EMPLOYMENT TRIBUNALS

Claimant: Mr J Lockwood
Respondent: QA Consulting Services Ltd

Heard at: **London South** **On: Wednesday, 21 February 2018**

Before: **Regional Employment Judge Hildebrand**

Representation

Claimant: In Person

Respondent: Mr S Butler, Counsel
Ms J Tunnicliff, Solicitor

RESERVED JUDGMENT

1. The Claimant is entitled to be paid in respect of his June earnings at the rate previously in force and for his July earnings a commission payment at the same rate which should have been paid to him at the end of August making as total sum of £**7,364.17**.

2. The Claimant is to be paid an award under section 38 of the Employment Act 2002. The Claimant's earnings exceeded the statutory maximum and the award is therefore for 4 weeks at the statutory maximum of £489 per week which is **£1,956**.

3. The total to be paid by the Respondent to the Claimant is therefore **£9,320.17**.

4. I order the Respondent to pay penalty to the Secretary of State in accordance with section 12A of the Employment Tribunals Act 1996 in the sum of **£4,660.08**.

REASONS

The Claim

5. By a claim presented to the Tribunal on 25 October 2017 the Claimant made claims against the Respondent in respect of breach of contract and reducing his bonus pay without giving him the notice required in the contract. The Claimant claimed that the percentage of gross profit achieved which he was paid a way of commission had been varied without 4 weeks notice as required. He had also expected a commission payment for his final month of employment in July to be paid at the end of August and he had not received this. In setting out the remedy he sought he made clear that he had been paid £500 for commission accrued in June which was 0.9% of the gross profit. He had not been paid £3,500 for commission accrued in July. He estimated his entitlement at £6,500 but asked the Tribunal to find "the truthful numbers" from the Respondent.

The Response

6. The Response gave the Claimant's dates of employment as 9 May 2016 to 31 July 2017. At box 5.3 it was stated that the Claimant did not work his last day of employment 31 July 2017. In the grounds of resistance the Respondent contended that the Claimant was informed by his manager, Roy Smith, Business Development Director that his commission would be reduced from 7% to 0.9% in April 2017 and in consideration for this reduction his salary would be increased from £23,000 to £27,000. It was also said that this reduction in commission was discussed with the Claimant by Mr Chris Scotland, Commercial Director. It was not contended that there was any written notification of this change.

7. In relation to the Claimant's commission for his final month worked the Respondent relied on a provision in his contract that commission would only be payable where full calendar month was worked. The Claimant had failed to attend work on 31 July 2017 his final day of work and accordingly the Respondent argued that the Claimant was not entitled to any commission for the month of July.

The Issues

8. The parties had not agreed any issues. The Tribunal stated that the apparent issues were:-

    a) whether the Claimant was notified of the change of his commission entitlement in April 2017 and whether there was an effective variation as a result and

    b) whether the Respondent was contractually entitled to

withhold commission earned in July 2017 as a result, it was contended, of the failure of the Claimant to have worked for a full calendar month.
The parties agreed those issues.

The Evidence

9. The Tribunal heard evidence from the Claimant and from the Respondent by Mr Roy Smith, Business Development Director who was the Claimant's manager during his employment with the Respondent.

10. Before it was possible to begin the hearing the Tribunal pointed out to the Respondent's representative that there was no documentation whatsoever in the bundle indicating the level of business achieved by the Claimant and the commission rates paid on it by the Respondent. Given the express terms of the claim to the Tribunal and the Claimant's wish to know the amount to which he was entitled it is surprising that the Respondent gave no discovery whatsoever in respect of what one might think was the central piece of information in dispute in the case. Nothing was produced in relation to commission earned by the Claimant in the period prior to the period in dispute and nothing was produced in relation to the period where the Respondent had purported to vary the arrangement and then forfeited the final month of commission arguably owed to the Claimant.

11. An adjournment was provided to allow the Respondent to take instructions. As a result the Respondent eventually produced a record of the sales commission earned from June 2016 to November 2016 and from December 2016 to May 2017 and after further delay copies of the Claimant's payslips, said no longer to be available because he had left the business, and what appeared to be his sales commission calculation for the periods of June 2017 to May 2018.

12. A further adjournment was given by the Tribunal for the Respondent to produce documentation in relation to the notification to the Claimant of his change of salary to clarify whether this was given to the Claimant by the Respondent's managers, and how it came to be communicated to their payroll services. The Respondent was also asked to disclose any material surrounding the discussion said to had taken place in April 2017 when on the Respondent's case the Claimant received an increase in salary in exchange for a reduction in commission. No further material was produced nor was any material produced evidencing the agreed change of the Claimant's place of work from Brighton to working from home in North Wales with a base in Manchester and Leeds.

The Findings of Fact

13. The Claimant began employment with the Respondent on or about 9 May 2016 as a Business Development Executive working from Brighton. In a document dated 28 April 2016 under the heading *Contract of Employment* the terms of the Claimant's employment were set out. The document was signed by the HR Manager, Tonia May and by the Claimant who dated it 3 May 2016. Relevant provisions from the contract are as follows:-

3 PLACE OF WORK

3.1 Your normal place of work is Worthing. The Company reserves the right to change the location to any place within 15 miles of the stated normal place of work. You will, where possible, be given at least 4 weeks' notice of any such change. Where the Company requires you to relocate in excess of this, the Company will consult with you …

3.2 You accept that you would work at any other site or establishment, of the Company throughout the UK as your Contract with the Company shall so require for the needs of the Business …

4 REMUNERATION

4.1 Your basic salary is £23,000 per annum which shall accrue daily and be payable monthly in arrears on the last working day of each month.

4.2 Your commission will be based on perceived gross margin and will be calculated as a percentage, determined by the level of perceived gross margin achieved. Commission will be paid in the month after it is earned.

The details of the Company's plan and your commission scheme will be agreed with you as soon as practicable. The Company reserves the right to modify, adapt, discontinue or withdraw schemes from time to time. In the event of any such modification, adaptation, discontinuation or withdrawal, you will be given 4 weeks' notice. In the unlikely event of a dispute over payments the ultimate decision will reside with this Chief Executive of QA.

If for any reason your employment is terminated or you resign, will only be payable where a full calendar month is worked (sic)."

14. At clause 10 the contract dealt with termination and notice period. It stated that after successful completion of the probationary period set as 6 months the prior written notice required from the Claimant to terminate employment would be one calendar month.

15. At clause 10.2 the Company was required to give one calendar month of notice up to 4 complete years of service and one additional week for each completed year up to a maximum of 12 thereafter.

16. A disciplinary and grievance procedure was set out at clause 11 which made reference to the employee handbook a copy of which was not produced to the Tribunal.

17. There were at clause 18 restrictions in relation to confidential information.

18. At clause 19.4 the Claimant was barred out for a period of 3 months from engagement in business involved in provision of any of the services that the Respondent had been engaged in during the preceding 12 months.

19. There is nothing in writing to indicate the commission rate that the Claimant was paid on joining the Respondent. The Claimant's evidence is that he was paid 7% in the first year of his employment. The Claimant indicates that he was aware that there were differential rates of 3 and 4% and that over for earnings over a certain level he received 7% although this is undocumented. The Claimant stated in cross-examination that he was told in his interview that he received commission at the rate of 10% on his earnings. When asked about the documents which the Respondent produced at the request of the Tribunal in the hearing the Claimant accepted that the document now found at page 102 of the bundle reflected the position before June 2017. The Claimant observed that it was based on the hours which consultants worked on contracts under his control. He did not know how the figure was calculated and had not seen this document before it had been produced in the hearing. The only document the Claimant accepted that he received was a payslip from which he could roughly work out how much he was paid. Again, in cross-examination he agreed that there was no document to explain how his commission was calculated. He said he believed that in November 2016 he was told 3% for some business and 4% for another account. He said it was a long time ago. It might have been by e-mail or orally.

20. The Claimant accepted in cross-examination that the company could change the commission arrangements if they gave 4 weeks' notice. He accepted that there was no requirement for this to be in writing but observed that writing would rule out any doubt about whether it had been given. He also accepted in cross-examination that in clause 4.2 the word "commission" should be added to the sentence: "If for any reason your employment is terminated or you resign, will only be payable where a full calendar month is worked".

21. The evidence of Roy Smith was that the Claimant was notified of the reduction in commission rates at the start of April 2017 in an informal one to one meeting at the Brighton office. Mr Smith said he had discussion with the Claimant in which he notified him of the Respondent's business plan and told him the standard rate of monthly commission would be decreasing from 7% to 0.9%. He also informed the Claimant that his salary would be increasing from £23,000 to £27,000. He stated that at this time the Claimant did not raise any concerns with the change. He further said that throughout the month of April the Claimant had multiple conversations with himself and with Chris Scotland, Commercial Director regarding his commission and salary. It was contended by Mr Smith that the Claimant had been given in excess of 4 weeks' notice as specified under his contract of employment.

22. Mr Smith explained in supplemental oral testimony that there were two separate commission plans. One related to inherited accounts and the next row of the schedule related to new business. Revenue was

calculated on the billable day rate for a consultant. The commission rate is now the same for inherited and new business. In cross-examination Mr Smith was challenged by the Claimant in relation to the requirement for written notice imposed on him while the Respondent sought to relay on oral notification for what it said was a change in commission. The Claimant questioned why there was no e-mail to follow up the change in commission in April. Mr Smith said he had followed the process. He did not need to send an e-mail but he had told HR and the finance department that the changes were happening. The Tribunal asked if there was internal documentation authorising Mr Smith to grant a salary increase, or communication to payroll to confirm that it had been put into effect. Mr Smith said that when individuals joined the Respondent they received low salary and high commission rates. The Claimant had lobbied for an increase in salary but there had to be a reduction in commission in return.

23. The Claimant disputed that his commission was cut from the level of approximately £3,000 per month which he had been earning. He stated that he would not have accepted a £4,000 pay rise in April if he had been informed at the same time of the reduction in commission. The Respondent's response was that the new commission plan would have increased his earnings and that there were plenty of opportunities.

24. Turning to the issue of the conclusion of the Claimant's employment the Claimant moved from Brighton to North Wales about the beginning of July. He said that when he moved it had been agreed that he could spend most of his time working from home but would have to go into the office in Manchester once a week. It transpired when he arrived in Wales that he was required to attend Manchester or Leeds for most of the working week. He quickly realised that this was not a tenable position and gave notice on 24 July 2017 to leave the Respondent. He agreed with Andrew Jones that he would be paid all due commission and that his final day of work would be 31 July 2017.

25. On reviewing his payslip for the end of July when it became available to him online on 28 July the Claimant discovered that his commission for June had been significantly reduced. He telephoned Chris Scotland (who did not give evidence to the Tribunal) to ask what had happened and was told that his commission rate had been reduced from 7% to 0.9%. He informed Mr Scotland that this was a breach of contract and he had not been given 4 weeks' notice. The Claimant's evidence was that Mr Scotland said that the Claimant had known the commission plan was only a 6 month plan and the if he chose to take this further he would not win. Mr Scotland has subsequently claimed that he and Roy Smith told the Claimant verbally that the commission percentage would be changed in April 2017. The Claimant's evidence is that this is not true. He further asserted that Roy Smith did not know what the commission was in July. The Claimant made reference in his evidence to e-mails sent at the time his concerns were considered by the Respondent as a grievance.

26. The Claimant wrote to Chris Scotland on 21 September to say that he was not given any form of notice of commission change, oral or written. He

wrote this because Mr Scotland had written earlier that day alleging that the Claimant had accepted he was given oral notice. The Claimant said that was a false record of what had been said. Mr Scotland did not give evidence to refute what the Claimant said.

27. The Claimant also produced witness statements from Sarah Butti and James Marriot Smith. These documents were signed but the witnesses did not attend to give evidence. I appreciate that there is a submission from the Respondent that no weight should be attributed to these statements. Sarah Butti records that she was in the Respondent's board room with Chris Scotland when the Claimant telephoned to ask why he was not notified of the commission percentage change to the commission owned to him. She confirmed that this took place around the July payday. She confirmed that the sales personnel were advised of the change in commission plan only days before the July payday and they were not given the 4 weeks' notice prior to changes in the scheme. Mr Scotland reminded the Claimant in the telephone call that the existing commission plan was a 6 month plan as previously communicated. She could not hear what the Claimant said in response but noted that Mr Scotland became very agitated and concerned. Her evidence was that Mr Scotland asked her advice on the Respondent's position and how the Respondent could "get round this" contractually. She stated that she advised him that the communication of ceasing the commission plan every 6 months stands but the company had failed to meet their contract in advising any changes 4 weeks' prior to the changes. She told Mr Scotland this was a very grey area because it meant there was a gap in the dates and the staff would default to the old plan as the new one had not been communicated in time and the Respondent had compromised its contractual obligation to give 4 weeks' notice. Ms Butti said that she was aware that during the month of June Chris Scotland and the Managing Director Toni Lysak had a meeting to create the new commission plan. Ms Butti had been chasing the new commission plan and the process was not finalised until July. This was relevant to the role which she was there to perform. She told Chris Scotland that, since the commission plan had not been released and communicated 4 weeks' prior to the date that the period commenced, QA Consulting had not met their contractual obligations to the staff in stating what the new plan was.

28. Ms Butti also recorded that after the Claimant's call Mr Scotland spoke to HR to ask them to provide the Claimant's contract and to read the terms and conditions of the sale commission contracts where it stated that leavers must work the full calendar month to be granted the commission that was earned in that month upon their final pay. She stated that the Claimant left the business on 31 July 2017. He worked from home that day and dropped his laptop equipment at 7pm at a colleague's house based in the Manchester office as per the agreement. The Claimant's P45 indicated that his last day of work was 31 July. Ms Butti then stated that Mr Scotland made multiple calls to check whether he could force through the commission plan even after it (presumably a higher rate) had been earned by the staff. She said he then contacted Tony Lysak in her presence and discussed ensuring that Roy Smith would not pick up any

calls from Jason Lockwood or send Jason Lockwood any documents in case Jason use this as evidence against the company and in case Roy Smith might say something he should not say to Jason Lockwood that would make the Respondent liable to pay commission owned to Jason Lockwood.

29. James Marriot Smith, a colleague of the Claimant who had also left the Respondent, also produced a statement. He did not attend to give evidence. His statement was short. He recorded that he was not given notice that commission accrued in June would be modified until 28 July 2017 one day before they were due to be paid money in respect to the commission on 31 July. He asked the Manager several times whether there was going to be a modification to the commission plan and if so what the percentage would be. He produced an e-mail asking Roy Smith for an update on when Tony Lysak was going to release the new plan. The particular e-mail is from Roy Smith to Mr Marriot Smith dated 25 July of 09:29. The subject is: "Any sign of the commission e-mail?" and the response is "Tony said today." Tony is said to refer to Tony Lysak, the Managing Director.

30. In relation to the Claimant's final day of work Mr Smith's evidence was that the Claimant was supposed to work on 31 July. He says he was made aware that the Claimant did not attend the office on that day nor did he return the company laptop and access card. Mr Smith said that the Claimant told him that he was to start employment on 31 July in a new post. The Claimant has produced documentation showing that he did not start a new post on 31 July. His evidence was that he chose to work from home that day because his partner needed the car for her work. He said he dealt with clients as usual and drove to Manchester around 4pm and met a work colleague at his home address at about 19:30 and asked him to return his laptop and other equipment to the Respondent's premises in Salford the following day which the colleague did.

31. The contemporaneous e-mails record that Andrew Jones wrote to his team in Manchester that the Claimant had resigned on the day of the e-mail on 24 July 2017 and that he would like his last day work to be Monday, 31 July 2017. He said it had been agreed as his last date and he would receive no remuneration beyond that date and he was to be processed as a leaver. The Claimant gave formal notice of resignation and indicated he would perform a full handover to the relevant individual. The Claimant evidence was that he did this as requested. On 28 July 2017 at 11:31 the Claimant indicated that he did not have a car on Monday, 31 July because his partner had a new nursing job and he would send the company laptop by recorded delivery. The Claimant indicated that he would bring the equipment to the Respondent's office on Monday and pay a train fare as opposed to send it by recorded delivery. Mr Lysak, the Managing Director wrote to the Claimant on 28 July to say that it was unacceptable not to go the Respondent's office on his last day. Also on 28 July Mr Jones e-mailed the Claimant to tell him that it had been agreed that he would return his equipment to the QA Consulting office in Manchester on Monday, 31 July. The Claimant was asked at 10:25 to confirm that the equipment would be

delivered to Manchester. The Claimant had already confirmed that he would be returning the equipment the preceding Friday at 11:41. There is nothing to suggest that the Claimant did not comply with his obligation to deliver the equipment and provided it to an employee of the Respondent on 31 July 2017.

32. The Respondent appears to have taken internal advice from Ruth Unsworth, Talent Advisor which was provided in an e-mail to Chris Scotland on 29 August 2017 at 12:02 at page 69 of the bundle. Amongst other things she stated that the request of the Line Manager to attend the Manchester office was reasonable and the Claimant's behaviour was completely unreasonable. The equipment had been returned to the residence of a member of staff at approximately 19:30 – 20:00 and the Claimant had put himself on gardening leave. She also stated: "Jason was instructed by his line manager to attend the Manchester office for his last day (his base location since his move to Wales), Monday 31 July 2017."

33. The Claimant recorded in an e-mail of 31 August 2017: "I was originally told I could move to Wales and work from the Manchester office 1 day per week. Then 1 week prior to move date I was then told I would be expected to work from the Manchester office much more than originally agreed which would have significantly increased my travel time. I believe that QA were forcing me to accept unreasonable changes to how I work knowing that I could not commit to this. After I handled in my resignation I was then told my expectations would be changed back to what was originally agreed however I received some borderline aggressive behaviour from Andrew Jones and was forced to leave."

34. The Claimant's place of work in clause 3.1 of the contract was defined as being in Worthing. There is no documentation to suggest that the company recorded a change of his place of work from Worthing to Manchester. There is no record of how the Respondent varied the terms of the arrangement under which he could work from home, or of the variation of those terms after he arrived in Manchester. As with many other aspects of this case there is no documentation or none that has been produced to the Tribunal. Those are the findings of fact.

Submissions

35. The Respondent produced a skeleton argument. The Respondent referred to ***Peninsula Business Services Ltd v Mr J Sweeney (2003) UKEAT/1096/02/SM***. In that case the contract provided that commission would only be paid if the sales representative was in employment at the end of the calendar month when the commission payment would normally become payable. It was submitted that provided the terms of the contract contained clear words making plain that any accrued entitlement to commission was dependent on the employee also being in employment at the date when the commission would be payable such an agreement was enforceable. The Respondent also cited ***Brand v Compro Computer Services Ltd [2004] EWCA Civ 204***. The ratio is that clear words making plain that accrued entitlement to commission is dependent on employment

at a date when the commission is payable are enforceable.

36. The Respondent submitted that the Claimant's entitlement to commission was in the employment contract. The scheme could be varied and there was no requirement for notice of variation to be in writing.

37. The contract made specific provision for payment of commission following resignation. If for any reason the employment was terminated or the Claimant resigned it would only be payable where a full calendar month was worked. There was a clear typographical error and the word "commission" had been omitted. The Respondent then gave the history of the Claimant's remuneration and its view of the commission structure identifying at paragraph 21 of the argument the conversations said to have taken place between the Claimant, Mr Smith and Mr Scotland. It was further submitted that the Claimant did not work on 31 July 2017. The Claimant said he claimed to work from home but he was not working. He had been instructed to attend the office. The Claimant contended he had worked from home and that he had contacted individuals in other companies. The Respondent had not attempted to contact those individuals but the Claimant had failed to do so to demonstrate that he had been working. I should record that the Claimant considered that the terms of the Respondent's correspondence to him had reminded him of his obligations under the contract which prevented him from contacting former business contacts of the Respondent for a period of three months.

38. The Respondent supplemented that skeleton argument with some oral submissions. It was submitted that the increase in salary went hand in hand with a reduction in commission. The Respondent wanted a flat commission structure. The Respondent's working environment involved informal conversations and not formal "one to one" discussions. There were no note takers. The Claimant was paid 0.9% in June. He was not paid in July because he failed to work the full calendar month. He took a unilateral decision not to come to work. He says he contacted three individuals on his last day of work but even after three months from his termination have elapsed he made no effort to contact them. The Respondent submitted that onus was on the Claimant to prove that he was entitled to payment to get payment under the contract.

39. The Respondent was also invited to make submission in relation to section 38 of the Employment Act 2002. The Response was that there was no document sent to the Claimant recording his increased rate of pay but it was recorded in the Respondent's internal systems. Details of commission set out in the spreadsheets were sent monthly to the Claimant. This alerted the Claimant to the change. The Respondent's representative was challenged on this point and accepted that the Claimant had not said in his witness statement that he received the commission schedules monthly.

40. The Tribunal invited a submission from the Respondent in relation to section 12A of the Employment Tribunals Act 1996. It was said that Mr Smith had attempted to explain the position and was open about how the

Claimant was managed. Even if the Tribunal can not say that the Respondent's case is supported it should be slow to conclude that there were the aggravating circumstances identified in section 12A. It was submitted that this was at the lowest end of the spectrum even if compensation was ordered.

41. The Claimant submitted that he was only told of the purported change to commission when he queried his payslip. There was no document upon which a conversation could be based about his remuneration package. The fact that he had sold £55,000 in a month indicated he was a hard worker. He had tried to settle the argument with the Respondent. He had no option but bring the case to the Tribunal. Documents have been produced in the hearing which the Respondent had refused to produce at an earlier point. He had not responded to the instruction to go to Salford. He did work and he did speak to Roy Smith on his last day at work and he spoke to clients. He did not enter his mind to contact those clients to obtain corroboration. He could contact them via LinkedIn but he did not anticipate they would wish to respond. He worked the full calendar month and he submitted he was due commission for July at the end of August. He wanted to know what was due and why. If he had received proof of his entitlement he would not be here. That entitlement had not been provided until the day of the hearing.

42. Those are the submissions of the parties.

The Law

43. Section 1 of the Employment Rights Act 1996 provides for a statement of initial employment particulars. Section 1(4) (a) requires that the statement should contain particulars of the scale or rate of remuneration or the method of calculating remuneration. There is no evidence in this case that the Claimant was ever supplied with a statement regarding the commission system introduced when he commenced with the Respondent or of the commission system said by the Respondent to have been introduced in April 2017. Section 1(4)(h) provides that the employees to be informed of either the place of work or, where the employee is required or permitted to work at various places, an indication of that and of the address of the employer. Section 4 of the 1996 Act provides that if there is a change to any of the matters particulars of which are required by sections 1 to 3 the employer is to give the employee a written statement containing particulars of the change. A statement under subsection 1 of section 4 is to be given at the earliest opportunity and in any event not later than one month after the change in question. Section 1(6) provides that a statement is to be given to a person under section 1 even if his employment ends before the end of the period within which the statement is required to be given.

44. The Employment Act 2002 provides by section 38 that if when the proceedings were begun the employer was in breach of his duty to the employee under section 1(1) or 4(1) the tribunal must, subject to subsection 5, increase the award by the minimum amount or may if it

considers it just and equitable in all the circumstances, increase the award by the higher amount instead. The minimum amount is 2 week's pay and a higher amount is 4 week's pay. The duty does not apply if there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable. The amount of the pay is provided by subsection 6 and should not exceed the limits specified in section 227 of the Employment Rights Act 1996.

45. Section 12A of the Employment Tribunals Act 1996 provides that where an employment tribunal determining a claim involving employer and a worker concludes that the employer has breached any the worker's rights to which the claim relates and is of the opinion that the breach has one or more aggravating features the tribunal may order the employer a penalty to the Secretary of State whether or not it also makes a financial award against the employer on the claim. The tribunal shall have regard to an Employer's ability to pay in deciding whether to award the employer to pay a penalty and subject to the relevant subsections in deciding the amount of the penalty. The amount of the penalty is to be 50% of the amount of the award subject to a maximum if the financial award is more than £10,000 of a penalty of £5,000. In relation to the Claimant's entitlement to payment under the contract no statutory provisions are relevant and, other than the two authorities cited by the Respondent, no law was referred to by the parties.

Conclusion

46. I deal at the outset with the weight to be attributed to the evidence of Ms Butti and Mr Smith. I accept that they did not attend for cross-examination. I do not attribute determinative weight to their statements. What they say is however entirely in accordance with documentation produced and more importantly with the absence of documentation produced by the Respondent.

47. The first issue in the case is a direct conflict of evidence between the Claimant on the one side who asserts that he was not informed of the change of commission in April 2017 as asserted by the Respondent and the evidence of Mr Smith of conversations which he believes he had and conversations which Mr Scotland is said to have had.

48. It is difficult to accept in this case that the Respondent has approached this litigation and in particular the obligation of discovery with any respect for the process. Indeed in the period prior to this litigation the Respondent has demonstrated disrespect for the entitlement of the Claimant to be paid appropriate remuneration for the work which he undertook for the Respondent. It is difficult to conceive of a modern organisation specialising in IT consulting that does not have a documentary track with the digital records and paper in relation to responding to a request for an increase in salary by a sales person and in relation to a commission structure for a large sales force. The e-mail produced by Mr Marriott-Smith strongly suggests, as Ms Butti corroborates, that there simply was no structure in place in April 2017 and there was therefore nothing which

could have been notified to the Claimant by a way of variation.

49. The Claimant's evidence is absolutely clear on this point. The Respondent has produced no documentation to demonstrate when the commission plan was decided on by the highest level of its management and when it was communicated to managers above the Claimant. Electronic documents are normally communicated by e-mail or have metadata which would corroborate their date of creation. The Respondent has singularly failed to produce any corroboration whatsoever. More significantly there is a significant absence of documentation which one would expect to see and documentation was produced in the course of the hearing on specific request by the Tribunal which was either previously said not to exist or had been refused to the Claimant.

50. I accordingly find that the Claimant's case that he was not informed of any change in his commission structure until the end of July 2017 is proved and the purported variation by the Respondent is of no effect. The Claimant is accordingly entitled to continue to receive commission until notification is given or the end of his employment in the respect of his earning as he had enjoyed in the period up to April 2017.

51. In relation to the Claimant's final day of work his P45 records his leaving date as 31 July 2017. I have not seen any demonstration that the Respondent was entitled to require him to work at any particular location in Manchester or Salford on that day. He did work on that day and he did return his equipment and was at work in his travel to Salford to deliver the equipment in the late afternoon of 31 July. I do not find that the Respondent has demonstrated that the Claimant failed to meet the condition required. I do not consider the Claimant was either under an obligation or in any position to approach clients of the Respondent to demonstrate the he had been at work that day. That is a matter within the control of the Respondent and indeed something which its e-mail reminding him of his restrictive covenants suggested he should not consider doing. The Claimant is accordingly entitled to be paid in respect of his June earnings at the rate previously in force and for his July earnings in a commission payment at the same rate which should have been paid to him at the end of August.

52. As with many employment disputes difficulties arose here because parties are not clear about the respective obligations of employer and employee. Such disputes normally derive directly from a failure to comply with straightforward statutory obligations in relation to the method of computation of remuneration. In this case the Respondent appears a matter of policy to have failed to supply the Claimant with the necessary information. The Respondent was in default in respect of his obligations under section 1 and section 4 of the Employment Rights Act 1996 and that default continued passed the time of issue of the proceedings. The Respondent was also in default in connection with the statement of variation in relation to the Claimant's place of work which default should have been rectified notwithstanding the Claimant leaving the Respondent's employment on 31 July 2017.

53. I am therefore obliged to consider whether an award under section 38 of the Employment Act 2002 is appropriate. Since the Respondent is in default the award must be increased by the minimum amount of 2 week's pay. I have considered whether it is just and equitable in all the circumstances to increase the ward by the higher amount. In the extremely unsatisfactory circumstances of this case I consider it is just and equitable for the award to be so increased and it is therefore increased by the higher amount which is equal to 4 week's pay.

54. I have also considered the terms of section 12A of the Employment Tribunals Act 1996. I consider that the Respondent has been in breach of the Claimant's rights to a statement of employment particulars and to remuneration. That breach has aggravating features. Those aggravating features principally centre on a failure to supply the Claimant with the required information to understand how much he should have been paid and whether he had been paid correctly. The aggravating features extend to the retrospective variation of remuneration in respect of a period of employment served and an attempt on the part of the Respondent to "cover its tracks" by subsequently falsely asserting that the Claimant had been notified. The aggravating features extend to the hearing of the case and the failure of the Respondent up to the start of the hearing to give adequate discovery. It remains questionable whether even at this stage adequate discovery of the Respondent's documentation regarding this dispute has been provided.

55. I invited submissions in relation to this provision. I am required by subsection 2 of section 12A to take into account ability to pay. In response to the submission no material was provided to me under this subsection. The penalty is therefore made in accordance with the section. I set out below the computation of the sums due in consequence of the ruling above.

56. Since the Claimant had already achieved earning in the commission plan in force up to May 2017 so that all his earnings were at 7% commission rate I continue to apply that rate to his earnings thereafter. The following table therefore applies.

	Gross margin achieved	0.9%	7%	Due
June 2017	55,446	499	3,881.22	3,382.22
July 2017	56,885	0	3,981.95	3,981.95
Total				**7,364.17**

Accordingly, the Claimant is entitled to be paid commission in the sum of £7,364.17 by the Respondent. That is the gross sum and accordingly as post termination remuneration the Respondent may subject to revenue approval deduct basis rate tax and remit the net sum to the Claimant together with proof for the tax deducted and paid to the HMRC.

57. In relation to the award under section 38 of the Employment Act 2002 the

Claimant's earnings exceeded the statutory maximum and the award is therefore for 4 weeks at the statutory maximum of £489 per week which is £1,956. The total to be paid to the Claimant is therefore £9,320.17.

58. In determining this claim I have concluded that the employer has breached the Claimant's rights to which the claim relates and I am of the opinion that the breach has significant aggravating features. The Respondent failed to make clear to the Claimant the terms of the commission scheme, frustrated his attempts to obtain information and varied the arrangements in breach of the contractual procedure. Evidence was then given to attempt to cover up the action taken. The Respondent persisted until faced with direct instructions in the hearing in seeking to obstruct the Claimant in pursuit of his legitimate request for discovery so that he could identify the payment to which he was entitled.

59. I order the Respondent to pay penalty to the Secretary of State in accordance with section 12A of the Employment Tribunals Act 1996 in the sum of £4,660.08, being 50% of the amount of the award.

Regional Employment Judge Hildebrand

Date 16 April 2018