Case Number 2501336/16

EMPLOYMENT TRIBUNALS

Claimant — ***Respondent***
Ms Lesley Tait — **TWC Facilities Ltd ("TWC")**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT NORTH SHIELDS ON 18th-20th April 2017
EMPLOYMENT JUDGE GARNON (sitting alone)

Appearances
For Claimant Mr R Owen CAB
For Respondent Ms A Del Priore of Counsel

JUDGMENT

The claims are well founded. Remedy will be decided on a date to be fixed after 25th May 2017.If remedy is agreed before that date, the parties are to notify the Tribunal without delay

REASONS

1. Introduction and Issues

1.1. By a claim presented on 22nd December 2016 the claimant, born 13th July 1973, brought claims of constructive unfair and wrongful dismissal and "other payments" being basic pay and commission while on sick . The last claim was not pursued. The claimant was employed from June 2011 as a sales representative and resigned on 27th September with effect from 31st October 2016.

1.2. The issues broadly framed are : -
1.2.1. Did either separately or cumulatively the following actions of the respondent amount to a breach of its contractual obligations to the claimant
(a) not paying her commission on business relating to "her customers", including an occasion she took as a "last straw" when she and Mr Peter Walker were each given 50% of the commission
(b) not increasing her basic pay to £25000 within 5 years of her starting
(c) not paying her commissions when they fell due
(d) not affording her a proper means of resolving grievances
(e) abolishing her entitlement to commission on "repeat business"
(f) changing a bonus scheme and increasing her "target"

1.2.2. Did the respondent, **without reasonable and proper cause**, conduct itself in such a manner calculated or likely to destroy or seriously damage the relationship of mutual confidence and trust between itself and the claimant ?

1.2.3. If the respondent did breach any express or implied terms of the claimant's employment contract, were such breaches fundamental and did the claimant resign, at least in part, in response to such breach without first affirming the contract ?

1.2.4. If so, there was therefore a dismissal (which was wrongful) , does the respondent show a potentially fair reason for it ?

1.2.5. If so, was the dismissal fair applying the test in s 98(4) of the Employment Rights Act 1996 (the Act) .

1.2.6. What remedy should be awarded for the unfair and wrongful dismissals?

2.The Relevant Law

2.1. Section 95(1)(c) of the Act provides an employee is dismissed if: -
"the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

2.2. An employee is "entitled" so to terminate the contract only if the employer has committed a fundamental breach of contract, ie. a breach of such gravity as to discharge the employee from the obligation to continue to perform the contract. See Western Excavating (ECC) Ltd v Sharpe [1978] IRLR 27. The conduct of the employer must be more than just unreasonable to constitute a fundamental breach.

2.3. In Cape Industrial Services v Ambler the Employment Appeal Tribunal ("EAT") explained that we should ask the following questions: -
(i) What are the relevant terms of the contract said to have been breached?
(ii) Are the breaches alleged or any of them, made out (the burden of proof being on the employee)?
(iii) if so, are those breaches fundamental?
(iv) did the claimant resign , at least in part , in response to the breaches not for some other unconnected reason and do so before affirming the contract.
If the answers to questions (ii), (iii) and (iv) are affirmative, there is a dismissal.

2.4. Section 98 (1) requires the respondent to show the reason for dismissal . Even constructive dismissal may be fair if the respondent shows a potentially fair reason for the dismissal and acts reasonably. The reason for dismissal in any case is a set of facts known to the employer or may be beliefs held by him which cause him to dismiss the employee, see Abernethy v Mott, Hay and Anderson. The reason in a constructive dismissal case was explained in Berriman v Delabole Slate Company [1985] ICR 546 as follows: -

"First in our judgment even in a case of constructive dismissal section 57(now section 98 of the Act) *imposes on the employer the burden of showing the reason for dismissal notwithstanding it was the employee not the employer who actually decided to terminate the contract. In our judgment the only way in which the statutory requirements of the Act can be made to fit the case of constructive dismissal is to read section 57 as requiring the employer to show the reason for their conduct which entitled the employee to terminate the contract thereby giving rise to a deemed dismissal by the employer.*"

2.5. In order to identify a fundamental breach of contract on the part of the employer, it is first necessary to establish what the terms of the contract are. Contractual terms may be either express or implied. Express terms are those which have been specifically agreed between the parties, whether in writing or under an oral agreement. They may be vague or incomplete and need to be supplemented by implied terms such as those required to give the contract business efficacy or those which custom and practice in the industry regards as "reasonable, notorious (meaning "well known") and certain" . Only in rare circumstances , eg where a term is implied by statute, may an implied term contradict an express one.

2.6. Lord Hoffman in <u>Investors Compensation Scheme-v-West Bromwich Building Society</u> explained one must in interpreting express terms look for the intention of the parties at the time the contract was made. His judgment includes

Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract…

The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax.

The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in The Antaios Compania Neviera S.A. v. Salen Rederierna A.B. 19851 A.C. 191, 201:
". . . if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."

2.7. Also very relevant in this case is a long established legal doctrine in **Pinnels case** that a party's failure in the past to enforce a term will not prevent that party from doing so in the

future unless there is created what is known a promissory estoppel. A promissory estoppel may arise where a person is led to rely to his detriment upon something not happening , eg rent paid late not resulting in forfeiture of a lease . It can only be advanced as what is called "a shield, not a sword". In other words a person cannot **bring a claim** based on an argument that because the other party to the contract acted in a certain way in the past , they must also do so in the future.

2.8. Many contracts contain what are sometimes called "variation clauses", permitting a party to the contract to vary a term without the consent of the other party. Ms Del Priore is quite right when she says these must be construed narrowly and, to use the Latin phrase, "contra proferentem ", which means against the person who is asserting reliance upon the right to vary. The terms of a variation clause must also specifically cover the variation which the employer actually effects.

2.9. A fundamental breach may be actual or anticipatory. An actual breach of contract arises when the employer refuses or fails to carry out an obligation imposed by the contract at a time when performance is due. For example, a reduction in an employee's monthly pay cheque is an actual breach. An anticipatory breach arises when, before performance is due, the employer intimates to the employee, by words or conduct, he does not intend to honour an essential term or terms of the contract when the time for performance arrives. A letter at the beginning of the month stating that 'With effect from the end of this month your salary will be reduced " would be an anticipatory breach.Vague or conditional proposals of a change in terms, conditions or working practices will not amount to an anticipatory breach.

2.10. In Greenaway Harrison Ltd v Wiles 1994 IRLR 380, the EAT held the employer's threat to terminate a contract with notice constituted an anticipatory breach of a fundamental term. There have long been doubts over the correctness of this decision, because it is well established an employer is perfectly within its rights to terminate the employee's contract with proper notice and offer to re-engage the employee on a new contract with new terms and conditions: in such circumstances there will be no breach of contract. As in this case, the manner in which the "threat" is made may be the decisive factor.

2.11. In Financial Techniques (Planning Services) Ltd v Hughes 1981 IRLR 32, there was a dispute over the interpretation of a profit-sharing scheme and the employee resigned on the ground his employer had indicated money would be deducted from his next quarterly payment. The Court of Appeal rejected his claim, holding when there is a genuine dispute about the terms of a contract it is not an anticipatory breach for one party to do no more than argue his or her point of view. Lord Justice Templeman said this did not mean an employer could invariably insist on a plausible but mistaken view of his contractual obligations without being held to have repudiated the contract. In the case of an *actual* breach, an employer's insistence on performing the contract according to a genuine but incorrectly held belief may prevent those actions from constituting a **repudiatory** breach, see Bridgen v Lancashire County Council 1987 IRLR 58, per Donaldson MR "*The mere fact that a party to a contract takes a view of its construction which is ultimately shown to be wrong, does not of itself constitute repudiatory conduct. It has to be shown that he did not intend to be bound by the contract as properly construed.*' This statement was accepted

without comment by the EAT in O'Kelly v GMBATU EAT 396/87 and Haberdasher's Monmouth School for Girls v Turner EAT 0922/03.

2.12. Once it has been established a relevant contractual term exists and breach (actual or anticipatory) has occurred, I must then consider whether the breach is fundamental. This is essentially a question of fact and degree. The employer's motive for the conduct causing the employee to resign is irrelevant to whether or not there has been a fundamental breach. In Wadham Stringer Commercials (London) Ltd v Brown 1983 IRLR 46, a sales director, was demoted in status and moved into a cramped and unventilated office. The employer argued economic circumstances impelled it to treat him in this way, but the EAT stressed the test of fundamental breach is a purely contractual one and that the surrounding circumstances are not relevant, at this stage .They will be to the reason for the dismissal , see later.

2.13. The obligation on an employer to pay employees their salary is so fundamental that breaches of this duty are likely to be treated as repudiatory. **Most** cases that involve a reduction in pay result in a finding the employer was in fundamental breach, albeit it may subsequently defend an unfair dismissal claim by arguing the reduction was reasonable. Two examples are (a) reducing an employee's commission by reducing her sales area - Star Newspapers Ltd v Jordan EAT 344/93 and (b) withholding a pay rise - GEC Avionics Ltd v Sparham EAT 714/91. Also in Cantor Fitzgerald International v Callaghan 1999 ICR 639, the Court of Appeal held if an employer deliberately diminishes the value a **salary package**, that is a fundamental and repudiatory breach, regardless of the amount involved, either in terms of the size or the proportion it represents of the overall pay package.

2.14. Whether changes to an employee's job content amount to a fundamental breach will depend upon whether the changes fall within the contractual job description. If they do not, one serious change or a gradual erosion of an employee's duties may result in a constructive dismissal. The main cases are Hilton-v-Shiner 2001 IRLR 727, Land Securities-v-Thornley 2005 IRLR 765 and Coleman-v-Baldwin 1977 IRLR 342. First , the job change must be significant. A clause in the contract widely framed to permit the employer to require the employee to do anything the employer reasonably asks will not prevent the employee showing a breach if the requirement is not objectively reasonable, even if the employer had valid grounds for the requirement. To hold otherwise would be to conflate the question of whether there was a breach with whether the employer can show a potentially fair reason for the breach . Next, the change must be more than temporary though it need not involve any loss of pay. The stronger arguments by employees that a change is a fundamental breach tend to be where the new duties “de-skill” the employee because they are of a humdrum nature well below her previous duties in terms of job demand and satisfaction.

2.15 In WA Goold (Pearmak) Ltd v McConnell 1995 IRLR 516, the EAT held an employer is under an implied duty to ‘reasonably and promptly afford a reasonable opportunity to employees to obtain redress of any grievance they may have. In that case, it was held two salesmen had been constructively dismissed when their employer failed to deal with their grievance over changes to their sales methods, which had the effect of reducing their pay. However, the salesmen concerned were “blocked” from even seeing their manager by his PA. There is no obligation on an employee to use the grievance procedure before resigning, see Seligman and Latz v McHugh [1979] IRLR 130. However, if there are procedures for

raising a grievance, the employee cannot complain the employer has failed to deal with a grievance if she refuses or omits to use them (see Hamilton v Tandburg Television).

2.16. Where the employer has not breached any express or other implied term , an employee may rely on the implied term of mutual trust and confidence. What does it mean? In Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347, the EAT, said: -

"*It is clearly established that there is implied in a contract of employment a term that the employer would not, without reasonable and proper cause, conduct themselves in a manner, calculated or likely to destroy or seriously damage the relationship of confidence and trust between an employer and an employee. To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract. The Employment Tribunals function is to look at the employer's conduct as a whole and determine whether it is such that its cumulative effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it any longer. Any breach of that implied term is a fundamental breach amounting to repudiation since it necessarily goes to the root of the contract.*"

2.17. The House of Lords considered the implied term of mutual trust in confidence in Malik v BCCI. and said that if conduct, objectively considered, was likely to cause serious damage to the relationship between the employer and the employee, a breach was made out irrespective of the motives of the employer. They emphasised that the conduct of the employer must be without "reasonable and proper cause" and that too must be objectively decided by the Tribunal. It cannot be enough that the employer thinks it had reasonable and proper cause. Bournemouth University Higher Education Corporation v Buckland 2010 ICR 908 held the question of whether the employer's conduct fell within the range of reasonable responses is not relevant when determining whether there is a constructive dismissal. Rather, it is something to be considered if the employer puts forward a potentially fair reason for dismissal when deciding whether dismissal was reasonable.

2.18. An employer is liable for the acts of its managers towards subordinates done in the course of their employment whether the employer knew or approved of them or not Hilton International v Protopapa. There are countless examples of the ways in which the implied term may be breached, for example, the use of abusive or intemperate language, see Palmanor v Cedron; telling an employee he is incapable of doing the job, see Courtaulds v Andrew. However, it is not enough for an employee to say she found a manager's " attitude" unacceptable without giving examples.

2.19. A breach of the implied term of mutual trust and confidence may result from a number of actions over a period of time, as said in Lewis v Motorworld Garages [1985] IRLR 465: -

"*In considering whether the respondent has breached the implied term of mutual trust in confidence, the Tribunal had erred in excluding consideration of two earlier breaches of express terms of the contract on the grounds that the employee had accepted the altered terms of the contract. Even if an employer does not treat a breach of that express contractual term as wrongful repudiation, he is entitled to add such breaches to other*

actions, which taken together may cumulatively amount to a breach of the implied obligation of trust in confidence."

As Lord Justice Donaldson said in that case, the earlier breaches are not "spent". This doctrine, sometimes called the last straw doctrine, was further explored in the case of London Borough of Waltham Forest v Omilaju [2005] IRLR 35. The last straw does not have to be a breach of contract in itself or of the same character as the earlier acts. Its essential quality is that when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant. The last straw viewed in isolation need not be very unreasonable or blameworthy conduct, though an entirely innocuous act on the part of the employer cannot be taken as the last straw, even if the employee genuinely but mistakenly interprets the act as hurtful and destructive of his trust and confidence in the employer.

2.20. Resignation is acceptance by the employee that the breach has ended the contract. Conversely, she may expressly or impliedly affirm the contract and thereby lose the right to resign in response to the antecedent breach. There is a lengthy explanation of the principles in WE Cox Toner (International) Ltd v Crook [1981] IRLR 443, which the Court of Appeal confirmed in Henry v London General Transport [2002] IRLR 472, but I will in this case give the shorter, but effective explanation in Cantor Fitzgerald v Bird [2002] IRLR 267, that affirmation is "*essentially the legal embodiment of the everyday concept of 'letting bygones be bygones'".* Delay of itself does not mean the employee has affirmed the contract but if it shows acceptance of a breach, then in the absence of some other conduct, reawakening the right to resign (see Omilaju), the employee cannot resign in response to that breach.

2.21 Even if there has been a fundamental breach which has not been affirmed, if it is not at least in part the effective cause of the employee's resignation, there is no dismissal, see Jones v F.Sirl Furnishing Ltd and Wright v North Ayrshire Council, EAT 0017/13

2.22. Secton 98 of the Act provides:
"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair it is for the employer to show –
(a) the reason (or if more than one the principal reason) for dismissal
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

2.23. Hollister –v-National Farmers Union 1979 IRLR 238 and Kerry Foods-v-Lynch 2005 IRLR 680 say where there is a sound business reason for imposing a reasonable change on an employee's terms and conditions and , after consultation , he refuses to agree, it may be some other substantial reason for dismissal.

2.24. Section 98(4) of the Act says:

"Where an employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
(a) depends on whether in all the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee
(b) shall be determined in accordance with equity and the substantial merits of the case."

2.25. In R-v- British Coal Corporation ex parte Price 1994 IRLR 72 fair consultation was defined as (a) discussion while proposals are still at a formative stage (b) adequate information on which to respond (c) adequate time in which to respond and (d) conscientious consideration of the response. The Court said *"Fair consultation involves giving the body consulted a fair and proper opportunity to **understand fully** the matters about which it is being consulted, and to express its views on those subjects, with the consultor thereafter considering those views properly and generally "* and in Samsung Electronics U K Ltd-v-Monte De Cruz EAT/0039/11 Underhill P. said : "*The merits of the reorganisation as such were not a matter for consultation. What the Claimant was entitled to be consulted about was how it affected him.* In Thomas-v-BNP Paribas EAT/1034/16 , Wilkie J said where consultation was held by the Tribunal to be " perfunctory and Insensitive" that should have resulted in a finding of unfairness unless it gave a well reasoned explanation for it not being unfair. In all aspects substantive and procedural , Iceland Frozen Foods v Jones (approved in HSBC v Madden and Sainsburys v Hitt) held I must not substitute my view for that of the employer unless its view falls outside the band of reasonable responses.

2.26. In Polkey v AE Dayton Lord Bridge of Harwich said :
. an employer having prima facia grounds to dismiss will in the great majority of cases not act reasonably in treating the reason as a sufficient reason for dismissal unless and until he has taken the steps, conveniently classified in most of the authorities as "procedural", which are necessary in the circumstances of the case to justify that course of action. .....If an employer has failed to take the appropriate procedural steps in any particular case, the one question the Industrial Tribunal is not permitted to ask in applying the test of reasonableness proposed by section 98(4) is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken. On the true construction of section 98(4) this question is simply irrelevant. … In such a case the test of reasonableness under section 98(4) is not satisfied … but if the likely effect of the appropriate procedural steps is only considered, as it should be, at the stage of assessing compensation, the position is quite different. In that situation as Browne-Wilkinson J puts it in Sillifant's case
"There is no need for an "all or nothing" decision. If the Industrial Tribunal thinks there is doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have lost his employment".

2.27. As Elias LJ explained in Software 2000 Limited v Andrews 2007 ICR 825, the mere fact that speculation is involved is not a reason for not finding from the evidence what was

likely to have happened .The employer may show that if fair procedures had been complied with, the dismissal would have occurred when it did in any event. The Tribunal may decide the employment would have been continued but only for a limited period. Section 122(2) empowers me to reduce the basic award on account of the conduct of the claimant before the dismissal if I find it just and equitable to do so. .

3 Findings of Fact

3.1. I heard the claimant and her husband Mr Paul Tait. I read a statement of the claimant's mother Marjorie Wilson. I heard for TWC Mr Martin Williams Managing Director, Ms Tracy Walker, General Manager and Ms Barbara Harris HR Consultant .

3.2. TWC's business is washroom services, infection control systems and commercial carpet cleaning. Mr Williams, a Chartered Surveyor by profession started the business in 2009 . He freely admits he had no experience of this type of business. He employed the claimant to work as a Sales Representative in June 2011. Her contract of employment expressly stated she would be paid £18,000 per annum, and be included in the respondent's commission scheme. The contract states she " **will be** paid commission on business you generate as detailed in your offer" (page 35) . The offer is at page 61 and says only "Commission of 15% of the first years income of **all contracts sold**" . **That would include contracts sold to existing customers by way of renewal of time limited contracts which had run their course.** Sales persons were also "account managers" expected to " look after" existing customers so they would "re-sign". Commission meant it was in their interests, as well as those of TWC, to do so well. The contract says the respondent "reserves the right to revise **commission levels** from time to time" **.** Mr Williams agreed "levels " in that context meant percentage rates of commission. Despite Ms Del Priore's engaging submission that "zero% is a level", I find the intention of the parties at the time the contract was made did not extend to this clause empowering TWC to remove entirely the core aspect of commission on contracts sold to existing customers , which all witnesses called "re-signs". It is implicit in Mr Williams statement "*.I note, however, that I had not had any previous experience of setting up a business and some of the system we had in place, for example relating to employees' commission payments, had perhaps not been given due consideration in line with the growth of the business"* that he sees what was proposed in 2016 as radically different from what was agreed in 2011 and worked to since.

3.3. One has to look to page 270 for any detail .It came in about 4-5 months after the contract and was worked to until 2016 It contains various percentages but for washroom and infection control but gives **a right** to renewal commission.

3.4. Commission often equated to or exceeded the claimant's basic pay and a good part of it was re-signs. Over time better office support and field working operatives visiting to perform maintenance work in the washrooms every 1-4 weeks, tended to do enough to keep the customers happy during the currency of a contract without as much input from the sales representative.

3.5. Washroom contracts involve periodic payments over the contract term from the customer to TWC for the installation and maintenance of the facilities. This causes a cash flow problem, as Mr Williams explained in his statement: **"***One of the reasons for this is that, once a contract has been secured, it is often the case that new equipment needs to be installed on the customers site which needs to be paid for by the Respondent prior to receiving any money from the customer. The customer is invoiced over a 3 to 5 year period therefore it takes time for the initial investment to be recouped. ".* Carpet cleaning is a "one off" service for which an invoice is raised which produces faster cash flow .

3.6. The longer a washroom contract is for, the more certainty of recoupment of initial capital outlay and the longer the period of higher profit. The "down side" for the sales representatives is fewer re-signs.

3.7. The claimant's job duties and responsibilities are detailed as including " *you shall.. be required to carry out the duties to assist the development of the business across all sectors as directed , you may be required from time to time to carry out different and/or additional duties within your skill and competence* " . As virtually every commercial building (hotels , offices, pubs etc) contain washroom facilities the market is huge . It is dominated by at least one market leader(PHS) Generating new business involved originally "cold calling" potential customers to wean them away from their existing provider .This requires sales technique and product knowledge **at which the claimant was very good.** Ms Del Priore said her instructions were the claimant was an "amazing" salesperson. The aim later was to get her back to what, in Mr Williams words, "*she did best*". He recognised there is a limit to the hours one can work and the miles one can drive, so she may need help. It was always the case that winning new customers paid higher commission then re-signs. This is a recognition of the fact it is easier to keep an existing customer happy than win a new one.

3.8. Prior to starting for TWC the claimant sold telephones for a small company but had previous washroom experience .She was on a £25000 basic salary which Mr Williams did promise in her interview he would **try to** get her up to if she proved herself over the years to come . In her first two to three years whilst the business was growing, there were occasions where her commission was too much for TWC to pay and she did take it in installments to help out cashflow.

3.9. Mrs Tracy Walker's husband, Peter, commenced employment for TWC in 2011 installing equipment and cleaning carpets. He was not a salesperson and had no right to commission. In February 2013 the opportunity arose for them both to move to Yorkshire so Mrs Walker commenced employment for TWC in May 2013. She had no sales experience but acquired some product knowledge. She was largely office-based.

3.10. In September 2013, TWC purchased Professional Washroom Services ("PWS") in Hull which significantly increased their number of customers up from about 500 to 1400 . The transferred PWS workforce included Julie Cockin who would become TWC's Operations Manager. She had an accounts background and gave everyone a hard time about accuracy . Part of her responsibilities was to ensure commission payments were only made on the completion of an installation . There had previously been instances where the

claimant had made sales that could not be completed due to compatibility issues, but she would still receive the commission payment**.** The claimant did not always agree with Ms Cockin's assessments of **when** commission ought to be paid. **She had no right to early payment, or payment on uninstalled products, though she often got it.**

3.11. From commencing employment, the claimant says she was "*solely responsible for the daily running of my sales role. I had years of experience in managing myself and had always been successful in what I did. The most important thing was spending my time out on the road to grow the business for him. I had never experienced any problems in my role or with the company and Martin told me on many occasion he was very happy with my performance.* " The claimant was described as " volatile ". I would not choose that word, but I am sure she would resent being managed by any person who had no sales knowledge and less product knowledge than herself . That would definitely include Mrs Walker who she described as " only an administrator ".

3.12. The claimant had a baby in July 2014 and took maternity leave returning in February 2015. During her maternity leave, she visited customers and signed up contracts. This is further evidence of her commitment to keeping customers and strengthens my view as to the correctness of my interpretation of the contract as regards "re-signs".

3.13. The claimant did not think it was appropriate to approach Mr Williams about pay when about to go off on maternity leave. On 31 July 2015, she asked him to consider offering her a pay rise to £25000p.a. By this point, her salary had increased to £20,000 p.a. The business was facing difficult trading conditions and Mr Williams could not agree a pay rise. She says "*When I eventually got round to approach Martin he was not forthcoming and our meeting wasn't positive, Martin was very evasive, hence I ended off work with WRS (6-23 Aug 2015) [8-9]..* WRS stands for "work related stress". I accept it was genuine, but this is the first of several occasions which indicate she was very susceptible to feeling ill when she was unhappy with something at work.

3.14. Shortly afterwards a bonus scheme was agreed instead of a rise in basic pay and I am sure it was not discretionary. Mr Williams said so in effect when I asked him if it created a legal right and he answered that if she hit £6000, her target being £4000, in sales in any month she **would be** paid one twelfth of £5000 = £416. The claimant up until April 2016 carried on with her job, brought new business,, and "upsold" to existing customers. in and as far as she able. She could and would sell carpet cleaning but preferred to sell washroom contracts . In Mr Williams view she, and probably and her fellow sales representative with whom she had a territorial split, Mr David Bond, lacked the time, and maybe the enthusiasm , to sell carpet cleaning to every existing Washroom customer , let alone new customers . Mr Williams deduces this simply from the sales figures, dividing the total revenue from carpets by the average price per clean and comparing that figure with the number of washroom customers TWC had. Even if only one in three such customers had carpets to clean , the figure was well short of the potential number of sales.

3.15. On occasions Mr Williams needed to contribute some personal funds to the business to ensure it could continue to trade. By 2015 , he realised the business needed to operate

more efficiently. This included a re-evaluation of the sales and commission processes and existing working practices.

3.16. Ms Walker was asked by Mr Williams to help him look at the existing commission structure. They consulted with other businesses that were part of the Independent Washroom Services Association ("IWSA") to see how their commission structures worked. Three IWSA members from the South West, Huddersfield and Ireland said what they paid their employees in salary and commission. The claimant's basic pay was in line with the rest of the market at £21-24000 but the TWC commission structure was unusual in that commission was paid for re-signing existing customers. In addition, the claimant and Mr Bond were on different commission structures at the time. Mr Bond did even more re-signs than the claimant which shows the changes which would be made were not targeted at her. It was decided to draft a new commission structure, and, so TWC say, to have a period of consultation on the proposed changes.

3.17. Quite separate from the issue of commissions, by late 2015 TWC identified carpet cleaning as an area to develop to bring in more revenue and improve cashflow. It took the decision to re-assign Mr Walker to this. He was personable and knowledgeable about products, and so was useful from both a selling perspective and as he was able to personally carry out the demonstrations of cleaning on site. He was successful in up-selling to a number of customers. The claimant and Mr Bond were also entitled to sell carpet cleaning. TWC say both would be working "*in parallel*" to Mr Walker who now would qualify for commission payments. From late 2015 a telesales company called Blueberry were engaged by TWC to make telephone appointments with their existing customers in an effort to persuade them , usually by giving a demonstration , to order a carpet clean. Blueberry made the appointments for Mr Walker only, not the claimant or Mr Bond. I see the sense in this as he could do the demonstration himself whereas the claimant would have to make an appointment for Mr Walker to give such a demonstration. Who then would get the commission? Would it be split ? Not only were these questions not raised with the claimant or Mr Bond, they were not even told Mr Walker had been re-assigned.

3.18. In April 2016 Mr Williams called a meeting with the claimant and Mr Bond. He told them Mr Walker now had the responsibility to grow the carpet cleaning side of the business and was visiting what the claimant calls "my customers" who, by hard work, she had brought to TWC in the first place. She voiced her opinion but was told by Mr Williams to stop wasting time and get on with it. Her statement says "*I really felt like saying "hello Martin this is my wages or should I say loss of income we are talking about" but I chose not to*" . She had no **right** to exclusive access to "her " customers and when I asked her what else TWC should have done if it thought she had not enough time or inclination to sell carpet cleans , she struggled . She suggested splitting the sales area but that could also be a breach of contract and Mr Walker could not match her abilities to cold call and then sell washroom contracts . I find the claimant was taking , **and continued before me to take**, a " dog in the manger " approach to "her" customers. By this old metaphor I mean that although she could not , for lack of time, exploit the full potential of her existing customer base , she was implacably opposed to sharing them with anybody. On this and other points, when I asked her to explain, if she said the respondent's actions were wrong, what she said

they should have done, she had no answer. She maintained that because the customers were " hers" no-one else should have access to them .In his brief evidence, Mr Tait, also an experienced sales person , took the same view. This was very influential on my decision, as to what she would have done had she been properly consulted, as will be seen.

3.19. In May 2016 she felt she was being **deducted** commissions by Mrs Walker and Ms Cockin "*as and when it suited them*" in her words . I disagree, though I can see why she thought it . A new tighter regime of checking when commissions were payable was in place. She was now convinced Mrs Walker and her husband were intent on driving her out. She and Mr Williams exchanged a few emails and he knew she was discontent.

3.20. Ms Barbara Harris an HR Consultant, started providing services to TWC on 26th May 2016. Mr Williams was not able to spend enough time at TWC, as he had another business to manage, and there needed to be someone to whom employees could turn if he was unavailable. He was also worried about the future of the business .One of the first issues he brought to Ms Harris' attention was that the claimant was unhappy. He asked she meet with the claimant to give her the opportunity to articulate all her concerns.

3.21. On 2nd June 2016, the claimant wrote a grievance letter (106-107). Her main concerns were lack of a rise in basic pay, Mr Walker being given her customers and the way commission was being paid . Ms Harris responded she would contact her to discuss this.

3.22. They met on 10th June 2016 for around an hour. Ms Harris says the claimant complained she rarely saw Mr Williams and that more interaction with her line manager, by which she meant Mr Williams not someone else, would be beneficial. Ms Harris , in my judgment , escalated this nebulous concern to the most important and relegated to a lower priority her concerns about pay, commission payments, Mrs Walker's attitude to her and Mr Walker being given access to her customers . Ms Harris says the conversation felt very positive, and she told the claimant her issues could be dealt with without too much trouble. In light of their conversation, the claimant was prepared to withdraw her grievance and said in an e-mail on 13th June 2016 the issues had been "blown out of all proportion" . I find Ms Harris did influence the claimant's decision by promising action. I also find Ms Harris was long on talk but short on action. She says none of the issues were effectively dealt with because there were so many. I reject this too. Ms Harris could talk about "soft" issues like communication but had no authority to resolve "hard" issues like pay. However, I find TWC did not breach its obligations as set out in <u>WA Goold (Pearmak) Ltd v McConnell</u> then or later . The claimant went along with Ms Harris' ineffective approach, even when she was told she could progress her grievance formally at any time.

3.23. Ms Harris statement says "*During the following days and weeks, I met fairly regularly with Mr Williams and his managers to discuss the financial health of the business and how we could move things forward positively. We discussed, amongst other things, roles, responsibilities, sales, pay and commission, communication, governance and individual issues which could be resolved. The sales commission structure was one of the first things we dealt with.*" I take "*his managers*" to mean Ms Cockin and Ms Walker. I do not know what "*roles, responsibilities, sales, pay and commission, communication and governance*" is

supposed to mean. Mr Owen did not press the point. I do know a new commission structure was drafted and TWC planned to hold meetings with the two affected employees.

3.24. On 6th July Mr Williams sent an email to the claimant saying Mrs Walker was to be her new line manager Mr Williams says "*Over the past two years, I have been spending an increasing amount of time on a separate business and needed someone in who could deal with employee queries in my absence. Mrs Walker seemed the natural candidate so I promoted her to General Manager, which meant she would become the Claimant's line manager*". The claimant says this was " *ridiculous*" him knowing of "*the way she was treating me*" . It was not ridiculous to appoint her, but it was to do so by an e-mail out of the blue without addressing the tensions which existed between them.

3.25. A meeting was planned for 15th July to discuss Ms Walker's new role and Ms Harris was to attend. The claimant was signed off with work related stress from 14th -25th July so could not attend . The meeting went ahead with Mr Bond. The claimant asked for minutes but none had been taken. At that meeting , as later with the claimant, the new Sales Manager Commission Structure was "sprung" . TWC say they wanted, before presenting the draft to explain **some** change was needed but exactly what was up for discussion . As the claimant says advance sight of the draft new structure " *would have been all I needed and also it would have given me time to look over it but not even to be offered that it was sheer awkwardness on Tracy Walkers behalf.*" I find it was a conscious decision by Ms Walker, Ms Harris and maybe Mr Williams for no good reason I can discern. I also find re-sign commissions were to be abolished , whatever the employees said .

3.26. A few days after, Mr Bond provided some suggestions to amend the proposed new structure. It did not allow for commission to be paid when existing customers increased their order. Mr Bond argued it should be and the commission rate on up-sales should be increased from 4.4% to 5%. These amendments were adopted in the final version.

3.27 On 19thJuly 2016, the claimant e-mailed Mrs Walker querying some amendments which had been made to an order placed by the Roker Hotel that she had been working on prior to her absence. Mrs Walker replied they had to be done as the claimant had requested items to be installed that were "*questionable due to the dimensions of the area*" . I accept the installing technician raised the point and , in the claimant's absence, Mrs Walker was right to deal with it . What annoyed the claimant was Mrs Walker appeared to query her professional judgment. On 19th July the claimant e-mailed Ms Harris stating she wished to continue her previous grievance. The claimant returned to work on 25th July 2016, and Ms Harris arranged to meet her .

3.28. The meeting she had missed on the 15th July was re-scheduled for the 28th July and on the same day her grievance was to be discussed beforehand. She requested Mrs Walker was not even in the building. During this first meeting, the claimant explained the problems she had with Mrs Walker's attitude. Mrs Harris said changes needed to happen in the business and the claimant asked what if she did not accept the changes. She says then Ms Harris shrugged her shoulders and said "dismissal". Ms Harris denies this saying she explained there was a clause in her contract which allowed TWC to vary the commission

structure but that this could not be without due notice and, in any case, would not be finalised it until she had been given her chance to consider it and feed back.. **I prefer the claimant's account** but that does not mean I find Ms Harris is lying . In her account she said things like " I would not have said …", suggesting she does not clearly recall, whereas this comment and gesture is emblazoned on the claimant's memory.

3.29. Also Ms Harris' account is again imprecise and evades the real issues . She says the claimant "*struggled to articulate exactly what grievance she wished to make*". She spoke of "*unnecessary questioning*" by Mrs Walker, a lack of communication across TWC, part of her job being allocated to Mr Walker and the new commission structure (of which she must have been made aware , probably by Mr Bond) reducing her earnings. There is nothing unclear about it. Ms Harris continues " *I attempted to reassure her she would have the opportunity to consider the new structure and raise questions when Mrs Walker joined us and raise the issue of communication* " .

3.30. Moreover, Marjorie Wilson , the claimant's mother, took a phone call from her after the meeting during which she was crying hysterically and told her " *Barbara said she would be dismissed if she didn't agree to changes, her wages would take a huge hit which really upset her.*" She told her mother she got upset in front of Ms Harris and Ms Walker and asked if she could leave.

3.31. The only grievance point discussed, even briefly, at the second meeting was the nebulous one about "communication". The claimant was given the document "Sales Manager Commission Structure 2016" and told to take 5 minutes to read it. She saw massive changes to her contract, became "upset" and left to drive home. Mrs Walker and Ms Harris say she was very agitated and defensive throughout the meeting and said as she was leaving she was" livid". Nothing turns on which adjective best describes the claimant's mood .

3.32. TWC say it was re-iterated **nothing was set in stone at that point,** and they would welcome any suggestions she might have. She was asked to think about the agreement **over the next few days** and provide her comments. Ms Walker says the claimant refuted any need to amend the current commission structure. I do not accept she said that , rather I believe she was, in her words, speechless. It is not clear exactly when but the claimant was offered a basic salary of £22,000 . However the £416 bonus was to be replaced by £50 net of tax if she hit a new "target" of £6000 of sales in any month.

3.33 . The issue here is the time for consultation. The draft new structure , 3 pages long and containing more than I need set out in these reasons, was first given to the claimant on 28th July which was a Thursday. No reasonable employer would expect meaningful feedback in less than a few days and discussion of that feedback would occupy at least two weeks from the date the draft was given **The next day** an email at 07.13 from Ms Walker read
Hi Lesley
Following our meeting yesterday, I will look forward to hearing from you ***by Monday*** *on any thoughts you have before we finalise anything. As far as you are concerned and subject to*

anything you might want to discuss further, the proposed changes would be effective from 1 October 2016.
I look forward to hearing from you either ***later today or tomorrow.***

3.34. She replied at 10.04 including :
Hi Tracy
Having put a lot of thought into the new proposed commissions I would like some justification why TWC have decided to reduce my commission by two thirds and increase my target by 50%? I think this is totally unreasonable and unacceptable. I have calculated this month for an example and I have earned £2362.50 commission but under the new scheme you are proposing I will earn £756.00

3.35. Ms Walker responded at 11.43
Hi Lesley
I explained yesterday that the business has to make some changes in order to remain viable. You have a clause in your contract which allows us to do this. I have included the paragraph of this clause below. Of course, it may affect your earnings in the short term but we hope that in the longer term, it means security of employment not just for you but for all our employees. We also hope that you will be able to build on levels of new business so that the impact isn't as negative as you expect.
Page 2 of contract, point 6 – You will be paid commission on business you generate as detailed in your offer. The Employer reserves the right to revise commission levels from time to time.

As far as the potential grievance goes and as Barbara has explained to you, this door is always open if you feel you are being treated unfairly. The choice has always been yours and this has in no way, affected our business decision to make the changes we have outlined to you. Those changes affect our two Sales Representative and would affect any new person joining us. We would have been discussing those changes and implementing them, regardless of your own situation.

I did say yesterday that we would like you to consider all the contents of the proposed new commission structure because your views are important. To this end, please do let me know by Monday if you think there is anything else ***(outside of the impact on you actual commission)*** *which you feel needs amending or any other ideas you have to help us bring our costs down and thus, secure the future of TWC.*

3.36. Ms Del Priore's explanation of the significance of "(outside of the impact on you actual commission)" was that Ms Walker and Ms Harris knew she was concerned about that and wanted to know if there was anything else for them to be considering. That is not what Ms Walker said in evidence . She accepted that, in context, any reader would see it as TWC saying "*changes to your salary package will be happening whether you like it or not, but is there anything else you have to say*" . Ms Walker could not explain why she wrote in that manner, but to me it is obvious. Albeit perhaps for good reasons, it had been decided re-sign commissions were to go . "Her" and Mr Bond's customers would henceforth be what the document calls "house" customers. The target would increase and bonus decrease . The only scope for negotiation may have been on "tweaking" the figures and percentages.

3.37. On 29th July 2016 an exchange about the claimant's husband's texts is a red herring. The clamant on 1st August 2016 at 09.45 e-mailed
Hi Tracy
Further to your email asking me to consider all the contents of the new proposed commission structure and you ask if I have any other ideas to help bring the company costs down to secure the future of TWC, I have nothing to add apart from that I am not consenting to these proposed changes.

I also wish to advise you that I am not feeling too good with all of this work stress and I am going to go back to see my GP when I can get an appointment.

I await your reply

3.38. Ms Walker replied at 11.46 including
Hi Lesley…
The changes of the commission structure will take effect from 1 October 2016 as discussed with you. The changes are being put into place for the reasons we have outlined and whilst we recognise that this may impact on your earnings in the short term, we have attempted to mitigate some of this with the increase in basic salary. We will do everything possible to support our sales team going forward in order that we give you the best chance to achieve the targets we need you to meet. We are a small business and need to do everything we can to drive it forward successfully. As far as the change goes, we are operating within the legal parameters of your contract. You have said that there is nothing else in the proposal that you wish to comment on.

I look forward to hearing from you later today when I can ensure that any work pressures are lifted temporarily whilst you make a full recovery.

The claimant replied at 17.08
Hi Tracy
Thanks for your reply earlier today.
As I mentioned I will be calling the doctors first thing in the morning and I will let you know what is said.
I have nothing outstanding at present that you can look after for me but if and when I receive emails I will forward them straight on to you to take care of in my absence
I am concerned about my future with TWC as Barbara did say last week I would be dismissed if I did not accept the changes, which I mentioned earlier I am not willing to accept. This has added so much more stress onto me now hence why I am feeling depressed as well as suffering from work related stress.

I look forward to hearing the outcome as soon as possible as I really cannot cope with this knotted feeling in my tummy waiting for your emails to arrive.

3.39. From 2nd August – 23rd September the claimant was again off sick with work related stress and on the 2nd August sought advice from a local solicitor who drafted a letter to TWC . It too instructed a solicitor to reply who did invite her to re-engage with consultation

but what Ms Walker had written explains why she did not . I find there was plainly an anticipatory fundamental breach of the salary package terms.

3.40. On 26th September the claimant had a return to work meeting with Ms Walker who basically told her the changes were in effect from 1st October and that her work had been looked after whilst she was off. She found out from other sources Mr Walker had been doing it. She says " *I think this was their plan all along. Tracy had a way of making me feel very uneasy* which *Martin & Barbara knew about. In the past year her intimidating and degrading attitude made it an uneasy working environment to be in. Tracy didn't make me feel welcome to be back to work and tried to intimidate me by her bossiness, **this is one of the reasons I handed in my resignation.***"

3.41. Whilst the claimant was demonstrably unhappy about the changes to her salary package , she signed a record of the meeting **in** which said she was willing to give it a go and continue work. I reject Ms Del Priore's submission this amounted to affirmation. The claimant , far from "letting bygones be bygones", was continuing under protest to see what might happen. Even if she had affirmed , what happened next, though not a breach in itself, is a valid" last straw" if she needs to invoke the implied term of trust and confidence.

3.42. Ebac was an existing customer the claimant won in 2014. **Through her**, TWC was aware Ebac had a second site contracted to a separate supplier. She had persuaded Ebac to let TWC quote for that site when the contract came up for renewal and had worked to ensure Ebac were " kept happy" with the service on the site TWC already supplied . This was a washroom contract not carpet cleaning. Ebac contacted TWC to say they were ready to change supplier at their second site . Mrs Walker says they required a new survey to be carried out. Mr Walker did the survey and provided a quote which Ebac accepted. He was paid 2.5% commission, rather than the full 5%, and the claimant was paid 2.5%, as Mrs Walker's statement says" *as acknowledgement of her previous involvement. Aside from the introduction of this customer, the Claimant played no active part in this new sale and the payment of commission was only eventually made as a gesture of goodwill.*"

3.43. Another customer was English Martyrs School (EMS) in Hartlepool. Ms Walker was involved in an e-mail exchange with the claimant . She says she does not believe anything she asked was anything other than a reasonable managerial instruction. The exchange includes, at 8.51am on 27th September, from the claimant to Mrs Walker: -
"I note you mentioned Peter has been out covering my appointments. You never mentioned it yesterday? Is there any others that he has dealt with in my absence ie any of my re-signs as I am going to concentrate on these this week."

The reply was drafted by Mrs Walker and sent at 4.14 pm to Mrs Harris for approval : -
"Hi Barbara
Please see my reply is this okay. This will go down like a lead balloon."

The reply was sent to the claimant at 16.58 and reads: -
"Hi Lesley

I have put some careful thought into this and I am not sure concentrating on re-signs is the best use of your time considering the time you have been absent. I really need you to concentrate on new business which will help to get the momentum going for you to achieve your new business target next month. As per the new commission structure, resigns are no longer your responsibility so to spend time getting appointments is not a productive use of your time.
The emails I forwarded to you with a history are the ones that need to be dealt with including the English Martyrs appointment tomorrow. If I think of anything else I will let you know."

3.44. The new structure was not yet in force. When I asked Mrs Walker why the claimant should not do re-signs in the last week she would be paid for them , she said she would not get commission on installations after 1st October even on contracts signed before that date. The trigger point for entitlement, as opposed to payment , had always, in the claimant's view, been completion of the "sale" ie the agreement not its completion. While Mrs Walker had the right to "manage" the claimant, dictating to her what she should and should not do would " go down like a lead balloon" , and Mrs Walker , knowing it would , did it anyway . In my view , she did so to stamp her authority on the claimant .

3.45. Returning to Ebac , in the past, if the claimant was off sick or on holiday and Mr Bond , Mr Williams or anyone else had brought to completion a contract for which she had done the groundwork , she would get all the commission . She would not expect any commission if she brought to completion a contract with one of Mr Bond's customers if he was off sick . In any event, she would need to know what had happened so as to continue to "service" Ebac in the future. On 27th September, she asked Mrs Walker for a copy of the contract. Mrs Walker refused to send her one and told her not to trouble herself with it. The claimant says "*I knew then she wasn't going to pay me on this deal and I thought then, this is going to be torture. .. She didn't want me in the role and she was sure not going to make it easy for me, Tracy wanted her husband in my role making the money I had been earning the previous 5 years which they were both aware of my income which I thought was wrong. Her way of intimidating and degrading me was making me violently ill and I couldn't take it anymore. This was the final straw so I resigned this day*"

3.46. On 27th September 2016, Mr Williams received an email from the claimant stating she wished to tender her resignation. She confirmed she was still willing to work a month's notice. He offered her the choice of taking her notice period as garden leave, or a payment in lieu of notice. She wrote back on 28th September to elect garden leave as she still needed use of the company vehicle. She later changed her mind and was paid in lieu .

3.47. On 18th November 2016, Mr Williams received a letter from the claimant saying she wanted to raise a formal grievance He wrote on 24th November 2016 saying there was very little in practice he could do now the employment relationship had ended. In her grievance letter, she indicated Mr Walker had taken over her role. I do not accept that. Following her resignation, TWC immediately advertised for a new salesperson to be her replacement and recruited one.

4. Conclusions

4.1. I found the claimant's evidence was credible but some of her views wrong. Past laxity, which had operated in the claimant's favour, in the payment of commissions earlier than , or even without, completion of the installation does not mean TWC were in breach of contract when they adopted a stricter approach to making payments only as and when they were due. She says in her statement that since, from June 2011 to July 2016, there was never any change in her commission structure, " *if nothing changes in 5 years surely that is an implied term of my employment contract*." It may be or it may not be, but that does not mean there cannot be change if a business needs it to survive.

4.2. Mr Paul Tait said in every business he had worked once a customer is signed up for any product or service that customer then belongs to that sales person and any further dealings will be credited to that person, irrespective of sickness or holidays. The claimant takes the same view. I wholly disagree. Many businesses have "house" customers introduced originally by one sales representative who is paid for introducing them, but not for subsequent business. However, even in a business the like of which Mr Tait describes, once a sales person has so large a client base that he or she cannot exploit the full potential of them all , it must be permissible for that business to let someone else do so.

4.3. All sales commission structure incentivise sales persons to do what the business needs and wants . The "old " structure gave commission for re-signs which were achieved by "looking after" existing customers . As time went by , it was found that could be done by better office based and maintenance personnel contact . The main aim of changes as regards washroom contracts was to secure longer contracts so as to have a longer period of profit after the initial outlay had been recouped. If under the new structure a sales person sold 5 year contracts to new customers. the commission would be at least as much as selling a 3 year contract under the old structure, or so TWC said. Mr Bond has succeeded in selling longer contracts. When I worked through an example with Mr Williams, the increased commission was negligible . Even taking into account the modest rise in basic pay, it appeared sales persons would be worse off. When I asked if Mr Bond's earnings had reduced and by how much , none of the respondent's witnesses could tell me .

4.4. The claimant alleges multiple acts which separately or cumulatively amount to a fundamental breach of TWC's contractual obligations to her. Dealing with them individually as per the list in 1.2.1. above :

(a) not paying her , and her alone , commission on business relating to "her customers", allowing Mr Peter Walker access to them and even giving him 50% of the commission on Ebac was not a breach in itself (but was a valid last straw if the claimant needs to rely on the implied term of mutual trust and confidence)

(b) and (f) not increasing her basic pay to £25000 within 5 years of her starting was no breach because there was no term her salary would definitely increase. However, the "bonus" of £416 on hitting a £6000 target in any month was an oral contract term and any

change of it not within the scope of any variation clause. It was a fundamental breach to replace it with an increased "target" of £6000 and a payment of £50 on hitting it.

(c) not paying her commission before installation was complete, even if it could not be installed through no fault of her own, was not a breach in itself or conduct which was without reasonable and proper cause so as to contribute to a breach of the implied term of mutual trust and confidence.

(d) She was afforded a proper means of resolving grievances. The means of addressing them was available if the claimant had used it . The evasive way Ms Harris dealt with it does contribute to a breach of the implied term of mutual trust and confidence.

(e) As for abolishing her entitlement to commission on "re-signs" , despite the respondent saying (i) the change was offset by an increase in basic pay and other no less lucrative means of earning commission (ii) in such circumstances was within the scope of an express contractual right to vary the commission structure, I uphold neither submission. The evidence does not support the former. To read a right to change commission **levels** as a right to remove totally an essential element of a salary package is not what the parties ever intended. TWC cannot rely on Financial Techniques (Planning Services) Ltd v Hughes because (i) Mr Williams did not even genuinely , let alone reasonably, believe what TWC was doing was within the scope of the variation clause . I also reject the argument that if such change was a breach of contract it was not fundamental. Taken together with the reduction if the bonus, these were anticipatory fundamental breaches. The claimant resigned, at least in part, in response to the fundamental breaches I have identified without first affirming the contract. Therefore , there was a dismissal.

4.5. Strictly, I need not consider whether there was also a breach of the implied term of mutual trust and confidence, but for completeness I will do so briefly. Many of the matters the claimant found objectionable , eg Mr Walker being given access to her customers and Mrs Walker's management style, were not in themselves conduct on the part of TWC which was without reasonable and proper cause and could be taken , objectively , as calculated or likely to destroy or seriously damage the relationship of mutual confidence and trust between herself and TWC. That is not to say the behaviour of Ms Walker or Ms Harris in particular, was always "reasonable" or that the claimant was not understandably upset by it. However, although TWC had reasonable and proper cause for much of what it did, the same cannot be said of the way they did it. For example, re-assigning Mr Walker to carpet cleaning sales was with reasonable and proper cause , but doing it without telling the claimant or Mr Bond was not. If I am held to be wrong in my analysis of breaches of individual express pay terms, the way the respondent went about imposing the changes amounted to a breach of the implied term of mutual trust and confidence.

4.6. The respondent has shown a substantial reason for the fundamental breaches. It was to save the business from its cash flow problems becoming a route to insolvency and to grow it in other areas while encouraging the claimant to focus on the areas not only that "she did best" but also required sales technique most other employees could not do at all.

4.7. The change was not properly consulted upon in that the guidance in ex parte Price was disregarded to an extent well outside the band of reasonableness. The dismissal was therefore unfair .It was also wrongful but caused no separate loss because she served her notice period or was paid for it.

4.8. Although the matters I have found to be fundamental breaches were a large part of the claimant's reason for resigning. they were not her sole reason . Other features were the way in which she was being treated by Mrs Walker , the way Ms Cockin was processing her commissions and the introduction of Mr Walker to "her customers".

4.9. I find one of two scenarios would have happened after a period of fair consultation which should have taken about two weeks. Either she would have left in response to the matters I have found did not constitute a breach of contract, or TWC would have done what it should have in the first place which was terminate her old contract and offered new terms. I am convinced she would, even after fair consultation, not have accepted any change in which case she would have been fairly dismissed by TWC.

4.10. The remedy to be awarded for the unfair dismissal would be a basic award (Ms Del Priore asked for a preliminary indication about reduction of that figure and I said I would take considerable persuasion to make one), an award for loss of statutory rights and loss of earnings for the time that it would have taken for fair consultation to take place which, in my judgment, would have been two weeks. When we reached this point the parties explained there were some disputes about figures and mitigation which they were confident they could agree given time . Hence I stayed remedy to enable this.

EMPLOYMENT JUDGE GARNON

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 2nd May 2017

SENT TO THE PARTIES ON

8 May 2017

G Palmer

FOR THE TRIBUNAL OFFICE