed to improve.
    (iii) The only point of discussion at the meeting for improving the Claimant's performance was the removal or scaling back of his mentoring role. No

performance improvement plan (or any other form of support) was suggested.

(iv) However, since DH and WE made known at the meeting they believed the workload associated with the Claimant's mentoring role had already reduced and was declining further, a reasonable person would understand that scaling back or removing the Claimant's mentoring role would not in fact free up significantly more time for him to devote to his agronomy business.

(v) Further, there was no discussion at the meeting of the impact on the Claimant's salary of such a "scaling back" or by how much he would have to grow his agronomy busines in order to increase his bonus by the £15,000 salary reduction. The evidence at the hearing was that the Claimant's agronomy business would have to grow to £680,000 to achieve a bonus that would compensate for the loss of £15,000 salary, which is £100,000 more than the figure of £580,000 he had achieved in his best years of 2015/2016 and 2016/2017. However DH agreed in cross-examination that she had not even thought about this at the time.

(vi) As regards the letter itself, it contains no suggestions for helping to improve the Claimant's performance. Indeed, even the removal of the Claimant's mentoring role is not stated as being done in order to give the Claimant more time to build up his agronomy sales, still less is there any reference to any expectation that the Claimant would be able to recoup the loss of £15,000 salary by doing so.

(vii) Although the word 'proposal' is used, the language of "with effect from 1 August 2019 you relinquish your role as mentor"… "The element of remuneration…linked to these responsibilities will be removed on this date", "with immediate effect you will focus your efforts on maintaining and increasing your agronomy business" and "Thank you for the contribution you have made as a mentor in recent years" is more consistent with dismissal (of the Claimant from the mentoring role) and payment in lieu of notice.

(viii) While the Claimant was told he was free to contact with DH or WE if he wished to discuss further, no meeting to discuss the proposal was suggested let alone arranged. Instead, unless the Claimant had any questions, he was to sign and return the form.

(ix) The cumulation of the above points would lead a reasonable person to conclude that (a) that DH was unhappy with the Claimant's agronomy sales and considered he was underperforming, (b) that she was not interested in supporting the Claimant to grow his agronomy sales other than by removing the mentoring role, (c) that she intended to remove the Claimant's mentoring role, (d) that the motivation for doing so was at least as much about reducing the Claimant's salary as giving him the opportunity to grow his agronomy business, and (e) that both DH and WE were entirely cavalier as regards the impact this would have on the Claimant.

50. In the light of all the above, a reasonable person would, in my judgment, conclude that by 16 April 2019 the Respondent had already made up its mind to remove the Claimant's mentoring role and stop paying him for that role as from 1 August 2019. This constituted an anticipatory breach of the express terms of

the Claimant's mentoring contract. Furthermore it is plain that such a breach was a repudiatory one.

51. The second issue is whether the letter of 16 April 2019, read in the context of the facts and circumstances of the meeting of 15 April 2019, also amounted to a breach of the implied term of mutual trust and confidence. In my judgment it did, because it plainly amounted to conduct, without reasonable and proper cause, that was likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Mr Duggan QC argued that the Respondent had reasonable and proper cause for holding the meeting on 15 April 2019 to discuss the Claimant's performance, and that it had reasonable and proper cause to make a proposal to the Claimant to remove his mentoring role. However, that argument falls away in light of the finding I have made that the letter of 16 April 2019 was not a genuine proposal but a statement of intent.

52. Furthermore, if, as I have found, the Respondent, without reasonable and proper cause, acted in a way that was likely to destroy or seriously damage the relationship of confidence and trust between employer and employee for the purposes of the Claimant's mentoring contract the same must necessarily apply to the agronomy contract; logically the Claimant could not lose trust and confidence in the Respondent for the purposes of the former but not for the purposes of the latter.

53. It therefore follows that the Respondent committed a repudiatory breach of both the Claimant's mentoring contract and his agronomy contract so that the Claimant was entitled to resign from both contracts without notice.

54. I would add that if I am wrong about the question of anticipatory breach, i.e. if a reasonable person would not have concluded, on the basis of the meeting of 15 April 2019 and the letter of 16 April 2019, that the Respondent did not intend to fulfil the terms of the Claimant's mentoring contract, then I would accept the submission of Mr Duggan QC that in these circumstances the facts would disclose no breach of the implied term either. In this respect, Mr Duggan QC submitted that the meeting of 15 April 2019 could not of itself amount to a breach of the implied term, that a genuine proposal to change the Claimant's mentoring contract could not amount to a breach of the implied term (because the Respondent was perfectly within its rights to propose changes to the contract), and that taking the two matters together did not change anything, and I did not understand Mr Hobbs to argue to the contrary.

55. The third issue is whether the Claimant's conduct amounted to a waiver of any breach or affirmation of his contract of employment. In this case it is difficult to see how a claim of waiver or affirmation gets off the ground in view of the fact that the changes to the Claimant's contract were to not to take effect until 1 August 2019 and there was no evidence (or even suggestion) that after receipt of the letter he focused his efforts on his agronomy business "with immediate effect". In these circumstances the delay of two months between the letter and Claimant's resignation cannot imply acceptance of the terms set out in the letter. Mr Duggan QC submitted that in a telephone conversation on 13 June 2019 the Claimant told WE that he had signed the letter, and that this amounted

to waiver or affirmation, however since I have found as a matter of fact that the Claimant merely told WE that he was "dealing" with the letter, and not that he had signed it, even this argument falls away. It follows that the Claimant did not affirm or waive the Respondent's repudiatory breach of contract.

56. The fourth issue is whether the Claimant resigned in response to the breach. Mr Duggan QC submitted that the Claimant had simply found other employment and then sought to manufacture a breach to avoid certain restrictive covenants. However on the evidence it is plain that the Clamant didn't begin to look for another position until shortly after he received the letter of 16 April 2019. Further, I accept his evidence that the only reason he sought alternative employment and then, once confident he had secured it, resigned from the Respondent, was because, following the events of 15 and 16 April 2019, he believed the Respondent intended to remove his mentoring role, together with its associated remuneration, and he had lost all trust and confidence in his employer.

57. The final issue is whether, given that I have found the Claimant was constructively dismissed, the dismissal was fair. In this respect Mr Duggan QC submitted that there was a potentially fair reason for the dismissal, namely the Claimant's capability or underperformance, and that the Respondent conducted itself in a manner that was fair in all the circumstances.

58. I reject this argument. While capability or underperformance is potentially a fair reason for dismissal, the Respondent plainly did not conduct itself in a manner that was fair in all the circumstances. It ambushed the Claimant at a meeting to discuss his performance, giving him no opportunity to prepare for that discussion, there was never any exploration as regards why the Claimant's sales had declined (i.e. of the reasons why the Claimant had lost 1000 acres on 3 accounts), no consideration was given to what steps the Respondent might take to help the Claimant improve his performance (other than removing his mentoring role) and the Claimant was given no opportunity to improve his performance before the Respondent decided to remove his mentoring role and reduce his salary.

59. In the light of all the above it follows that the claim of constructive dismissal succeeds.

60. A remedy hearing will be held on 4 October 2021 with a time estimate of one day.

____

Employment Judge S Moore

Date: 7/7/2021

Sent to the parties on:

…………………………..……….

For the Tribunal:

………………………………..……..