EMPLOYMENT TRIBUNALS

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE F SPENCER**

BETWEEN: **MR E ANGUS** **CLAIMANT**

AND

FORFRONT LIMITED **RESPONDENT**

ON: **30 and 31st August 2018**

Appearances
For the Claimant: Ms I Ferber, counsel
For the Respondent: Mr M Smith, counsel
(written submissions sent on 14th September 2018)

RESERVED JUDGMENT

The Judgment of the Tribunal is that:-

(i) The Claimant's claim for breach of contract is not well founded and is dismissed.

(ii) The Claimant was not dismissed for asserting a statutory right.

The claims are dismissed.

REASONS

1. The Claimant was employed as a Sales and Marketing Executive by the Respondent from 7 September 2015 until 15th June 2017 when he was dismissed. It is acknowledged that the Claimant has insufficient service to claim "ordinary" unfair dismissal. He claims

a. automatic unfair dismissal for asserting a statutory right (section 104 of the Employment Rights Act 1996 – the ERA);

b. breach of contract by the non-payment of commission.

2. In relation to the first claim, it is the Claimant's case that the principal reason for his dismissal was that he had asserted the right not to suffer unauthorised deductions from his wages.

3. In respect of the claim for breach of contract it is the Claimant's case that the Respondent has breached an agreement, recorded in writing on 27 January 2017. In particular the Respondent had refused to pay him commission based on a 100% profit margin on IPR (see below). The issue is the proper construction of terms which were agreed between the Claimant and the Respondent on 27 January 2017 (388). Did that agreement provide that the Claimant should be paid commission on 100% of the IPR?

4. I heard evidence from the Claimant and, on behalf of the Respondent, from Mr Kellerman, Managing Director and owner of the Respondent. The Claimant also provided two written statements from former colleagues (which however were not of much assistance). I had an agreed bundle of documents running to over 550 pages.

<u>Findings of relevant fact</u>.

5. The Claimant was employed as a sales executive from 7 September 2015. The Respondent is a relatively small employer which provides bespoke software to businesses and also provides email marketing software called e-shot. The Claimant was principally recruited to sell bespoke software/software development to businesses. Essentially this involved selling the time of the Respondent's software developers. At the time the developers' time was sold at £100 an hour.

6. The Claimant was offered the position on 3 August 2015 (71), The offer letter set out his base salary of £40,000 and stated that he would be eligible to earn an additional £40,000 per year in commission for on target earnings (OTE) of £80,000 a year.

7. His Target was described in the offer letter as follows.

New Business target

Quarterly Gross Profit Targets	
Per Quarter	£62,500
Total P.A.	£250,000

Commission Schedule	
% Target	Multiple Factor
0% to 110%	1
>110%	1.1

OTE was therefore £250,000 per year or £62,500 per quarter. A multiplication factor of 1.1 applied for earnings over 110% of target. Essentially if the Claimant's sales hit the target he would earn an additional £40,000. There was, however, no definition of how gross profit would be calculated.

8. The Claimant was provided with a contract of employment which he signed and returned on 7 September 2015. This provided that "Subject to the successful achievement of targets agreed between you and your manager, you may be eligible to earn an additional £40,000 per year, paid out as per the terms of the plan for total annual on target earnings (OTE) goal of £80,000. The plan may be altered or changed at the complete discretion of the company and confers no rights upon you." However, it is accepted that contractual rights were created in an agreement dated 27th January 2017 which is the subject of this case.

9. The Claimant was given his commission structure by the Sales and Marketing Director, Mr Nathan in December 2015, (though this did not appear in the bundle). The Claimant was told that he would be entitled to 35% of profit generated. Profit was defined as the number of hours sold less (i) the cost of sales and (ii) the cost of the Claimant's salary. The "cost of sales" for development hours was 62.5%, so that for every £100 charged to the client, the notional profit element on which commission would be calculated would be £37.50.

10. The Claimant felt that this definition of profit in relation to development hours made his target earnings unachievable. He also complains that following departures of other sales staff he was required to work on marketing, telesales, mobile apps and other matters in addition to selling development hours for software development. The Claimant also considered that it was unfair that he was paid commission only on amounts billed and paid. This meant that if a developer underestimated the number of hours that it would take to develop software, the client would not be charged for the full number of hours spent and this affected commission. The Claimant felt it was unfair that he was penalised in commission for failures by the developers to accurately identify the number of hours to be billed.

11. In July 2016 the Claimant was working hard on securing a large sale of development hours to the Ministry of Defence (the Novo contract). He was concerned about his commission structure. Emails in the bundle show that there was significant disagreement between the Claimant and Mr Kellerman as to how gross profit was to be calculated. The Claimant was also unhappy when Mr Kellerman said that commission would not be paid until the project had concluded. The Claimant felt that this was unfair as the Novo project would take some 6 months to complete. This was not just a timing issue but also affected whether he would meet his OTE,

12. The development of software which was sold by the Respondent created intellectual property rights (IPR). The IPR would generally remain the

property of the developer as was standard in the industry. Further income could then be generated by the grant of a licence to use the software over a number of years. Mr Kellerman gave evidence, which I accept, that for the Respondent the sale of IPR was generally neither profitable nor desired, as they gave up valuable licensing rights.

13. Negotiations about the Claimant's commission took place in the 2nd half of 2016. These negotiations were about the amount payable for 2016 and about how to calculate commission for 2017. In respect of the Claimant's 2016 commission, Mr Kellerman agreed that the Claimant would be paid before completion of the Novo project and, and although he had not achieved his OTE he would be paid on the basis he had achieved 76.39% of his quarterly target. Many emails later, the Claimant and the Respondent agreed the amounts that would be paid in respect of commission for 2016.

14. During the negotiations numerous different spreadsheets were provided to the Claimant providing examples of commission payments. A spreadsheet in July (112A) identified different types of work (new sales, consultancy, hosting and maintenance). A spreadsheet (167) provided to the Claimant on 19th September, identified a different commission calculation for different types of work - for example sales with labour, sales no labour, e-shot and hosting. Commission on "sales with labour" was payable at 20% and calculated on the basis that net income was defined as 37.5% of total sales. Other types of work did not apply a percentage deduction to the calculation of "sales" but commission was paid at a lower rate. Commission on "sales no labour" was 11%, commission for e-shot was 15% and for hosting 10%. The Claimant objected to that formulation of the calculation of commission. In particular he queried why commission on "sales no labour" was 11% and not 35% saying that "I assume license fees fall into this category". (108) It is agreed that none of these earlier spreadsheets reflected the agreement which was ultimately adopted.

15. On 24th November, a new spreadsheet (v5) for the calculation of commission was provided to the Claimant (182). This did not identify different types of work but referred only to "New sales" and a commission rate of 20%. All calculations in that spreadsheet (both in relation to actual and projected sales) were on the basis that only 37.5% of the amount billed represented profit. The Claimant's salary would be deducted from that profit figure and he would then receive a commission of 20%. The new spreadsheet did not refer to the multiplier.

16. In a lengthy email dated 1st December 2016 (365) objected to this formulation. Amongst other objections he referred to IPR "Lets bear in mind that the contract with Novo allows IPR and a support contract which are future earnings worth over £170,000"

17. Discussions about commission continued throughout December. He wrote to Mr Nathan copied to Mr Kellerman asking for clarification of some elements and following further discussions Mr Nathan responded on 6th

January. An email of 6th January notes the Claimant's questions (and Mr Nathan's answers.

"On *the v5 commission spreadsheet, are tabs 2 and 3 still part of the plan?*" Mr Nathan responded on 6th January with version 6 in which tabs 2 and 3 had been removed. Tab 3 of the previous versions of the commission plan had contained the variable profit calculations and variable commission rates referred to above as well as notes stating that profit would not be calculated until the end of a project.
What is the categorisation of elements that now incur a cost? E.g. what is the margin on IPR, support and maintenance, hosting etc" Mr Nathan responded "All elements now carry the same margin as development". (382).

18. In an email dated 12th January (380) the Claimant said this
"Sticking points now are from my perspective…

"1. IPR is profit so stating it now carries a margin of 62.5% "development cost" and only a 37.5% would be counted, makes no sense and can't agree with for a model moving forwards. My target is profit, this is all profit.
2. My offer letter (which forms part of my employment terms) state I will have a 10% multiplier on sales over my target, removing this completely "to be reviewed later" is a variation of contract that would need to be agreed before you can simply apply it."

19. On 17 January 2017 (384) Mr Kellerman wrote to the Claimant confirming that the multiplier would be reinstated to the commission plan. No reference was made to IPR. The Claimant says that he discussed IPR with Mr Kellerman who said that that IPR was now to be paid at 20% rather than at 35%, but it was clear from v5 (sent in November) that no commission was now payable at 35%.

20. In cross examination the Claimant was asked if he had specifically raised the question of IPR with Mr Kellerman. The Claimant said that he had. He told the Tribunal that he had told Mr Kellerman that IPR was all profit and it was not addressed in the spreadsheet and asked, "where does it go?". The Claimant told the Tribunal that Mr Kellerman responded with "in the profit row." Effectively this would mean that IPR would be calculated as 100% profit.

21. Mr Kellerman denies that he discussed this with the Claimant. He says that the profit row in the spreadsheet was populated automatically with a formula (i.e. 37.5% of sales) and they would not have been able to put 100% of an invoice into that spreadsheet in the way that the Claimant suggested.

22. I do not accept the Claimant's evidence as to the discussion about IPR with Mr Kellerman. The Claimant makes no reference to such an important discussion in his witness statement. On the contrary he says this "In the build up to the settlement offer Ron said he wanted to apply a cost on IPR of 62.5% as a "development cost". This development cost was a fictitious

cost created solely for the purpose of trying to pay me less commission and to set up unachievable targets, especially when I was forecasting IPR from January through until the time I was dismissed. I pointed out I could not accept the IPR attracting a development cost of and that this was entirely profit. …Ron did not address this IPR point even when coming to a settlement, which he could have attempted to do if he wished to clarify this point."

23. There is also no reference to such a conversation in his subsequent letter of 15th June. Given that Mr Nathan had specifically stated that IPR would incur the same margin as development it seems unlikely that if this is what Mr Kellerman had stated in terms, the Claimant would have neither confirmed this statement in an email nor sought an amendment to the draft agreement to make it clear.

24. Eventually the commission negotiations culminated in a signed agreement dated 27th January 2017 to cover the commission structure for the past 6 months (1 July to 31 December 2016) and from 1 January 2017. So far as material it provided that

"You will be eligible to earn an additional £40,000 per year in commission. This will be paid on a quarterly in arrears basis, paid on or before the last working day of the month following the relevant quarter which will give you an annual on target earnings (OTE) of £80,000 per year. Your targets for the next 12 months are the same as with the previous 12 months:

New Business target

Quarterly Gross Profit Targets	
Per Quarter	£62,500
Total P.A.	£250,000

Commission Schedule	
% Target	Multiplication Factor
0% to 110%	1
>110%	1.1

Gross Profit is calculated based on Forfront's cost per hour of £62.50. Any amount that is calculated per hour above the £62.50 will be considered as Profit. Based on the current basic salary of £40,000 per annum, the amount of £10,000 per quarter will be deducted from the profit value to achieve the "commissionable income". Your commission will be based on 20% of the commissionable income times a multiplication factor. In other words, if your quarterly profit is higher than 110% of your target (£68,750+ based on the current £62, 500), your commission will be multiplied by 1.1. The formula for the calculation of your commission together with examples of your OTE is available in a separate spreadsheet…. The File also includes 2016 commissions for Q3 and Q4: Q3 1 July 2016 to 30 September 2016 – 7549; and Q4 1 October 2016 to 31st December 2016 £6,076.

£7,639 was paid in the 30/11/2016 payslip and the balance of £5,986 will be paid in the January 2017 payroll run. We have also offered you a one-off extra bonus of £4,000 subject to signing this plan and in full and final settlement of all remuneration owed to up to and until 31 December 2016 as well as being the only active remuneration plan in effect for the first quarter of 2017 (to automatically continue unless otherwise agreed**)**

25. The attached spreadsheet (385) showed a calculation of the Claimant's actual commission for 2016. For 2017 the spreadsheet showed projected commission based on the sales which would need to be achieved to reach the Claimant's OTE (which would generate £40,000 in commission.) The spreadsheet identifies New sales, Cost, Profit and target. In each column

"cost" equates to 67.5% of the figure for New sales and the "profit" equates in each case to 27.5%. A box at the side identifies that the day rate is £800, of which 62.5% is £500 and 37.5% is £300. There is no mention of sales "no labour".

26. The contract with Novo systems for the sale of development hours which the Claimant had sold, was signed by the Respondent in August 2016 (140). In that contract ownership of IPR remained with the Respondent. The Respondent agreed to grant a licence to Novo to use the software at <u>no</u> additional cost for the first 5 years. At the end of that five-year period the IPR would be available for Novo to buy for 20% of the total cost of the entire project over 5 years, or the Respondent could relicense it at a capped fee.

27. In December 2016 Novo systems were lobbying for the early sale of the IPR. In June 2017 the Respondent sold them the IPR for £69,000 (447). The purchase order is dated 9th June and the completion date 16th June. It is the commission payable on that sale that is the crux of this case.

28. After the January agreement Mr Kellerman believed that the Claimant was not sufficiently focused on generating further new sales and instead was focusing on project managing the Novo work and maintaining that relationship. Mr Kellerman met with the Claimant on 7th April and asked him to spend more time generating new business. Mr Kellerman said that he intended to introduce a minimum target for sales to <u>new</u> clients. The Claimant objected saying that he was about to hit his profit target for the quarter and would not accept a 2nd target. Mr Kellerman told the Claimant that the discussion would be followed up in writing. The Claimant said that he would take a look and respond but he was unlikely to accept any new arrangement.

29. Mr Kellerman emailed the Claimant on 10th April (418A) with the subject line "sales targets 2017". The text of the email stated "Further to our last conversation, I enclose the document we discussed." It is now accepted that Mr Kellerman did not in fact attach any document to that email and believed he had sent it to the Claimant. The Claimant did not enquire about the missing attachment.

30. On 11 April 2017 Mr Kellerman sent the Claimant the calculation of his commission for the first quarter which resulted in a further disagreement between the Claimant and Mr Kellerman as to the calculation of commission.

31. On 18th May Mr Kellerman spoke to the Claimant about what he perceived was the lack of new business. Mr Kellerman felt that the Claimant was not generating new business. The Claimant felt that he had not been provided with sufficient leads or support from Mr Kellerman and Mr Nathan.

32. In June Mr Kellerman forwarded the document he not attached to his April email. In that document Mr Kellerman told the Claimant that he was introducing minimum "new business only" targets - although his overall revenue targets had not changed. It also asked the Claimant to provide

weekly stats regarding his sales activities including phone calls, meetings and other sales activities.

33. The Claimant interpreted this email as putting him "on notice that if I didn't achieve a new 2nd target, there would be consequences". The Claimant responded to Mr Kellerman on 15th June (448). He complained about

> "What feels like an ongoing attempt to avoid your contractual obligations to me, by continually suggesting alterations to how my commission entitlement should be calculated both historically and moving forwards."

He complained also that

> "The effect your proposed changes would have on my income are real and tangible, leaving me with great uncertainty from one month to the next as to whether I will be getting further commission. This is not what was originally contractually agreed, nor within the spirit of our agreement. Furthermore, your threat of "I can just let you go" is a further indication to me that you are intent on continuing along this unacceptable path. I am sure you understand that even if you did "let me go", I will still have claims against you for breach of contract/unlawful deduction from wages, which I could pursue through the County Court or the Employment Tribunal respectively."
> It is of great concern to me that once again you have decided to try and impose new targets in this quarter, when I have secured £83k+ profit for the business. You can see the benefits that this income can bring to the company, yet appear to be doing all you can to reduce my previously agreed commission.

He continued:

> "I have now taken some further legal advice and want to make my position very clear as follows;
>
> IPR is all profit. You have repeatedly attempted to unilaterally amend our previously agreed and understood commission of arrangements, by stating that IPR should now incur a development cost of 62.5% I do not and will not accept this, as detailed in my most recent email dated 12 January 2017 and in other conversations since. It appears clear to me that this unjustifiable development cost is intended only to reduce the commission due to me, as to date I have not been given another credible explanation, there are no hours so a cost per hour does not apply."

34. The letter continued to set out a calculation of the profit and the commission which the Claimant considered was due to him. This was done on the basis that the full £69,000 in respect of the sale of IPR should be included in the calculation of commission. No cost element had been deducted from that sale as IPR was "all profit". The Claimant's calculation also included a multiplier of 1.1 as, on his figures, he had achieved 110% of his OTE. He

therefore calculated that £16,097.18 would be due to him "in the next commission run in July 2017."

35. The April letter (received by the Claimant in June) had made no reference to IPR. The proposed change that the Claimant was responding to was an additional target for new business and had nothing to do with IPR. There was no evidence that there were any conversations about IPR after the agreement signed on 27th January. Despite this, in his 15th June letter the Claimant repeatedly refers to IPR and in the calculation of commission the figures for IPR appear in red.

36. The Claimant concluded his letter by suggesting that either Mr Kellerman confirmed to him in writing that he would pay his full commission or that they agreed to an amicable parting of the ways via a settlement agreement "to reflect my commission entitlement, plus my notice and any accrued but untaken holiday entitlement. Additionally, I am happy to agree to terms preventing me from discussing these experiences with any other interested parties."

37. Mr Kellerman's considered that the Claimant was now trying to override the terms that had been agreed in January, after a long negotiation, that for every £100 of revenue he brought, a fixed percentage of 37.5% would be considered for commission.

38. Thereafter there was a brief discussion about a potential agreed termination. Mr Kellerman asked the Claimant to leave and to clear his desk.

39. Later the same day Mr Kellerman emailed the Claimant (451) to confirm that his employment had terminated, and he would be paid in lieu of notice. He said that the Respondent's solicitors would forward a settlement agreement to him shortly and that the company would meet the costs of the Claimant's legal advice on the settlement agreement up to £500 plus VAT.

40. However, Mr Kellerman changed his mind and decided not to progress a settlement agreement. Instead on 26th June 2017 the Claimant received a letter from the Respondent's solicitors confirming the termination of his employment. It stated that it was terminated "after it became clear to the Company that the relationship between the Company and you had broken down. The commission arrangement that was a component of your remuneration was causing issues between Ron Kellerman, the company's managing director, and you. You continued to claim commission far in excess of your contractual entitlement as set out and agreed in attached letter (the Commission Letter.) the January letter." The letter also said that the Claimant sales did not justify his continued employment. Commissionable income of £5, 638.75 would be paid to him together with 3 days outstanding holiday pay and expense claims. The Claimant has been paid commission on 37.5% of the sales of IPR to Novo.

<u>The law</u>
<u>Unfair dismissal.</u>

41. Section 108 of the ERA provides that:

> "(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason or, if more than one, the principal reason) for the dismissal it that the employee …. (b) alleged that the employer had infringed a right of his which is a relevant statutory right."
>
> (2) it is immaterial for the purposes of subsection (1)-
> (a) whether or not the employee has the right, or
> (b) whether or not the right has been infringed but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.
>
> (3) it is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.
> (4) the following are relevant statutory right to the purposes of this subsection
> (a) any right conferred by this act for which the remedy for its infringement is by way of a compliant or reference to an employment tribunal.

An allegation that an individual has suffered an authorised deduction from wages is one such right.

42. There are therefore three main requirements.

    a. The employee must have asserted a statutory right,
    b. The assertion must have been made in good faith; and
    c. The assertion must have been the principal reason for the dismissal.

43. In McPartland v Pybus EAT/170/99 the EAT said that the wording of section 104(1)(b) requires that the employee must allege that the employer has infringed a statutory right. An allegation that he employer proposes to infringe such a right is not enough. This stems from the wording of the section

> "The allegation must relate to an infringement of a statutory right which has taken place. It matters not whether the allegation is correct in the sense that there has been an un-authorised deduction or that the employee was entitled to complain that there had been an unauthorised deduction. The key to the right under section 104 is that there had been an infringement before the allegation is made."

Breach of Contract

44. What was the agreement made in January 2017? In any disagreement as to the construction of contracts, the starting point for the Tribunal is to identify the intention of the parties taken objectively. The test is "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean." (Chartbrook Ltd v Persimmon Homes Ltd 2009 UKHL 38). This was confirmed by the Supreme Court in Wood v Capita Insurance Service Ltd 2017 2 WLR 1095.

45. In considering the contract the Tribunal should consider not only the words of the relevant clauses but also the documentary, factual and commercial

context (Arnold-v-Britton UK SC 36). The starting point is the natural and ordinary meaning of the clause. If that is clear that is the end of it.

46. If the meaning is not clear then it is necessary to look at any other relevant provisions of the contract, the overall purpose of the clause in the contract and the facts and circumstances known or assumed by the parties at the time the contract was made and any commercial common sense. What is not relevant is what the parties subjective intentions were. Prior negotiations are not relevant per se, but may be important in understanding how the parties understood the language in the contract. The Court of Appeal has said (Rugby v ProForce Recruit Ltd 2006 EWCA Civ 69) that in construing words not defined in the contract, and with no obvious natural and ordinary meaning, the court can explore the factual hinterland to ascertain how the parties understood it.

<u>Submissions Breach of contract</u>

47. The dispute in this case is the commission payable on IPR. What do the following words mean? "*Gross Profit is calculated based on Forefront's cost per hour of £62.50. Any amount that is calculated per hour above the £62.50 will be considered as profit".*

48. Oddly the reference to "costs per hour" and is to an amount (£62.50) rather than to a percentage (62.5%). The Claimant's case is that the above sentence only governs the approach to be taken to development hours. As there are no hours to be attributed to IPR the wording must relate solely to the sale of development hours. The wording does not therefore relate to the sale of anything other than development hours. Mr Smith submits that if the Tribunal was inclined to interpret the first sentence is requiring all sales to be reduced by 62.5% then the 2nd sentence would be nonsensical and cannot be correct.

49. Mr Smith suggests that so far as IPR is concerned the term gross profit should be given its ordinary natural meaning. As such sales of IPR constitute profits for which the January agreement does not provide for any reduction before the calculation of commission. He submits that therefore Mr Angus is entitled to commission on the full value of the IPR sale at £69,000.

For the Respondent Ms Ferber submits that the 17th January letter needs to be read with the spreadsheet. The January letter intended to cover the commission structure for the past 6 months and going forwards for 2017. The only profit margin calculation in the spreadsheet is 37.5%. At the time the Respondent charged an hourly rate of £100 for development work. The cost margin was therefore the same number whether expressed as a percentage or as an amount of money.

50. Ms Ferber submits that the meaning of the January letter is not to be ascertained in a vacuum. It should be construed by reference to the meaning

a reasonable person with background knowledge of the situation in January 2017.

51. She submits that the Claimant must have understood that the percentage deduction applicable to sales set out in the spreadsheet also applied to IPR. There was no reference to different types of sale, as in earlier versions. Mr Nathan had stated clearly in response to the Claimant's questions about IPR, that "all elements will carry the same margin as development." The Claimant had raised IPR and the multiplier as objections to the proposal in response to which the multiplier had been reinstated. No amendment had been made to deal with the IPR profit margin and therefore all parties must have understood that it would carry the same deduction as development hours. In that context the agreement was clear and there was no ambiguity. In the absence of any reference to IPR in the January letter it was incapable of giving rise to the Claimant's interpretation that IPR was to be 1000% profit and 0% cost.

<u>Conclusions Breach of contract</u>.

52. On its own the January letter is far from clear. On its own the wording "Gross Profit is calculated based on Forfront's cost per hour of £62.50" appears to refer to development hours. As the Claimant said there was no "cost per hour" for IPR. There is no reference at all to the way profit on sales of IPR or e-shot or hosting is calculated. The second sentence "Any amount that is calculated per hour above the £62.50 will be considered as Profit" makes little sense in any context.

53. Mr Smith suggests that so far as IPR is concerned the term gross profit should be given its ordinary natural meaning and no deduction applied, but the term "profit" is notoriously prone to different meanings and has to be viewed in context.

54. The 27th January letter goes on to say that "The formula for the calculation of your commission together with examples for your OTE is available in a separate spreadsheet." That spreadsheet is version 7 at page 385.It is an integral part of the agreement.

55. The only calculation set out in the spreadsheet provides for profit to be 37.5% of new sales. The calculation is done by a percentage rather than a cost per hour (although there is a box at the side that refers to a cost per hour). There is no reference at all to different types of sale or different cost of sales.

56. What would a reasonable person having all the background knowledge that is set out above have understood the letter and the spreadsheet to mean? I am satisfied that a reasonable person would have understood it to mean that sales of all elements would attract the same notional cost.

57. Key to that finding is Mr Nathan's email to the Claimant of 6th January. Before the January letter was signed the negotiations took place by different

versions of the spreadsheet. (I was not taken to any earlier drafts of the January 27 letter.) Earlier spreadsheets set out different rates of commission for different types of sale “sales with labour” and “sales no labour”. When this changed the Claimant asked what margin applied to IPR and was told that “all elements will now carry the same margin as development.” When the Claimant objected the multiplier was added back into the final version of a spreadsheet but crucially no change was made to identify different types of sale or any different definition of cost or profit. I conclude that a reasonable person would have understood that whatever the type of sale, the profit element would be 37.5% of the total.

58. After the Claimant’s query about IPR in January (which did not receive the answer he wanted) and during the negotiations for the sale of IPR to Novo between November 2016 and June 2017 the issue of commission on that sale was not raised by the Claimant until after the sale of IPR had been concluded. In his letter (448) of 15th June the Claimant says this. “IPR is all profit. You have repeatedly attempted to unilaterally amend our previously agreed and understood commission arrangements, by stating that IPR should now incur a development cost of 62.5%. I do not, and will not accept this, as detailed in my most recent email dated 12 January 2017 and in other conversations since.” The Claimant here acknowledges that he had been told that the spreadsheet meant that IPR would incur a development cost of 62.5% and it was on that basis that he signed the agreement.

<u>Submissions What was the principal reason for the Claimant’s dismissal?</u>

59. It was not in dispute that the Claimant was dismissed as a result of the contents of his 15th June letter. The Claimant’s case is that he unequivocally raised the issue of unlawful deduction of wages in that letter and was dismissed as a result.

60. For the Respondent Ms Ferber submits that the Claimant did not, in his letter of 15th June, allege that the Respondent <u>had</u> infringed a relevant statutory right. She submits that the same situation arises in this case as in the McPartland case (above). The Claimant complained about a prospective deduction from wages relating to the amount of IPR commission he was to receive. She submits that the anticipatory nature of the complaint is clear where he alleges that “£16,097.18 will be due to me in the next commission run in July 2017.” For that reason, there was no allegation of an infringement of statutory rights which had taken place before the allegation was made as required by the words of the statute as interpreted in Portland.

61. Secondly Ms Ferber submits that the Claimant did not claim in good faith that he had the statutory right to payment of commission. He did not have that right and did not genuinely believe that he had that right. The Claimant was well aware following the response of Mr Nathan on 6 January 2017 that IPR carried the same margin as development.

62. Finally she submits that Mr Kellerman did not dismiss the Claimant because he had asserted anything but because he had said in terms that he could no

longer work with the Respondent and had threatened to damage their reputation.

63. In response to the McPartland point Mr Smith accepts that section 104 does not apply to complaints about prospective deductions of wages. However, he submits that the 15th June letter made allegations of historic deductions of wages. He refers to this passage: "With that in mind, I am surprised and disappointed at what feels like an ongoing attempt to avoid your contractual obligations to me, by continually suggesting alterations as to how my commission entitlement should be calculated historically and moving forward.". The references to "an ongoing attempt" and "historically" demonstrated that the Claimant was alleging unauthorised deductions had taken place in the past and he feared that further unauthorised deductions would be made in future. The letter of 15th June should be understood in the context of the historic complaints that the Claimant made throughout his employment.

<u>Conclusions Breach of Contract</u>

64. Reading the 15th June letter as a whole, I cannot construe it as a complaint that the Respondent <u>has made</u> unlawful deduction of wages. The Claimant is complaining about Mr Kellerman's "repeated <u>attempts</u> to adjust his targets/commission calculations unreasonably" and that he sought "to move the goalposts". He is complaining about the disputes that were live during 2016 and but which he had now abandoned following the January 27th agreement. The Claimant clearly felt that he had been misled in the way that commission would be calculated but I do not read the letter as saying that there had been an unlawful deduction or non-payment of wages that were due.

65. In this letter he complains about the imposition of a new additional target which would restrict his earning potential and alleges that he is due commission for IPR. In the Claimant's ET1 he says this about the April letter. "The content of this previously unseen letter greatly concerned the Claimant and raised doubts about his future working relationship with the Respondent, as they were once again attempting to alter the commission structure unilaterally. This combined with Mr Kellerman's previous actions with regards to commission payments led him to fear that <u>future</u> commission payments would not be paid as expected and that his complaints regarding the IPR element had not been seriously considered."

66. The Claimant's receipt of the April letter in June coincided with the completion of the sale of IPR. The Claimant took the opportunity in this letter to set out his arguments regarding IPR. Having said he had taken legal advice he says that "you have repeatedly attempted to unilaterally amend our previously agreed and understood commission arrangements, by stating that IPR should now incur a development cost of 62.5% I do not, and will not accept this, as detailed in my most recent email dated 12 January 2017 and in other conversations since".

67. In his calculation of commission he sets out the claim to IPR in red. This is despite the fact that the April letter (received in June) made no reference to IPR at all and there has been no evidence that there were any conversations about IPR after the agreement signed on 27th January. I infer from this this letter that the Claimant did not genuinely understand the letter of 27th January to have given him a right to commission on 100% of IPR. If the Claimant had genuinely believed that he would be receiving commission on 100% of IPR the letter would not have been in such pugnacious terms. Instead the Claimant would have simply reminded Mr Kellerman of the amounts due and how it was calculated.

68. The Claimant was dismissed because of the letter of 15 June and because of the accusations that the Claimant leveled at Mr Kellerman in that letter and because the Claimant was claiming commission which Mr Kellerman believed were in excess of his entitlement. Notwithstanding this, for reasons set out in McPartland, he was not dismissed for asserting a statutory right. He did not allege that a statutory right had been infringed, only that one was proposed. With some reluctance I am also satisfied that (while the Claimant felt genuinely aggrieved by what he perceived to be unachievable and constantly changing targets being set by the Respondent,) he did not genuinely believed that the January 27th agreement entitled him to commission on 100% of IPR.

69. The claims are dismissed.

Employment Judge Spencer

Date: 9th November 2018