

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS IN MANCHESTER**  
**CIRCUIT COMMERCIAL COURT (KBD)**

Date: 30 April 2024

**Before :**

**His Honour Judge Halliwell sitting as a Judge of the High Court**

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**Between :**

**CIARA McCORMACK**

**Claimant**

**- and -**

**MEDIVET GROUP LIMITED**

**Defendant**

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**Mr Daniel Northall** (instructed by **CG Professional Limited**) for the **Claimant**  
**James Boyd** (instructed by **Gateley Legal**) for the **Defendant**

Hearing dates: 27-29 February 2024  
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**JUDGMENT**

This judgment was handed down remotely at 10am on Tuesday 30 April 2024 by circulation to the parties' representatives by e-mail and release to the National Archives.

**His Honour Judge Halliwell:**

***(1) Introduction***

1. By these proceedings, the Claimant (“**Dr McCormack**”) sues the Defendant (“**Medivet**”) for damages following the termination of her contract of employment. Medivet provides veterinary services from premises throughout the UK. Dr McCormack was employed by Medivet as Director of Clinical Operations. She resigned with immediate effect on 8 July 2022.
2. Although her case is advanced in more than one way, the critical question is whether, by the time of Dr McCormack’s resignation, Medivet was in repudiatory breach of her contract of employment. If so, it is contended that, by resigning, Dr McCormack accepted the breach or breaches and thus terminated the contract. On this basis, she claims loss of salary, accrued holiday pay, the loss of her company car and other benefits. If liability can be established, quantum is not in issue.
3. The trial took place before me on 27-29 February 2024. Mr Daniel Northall, of counsel, appeared on behalf of Dr McCormack and Mr James Boyd, of counsel, appeared on behalf of Medivet. The advocacy was to a high standard.
4. This is my judgment following the trial.

***(2) Background***

5. Having qualified, in June 2011, as a veterinary surgeon, Dr McCormack worked full time in clinical practice until 2014. She then continued to work, part time, in clinical practice until October 2016 when she joined Medivet as Regional Director. Her role as such grew as Medivet expanded its operations. She was promoted to the role of Head of Clinical Operations and, ultimately, Director of Clinical Operations. In this role, she reported directly to the Chief Executive Officer, maintaining responsibility for day to day operations and a number of Medivet’s central functions, including pricing, laboratory, facilities, procurement, practice development and property.
6. However, it was expressly provided, in clause 2.5 of her service agreement dated 20 March 2019, that Medivet was entitled, through its board of directors, to appoint other persons to act jointly with Dr McCormack in her office or to change her executive

office or responsibilities. By Clause 3.1.3, she agreed faithfully and diligently to perform her duties and exercise such powers as may be assigned to her and obey the lawful directions of the board.

7. Dr McCormack's initial yearly salary – reserved in Clause 4.1 - was £140,000. This eventually climbed to £220,000. She was also entitled to a car allowance of £6,000 and 25 working days paid holiday in every complete year of her employment.
8. By Clause 17.1, it was provided that if, during her appointment, Dr McCormack should have any grievance concerning her employment she could apply in writing for her grievance to be considered by the board.
9. In October 2021, the share capital of the holding company, Medivet Group Holdings Limited ("**Medivet Holdings**"), was acquired by or on behalf of CVC Advisers Limited. Following acquisition, a decision was taken to remove Mr Neil Harrington, as Chief Financial Officer, and Ms Deirdre Burns ("**Ms Burns**"), as Chief Executive Officer. Mr Bart Borms was appointed to replace Mr Harrington and, on 14 February 2022, Mr Christiaan Cools ("**Mr Cools**") was appointed to replace Ms Burns although Ms Burns did not leave until shortly after Mr Cools' appointment.
10. Throughout this period, Mr James Dickens ("**Mr Dickens**") was employed by Medivet as Chief Human Resources Officer. Prior to the appointment of Mr Cools, Mr Dickens discussed Dr McCormack's role at a remote meeting, conducted online, with Dr McCormack herself and Ms Burns. In their discussion, Ms Burns and Mr Dickens confirmed that Medivet Holdings intended to develop and extend Medivet's European operation outside the UK and canvassed with Dr McCormack her role in such an operation. Dr McCormack was enthusiastic about taking on such a role.
11. Once appointed, Mr Cools met Dr McCormack to discuss the business and, more specifically, Dr McCormack's role. He was distinctly unimpressed with her, concluding that, whilst Dr McCormack had too many responsibilities and her role was too broad, she was poorly organised and could not keep up with the areas for which she was responsible.
12. At a subsequent meeting with Dr McCormack on 6 April 2022, Mr Cools advised Dr McCormack of his plans to re-organise Medivet's management structure and showed

Dr McCormack a new executive organisation chart. This provided for the creation of a series of new officers, accountable directly to Mr Cools himself. This included the creation of new Chief Operating and Clinical Officers. Dr McCormack would be appointed as Chief Clinical Officer, not Chief Operating Officer. This involved a different role from her current job and involved the allocation of some of her responsibilities to other officers, for example pricing was to be transferred to the role of Chief Marketing Officer. When giving her evidence, Dr McCormack stated that Mr Cools advised her the new Chief Operating Officer would be a “KPI man”.

13. Following the meeting, Dr McCormack asked Mr Cools, by email, for a copy of the new organisation chart. Once this had been forwarded to her, she emailed Mr Cools for confirmation whether this “gets rid of my current role and structure as it stands, breaking it down into an Ops, led by a COO (to be recruited or taken from internally)...”
14. On 11 April 2022, Mr Cools emailed Dr McCormack with a copy of the job description for the new role of Chief Clinical Officer confirming that he was “happy to discuss” and “your input is appreciated”. Under the heading “Responsibilities”, it was provided, in the job description, that “the CCO is the clinical conscience of the company and is part of the executive team”. Under the heading “Job Purpose Summary”, it was provided that “the CCO is ultimately responsible for giving advice on various aspects of the quality of care within Medivet practices and clinics, both in the UK and internationally in collaboration with local leadership”.
15. On 13 April, Dr McCormack and Mr Cools attended another meeting. According to Dr McCormack, Mr Cools reminded her that he intended to recruit a “KPI man” for the COO job and asked her whether another employee, Mr Iqbal Gill, would be suitable for the role. Mr Gill was then designated as “Head of Clinical Operations”. However, this was at a more junior level of responsibility than Dr McCormack herself and, as Dr McCormack put it in her evidence, he reported to her in the overall management structure. Dr McCormack advised Mr Cools that, since Mr Gill was less experienced than her, it would be wrong to appoint him to the new role.
16. On 28 April, Dr McCormack and Mr Cools attended a remote meeting when Mr Cools was in his property in Spain. At this meeting, Dr McCormack sought to impress on Mr

Cools that her existing role was more closely aligned with the new COO role than the role envisaged for her as CCO. Moreover, she believed she was not properly qualified to take on the role of CCO given that, in more recent years, she had been involved more on business strategy and management than on veterinary practice.

17. Dr McCormack states that they were unable to make any progress in their discussions on 28 April. In part, she maintains this was because they were distracted by the sound of building work at Mr Cools' property in Spain. However, her stance was that Mr Cools' changes would effectively involve replacing her with another employee. Conversely, Mr Cools was unwilling to accept she was being replaced. In subsequent communication, he continued to maintain he was carving out a new role for Dr McCormack rather than replacing her.
18. By an email dated 14 May to Mr Cools and Mr Robinson, Dr McCormack stated that, since she was being replaced and allocated a role for which she regarded herself as unsuitable, she was willing to agree a planned exit. She sought to clarify the basis on which this could be achieved. In his reply, by email dated 15 May 2022, Mr Cools stated that "it is not and never has been our intention to replace you...and we are not doing so. On the contrary, in our journey to professionalize and internationalize the organization, we have carved out for you a very important and strategic role". However, he interpreted Dr McCormack's email as notice of her "decision to leave the company". An impasse was then reached since Dr McCormack declined to accept that she had made any decision to leave the company rather, as she saw it, Mr Cools had himself decided to replace her.
19. By 16 June 2022, Dr McCormack had instructed CG Professional Limited to act as her solicitors. By an email dated 16 June 2022, they presented to Medivet, under its Grievance Policy, a formal written grievance letter contending *inter alia* that Dr McCormack was "being forced out of her role" and the putative restructuring was a "sham".
20. The new arrangements came into effect on 1 July 2022 in relation to Medivet's UK workforce as a whole. Medivet contends that they were never fully implemented in relation to Dr McCormack herself. However, at about this time, Dr McCormack

obtained a sick note and ceased to attend for work. In response to a message on 6 July 2022 in which she confirmed she would not be attending that day since she remained unwell, Mr Cools replied to say her grievance hearing would be arranged so as to take place when she returned to work.

21. By letter dated 8 July 2022, Dr McCormack gave notice terminating her contract of employment on the basis *inter alia* that she had been “forced out of [her] role” following a pre-determined decision without formal consultation and the putative restructuring was a sham. She stated that she was now “very unwell with work related stress”.
22. The Claim Form was issued on 20 December 2022. It includes a claim for damages for loss of salary, loss of a company car or car allowance, accrued holiday pay, loss of nursery care fees, loss of pension and other benefits.

### **(3) Witnesses**

23. Both parties called witnesses to give evidence and their evidence was tested in cross examination. Dr McCormack gave evidence herself. She also called Ms Burns to give evidence. On Medivet’s behalf, Messrs Cools and Dickens gave evidence and some reliance was placed on a witness statement from Mr Philip Robinson, a senior managing director of CVC Advisers Ltd (“CVC”), which acquired Medivet’s share capital in October 2021. This was of limited evidential value.

#### **(a) Dr McCormack**

24. Dr McCormack was a careful witness. For the most part, her testimony was internally consistent but she was willing to make concessions where appropriate. In my judgment, her factual account was generally accurate and she gave an honest account of her perceptions and inferences at the time.
25. She gave evidence about her initial appointment and the development of her career. Whilst qualified as a veterinarian surgeon, she ceased to practice as such in 2016. As she saw it, her role with Medivet was “akin to the role of a Chief Operating Officer”. She reported directly to the Chief Executive Officer and took responsibility for the day to day operations of each practice and the central functions of the business, such as pricing, laboratory, facilities, procurement, practice development and property. She

saw it as her role to develop the business departments so as “to better support the practices to deliver care and perform commercially”.

26. In cross examination, she accepted that her role evolved and grew over time and she took over some of the central functions for which Mr Keith Morris – another employee with veterinary qualifications - had previously been directly responsible in his capacity as Chief Operating Officer. This included laboratory and facilities. She also accepted that, with the accumulation of her work and duties, she became “stretched”. Conversely, she also accepted that, during 2021, she expressed an interest in assuming some responsibility in connection with the development of the European platforms and accepted that, if she was to do so, this would have to involve divesting herself of some responsibilities in the UK. Her discussions during this period were with Deirdre Burns and James Dickens, respectively Chief Executive Officer and Human Resources Director.
27. Dr McCormack also accepted that, in January 2022, Mr Dickens emailed her a plan embodying proposals for a new organisational structure in which Dr McCormack was herself shown as Chief Clinical Officer with the role of Chief Operating Officer marked vacant. Whether this was suitable for her would depend, she considered, on the nature of the role – in particular whether it was operational in nature – rather than the nomenclature.
28. However, at the meeting on 6 April 2022 when Mr Cools showed her the new executive organisation chart and described the role he envisaged for her, it became clear to her she was to be moved to a clinical role with no revenue or line management responsibility. Her responsibility for pricing, procurement, facilities, field operations, practice development and integration were being taken from her and allocated to another officer. In her contemporaneous note of the meeting, Dr McCormack noted that “only aspect of my job not taken away is lab”.
29. On 11 April 2022, Mr Cools emailed Dr McCormack attaching a job description prefaced with the acronym “wip” to suggest that the parameters of the new job remained under consideration. He also stated that he was “happy to discuss” the job description and “your input is appreciated”. In this document, under the heading,

“Job Purpose Summary”, it was provided that “the CCO is ultimately responsible for giving advice on various aspects of the quality of care within Medivet practices and clinics, both in the UK and internationally in collaboration with local leadership”.

30. In the light of this email, Dr McCormack accepted, in cross examination, that the parameters of the new job were “not set in stone” but the nature of her responsibility would be wholly different. She also accepted she did not explicitly put herself forward for the new COO role. However, the gist of her evidence was that it would have been pointless for her to have done so since Mr Cools had already made clear he intended to recruit a “KPI man” for the role rather than Dr McCormack herself.
31. At her subsequent meeting with Mr Cools on 13 April 2022, Dr McCormack was unable to persuade him she was unsuitable for the new role of CCO since she had spent only five years in clinical practice and did not have advanced clinical qualifications. It was also at least implicit in her evidence that, in her career at Medivet, she had focused on the operational side of the business and did not now have the confidence to take on a more technical veterinarian role.
32. She was unable to make any further progress with Mr Cools in their conversation on 28 April 2022. It became clear to her that the new organisational structure was to be implemented with most of her responsibilities re-allocated to a new COO. She thus sought to open discussions for a “planned exit” but Mr Cools was unwilling to proceed on this basis. Implementation was scheduled to take place on 1 July 2022. As a result of the position in which she found herself, Dr McCormack ceased to attend work. By her letter dated 8 July 2022, she gave notice of termination.

**(b) Ms Burns**

33. Ms Burns is still a shareholder of Medivet but she attended to give evidence on behalf of Dr McCormack. She chaired the company from 2019-21 or thereabouts and undertook the role of CEO from 2020-2021. Mr Cools was appointed to replace her and she left shortly after Mr Cools’ took office in February 2022. Her evidence was thus focused on the period prior to the events leading to Dr McCormack’s notice of termination. However, I accept that her factual narrative was generally reliable.



34. She confirmed that, in 2020-2021, Medivet undertook a strategic review of its business. During this period, it acquired some assets in mainland Europe and planned to develop its European business further. Dr McCormack expressed an interest in taking on a role in this part of the business. Ms Burns thought that Dr McCormack had qualities warranting an important role in the company's business. She envisaged a new role for Dr McCormack in the company's clinical strategy in UK and mainland Europe and in designing and establishing the Medivet model in mainland Europe. In cross examination, she confirmed this was distinct from the role of COO. Whilst Dr McCormack would have been well capable of taking on the role of COO, the role would have been more suited for someone who was "UK centric" if Dr McCormack was to take on the pan European role envisaged for her.

***(c) Mr Cools***

35. Mr Cools remains Chief Executive Officer of Medivet following his appointment in February 2022. English is not his first language but, in cross examination, he demonstrated a high level of proficiency in the language. He was also a confident witness. Whilst his views and perceptions on some issues were different from Dr McCormack, their recollections were generally reconcilable in relation to significant parts of the factual narrative. His evidence was generally consistent with the contemporaneous documentation and was no doubt given to the best of his recollection. Where there were differences of perception between Mr Cools and Dr McCormack, these were largely attributable to differences in the perspective from which they viewed events. Upon taking up his appointment in February 2022, Mr Cools inevitably relied on information provided to him by others, such as Ms Burns and Mr Dickens. He then exercised his own judgment informed by his perceptions about the best interests of the company.

36. Mr Cools was appointed CEO of Medivet not long after the company was acquired by CVC. By then, he already had substantial management experience in a business career of more than thirty years. He was advised that CVC intended to "go to a bigger scale". He was also made aware a new COO was to be appointed and, with this in mind, there had already been discussions with a view to appointing someone from one of Medivet's major competitors owing to the way in which the operational side of the

business was being run. Whilst she was thought to be “pivotal” to the business and then “ran everything relating to the medical and operational side of the business”, Dr McCormack was not earmarked for this role. However, Mr Cools wanted to form his own view about what was required, how the work should be allocated and who had the appropriate skills to fulfil the various roles.

37. Following his appointment, Mr Cools met Dr McCormack on 14 February 2022 and, again, during the following weeks. He formed the view that “she was poorly organised, which was made worse because she had too many responsibilities and too broad a job role given that she had very limited knowledge or experience. Everyone reported to [Dr McCormack] about everything (operations, clinical partnerships, procurement, integration, maintenance, facilities, property, graduate presentations the health plan team, pricing, the lab, practice development and the wholesale business) which created a bottleneck and prevented things moving forward. She could not keep up with the areas she was responsible. She had too much responsibility but no (in depth) knowledge and she was poorly organised”.
38. Having formed this impression of Dr McCormack and concluded she was unable to properly perform her wide range of tasks and responsibilities, he concluded it was necessary “to appoint a new COO and for [Dr McCormack] to be relieved of some of the areas that she was involved in and into a clinical focused role”. He reached this conclusion personally.
39. In these circumstances, it is not in the least surprising that Mr Cools advised Dr McCormack at their meeting on 6 April that he “was going to take away some of her responsibilities” and “moved procurement to the CFO, ...pricing and the health plan to Alan Jubb and some other responsibilities (H&S and property and maintenance) to Alan Gordon”. There is an issue as to whether Dr McCormack agreed to this. Mr Cools states that she did. Dr McCormack disagrees. It is more than conceivable Dr McCormack did not immediately take issue with Mr Cools at the meeting and Mr Cools initially thought this was indicative of her assent. If so, it was unrealistic of him to do so. Dr McCormack couldn’t reasonably have been expected to reach agreement immediately with Mr Cools on matters of such importance. In any event, I am satisfied that Dr McCormack was unhappy with these changes from the outset and made this

clear to Mr Cools at subsequent meetings. Moreover, whilst Mr Cools took immediate action to divest Dr McCormack of some of her responsibilities (for example her responsibility for pricing), it appears he still regarded the parameters of Dr McCormack's new job description as a work in progress, "wip", when he emailed her on 11 April 2022.

40. Mr Cools accepts he may have stated he intended to recruit a "KPI man" for the new COO role. If so, however, he was referring simply to an individual with an eye to key performance indicators. He was not referring to the gender of the individual. On the balance of the evidence, it is overwhelmingly likely he did state he was looking for a "KPI man" in his discussions with Dr McCormack. No doubt, his explanation for the use of the expression is correct. He was not intending to say anything about the gender of the new COO. However, he did not regard it as a job for Dr McCormack and she was left with no room for ambiguity. As it happens, the new COO – Mr Cresswell - was not appointed until September 2022.

***(d) Mr Dickens***

41. Mr Dickens was Chief Human Resources Officer at Medivet from January 2018 until November 2022. He was thus in office when CVC acquired its shareholding in Medivet and remained in office for upwards of a year afterwards. He was also in office throughout the period leading to the termination of Dr McCormack's contract of employment. Mr Dickens's evidence was given in a clear and straightforward way and I am satisfied that he gave an honest and reliable account.
42. His evidence was consistent with the evidence of Ms Burns in relation to the preliminary discussions, in 2021, with a view to Dr McCormack taking on a more European focused role. He could see that, given the demands of her existing role, Dr McCormack was already stretched. However, he accepted that this was an issue in relation to her capacity rather than her competence. There is no suggestion that he shared Mr Cools's misgivings about Dr McCormack's levels of competence and organisation.
43. Mr Dickens accepted that the role earmarked for her by Mr Cools was more clinically focused than previously envisaged. Whilst he was not present at the meeting on 6

April 2022 when Mr Cools advised Dr McCormack about the new role, he was made aware that Dr McCormack was uncomfortable with the new role and it was not a positive meeting. Mr Dickens was subsequently present at a meeting at which Mr Cools stated that he wanted a “KPI man” as COO but, whilst Dr McCormack did not react well to this, it was only a “generic term”. At no stage did Mr Cools state that he wanted a male rather than a female in the role of COO. However, Mr Dickens accepted, in cross examination, that Dr McCormack came to believe that part of her job was being taken away.

***(4) The Rival Contentions***

44. During counsel’s opening submissions at the commencement of the trial, I gave Dr McCormack permission to amend her Particulars of Claim to rely on her job designation and thus contend that by creating a new role for her as part of “a pre-determined decision in relation to the alleged restructure” without inviting Dr McCormack to apply for another role, closer to her existing job, Medivet had committed a repudiatory breach or breaches of contract.
45. Mr Northall submitted, on Dr McCormack’s behalf, that by divesting Dr McCormack of some of her responsibilities following her meeting with Mr Cools on 6 April 2022, Medivet committed an immediate repudiatory breach or breaches of contract. He also submitted that, whilst the new job was never formally assigned to Dr McCormack, the decision to allocate it to her amounted to an anticipatory breach of contract.
46. Alternatively, Mr Northall contended that it was an implied term of Dr McCormack’s contract of employment that Medivet would not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. He submitted that, through its predetermined decision to restructure the management of the company – itself characterised as a sham - without properly consulting Dr McCormack, Medivet was itself in repudiatory breach.
47. Having framed Dr McCormack’s case in this way, it was submitted that she accepted the putative breaches – anticipatory or otherwise - through the service of her termination letter dated 8 July 2022.

48. In response, Medivet contended that the proposals to restructure the management of the company were genuine and Dr McCormack was properly consulted in the decision-making process. Whilst Medivet released a statement to confirm the new structure would come into effect on 1 July 2022, this did not relate to Dr McCormack's position. She was never forced into the new role. It follows that Medivet was not in repudiatory breach, anticipatory or otherwise, when Dr McCormack purported to terminate her contract of employment.
49. In any event, Medivet had reserved a contractual right to unilaterally vary Dr McCormack's responsibilities. Moreover the test of whether Medivet was in breach of contract was objective and only very serious breaches could qualify as a repudiatory breach.
50. Nevertheless, on the hypothesis Medivet fails on the issues as to liability, it does not take issue with the quantification of Dr McCormack's claim in damages.

***(5) Factual inferences and conclusions***

51. There were factual issues between the parties in relation to the origins and substance of Mr Cools' scheme for a management re-structure – whether it was a sham – and whether Dr McCormack was meaningfully consulted or presented with a pre-determined decision. There were also issues in relation to Dr McCormack's status as an employee at the time she served notice of termination.
52. Contrary to the case presented on Dr McCormack's behalf, I am not persuaded that Mr Cools' scheme was a sham. The scheme evolved from the proposals, in 2021, for the company to expand its operations in mainland Europe and modify its system of management to meet CVC's demands following acquisition. It was envisaged that Dr McCormack would be given a substantial role in the European operation. However, it was also recognised that, owing to her evolving accumulation of responsibilities, she was already stretched. It was thus recognised that she would have to be divested of some of her responsibilities in the UK. When consulted in 2021 with respect to the prospective enlargement of the company's European operations, Dr McCormack expressed a willingness to become involved on this basis.

53. Mr Cools was himself aware of these proposals by the time he commenced work. Indeed, it was recognised, based on his knowledge and experience, that he was well capable of advancing the European project and this was one of the main reasons he was chosen as Medivet's new Chief Executive Officer. At the outset, Mr Cools personally assessed the company's system of management and the capabilities of the staff. He soon decided he would need the support of a COO who could be trusted to assist him in ensuring the company performed well according to the "KPIs", as he saw them. He also formed the impression, at an early stage, that Dr McCormack was disorganised and would not be suitable for such a role notwithstanding that she was already responsible for several of the functions to be assigned to the new COO. However, Dr McCormack was a well valued member of the management who he would not want to lose. Building on her professional qualifications and the enhanced role already envisaged for her in the European operation, he defined the boundaries for Dr McCormack's new role as CCO. This would include taking and explaining the clinical model to Medivet clinics across the continent.
54. Mr Cools' plans for the management of the company were informed, in part, by his perceptions of the capabilities and experience of the company's employees. This included Dr McCormack. The new role of CCO was created, in part, with a view to accommodating Dr McCormack's experience and skills. Mr Cools' plans were formed over a short period of time following his appointment and they were shaped, to a significant extent, by his own personal perceptions without him first having had the time to obtain anything more than limited personal experience of the company's day to day business operations. However, the plans were not – as Dr McCormack's solicitors put it – a sham. They were not designed for the narrow purpose only of severing Dr McCormack's responsibilities or masking Mr Cools' real objectives.
55. Nevertheless, Mr Cools presented his plans to Dr McCormack in April 2022 without making anything more than the most perfunctory enquiries of her personally about the type of role she would find comfortable and rewarding. Had he done so, he would quickly have ascertained Dr McCormack would not feel comfortable in the role he had in mind for her.

56. It is correct, as Medivet maintain, that Dr McCormack was not formally allocated to the new role prior to her notice of termination on 8 July 2022. However, with effect from 6 April 2022 or shortly afterwards, Mr Cools took away some of her responsibilities, moving them to other employees. This included her responsibilities for pricing and property and maintenance. Moreover, Mr Cools' mind was already made up.

57. During the course of April 2022, Dr McCormack made it obvious to Mr Cools she was unwilling to take on the new job he had earmarked for her. It is true that she did not offer to do the new COO job or ask Mr Cools whether she could be given the opportunity to apply. However, the reason for this is that she perceived – with good reason - that she had no realistic prospect of persuading Mr Cools to offer it to her. Having concluded that Dr McCormack was disorganised and unsuitable for the role, it is fanciful to suggest Mr Cools could have been persuaded to give her the COO job. In his submission for Medivet, Mr Boyd submitted that it is not open to Dr McCormack to complain since she did not put herself forward for the new job. However, in my judgment, this submission does not lead anywhere since Mr Cools made it abundantly clear to Dr McCormack that the new job was not for her.

58. As it happens, Mr Cools was not formally appointed as a director and recorded as such, at Companies House, until 27 July 2022. Indeed, following the resignation of Ms Burns on 12 March 2022, there was only one recorded director, namely Mr Borms. Whilst Mr Cools acted as a *de facto* director from 14 February 2022, there were and are no formal board meetings or minutes during this period. However, whilst Mr Cools made the decisions to take away some of Dr McCormack's responsibilities and carve out a new role for her, he was authorised to do so and these decisions can be taken to have been made with Mr Borms' assent. I can thus infer that the decisions were taken by the company through its directors.

### **(6) Analysis**

59. There are preliminary issues of law as to the scope of Medivet's rights to vary Dr McCormack's contract of employment and the extent to which it lawfully exercised such rights. There are also issues as to the application of Medivet's implied duty of

trust and confidence to Dr McCormack, as an employee, and whether Medivet committed repudiatory breaches of contract so as to furnish Dr McCormack with a right of termination.

60. I shall deal first with Medivet's rights to vary Dr McCormack's responsibilities under her contract of employment.

61. Dr McCormack was designated, in Clause 2.1 of her contract of employment, as "Head of Clinical Operations". However, her job was not described in detail and her responsibilities evolved over time. By April 2022, she was responsible for much of the day-to-day management of the company. More specifically, she was responsible for pricing, procurement, practice development, property and the laboratory management.

62. By clause 2.5 of Dr McCormack's contract of employment, it was provided that "the Board [of directors] shall be entitled from time to time to appoint any other person or persons to act jointly with [Dr McCormack] in the office which she then holds under this agreement or to change the Executive's executive office or its responsibilities and powers as it shall think fit".

63. Relying on the judgment of Lord Woolf MR in *Wandsworth LBC v D'Silva [1998] IRLR 193*, Mr Northall submitted that such a clause cannot generally be utilised by an employer in respect of an employee so as to do more than "vary [the] contractual provisions with which that party is required to comply". However, in my view, caution is exercisable before treating this as a general principle and applying it in the present case. In *Wandsworth v D'Silva (supra)*, a local authority made changes to their Code of Practice on Staff Sickness. There were issues as to the extent to which the Code was contractually binding on the council and, if so, whether the council were entitled to make changes to the Code under rights reserved in their contracts of employment with staff. The Court of Appeal concluded that the relevant provisions were not intended to have contractual effect. On the hypothesis, however, that they were contractual, the rights were generally capable of unilateral variation save to the extent they took away employees' rights, particularly their rights of appeal. In the present case, unlike *Wandsworth v D'Silva (supra)*, there can be no substantial issue of



interpretation. Medivet's reserved rights, in clause 2.5 of her employment contract, unambiguously apply to Dr McCormack's role and responsibilities.

64. The material questions in the present case are not as to the *express* ambit and interpretation of Medivet's reserved rights; rather they are as to the nature and extent of any *implied* proviso to the exercise of such rights. Whilst "interpretation...is the precursor of implication", the two processes are logically separate, *Trump International Golf Club Ltd v Scottish Ministers* [2015] UKSC 74 at [35].
65. Analysed in this way, the parties cannot have intended Medivet's reserved rights to be exercisable without limit. Since the reserved rights conferred discretionary powers on Medivet which were exercisable unilaterally to Dr McCormack's disadvantage, it was *implicit* Medivet would exercise such powers honestly, rationally and for the purpose for which they were conferred ("**the Implied Proviso**"), see Lewison on "*the Law of Interpretation of Contracts*" (8<sup>th</sup> edn) (2024) Chapter 14 (11) [14.70] – [14.98]. In my judgment, the Implied Proviso satisfies the tests of necessity and reasonableness.
66. It can also be surmised that the Board's discretionary powers were conferred in the interests of good management so as to apply where there was good reason to appoint others to work with Dr McCormack or change her responsibilities. The test of rationality implicitly endorsed by Lewison, at [14.81], when formulating the implied proviso, can be seen in Lord Sumption's authoritative guidance in *Hayes v Willoughby* [2013] UKSC 17.

"Rationality is not the same as reasonableness. Reasonableness is an external objective standard applied to the outcome of a person's thoughts or intentions. The question is whether a notional hypothetically reasonable person in his position would have engaged in the relevant conduct...A test of rationality, by comparison, applies a minimum objective standard to the relevant person's mental processes. It imports a requirement of good faith, a requirement that there should be some logical connection between the evidence and the ostensible reasons for the decision, and (which will usually

amount to the same thing) an absence of arbitrariness, of capriciousness or reasoning so outrageous in its defiance of logic as to be perverse”.

67. On this basis, the next questions are whether Mr Cools’ decision, in April 2022, to divest Dr McCormack, with immediate effect, of her responsibilities for pricing and property and maintenance and transfer them to other employees (“**the Immediate Decision**”) and, with effect from a date as yet unidentified in the future, allocate a new role to Dr McCormack as CCO (“**the Inchoate Decision**”) were properly taken in the exercise of the board’s powers in clause 2.5.

68. Mr Cools made each decision personally, he did so with a minimum of formality and without purporting to invoke his specific powers in clause 2.5. However, it was not suggested before me that they cannot be treated as decisions of the board nor was it suggested that, if applicable, the powers in clause 2.5 were not invoked. The operative test is thus whether, in making either decision, Mr Cools exercised the board’s power in accordance with the Implied Proviso.

69. In my judgment, the short answer to this is no. It follows that the operative test is not satisfied and the relevant decisions are void as the lawful exercise of the company’s powers in clause 2.5. The Immediate Decision was taken on an *ad hoc* basis without reference to the board’s contractual powers or the time scale for implementation of the Inchoate Decision. The proposals were not properly canvassed with Dr McCormack in advance. Nor was proper consideration given to the structural adjustments necessary to accommodate the Immediate Decision. There was also no meaningful assessment as to how Dr McCormack’s interim and final responsibilities should be allocated. It was irrational in the sense identified by Lord Sumption in *Hayes v Willoughby (supra)* and did not accommodate the purposes for which it was exercisable since no good management reason can be discerned for making the decision at this stage in advance of the final re-allocation of Dr McCormack’s duties. Dr McCormack was perceived to be “stretched” and Mr Cools was critical of her organisational competence but no interim solutions were explored with Dr McCormack before the decision was made and no good reason was given for preemptively divesting her of these particular functions. Until Mr Cools’ arrival, Dr McCormack had performed her established role without substantial criticism and, by

the time he made the Immediate Decision, Mr Cools can have had no more than a limited opportunity to evaluate her working contribution to the operation of the company. Mr Cools' assessment of Dr McCormack was primarily based on his assessment of her during personal discussions with her. Conversely, whilst the Inchoate Decision was communicated to Dr McCormack on the understanding it would take effect at some point in the future, the board's specific decision making powers cannot have been fully engaged since it was not scheduled for implementation prior to the termination of her employment. Indeed, whilst it is unclear precisely when the new COO was first appointed, the new appointment did not take effect until September 2022.

70. Since the Immediate Decision and the Inchoate Decision were not made and communicated to Dr McCormack in the proper exercise of the company's powers in clause 2.5 of her contract of employment, it is pertinent to ask whether they gave rise to a repudiatory breach or breaches of Dr McCormack's contract of employment.

71. In addressing these questions, Mr Northall submitted that requiring an employee to take on a new role for her employer will generally amount to a repudiatory breach of her contract of employment where this is not authorised under the employee's contract of employment. In support of Dr McCormack's case on this point, Mr Northall relied on a judgment of the Employment Appeal Tribunal, delivered by Recorder Langstaff QC, in *Hilton v Shiner Ltd* [2001] IRLR 727. One of the issues before the Employment Appeal Tribunal, in that case, was whether an employer had committed a repudiatory breach of an employee's contract of employment by redeploying him to another role following allegations of dishonesty. Of course, there has never been an allegation of dishonesty in relation to Dr McCormack. However, at [29], the EAT observed as follows.

“Requiring an employee to cease doing what has been his principal job, and to require him to take up a new role, in circumstances in which there had been no allegation of dishonesty against the employee, would in our view amount to a variation of the employee's contract. We do not think that such a variation could be imposed upon the employee without his consent. To attempt to do so would, we think, almost always be capable of being a repudiatory breach.

Whether it reached the materiality sufficient for the breach to be repudiatory has to be judged objectively, by reference to its impact upon the employees, as the cases to which we have referred show. Once the breach is of sufficient materiality to be regarded as repudiatory, the motive that underlay it becomes irrelevant, as Brown Wilkinson J pointed out in *Wadham Stringer v Brown*. The presence of an allegation of dishonesty thus makes no difference.”

72. Mr Northall submitted that, by divesting Dr McCormack of some of her responsibilities and advising her of its decision to allocate her an entirely new role as CCO, Medivet committed repudiatory breaches of her contract on this basis. He accepted that the Immediate Decision and the Inchoate Decision are to be treated differently for this purpose on the basis that the Inchoate Decision gave rise to an anticipatory breach only. However, he submitted that by communicating the Inchoate Decision to Dr McCormack, Mr Cools notified her that Medivet would refuse to perform its contractual obligations when the Inchoate Decision was implemented. Relying on *Paragraph 28-070 of Chitty on the Law of Contract (35<sup>th</sup> edn) (2023)*, Mr Northall submitted that this was tantamount to the renunciation of Medivet’s contractual obligations. Dr McCormack was thus entitled to accept this as a repudiatory breach so as to terminate the contract and sue for damages.

73. In my view, the EAT’s above analysis in *Hilton v Shiner* correctly states the law. In the present case, the nature or Dr McCormack’s responsibilities and the level of her seniority are significant. By taking away and transferring, to other employees, her core responsibilities for areas such as pricing and property and maintenance, Medivet committed breaches of Dr McCormack’s contract of employment which formed an essential part of her role as employee. This amounted to a repudiatory breach of contract. Conversely, whilst Medivet did not deliver a new contract of employment to Dr McCormack nor do anything else to specifically implement the Inchoate Decision or designate a date for final implementation prior to Dr McCormack’s termination letter, Medivet had by then decided to allocate her a new job with new responsibilities. Whilst there was room for negotiation of detail, the general scope of the new job and the nature of Dr McCormack’s new responsibilities had been

determined. There was no room for her to re-assimilate the responsibilities of which she had already been divested.

74. Dr McCormack was entitled to interpret the Inchoate Decision on this basis and, once communicated to her, she was entitled to treat it as an anticipatory breach and terminate her contract of employment.

75. Mr Northall also submitted that each of these decisions and the action taken by Medivet to communicate them should be taken into consideration when assessing the company's conduct as a whole to determine whether the company had committed a repudiatory breach or breaches of the implied term of mutual trust and confidence in Dr McCormack contract of employment.

76. For the ambit of the implied term, Mr Northall relied upon the contractual formula identified by the House of Lords in *Malik v Bank of Credit and Commerce International SA [1998] AC 20*, namely "the employer will not, without reasonable and proper cause, so conduct itself in its dealings with third parties so as to destroy or seriously damage the relationship of trust and confidence between employer and employee". Relying on the principles identified by Dyson LJ in *Waltham Forest v Omilaju [2004] EWCA Civ 1493 at [14]*, Mr Northall submitted that, whilst the test of whether there has been a breach is objective, a relatively minor act may suffice if the last straw in a series of incidents. This is significant because any breach of the implied term amounts to a repudiation of the contract, *Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347 at 351*.

77. On this basis, Mr Northall submitted that the company's conduct as a whole commencing with its premeditated decision, without consultation, to change Dr McCormack's role as employee and culminating in its failure to engage properly with her formal grievance letter amounted to a repudiatory breach of the implied term of mutual trust and confidence in Dr McCormack's contract of employment.

78. Whilst Mr Boyd was correct to remind me that only serious breaches of contract qualify as a repudiatory breach, Dr McCormack has successfully established the essential elements of this part of her case. Through its conduct viewed cumulatively, the company was in repudiatory breach of contract by the time Dr McCormack sent

her letter of termination. This includes, in particular, the company's failure to consult Dr McCormack properly prior to the meeting on 6 April 2022 at which Mr Cools advised her of the Inchoate Decision and, having done so, divested her of specific responsibilities in advance of implementation. It also includes the implementation of the Immediate Decision, the communication of the Inchoate Decision and, more generally, the failure of the company to communicate properly with Dr McCormack to assess and accommodate her views in the period leading up to termination, including the company's failure to make immediate arrangements to deal with her formal grievance. If the company's conduct was not calculated to undermine the relationship of trust and confidence with Dr McCormack, it ought to have been in little doubt that this was likely to be the consequence as, indeed, it was.

***(7) Disposal***

79. Having accepted Medivet's repudiatory breaches and terminated her contract of employment, Dr McCormack is entitled to damages for breach of contract. The quantification of these losses is not in issue but I shall hear submissions from counsel on quantum, interest and other consequential matters before formally entering judgment.