



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr C Riley

**Respondent:** Intellicentrics UK Ltd

**Heard at:** Manchester **On:** 7 & (in chambers) 31 March 2017

**Before:** Employment Judge Wardle

## Representation

Claimant: Mr B Williams - Counsel

Respondent: Mr S Elliott - Solicitor

## RESERVED JUDGMENT

The judgment of the Tribunal is that the claimant's complaints of wrongful dismissal and of an unauthorised deduction from his wages/breach of contract are well-founded.

## REASONS

1. By his claim form the claimant brings complaints of wrongful dismissal/breach of contract in respect of notice pay having been summarily dismissed on account of allegations said not to constitute gross misconduct and of unauthorised deduction from wages contrary to section 13 of the Employment Rights Act 1996 or in the alternative a breach of contract claim for failure to pay all contractual bonus entitlement for the year 2015.
2. The respondent, by its response contends that the claimant committed gross misconduct and was dismissed as a result and that as such he is not entitled to any notice pay or pay in lieu of notice and it denies that it has any contractual obligation to make any further payment of bonus to him.
3. The Tribunal heard evidence from the claimant and on behalf of the respondent it heard from Mr Azadar Shah, Managing Director and Mr David Mellers, Finance Director. Each of the witnesses gave their evidence by way of written statements, which were supplemented orally by responses to questions posed. Also before the Tribunal was a joint bundle of documents.
4. The taking of the evidence in the case was not completed until late on the

day of the hearing, which did not leave time for the making of submissions. In this regard the parties expressed their preference to produce written submissions and they were given until 21 March 2017 for this purpose. An in chambers hearing was subsequently arranged for 31 March 2017 to allow the Tribunal to consider the evidence, submissions and law in order to reach conclusions on the issues requiring determination by it.

5. Having heard and considered the evidence the Tribunal found the following facts.

### **Facts**

6. The claimant was employed by the respondent as a Business Development Manager from 9 February 2015 until his summary dismissal on 15 June 2016. On the claimant's evidence he was simultaneously offered a role with an IT company with a higher salary and a guaranteed three months bonus payment upon commencement but being really impressed with the respondent and its business he asked the recruitment company, through which he had secured the two offers of employment, to ask the respondent if they would match the salary package in respect of the other position. The request was declined by the respondent but it did offer to pay two months of advance bonus payments of £1,500 per month to help get him started.
7. The terms of the offer made by Mr Shah were set out in an email dated 4 February 2025 to the recruitment company at page 54D of the bundle of documents. The remuneration elements of which comprised a basic annual salary of £35,000: an additional commission plan at £30,000 per annum for on target performance; an uncapped commission plan with accelerator payments for above target performance and £500 per month car allowance.
8. The respondent, which was formed as a start-up company in 2013 is a subsidiary of VTC Corp, a company incorporated and registered in Taiwan. It provides credentialling services to both the NHS and private hospital groups which ensure that healthcare industry representatives visiting them comply with policies on safety, duty of care and clinical governance.
9. The Employment Agreement that the claimant entered into with the respondent at pages 40 to 54 confirmed at clause 6.1 that his initial salary would be £35,000 per annum and that he would be entitled to an additional bonus of up to £30,000 per annum for an on-target performance but was silent in respect of the uncapped commission plan that had formed part of the offer. It also stated that the bonus scheme targets would be set annually and were subject to change at any time and may be withdrawn at the sole discretion of the company. It further stated that his salary and bonus would accrue from day to day and would be paid in equal instalments in arrears on or about the last day of each month by credit transfer to his bank account.
10. By clause 12.1 of the Employment Agreement the claimant's employment was terminable by either party giving to the other two months' notice in writing, subject to the company's election in its sole discretion to terminate his employment forthwith on payment of an amount equal to his basic salary in lieu of the notice period or any unexpired portion thereof.
11. In essence the claimant's remit was to grow the business. In this regard it

was established that three people had carried out this role prior to his appointment, two as contractors and one as an employee but that since the company's inception in 2013 according to the claimant's unchallenged evidence only three NHS Trusts (Leeds, Bradford and Airedale) had been secured by the respondent and only in a limited way in that they had agreed to roll out the respondent's services in a maximum of two departments within one of their hospitals. In terms of members/subscribers to the credentialling services this equated to a figure of 1097 at the time that the claimant was appointed. It was from the members/subscribers that the respondent generated its revenue in that when commercial visitors wished to visit departments within a Trust they would have to register with the respondent and pay it an annual fee.

12. During 2015 the claimant managed to secure an additional two Trusts firstly Leicester and then Guys and St Thomas and also obtained agreement that the respondent's services would be rolled out in all of their hospitals and departments, in which respect Leicester had four hospitals and Guys and St Thomas had three, albeit in the case of the latter Trust the services did not go live until 2016. The securing of Leicester alone however brought in a further 597 members/subscribers and whilst Mr Shah claimed in cross-examination that Leicester had called the respondent and that the claimant had very little to do with securing its agreement, which he attributed to the work of his three predecessors, the fact remained that the additional members/subscribers came on board on the claimant's watch.
13. In regard to payment of bonus the claimant received the two amounts of £1,500 at the outset of his employment as promised by Mr Shah as advances but nothing further. On the claimant's evidence, having secured Leicester as a client he approached Mr Shah in or around July 2015 regarding his bonus as he was keen to have his target set so that he knew what to work to, which saw Mr Shah acknowledging that no targets had been set but that he had his best interests in mind and would deal with the matter in due course. Being relatively new to the business he was reluctant to force the issue and left the matter in Mr Shah's hands before out of concern raising the issue of the bonus again with him in December 2015 and his expectation of payment that month. Having done so, he says that he was questioned by Mr Shah as to whether he believed that his work warranted a £27,000 bonus, to which he responded that he did justifying his position by pointing to the enormous improvement in the client base over the course of a few months and the fact that the business was ahead of where Mr Shah and his senior Mike Sheehan had forecasted it to be at this juncture, which saw Mr Shah inform him that he would have to think about it. He further says at a follow-up meeting to an appraisal in January 2016 with Mr Shah he once again raised the issue of his 2015 bonus payment and was told by him that he simply could not justify paying him the sort of money he was expecting. However, having indicated that he would have to escalate the matter and having for a second time justified his case Mr Shah effectively relented but said he could not make a lump sum payment as the Auditors would ask questions and it was agreed that payments would be spread over the course of the year.
14. Subsequently the claimant emailed Mr Shah on 23 February 2016 at page 65 on the subject of his commission payment from 2015 asking for confirmation that as per their discussion that a commission payment would

be made in February's payroll. In response Mr Shah, who was in America at the time emailed him on 25 February 2016 to say that they needed to have another discussion on this payment, as the £6k payment for 2015 was recognition for the work that he had done in 2015 to set up a great 2016 as based on his forecast for the first two quarters, which he now had cause to question when he (the claimant) had felt so strongly that his 2016 target of 80+ hospitals was not realistic before adding that he would still like to find a way to make the remaining £3k payment, options around which he suggested could be discussed on his return. Whether or not these discussions took place was not clear from the evidence but it would appear from the claimant's pay slip dated 31 March 2016 at page 34 that the claimant was paid £3,000 that month by way of commission, which was subject to both tax and National Insurance and also an unexplained net deduction of £1,800, which meant that he only received some £76 more than in April, when no commission was paid. For his part the claimant made it clear in his evidence that he would not have accepted £3,000 in settlement of his bonus claim maintaining that it was his understanding that payments were going to be made throughout 2016 given the position with the auditors. He also claimed that he mentioned the bonus payments again in April and May 2016 shortly before he was due to be paid.

15. On Mr Shah's evidence the respondent's bonus scheme has always been centred on the sales person achieving a minimum of 60% of their sales target, based on the number of hospitals who subscribe to the company's service in order to obtain any payments on the plan, in support of which he pointed to the company's Sales Incentive Bonus Scheme at pages 58 to 59 of the bundle. However, it is clear that such scheme, which does refer to a threshold of 60%, was only sought to be introduced in January 2016 as is evidenced by the emails sent by him on 26 and 29 January 2016 to the claimant at page 62 inviting his acceptance of the plan for the period from 1 January to 31 December 2016 with a target of 86 hospitals based upon 36 Trusts closed at an average of 2.4 hospitals.
16. It was his further evidence that it was agreed in March 2015 between him and the claimant that the company would not set a target until he had got some sales under his belt, which would allow for a possible but not guaranteed Key Performance Indicator (KPI) payment, an undated handwritten note to the effect of which was produced at page 55. In addition he claimed at a second meeting on 8 June 2015, the gist of which was again reflected in a note at page 56 that it was reiterated that there was no point in assigning a target at that time but that a KPI type payment would be looked at as part of a commission plan if the claimant was below the minimum threshold at the end of the year. He claimed further that on 28 October 2015 as referred to at page 57 when it had become apparent that the claimant would not achieve a minimum threshold of 15 Trusts closed and implemented, which appeared to be based on 60% of a target of 25 Trusts, which had never actually been set that he informed him that there would be no claw back of the commission paid at the outset of his employment, which advance the claimant gave him to understand would be very difficult/impossible to repay and that he would make some payment to him against a KPI so he at least got some commission that year.
17. Despite the claimant only concluding one sale throughout 2015 Mr Shah gave evidence to the effect that he authorised a KPI payment of £6,000 to

him, which figure he explained he arrived at by reference to the advance of £3,000 paid against future 2015 commission earnings and an additional £3,000 as a fair recognition of his efforts in building his 2016 sales funnel, which appears to be the amount paid to the claimant at the end of March 2016 referred to in paragraph 13 above.

18. In so far as the discussions which Mr Shah states took place with the claimant on the abovementioned dates concerning sales and targets he (the claimant) refuted that they had taken place and stated that he had no recollection of Mr Shah making any notes during any meeting with him, in which respect it has to be said that the notes, which were extracts from a notebook kept by Mr Shah had the appearance jottings rather than of formal meeting records and that there was no suggestion that they had been shared with the claimant at the alleged material times.
19. During the foregoing period the claimant was arrested at his home in the early hours of Thursday 10 September 2015 in connection with an allegation of harassment made by his former partner. He stated that he sent a quick text to Mr Shah that morning simply saying that he could not explain but that he would not be in work that day before asking him to rearrange a meeting that he had with East Lancashire Hospitals Trust and that he would contact him later. He was subsequently bailed at 16.31 and says that he spoke with Mr Shah thereafter and briefed him on his situation following which it was agreed that he would still attend a previously planned work's dinner that evening in Manchester with Mr Shah and Mike Sheehan, who was over from America and that he was told not to mention the fact of his arrest. He further stated at a subsequent meeting with Mr Shah in the office when he provided his mitigating circumstances he was advised by him that they were to continue as normal commenting that a DBS Certificate was never requested by clients so it should not pose a problem and that he should keep him updated. This aspect of the claimant's evidence went unchallenged, which suggested to the Tribunal that the respondent was made aware by the claimant of his being charged with the offence of harassment.
20. It was also stated by the claimant that when he received notification of his court date he informed Mr Shah and booked annual leave to attend adding that the trial went part-heard and that he was required to return to court a week or two later, when he was convicted and informed that he would be sentenced two weeks later. He claims that on attending work the following day he informed Mr Shah accordingly and warned him that the matter had been reported nationally and did not make great reading and that it was left that if the matter created a problem then the situation would have to be reviewed but for the time being it would be business as usual. Sentencing proceeded on 13 April 2016 when the claimant states that he was told by Mr Shah that he could work from home. On this date he was ordered to pay compensation and costs and was given 12 weeks in custody suspended for 18 months, in respect of which outcome he says that he informed Mr Shah, who confirmed that he was to continue as normal, albeit that he had been speaking to a person called Frank McGraw and that he was looking to take him on board to assist him (the claimant) in his role, which he says came out of the blue as there had been no mention of recruitment prior to his conviction only two weeks earlier. In terms of the respondent's knowledge of the claimant's conviction and sentence it was Mr Shah's evidence that he only became aware of these matters on 21 June 2016 after he had

dismissed the claimant when a friend showed him an article from the Daily Mail's website. Having found however that the respondent was aware of the claimant having been charged it seemed unlikely that it remained in the dark about the progression of this charge and the tribunal felt compelled to treat Mr Shah's evidence on this aspect of the matter with some caution notwithstanding the respondent's action following the claimant's dismissal in allocating a day's leave to the week commencing 11 April 2016 in substitution for a sickness absence by the claimant apparently coinciding with the day upon which he attended for sentencing.

21. The sentencing of the claimant on 13 April 2016 also made the national press and the reporting did not again make good reading. He claimed thereafter that the working atmosphere changed in that his relationship with Mr Shah became tense and he felt that he was being put under immense pressure to achieve unattainable targets.
22. On Friday 3 June 2016 the claimant was on compassionate leave for the purpose of attending the funeral of his mother. On this day Mr Shah sent him an email at page 80B in connection with a funnel review meeting to take place on the afternoon of Monday 6 June 2016, in which he required him to present in power-point his funnel numbers - including comparisons with his forecast at the beginning of the year - and his plan to get his funnel back in shape following on from a review meeting that the claimant had had with David Mellers on 31 May 2016. On his evidence he acknowledged that he was not particularly happy with email believing that it had been constructed to provoke a reaction from him for the reasons that it had been sent on the day of his mother's funeral and Mr Shah would have been aware that it would not be received until he returned to work on the Monday; the instruction to make a power-point presentation that afternoon was given without any warning and/or notice; the timeframe to do so was insufficient and was a deliberate attempt to see him fail as Mr Shah was well aware of his personal circumstances and that he would not have had the opportunity to formulate all the necessary information into a power-point presentation and that he had never previously been required to prepare for a presentation within such a limited timeframe.
23. He also claimed that whilst reading the email in the office on the morning of 6 June 2016 he received a call from his ex-wife, with whom he was hoping to reconcile only for her to inform him that she did not think that it was going to work, which devastated him and caused him to inform his colleague Mark Farrell, who was present during the call that he needed to go home and that he would contact Mr Shah to inform him of his absence, which he did by an email at page 80C sent that morning stating that in catching up with his emails he had flipped to the point where he had left the office and that they needed to have a meeting to discuss his future or not with the company as today he had felt shell-shocked, which he suggested was maybe the accumulation of issues both personal and professional coming to a head before adding that he would contact him later to schedule a meeting.
24. On his further evidence a meeting was then arranged that day for the next day 7 June 2016 at the De View office in Accrington, which he attended casually dressed where he met Mr Shah and Mr Mellers. Having been asked by the former why he had left work suddenly the previous day alongside the suggestion that he had done so to avoid the presentation he claimed that he

asked if he could speak in confidence with Mr Shah regarding his personal situation, which request was granted and that he spoke of the significant personal problems that he was experiencing including the death of his mother, his sister's mental health problems and family breakdown. On his case an understanding was reached that he was going to try and arrange to see his GP following which he would update Mr Shah accordingly, whereas Mr Shah's case was that following the meeting he fully expected the claimant to return to his normal duties and complete the sales forecast as had previously been discussed, which expectation he claimed was supported by an email he sent to the claimant at 10.13 on 8 June 2016 at page 80D, in which he asked him to prepare his funnel review and plan for presentation tomorrow morning and that aside to continue with business as usual.

25. At 10.34 on 8 June 2016 the claimant emailed Mr Shah to advise that he had a doctor's appointment that afternoon to review his blood pressure and to discuss the accumulation of issues culminating in his actions on Monday 6 June 2016 with the aim of receiving appropriate advice and if required medication to support him through this exceptional time and to avoid any such occurrence repeating itself adding that he would keep him updated. Mr Shah replied at 13.41 stating that without wishing to pre-empt what his doctor advised he was going to move the review to Friday (10 June 2016) to give him more time to prepare.
26. On 9 June 2016 at 7.59 the claimant emailed Mr Shah asking if he would approve a holiday request, which was clarified by Mr Shah with him as being for Friday 10 June 2016 for the reasons that he had an annual gas check being conducted, his car was going in for a cam belt change and it was his daughter Olivia's birthday and he had planned to spend some time with her. The request was declined by Mr Shah in an email sent at 8.23 stating that the time to have explained his plans for Friday was when he was told that the funnel review was being moved from Thursday to Friday, which saw the claimant responding at 8.25 to say that the request had been submitted the previous week and that the paperwork had been left on his desk.
27. Subsequently at 8.30 the claimant sent a further email at page 86 to Mr Shah saying that he had just seen an email to him was still in his outbox, which he was not sure why it didn't send. On the claimant's evidence he drafted the email after he had seen his doctor on 8 June 2016 and believed that he had sent it. In it he explained that his medication for his blood pressure had been changed as it remained high and that his doctor had referred him to Minds Matter, which is a support group that helps people discuss and work through/past issues they are having and had advised him to take some time away proposing that he self-certificated for this week and that a sick note for up to a further two weeks' absence would be provided. He explained that he had presently declined the sick note as he felt that it would compromise his employment but that at the same time he had to consider his health and that he intended to review how he felt at the end of the week and decide then, although he would pick up/complete any calls/emails that couldn't wait
28. At 8.56 Mr Shah emailed the claimant saying that he was happy to accept that his leave request had been submitted the previous week but that he ought to have pointed out when the review was moved to Friday that he

expected to be on leave that day before advising that it was approved subject to his providing his revised forecast and the slides that he would have presented by 3.00 p.m. today, which would be reviewed over the phone with him at 4.00 p.m. before adding that they had to submit a revised budget to Taipei by close of business tomorrow. At 9.35 he emailed the claimant further asking him to confirm that he would send the slides in for 3.00 p.m. and that he would be available at 4.00 p.m. for a call.

29. In response to the claimant's email sent at 8.30 Mr Shah emailed him at 14.19 assuring him that following his doctor's advice would not compromise his employment and that he ought to know by now what his response had been to each and every request for leave/time off /sickness.
30. On Saturday 11 June 2016 the claimant says that he tried remotely to log into work but was denied access and texted Mr Shah to query the position, in response to which he was advised later in the day that he had been suspended.. He subsequently received a letter dated 10 June from Mr Shah requiring him to attend a disciplinary hearing on 15 June 2016 to respond to allegations of unprofessional conduct and/or gross misconduct in the form of his actions on 6 June 2016 when he took a day's leave without approval, the appearance of his doing the same on 9 June 2016 and his failure to respond to communications and instructions from his line manager and other authorised company personnel.
31. The disciplinary hearing went ahead on 15 June 2016 conducted by Mr Shah in the presence of Mr Mellers. The claimant was accompanied by Simon Ramsden. At this point the claimant had obtained a sick note dated 13 June 2016 signing him off with stress for two weeks, which he handed in at the meeting. The notes of the hearing in two formats are at pages 89-90 and 91-92.
32. The hearing's outcome was communicated to the claimant by Mr Shah in a letter dated 15 June 2016 at pages 93-94, in which he informed him that he had decided that his conduct constituted gross misconduct such as to warrant dismissal without notice and without any further warnings in circumstances where he claimed that the claimant had previously been given a verbal warning on 7 June 2016 about his conduct, which could only have related to the events of 6 June 2016 when the claimant left work early in the morning but before doing so emailed Mr Shah to inform him of his decision to do so.
33. In regard to the alleged issuing of this verbal warning the claimant denied that he was given one and it is to be noted that the respondent's disciplinary policy and procedure at pages 139-141 makes no provision for such a sanction to be used and requires the company to provide the employee with a written statement setting out the conduct, performance and/or any other circumstances which leads it to contemplate taking disciplinary or improvement action against the individual and the grounds on which these concerns are based prior to attendance at a disciplinary or performance review meeting before stating that in most cases of misconduct the employee will be given a first written warning, which will set out the details of the misconduct and the improvements required and confirm that failure to improve one's behaviour within a specified timescale may lead to a final written warning and/or dismissal.



34. In regard to examples of matters that would normally be regarded as gross misconduct the policy and procedure provides in relation to unauthorised absence from work that it is of the prolonged variety..
35. The claimant exercised his right of appeal against the decision to terminate his employment summarily by a letter dated 23 June 2016 to Mr Sheehan, Chief Executive Officer at pages 97-101 in circumstances where the policy and procedure provides that wherever possible appeals will be heard by a manager who has not been involved in the matter to date and who is more senior than the manager who took the original decision. This was responded to by Mr Shah on 28 June 2016 in which he confirmed that the appeal would be heard by Frank Holden, HR Consultant on the grounds that there was no more senior manager than Mr Shah in the company and that it would be held on 4 July 2016. On the claimant's case he requested that the appeal be heard by someone other than Mr Holden because he says that he was aware that he had been advising Mr Shah through the disciplinary process and was good friends with him and because he did not believe he would receive a fair and independent hearing. His request was declined and the evening before the rescheduled hearing on 8 July 2016 he emailed Mr Holden to advise that he would not be attending having been denied his right to have his appeal heard by a more senior manager than Mr Shah in the person of Mr Sheehan.
36. The claimant subsequently presented his claim form making the abovementioned complaints on 21 September 2016, which was responded to within the prescribed timeframe.

## **Law**

37. The relevant law for the purpose of the unauthorised deduction aspect of this claim is to be found in the Employment Rights Act 1996 (the 1996 Act). Section 13(1) gives a right to workers not to suffer unauthorised deductions providing as follows 'An employer shall not make a deduction from wages of a worker employed by him unless - (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or (b) the worker has previously signified in writing his agreement or consent to the making of the deduction'. Section 13(3) provides that 'Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated as a deduction made by the employer from the worker's wages on that occasion'.
38. Section 23(1)(a) goes on to provide that 'A worker may present a complaint to an employment tribunal that his employer has made a deduction from his wages in contravention of section 13. There is a three month time limit for presenting a complaint under this head and in the instance of a deduction by the employer per section 23(2)(a) the operative date is the date of payment of the wages from which the deduction was made. In the instance of a complaint about a series of deductions, the three months time limit starts to run from the date of the last deduction in the series, in which further connection for completeness section 23(4) provides that 'where the employment tribunal is satisfied that it was not reasonably practicable for a

complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

39. Section 27(1)(a) defines "wages" as including any fee, bonus, commission, holiday pay or other emolument referable to (the worker's) employment, whether payable under his contract or not.
40. In addition, as the complaint is pleaded in the alternative as a breach of contract claim the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 by article 3 permits the bringing of proceedings in respect of a claim of an employee for the recovery of damages or any other sum provided that it is not one to which article 5 applies, which it does not and the claim arises or is outstanding on the termination of the employee's employment.

### **Conclusions**

41. Applying the law to the facts as found the Tribunal reached the following conclusions. Dealing first of all with the wrongful dismissal complaint it is not in dispute that the claimant was dismissed without notice. The respondent's case is that it was entitled to dismiss him summarily for gross misconduct, which requires the employee to have committed a repudiatory breach of contract i.e. behaviour that was sufficiently serious to warrant dismissal. In this connection the misconduct boiled down to two days of purported unauthorised absence on 6 and 9 June 2016 and a failure by the claimant to produce slides for a power-point presentation and his plan to get his sales funnel back in place, which information was needed for the submission of a revised 2016 budget to the respondent's parent company.
42. Taking the unauthorised absences in the order in which they occurred the first on Monday 6 June 2016 arose in circumstances where the claimant had returned to work after attending his mother's funeral on the previous Friday to find an email from Mr Shah sent on the day of the funeral requiring him to present that afternoon his funnel numbers in power-point and his plan for getting his plan back into shape.
43. On the claimant's evidence this demand together with a call that he simultaneously received from his ex-wife ruling out a hoped for reconciliation caused him to flip to the point where he felt that he had to go home. However before doing so he emailed Mr Shah to advise him of his departure and the reason for it telling him that he felt shell shocked and that he would contact him later to schedule a meeting to discuss his future with the company. From this communication it could be reasonably inferred that the claimant was undergoing an episode of stress, which indeed he explained when he met with Mr Shah the next day and confided in him that he was experiencing significant personal problems and was going to try and arrange to see his GP, which he did the following day when he was referred to Minds Matter and recommended to take some time off work to get his stress levels down. In such circumstances the Tribunal found it difficult to see how the respondent in the person of Mr Shah was justified in treating this absence as an unauthorised one given that the claimant was on the face of things in a difficult place on the day in question, which would have legitimised his absence.

44. Turning to the second absence on 9 June 2016 this followed on from the claimant's attendance on his GP on the previous afternoon when as set out above he was advised to take some time away and to self-certificate for the remainder of the week. Under the claimant's Employment Agreement at clause 10.1 in the event of an absence from work for any reason the requirement is for him to notify his manager of the reason for his absence as soon as possible but no later than 30 minutes after the time when he would normally be expected to start work. According to clause 5.1 his normal hours of work were 9.00 a.m. to 5.00 p.m. and in respect of this absence the claimant's email to Mr Shah was timed at 8.30 a.m. In the view of the Tribunal this email explained in a sufficiently clear way that the claimant had been advised to remove himself from work initially for that week on a self-certification basis and subsequently as supported by a fit note of a two week duration, which was issued on 13 June 2016. Again given that there was on the face of matters a legitimate reason in the shape of the claimant's sickness by reason of stress for his absence on this day and the fact that he had complied with the respondent's sickness reporting procedure the Tribunal found it hard to understand why Mr Shah construed it as an unauthorised absence particularly in the light of his reassuring the claimant on 9 June 2016 that following his doctor's advice, of which he had been made aware would not compromise the claimant's unemployment.
45. Dealing finally with the claimant's failure to present slides for a power point presentation in relation to his sales funnel it is difficult to discern from the letter of dismissal what part, if at all, this played in the decision to dismiss the claimant as the focus is very much upon the aforementioned absences. In addition it has to be said that the request was somewhat insensitively made on 3 June 2016, the day of the claimant's mother's funeral and that the continuing pressure that was applied for compliance by the claimant paid scant regard to the stress that he made known he was suffering with from 6 June 2016 onwards.
46. When the Tribunal then factored in the breaches of procedure which punctuated the respondent's application of its disciplinary policy in giving effect to the claimant's dismissal namely the failure by the respondent to provide the claimant with a written statement of its concerns in advance of the meeting on 7 June 2016 when it purportedly issued him with a verbal warning in respect of his unauthorised absence on 6 June 2016; the lack of provision for such a sanction in the policy; the lack of issue of a first written warning for this absence; its failure to issue a final written warning in response to his alleged further unauthorised absence on 9 June 2016 and the categorisation of these unauthorised absences as gross misconduct when the policy is clear that it is only prolonged unauthorised absence that may be regarded as gross misconduct it concluded that it was not the claimant but the respondent who was by these breaches in repudiatory breach of contract.
47. In such circumstances the Tribunal concluded that the respondent had failed to show that the claimant had committed a repudiatory breach of contract to justify its dismissing him summarily and that he is therefore entitled to his contractual notice of two months' net pay, which based on his pay slip for April 2016 it assessed to be £5,175.02, which amount the respondent is ordered to pay him.

48. Turning to the claimant's unauthorised deduction from wages/breach of contract complaint pursuant to the Employment Agreement he had a contractual entitlement to a bonus of up to £30,000 per annum for on target performance plus an uncapped commission plan with accelerated payments. It is also the case that the bonus year runs from January to December each year and bonus accrues from day one and is to be paid in equal instalments. As submitted there was an expectation on the part of the claimant of achieving significant commission, which the Tribunal accepted was an important factor in his decision to take up the offer of employment with the respondent in circumstances where he had a competing offer. However in order to achieve bonus an on-target performance had to be met, which implicitly required the setting of such a target by the respondent, which it failed to set. The claimant's case is that the respondent's failure to do so amounts to a breach of contract, the consequence of which was that the claimant was deprived of the right to earn his contractual entitlement.
49. In response the respondent says that the contract was varied when Mr Shah and the claimant agreed in March 2015 that the company would not set his bonus targets until there was a clearer view of what his sales achievement would look like but aside from Mr Shah's jotting at page 55, the contents of which the claimant refutes was the subject of discussion with him there is no written material evidencing such a contractual variation, which may equally be said of the subsequent contended for variations in June and October 2015.
50. In such circumstances the Tribunal found that it was unable to accept that the Employment Agreement had been amended in such an important way in so far as the claimant's ability to earn bonus was concerned and that his target simply was to grow the business, which he did by securing two additional NHS Trusts - Leicester and Guy's and St Thomas, albeit that in the latter case the services did not go live until 2016. As noted above the effect of the acquisition of Leicester alone increased the number of subscribers by 597, which was an increase of some 50% on the existing number of 1097.
51. Accordingly the Tribunal concluded that the claimant was denied the opportunity to receive his contractual entitlement and that his Employment Agreement was therefore breached and accordingly it finds that his complaint in respect of unpaid bonus to be well-founded as amounting to a breach of contract . In assessing his damages in this regard the Tribunal calculated that given his start date of 9 February 2016 he had a potential entitlement of £26,700 in bonus in gross terms as against which he has already been paid £6,000 which leaves an amount of £20,700, which will need to be subjected to tax and National Insurance, which the Tribunal is not competent to calculate and which the parties are directed to resolve between themselves failing which the matter will have to be listed for remedy on application.

Employment Judge Wardle, 2<sup>nd</sup> May 2017

JUDGMENT SENT TO THE PARTIES ON

3<sup>rd</sup> May 2017

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS