

EMPLOYMENT APPEAL TRIBUNAL
FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 2 February 2018

Before

THE HONOURABLE MR JUSTICE SOOLE

(SITTING ALONE)

KUKD.COM LIMITED

APPELLANT

MR R FAROOQ

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

MR JEFFREY JUPP
(of Counsel)

For the Respondent

MR RASHID FAROOQ
(The Respondent in Person)

SUMMARY

CONTRACT OF EMPLOYMENT - Notice and pay in lieu

CONTRACT OF EMPLOYMENT - Implied term/variation/construction of term

PRACTICE AND PROCEDURE - New evidence on appeal

The Respondent Employee resigned, giving 4 weeks' notice and claimed pay during that period. The claim was made on the basis of resignation not dismissal. The ET awarded 4 weeks' notice pay. The Employer appealed on grounds including that upon receipt of the resignation it had immediately waived the requirement of notice, thereby terminating the contract and reducing any award to the notice period (1 week) which applied to termination by the Employer. The EAT dismissed the appeal, holding that the Employer had merely waived the Employee's obligation to work and that the contract continued.

The Employee's claim for commission depended on construction of the meaning of the word "images" in the contract. The ET rejected the Employer's interpretation. The Employer appealed on grounds that the conclusion was perverse and/or that fresh evidence should be admitted. The EAT rejected both arguments. As to fresh evidence, the first requirement of **Ladd v Marshall** was not satisfied.

A THE HONOURABLE MR JUSTICE SOOLE

B 1. The Appellant Employer (KCL) appeals against the Judgment of the Employment Tribunal (Employment Judge Davies) sent to the parties on 28 November 2016, whereby she awarded the Respondent (Mr Farooq), amongst other things, (1) 4 weeks' notice pay, (2) commission, (3) bonus, in connection with his employment as a Business Development Manager or Sales Representative for KCL's online food ordering business. His central task was of signing up Bangladeshi and Indian restaurants and other food outlets, generally described in the hearing as eateries. Mr Farooq was employed in that capacity from 26 February 2015 until he resigned by email dated 9 March 2016 giving 4 weeks' notice.

C
D 2. KCL appeals on the essential bases that the Employment Judge erred in law in (1) holding that Mr Farooq's contractual entitlement was to 4 weeks' rather than 1 week's notice pay, and (2) misinterpreting the contractual conditions for the entitlement to commission and in consequence to bonus, and/or failing to conclude that the conditions have not been satisfied. The latter basis includes an application for the admission of fresh evidence.

E
F 3. KCL's business provides a means of connecting fast-food outlets and other independent restaurants to customers for takeaway and table ordering online. The company is based in South Wales. Mr Farooq lives in the Peterborough area and so was described in the Judgment as a "*field-based employee*". His remuneration was a combination of salary, a commission structure based on the number of establishments he had signed up, and bonus. His employment commenced on 26 February 2015. The contract and its particulars stated his job title as "*Business Development Manager*". The notice provisions were as follows:

A

“Notice Period

In the event of *you* terminating your employment, you are required to provide The Company with the following amount of notice:

- You will not need to provide notice during the first four weeks of work
- 1 weeks’ notice after one month’s continuous employment
- 4 weeks’ notice after six months continuous employment
- 12 weeks’ notice after twelve years continuous employment

B

In the event of *The Company* terminating your employment, you are entitled to receive the following amount of notice:

- You will not receive notice during the first four weeks of work,
- 1 weeks’ notice after one month’s continuous employment
- 2 weeks’ notice after 2 years continuous employment
- Thereafter, 1 weeks’ notice for each year of continuous service, up to a maximum of 12 weeks.

C

The Company reserves the right to pay you in lieu of notice. In the event of you leaving without giving proper notice, The Company reserves the right to substitute any outstanding holiday in place of the required notice. The balance of any accrued holiday not substituted for notice will be paid to you in your final wage.”

D

4. As to variation, the contract provided:

“The Company reserves the right to vary the terms of employment contained in this agreement. The Company will notify the employee in writing within one month of such variation. ...”

E

5. Reward was by way of a salary (£25,000 per annum at the relevant time), commission, and bonus. The contractual conditions for commission and bonus were contained in separate documents. As to commission, the relevant terms were agreed to be as follows:

F

“Commission options

- Option 2**
- £40 - 10% commission with £75 plus VAT weekly capped rate**
- £15 - kukd points loyalty scheme signup**
- £5 - kukd club scheme signup**

...

Commission targets and scales

The set target is 32 eatery signups for each four weekly cycle.

G

Commission payments will be paid on a scaling commission structure.

...

Individual, team and department targets may be subject to change at any time depending on associated performances. This will be notified in writing

H

A

Commission payments

Commissions will be paid on all options in the following four-week cycle

Commissions will be calculated for each four weekly cycle on the first week of the following four weekly cycle

The cut-off date to receive all signup forms/images will be by the end of play on the Tuesday of the first week of the following new sales cycle

B

Any sign-up forms not received by the cut-off date will not get processed in the corresponding cycle. On receipt of any "late" signup forms, these signups will not be calculated retrospectively or added back but will be scaled separately and accordingly to the scaling commission structure.

As the company grows in the order activity starts to increase, options will only be paid as detailed below. This will be notified in writing

C

Kukd linked payment options

*Option A - kukd link special offer one-off rental fee at £199 (retail price £350)
commission paid on option a when eatery is live, kukd linked payment has been received*

*Option B kukd link special offer one-off rental fee can be paid over two months at £250 (retail price £350)
commission paid on option B when eatery is live, kukd linked final instalment has been received*

D

*Option C kukd linked one-off rental fee cost deducted from orders at a cost of £350
commission paid on option C when eatery is live, £350 in order commissions has been deducted"*

(Paragraph 25 of the ET's Judgment, ET Judge's emphasis)

E

6. By notice to Mr Farooq dated 22 October 2015 and headed "*Variation to contract*", KCL advised that the particulars of employment had been amended as follows:

"Notice period

In the event of you terminating your employment you are required to provide the company with the following amount of notice:

F

- You will not need to provide notice during the first four weeks of work
- 1 weeks' notice after one month's continuous employment
- One week for each completed year of service up to a maximum of 12 weeks

This change will take immediate effect. Please [be] advised that all the other terms of your employment remain unchanged."

G

7. By email reply on the same date Mr Farooq objected to this purported variation stating:

"After reading and considering your email I do not agree to these terms for notice period as I feel they are unfair as 1 week is not enough time to find other employment.

H

Please advise the management of request to return to the previous agreement and new terms cant be imposed with out a notice period."

A 8. In consequence of this exchange, there followed a meeting between Mr Farooq and KCL's Managing Director (Mr S Hussain) and Sales and Marketing Manager (Mr I Jabbar).
B The outcome of that meeting was sharply in dispute; Mr Farooq contending that they reached agreement that the notice period, i.e. for him giving notice, would remain at 4 weeks. As will
C be seen, the Judge preferred his evidence. Pausing there, it is to be noted that this issue related to the period of notice which Mr Farooq was required to give KCL in the event of his resignation.

9. By email dated 9 March 2016, Mr Farooq gave 4 weeks' notice in terms which included:

D "I will also like to inform you of my intention to give you the 4 weeks notice to end my job with Kukd. You, Imran and myself had a meeting in [your] office and you and I had a verbal agreement that if I was ever to leave Kukd [then] you will allow me 4 week notice period.

...

My last working day will be on 6th of April 2016 up until this day I will continue to go out [and] get new clients for Kukd.

E My last 4 weeks of employment with Kukd will be according to our original contract as I don't want to [accept] the new terms."

10. By reply of the same date, KCL's head of HR, Mr Rawlings, stated:

F "I refer to your email sent to Shelim Hussain submitting your letter of resignation. This is accepted with immediate effect.

As you will be aware your notice period was varied in October 2015 which means you are required only to submit 1 weeks' notice. However given our ongoing concerns about your performance you will be paid up to today's date and arrangements will be made to collect your car and equipment.

G It only remains to thank you for your service to Kukd.com and to wish you well for the future."

H 11. By his ET1 claim form dated 27 April 2016, Mr Farooq's claim was on the basis that he had resigned on the 9 March giving 4 weeks' notice. Amongst other things, he claimed payment of salary for that 4-week period and unpaid commission.

A 12. By its ET3 response, KCL disputed Mr Farooq’s date of termination of employment, giving 11 March 2016 as that date. It made no reference to Mr Farooq’s resignation of 9 March 2016, but stated that “*his employment was summarily terminated due to poor performance*”.

B The response also refers to a previous dismissal by notice dated 19 January 2016, which had subsequently been rescinded. As to payment during the notice period, KCL relied on the variation letter of 22 October 2015. As to commission, the claim was denied in short form, thus:

C **“The Claimant states in his application that he is owed commission based on both sales and on being top sales representative and for the top sales team. This is denied. The Claimant is owed no commission. Further there has never been in place a rewards mechanism for the top achieving sales representative or sales team.”**

D 13. At a Preliminary Hearing, a list of issues was subsequently identified and agreed by the parties. As to notice pay, the issue was “*Had C’s contract of employment been varied prior to his dismissal so as to reduce his entitlement to notice pay from 4 weeks to 1 week?*”. As to commission, the first question was “*Was C’s entitlement to commission pay conditional on clients activating and using the KukdLink machines that C would have sold to them?*”. The second question concerns the correct value of such commission as he was entitled to.

F 14. Thus, according to the list, the issue on pay proceeded on the basis that Mr Farooq had been dismissed. The issue on commission did not refer to the question which subsequently arose at the Full Hearing, namely whether Mr Farooq had failed to satisfy a requirement that “*all signup forms/images*” must be provided by the end of play on the Tuesday of the first week of the following new sales cycle, nor what was meant by the word “*images*”.

H 15. Mr Farooq’s witness statement of 27 June 2016 was made on the basis that he had resigned, but referred to the meeting at which he alleged the 4-week notice period had been

A agreed. On commission it contained no reference to the condition in respect of images. As to
the statements on behalf of KCL, Mr Hussain's undated statement made no reference to the
images issue. Counsel for Mr Jabbar, who did not appear below, points to paragraph 6 of that
B statement where Mr Hussain referred to "*Late submission of sign-ups impacting commission
payments and processing*". Mr Jabbar's undated witness statement referred to menus in these
terms (under the heading "Commission"):

C **"The commission structure was changed on a number of occasions in line with the
development and growth of the business. However, the underlying principle was that the
commission was based on completed signups, which included all the paperwork being
completed on time and in order, with menus attached, and submitted by a set date."**

D 16. In a statement dated 20 October 2016 - i.e. 11 days before the Full Hearing, Ms Laura
Brown, a Sales and Marketing Executive for KCL, stated:

**"One of the big problems that we had with the Claimant was with him not sending restaurant
menus with the signup forms which resulted in the signup forms not being processed as we did
not have all the required information. This resulted in a knock-on effect, as it meant that we
could not put these on to the sales numbers, which in turn had an impact on the Claimant's
commission."**

E 17. The one-day hearing took place on 31 October 2016. On that occasion Mr Farooq
produced a tape recording of a telephone conversation between him and Mr Jabbar post-dating
his resignation, which was said to support his account of the earlier meeting in respect of the
F notice period. The Judge agreed to hear the recording.

G 18. Evidence was heard from the Claimant, Mr Hussain, Mr Jabbar, Ms Brown, and Mr
Rawlings. There being insufficient time at the end of the day for submissions, the Judge
ordered sequential written submissions to be supplied.

H 19. Counsel then appearing for KCL provided submissions dated 31 October; i.e. the same
date but supplied, of course, after the hearing. As to notice pay, these proceeded on the basis

A that the contract of employment had been terminated by Mr Farooq's resignation. It then dealt
with the factual question of whether or not the meeting between Mr Farooq, Mr Hussain, and
B Mr Jabbar had resulted in agreement of a notice period of 4 weeks, i.e. in the event of his
resignation. The only reference to dismissal in counsel's submissions was in respect of the
rescinded dismissal of February 2016. As to commission, these submissions dealt in detail with
the propositions that (1) the signup sheet and images had to be submitted within a specified
C timeframe, and (2) that on its proper interpretation, the required images were of the menus at
the eateries which had been purportedly signed up by Mr Farooq. Since the menus had not
been supplied by the due date, it was submitted that the claim for commission must fail.

D 20. It is to be noted that the issue on commission identified in the list of issues was still in
play. Counsel's submissions acknowledged that KCL had produced various documents on the
menu/images on the morning of the hearing, but observed that this was not a "new point", citing
E Ms Brown's statement.

F 21. Mr Farooq's sequential submissions were dated 30 November 2016. As to pay, these
also proceeded on the basis of his resignation. In support of his case as to the meeting to
discuss the notice period, he also relied on the recorded conversation with Mr Jabbar and a
post-resignation email dated 18 March 2016 from Ms Alison Richards, who worked in KCL's
G HR department. That email concluded "*It was originally agreed to give you 4 weeks notice pay
but Shelim has now decided to give you 1 weeks notice*".

H 22. As to commission, Mr Farooq challenged the case that "images" referred to menus and
stated that the word referred to the digital image of the form. This contrasted with the evidence
he is recorded as having given at the Tribunal, namely:

A

“31. The claimant’s position is that the reference to ‘*images*’ is to photographs taken of stickers put up in the eateries; part of the job of the sales representative was to persuade eateries to take down competitor’s advertising material and replace it with that of the respondent. Photographs were taken to prove that this had been done. Additionally, the claimant asserts that menu information was available online on competitor websites and that data could be obtained (‘scraped’) in that way.”

B

23. Mr Farooq said that menus were taken from the restaurants’ online menus. Furthermore, he had received part payment of commissions in the relevant period, which he would not have received if there were a problem with KCL’s receipt of menus.

C

24. The Judge considered the evidence and the submissions in chambers on 17 November 2016. In her Judgment, sent to the parties on 28 November 2016, the Judge proceeded on the basis that the employment had been terminated by Mr Farooq’s resignation on 9 March 2016.

D

As to pay during the 4-week period, she: (1) recorded the 22 October 2015 exchange concerning the variation of the notice period; (2) observed that “*There is no written variation of contract signed by the Claimant*”; (3) considered the disputed evidence of the meeting concerning the notice period; (4) preferred Mr Farooq’s account of that meeting; (5) upheld the claim on the basis that “*his contractual entitlement was to 4 weeks’ notice*”.

E

F

25. An application for reconsideration, including further evidence to which I shall refer later, was submitted to the Judge on 23 January 2017 and was rejected on grounds of lack of explanation for the delay. An application for permission to appeal that decision was refused.

G

26. Mr Jeffrey Jupp submits that the conclusion on notice pay was wrong in law because the Judge (and indeed both parties) misunderstood the issue, in that they treated it as being one where Mr Farooq was entitled to notice, rather than one where he was giving the notice. The true position was that: (1) for the purposes of resignation by Mr Farooq, the original contract required him to give 4 weeks’ notice; (2) the variation clause in the contract entitled KCL to

H

A vary it unilaterally, provided notice of variation was given within one month of the variation;
(3) by its letter of 22 October 2015 KCL so varied the notice required of Mr Farooq, by
B reducing it from 4 weeks to 1 week; (4) Mr Farooq on 9 March 2016 gave 4 weeks' notice; (5)
by its response of the same date, KCL (a) stated that only one week's notice was necessary, but
in any event, (b) waived the requirement of any notice.

C 27. As to waiver the requirement of notice by the employee was a provision for the benefit
of the employer, and thus could be waived by KCL. He cited **Trotter v Forth Ports Authority**
[1991] IRLR 419 and its statement:

“5. ... If the right to notice was waived, termination of the contract without notice was not a
breach and no damages were due. In my view that argument is correct. ...”

D 28. He further submitted that, if this had been a case of dismissal, Mr Farooq's contractual
entitlement would have only been one week.

E **Conclusion on Notice Pay**

F 29. I accept that the variation clause in the contract of employment gave KCL the right to
vary the contractual terms by the requisite notice and that the letter of 27 October 2015 had that
effect in respect of the length of notice to be given by Mr Farooq. Furthermore, that provision
did not require consent, in writing or otherwise, from Mr Farooq. However Mr Farooq
immediately objected to the change and there followed the meeting with Mr Hussain and Mr
G Jabbar. Having considered the evidence in respect of that meeting, the Judge preferred Mr
Farooq's account that agreement was reached that the required period of notice to be given by
him would remain at 4 weeks.

H

A 30. That was, an unimpeachable finding of fact. Although this was not a ground of appeal, I also do not accept that that finding was vitiated, as Mr Jupp argued, by the Judge’s statement that there was no signed or written variation of contract by Mr Farooq.

B 31. Mr Farooq gave such 4-week notice by his resignation email of 9 March 2016. The consequence was that the contract would continue until the expiry of that notice period. In the same email Mr Farooq made clear, in effect, that he continued to be ready, willing and able to carry out his work. Thus, absent a subsequent material change in the contractual relationship, he was entitled to payment of salary during that period.

C

D 32. In my judgment, the effect of KCL’s reply of 9 March 2016 was merely to waive Mr Farooq’s obligation to work or to be available for work in the notice period. Conversely, I do not accept Mr Jupp’s submission that this effect was to bring the contract to an earlier end or otherwise to remove Mr Farooq’s continuing entitlement to be paid salary until the 4-week period expired. I do not accept that the cited decision on waiver of notice (**Trotter**) provides any support for Mr Jupp’s submission. The present case was not ultimately presented on either side as a summary dismissal by KCL’s email of 9 March 2016, but one of resignation by Mr Farooq’s previous email of that date. True it is that the Judgment, like the written submissions of counsel for KCL, refers to Mr Farooq’s “entitlement” to 4 weeks’ notice. However, this use of language does not reflect any misunderstanding of Mr Farooq’s essential case, which was that (1) the required notice period was 4 weeks; (2) Mr Farooq gave such notice; and (3) the contract, and thus his entitlement to salary, continued until the expiry of that period. For all these reasons, the appeal in respect of pay during the 4-week period is dismissed.

H

A 33. As to commission, the Judge rejected KCL’s case as identified in the list of issues that commission was based on selling “*partnership solutions*” and the link machines.

B 34. As to the meaning of the word “images”, the Judge recorded KCL’s submission that it should be taken to mean images of menus, and Mr Farooq’s submission that it referred to photographs of stickers put up in the eateries. She made no reference to Mr Farooq’s written and contrasting submission that “images” was a reference to the digital image of the form. She
C noted that neither Mr Hussain nor Mr Jabbar made reference in their witness statements to the issue of menus not being provided. As I have noted, Mr Jabbar’s statement did refer to the requirement for signups to be supplied “*with menus attached*”, but did not say that there had
D been a failure to do so. The Judge expressly considered Ms Brown’s evidence from her 20 October statement but concluded “*however, she does not specify when this was an issue. I note that she transferred to her sales role for the respondent in June 2015, during the period in question*” (ET Judgment, paragraph 32). The Judge accepted Mr Farooq’s evidence that menus
E from targeted restaurants would, at least initially, have been available on the internet, and she accepted his submission that KCL’s case was inconsistent with its payment of commission in the summer of 2015. In the light of all the evidence she rejected KCL’s construction of the
F word “images” as meaning menus.

35. Mr Jupp submits that the Tribunal:

G (1) failed to make a finding as to whether the payment of commission was conditional on submission of the signup form and images within the specified time frame (ground 2);

H (2) would have reached the correct interpretation if it had seen further evidence which KCL now seeks to adduce (ground 3); and

A (3) in any event, reached a perverse conclusion on the meaning of the word
“images” (ground 4).

B It is convenient to take these grounds in reverse order.

Ground 4

C 36. The submission on perversity is that no reasonable tribunal, properly directing itself in
the light of the evidence given by Mr Farooq and in comparison with his closing submissions
and the nature of KCL’s business, could properly have concluded that “images” referred to
photographs of stickers or that menus could be scraped from websites of competitors. Mr Jupp
D contrasts Mr Farooq’s change of tack between evidence given at the hearing (i.e. as to stickers)
and his written submission (i.e. as to digital forms). As to the latter, he points to the separate
reference to “forms” and “images” in the commission agreement. In any event, without menus
E KCL simply could not perform its service of delivery to clients. The suggestion that the menus
could be obtained from the internet was untenable and flouted both common and business
sense.

F 37. I am not persuaded that the Employment Judge’s conclusion was perverse. In her
consideration of the evidence and submissions she in particular noted that Mr Hussain and Mr
Jabbar had made no reference to the issue of menus in their witness statements; and considered
G that KCL’s payment of commission in the summer of 2015 was inconsistent with its case on the
importance of menus. Whilst the Judge made no reference to Mr Farooq’s subsequent change
of tack on the meaning of the word “images”, the ultimate question was whether it meant
H menus. The Tribunal had the benefit of seeing and hearing the witnesses and all the documents.

A I am not persuaded that her conclusion offended common or business sense or otherwise reaches the high threshold for establishing perversity.

B *Ground 2*

C 38. This ground relates to the same conclusion on commission but depends on an application to adduce fresh evidence. This consists of a substantial quantity of emails from KCL (in particular from Mr Darren Scurville who was its Operations Director and Mr Farooq's line manager but was no longer employed by KCL) to Mr Farooq which pressed him to supply menus, and of emails from Mr Farooq attaching images of menus. Examples are provided; in particular emails dated 20 April, 8 May and 16 May 2015. The latter is an email from Mr D Scurville to Mr Farooq and includes the following:

“Here is the procedure again (for the last time)

Sign-Up forms

Send a picture/scanned PDF copy of the forms along with an image/PDF copy of the paper menus within 24 hours of signing. ...”

E Is it is submitted that these, together with Mr Farooq's response, demonstrate that “images” plainly meant menus and that these undermine Mr Farooq's contrary and internally conflicting F evidence and submissions in the Tribunal.

G 39. In order to adduce this evidence, KCL must of course satisfy the three requirements of **Ladd v Marshall** [1954] EWCA Civ 1; see also the **EAT Practice Direction**, paragraph 10.3.

H 40. In support of the first requirement of **Ladd v Marshall** - namely that the evidence could not have been obtained with reasonable diligence for use at the Employment Tribunal hearing - there is the witness statement of KCL's in-house legal adviser Mr Shahid Ghafoor, who attended the hearing on 31 October 2016. He states that there was no issue raised in the ET1 or

A the list of issues as to the correct interpretation of the commission agreement or in particular as
to the meaning of the word “images”. He says that KCL had been taken by surprise when this
new issue arose; and that it had in fact been raised by the Judge. He states that, following the
B decision, he began in December 2016 to search for evidence relating to the definition of
“images”. For that purpose, he obtained access to the email accounts of Mr Scurville and Mr
Farooq.

C 41. Mr Jupp acknowledged that the overall issue concerning the supply of menus was not
raised by KCL in its ET3 response or in the list of issues. However it was sufficiently raised in
Ms Brown’s witness statement of 20 October 2016. As to whether “images” meant menus,
D there had been no reason to consider that an issue. KCL was therefore taken by surprise and
could not with reasonable diligence have anticipated the point and thus obtained this evidence.

E 42. Skilfully as the submission was argued, I do not accept that the first requirement of
Ladd v Marshall is satisfied in this case. First, the defence to the claim to commission on the
basis of failure to supply menus was not raised by KCL until the hearing itself. Giving all due
weight to the relative informality of Tribunal proceedings, it would not have been sufficient to
F raise this issue through a witness statement (i.e. from Ms Brown) served 11 days before the
hearing. In any event, paragraph 8 of that statement did not raise that issue squarely as a
defence to the claim. Indeed, KCL was perhaps fortunate that the Judge was willing to
G entertain this alternative defence. The somewhat defensive observations in counsel’s
subsequent written submissions of 31 October 2016, that this was not a new point, rather bear
this out. Thus on the overall issue it was Mr Farooq, not KCL, who may be said to have been
H taken by surprise.

A 43. Secondly, it was for KCL to prepare itself for the new point which it was raising and to ensure that it produced all relevant material to the Court. In this respect, I do not accept that a distinction can properly be drawn between the various ingredients of the defence. In the
B absence of agreement from Mr Farooq, one ingredient was the correct interpretation of the word “images”. In raising a new defence, KCL was not entitled to assume that to be uncontroversial.

C 44. Thirdly, there was no suggestion at the hearing or in subsequent written submissions of counsel that KCL had unfairly been taken by surprise. In this respect I note that Mr Ghafoor was present at the hearing and evidently took no steps to seek further evidence until after the decision was received almost a month later. Even then the search appears to have proceeded at
D a relatively leisurely pace, the documents not being provided to the Judge for reconsideration until 23 January 2017. In the light of this conclusion, it is unnecessary to proceed to the second or third requirements in Ladd v Marshall.

E 45. The consequence of the conclusions on the commission appeal are that grounds 2 and 5 must also fall away. Ground 2 concerns the absence of a finding as to whether the payment of commission was conditional on the sales person submitting the signup form and images within
F the time frame specified in the agreement. It falls away because the case in this respect depends on the menus issued. It is not suggested that there was a failure in any other respect. Ground 5 concerns the bonus issue, which is admittedly parasitic on the case concerning commission.

G 46. For all these reasons, the appeal is dismissed.

H