EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr D Daniels **v** **Bransom Retail Systems Limited**

Heard at: Watford **On**: 24-27 September 2018

Before: Employment Judge Andrew Clarke QC (Sitting alone)

Appearances

For the Claimant: Mr Nikolas Clarke, Counsel
For the Respondent: Mr David Southall, Consultant

JUDGMENT

1. The claim for constructive unfair dismissal fails and is dismissed.

2. Permission is granted to amend the claim (so far as necessary) to add a claim for unlawful deduction from wages contrary to Part II of the Employment Rights Act 1996, the deduction being of sums due in respect of commission payable after the claimant's employment terminated.

3. The claim for unlawful deductions from wages in respect of such commission succeeds, an unlawful deduction having been made, and the respondent must pay to the claimant £1,235.50.

4. In breach of contract the respondent failed to pay to the claimant £84.52 in respect of holidays not taken at the time of his termination of employment and it is ordered that the respondent pay that sum to the claimant.

5. All other claims for breach of contract and unlawful deductions from wages fail and are dismissed.

REASONS

Background

1. The respondent was at all material times a supplier of specialist computer software and hardware to the jewellery and pawn broking industries. In addition to supplying new customers and new systems to existing

customers the respondent's business earns revenue from annual fees, upgrades and training for those existing customers. It is a small company having some thirty employees at the time of the claimant's alleged dismissal.

2. The claimant joined the respondent on 1 February 2002 as a Sales Consultant. The respondent was then a smaller company. His remuneration was a mixture of fixed salary and commission, he was paid travel expenses. In December 2009 the claimant entered into a revised contract of employment. His remuneration was by fixed salary, a fixed "marketing plus" commission and variable commission. That fixed sum of commission ceased to be paid several years ago against the background of financial difficulties, occasioned at least in part by the departure of an employee. Schedule 3 of that contact, which was still in operation at the time of the claimant's departure provided for the payment of the variable commission. It was then payable at 5% on new system sales and 4% on upgrades on the customer paying the deposit, 50% of the commission became payable, the balance being payable when the balance of the contract monies were received. The commission rates and the details of a threshold (to exclude items of low value) were varied from time to time in meetings between the claimant and the respondent's Managing Director and then recorded on a spreadsheet of which I have seen an example. A right to deduct sums owed from final payments otherwise due on termination was also provided.

3. On 24 May 2017 the claimant gave the contractual notice of three months required to terminate his contract of employment. He alleges that he was constructively dismissed. Part way through his notice period on 26 June he stated that he would not work again and did not. He again claims that he was responding to the respondent's repudiatory breaches of contract.

4. The claimant relies upon a series of twelve alleged breaches of contact which can be summarised as follows:

    4.1 Working in excess of over 48 hours a week.
    4.2 Unexplained reductions or deductions from and of commission in respect of four clients, Old English Pawnbrokers, Maddison and Artielli.
    4.3 Varying his commission and salary in 2010.
    4.4 Not consulting him about business matters from late 2016 onwards.
    4.5 Reducing his commission rate in November 2015.
    4.6 Failing to review his salary both annually and in September and December 2016.
    4.7 Introducing changes to his job description and to the management structure of the respondent in April 2017.
    4.8 On 2 May asking the claimant to sign a new contract of employment without consultation and in an open office.
    4.9 On 22 May giving him his payslip in the office with no confidentially.
    4.10 On 14 June telling him that he could take garden leave but that this would be unpaid.

4.11 On 21 June failing to pay his monthly salary.
4.12 On 23 June giving him a document containing restrictive covenance concerning the use of confidential information and dealings with clients which had to be agreed in return for a possible *ex gratia* payment.

5. I heard evidence from the claimant on his own behalf and on behalf of the respondent from the following:

5.1 Mr Chris Garland, its Managing Director.
5.2 Mr Rob Saville, its Technical Director.
5.3 Ms Barbara Charlton, a Business Consultant engaged by the respondent from about December 2016.
5.4 Ms Emma Garland, the respondent's Programme Manager since July 2017.

Facts

6. Both in correspondence and in evidence the claimant acknowledged that the respondent (in particular its Managing Director) had been very kind and helpful to him during extended periods of difficulties in his personal life by giving time off, advancing monies and in other ways. He also acknowledged that he had never sought to raise a grievance about any of the matters complained of as alleged repudiatory breaches of contract, but had spoken to Mr Garland about some of them. Many of the alleged breaches of contract date back many years, but the claimant accepted that he had worked on despite them and, indeed had been promoted to Associate Director and negotiated revisions to his remuneration package on several occasions since the time of a number of the alleged breaches.

7. The claimant's evidence as to his working excessive hours consisted of no more than an assertion that this was the case. There are no records of the hours he worked and no contemporaneous complaints from him relating to this matter. I am satisfied that he worked the hours needed to do the job, often fitting work around the significant calls on his time due to the difficulties in his personal life. I do not consider that the respondent was requiring him to work in excess of reasonable hours. His contract referred to 40 hours a week, but also provided for a degree of flexibility needed to undertake sales and marketing work. I do not consider that the claimant exceeded such reasonable hours to perform his tasks.

8. The claimant was made an Associate Director towards the end of 2015. He wrote to Mr Garland in the following terms on 21 December:

> "Thank you, Chris, and thank you for everything, supporting me over the years, allowing me to develop as a person and now making me a Director … it's all I've ever wanted and worked for."

9. I am satisfied that the relationship between the claimant and Mr Garland (indeed the claimant's relationship with the respondent generally) was very good at that point in time. The claimant had been unhappy at the failure to pay him full commission for some sales and at the variation (to which he had agreed) of his basic salary and commission targets in 2010, but that

was now some years in the past. In any event, the changes in 2010 had in fact increased the claimant's basic salary and led to significant increased commission payments in 2011.

10. In the early months of 2016 the claimant and Mr Garland were discussing a further revision to the remuneration package of the claimant in the light of the fact that he was now an Associate Director and supervising an expanded Sales and Marketing Team. The discussion was complicated by the intention of the sales person responsible for the North of England to leave and negotiation of an exit package for that employee. Looking at the contemporaneous emails and having heard from the claimant and Mr Garland in this regard, it is clear to me that there was a frank exchange of views between them and that agreement was eventually reached. The negotiations were prolonged because the claimant wanted an increase in his basic salary somewhat beyond what Mr Garland thought sensible and wanted to earn some commission on sales produced by the team that he was to be responsible for. Historically, he had received commission only on his own sales. In the event his basic salary was increased from £22,500 to £33,000 and the bonus structure was revised. The claimant agreed to those changes.

11. The claimant asked for his salary to be reviewed again in September and December 2016 but was told (as was the case) that his contract provided for an annual review in March. The claimant was undoubtedly disappointed by this as he considered that he had a case for earlier revision. Mr Garland disagreed and his refusal also has to be seen in the context of the then sales situation.

12. By late 2016 Mr Garland was becoming concerned as to the level of sales and as to the organisation of the respondent generally. He was looking to retire and wanted to ensure that the respondent was on a firm foundation when he did so. Hence, he arranged for a Management Consultant, Ms Charlton, to come in and look at the whole business with a view to organising so as to be more effective and productive.

13. Ms Charlton met with the claimant on 21 December 2016 for several hours, she was concerned that whilst the claimant had various ideas as to future sales and marketing he had no finished ideas, no costings or revenue projections and that customers had not been surveyed to gauge their requirements.

14. Having considered the claimant's evidence, that of Mr Garland and Ms Charlton and having looked at the contemporaneous emails and Board Minutes, I am satisfied of the following:

    14.1 The claimant was nervous and suspicious of Ms Charlton and the regime of staff surveys, staff appraisals and fact finding that she was embarked upon.

    14.2 The claimant appreciated that the respondent had serious problems which needed to be addressed. These concerned product

development in relation to new software, a matter dealt with below and the efficient functioning of the business more generally. Indeed, it is clear that all senior employees were concerned that the respondent's paperwork and internal processes were inefficient and often inconsistent. Problems with prospective contracts were not picked up early and those who should be addressing them often simply noted them and then referred the problem back from whence it came.

14.3 The claimant engaged with Ms Charlton as little as possible, so avoided meeting with her and engaging with what she had initiated as far as he could. For example, his staff were not appraised by him (as they should have been) by 31 March 2017 and the appraisals were only undertaken in May when Ms Charlton did them with the claimant.

14.4 Albeit with some reluctance (concerning the introduction of a PMO, discussed below) the claimant signed a new detailed job description after this and his concerns had been fully discussed with him. It was the claimant's case that the job description was forced upon him. Yet it is clear from emails that he raised several questions about its contents which Mr Garland answered in detail before a final version was agreed. He also claimed that he was concerned that his role as a Director was ignored in the job description. That he was an Associate Director is clear from that job description. He was described as part of the Senior Management Team. Mr Garland told him that being on the Board was not one of the duties associated with the role. He never suggested that the claimant's membership of the Board (as an Associate Director rather than a Companies Act Director) had ceased. It had not and the claimant never complained of this. Indeed, when talking of the reasons for his resignation at a meeting dealt with below, his complaint was that Mr. Garland avoided taking matters to the Board and imposed decisions on it rather than that he was no longer a member of the decision-making body.

15. One aspect of the reorganisation which resulted from Ms Charlton's work was the introduction of a Programme Management Office ("PMO"). So far as sales activity was concerned this office was to have intended sales contracts and other documents submitted to it so that checks could be made to ensure that what was proposed was deliverable, appropriate and profitable. The PMO was not a decision- making body (the Board and/or the Managing Director retained that function) but was to provide uniformity of approach and appropriate monitoring.

16. The introduction of the PMO was discussed at Board Meetings and more generally. The claimant, albeit not a statutory director, attended such meetings and discussed this matter. He did not agree with the proposal. However, he did accept in evidence that there had been instances of customers being sold what were arguably inappropriate items of software (in one case by him) and of unprofitable sales and also that there was a lack of a uniform and organised approach to process, procedure and documentation and that one was needed. The PMO was intended to address these problems. The claimant expressed particular concern about

the risk of delaying the conclusion of a contract by the quotation having to be approved by the PMO and the Board before being sent to the customer. That had originally been the intended process after the introduction of the PMO. After discussion with the claimant it was agreed that the PMO would receive the quotation (as a blind copy) simultaneously with the client. The claimant had persuaded Ms Charlton that there would still be scope for PMO oversight and Board approval as clients invariably debated aspects of a quotation before accepting it. This exemplifies the claimant being consulted about the detail of what was proposed and having a real influence over what was eventually adopted.

17. The revised business structure, to include the PMO, was presented to staff on 5 April 2017. The slides to be used at the presentation had been shown to directors, including the claimant, a little earlier. The slides setting out the structure in diagrammatic form differed very slightly between those two events, but not in a way that is material to the claimant. The claimant did not protest that the structure suggested any downgrading on his part, nor did he ask for it to be made clearer that he had Associate Director status, when other managers did not.

18. It is the claimant's case that the new structure clearly showed that he had been demoted. His evidence was that his team looked at him when the presentation was made and were "shocked and speechless" and that there was an audible sigh and that he felt humiliated. He claimed that his title was specified to be that of "Sales Manager". I reject his evidence on this matter. His title was given as "Associate Director Sales and Marketing" both on the version he had considered prior to the 5 April presentation and the version presented on that day. Like all others with operational roles he had a reporting line to the PMO and in his case, there was also a reporting line to the Managing Director. His reporting line to the PMO did not mean that the PMO was to manage him as part of a hierarchical management structure. The PMO's role was not to manage in that sense, but to collect information and monitor it to ensure an appropriate and uniform approach was adopted throughout the respondent. In evidence much was made of the PMO's role in coordinating holidays and sickness absence and of coordinating his and others work diaries. The PMO here had functions similar to those of a Human Resources Department and a Personal Assistant. It had those roles in order to ensure that absences were coordinated and that the whereabouts of staff were clearly known about. I consider that at the time the claimant understood the role of the PMO, but wished if he could to retain the old system whereby he managed the Sales and Marketing Team without (as he saw it) the interference of the PMO or anyone else. I have no doubt that he felt challenged by this change, which eroded an element of his independence, albeit for sound business reasons.

19. In the two days prior to that meeting on 5 April two other relevant meetings took place upon which the claimant heavily relies. These were not described or isolated in the ET1 as being instances of the respondent being in repudiatory breach of contract, but to the claimant they provide evidence of the downgrading of his role of which complaint certainly was made.

20. On 3 April, whilst he was absent from the office, one of his Sales Team had referred a proposed contract to the PMO. It related to a full version of a new product called MPOS, which was yet to be launched. This product had been demonstrated to some customers and that it was forthcoming was known generally in the market place. The claimant had been told by Mr Garland only to market it to a limited number of customers who were known to need only the most basic functionality which it was intended would soon be available. Even for them, it was to be stressed that this was not a product which was yet available but one that they could expect to receive shortly if ordered. On learning of the proposed sale and that the Sales Team were upset that an order for it had been rejected by the PMO, Ms Charlton and the software developer met with three members of that team to explain the situation and, when it became clear that they were confused as to what they could sell, to apologise that this had not been made clear to them and to set out what were the limits on the marketing of that product. Attempt had been made to contact the claimant in order that he should attend the meeting, but he could not be contacted. It was decided that the meeting should proceed despite his absence because of the necessity of giving clarity on this point as a matter of urgency. Ms Charlton went out of her way not to be seen to criticise the claimant, but it must have been inevitable that the Sales Team would have seen this as some criticism of him, in failing properly to inform and support them.

21. The following day the claimant met with Mr Garland and Ms Charlton to discuss the situation. Mr Garland re-emphasised that MPOS could not currently be marketed save in the limited ways that had previously been agreed upon. I do not accept the claimant's contention that these meetings formed part of an exercise designed to manage him out of the business. The meeting with the three members of the Sales Team took place in his absence because he could not be located, because the Sales Team were upset about the rejection of the contract (which they failed to understand) and because there was understandable concern that their obvious failure to understand the limits of MPOS sales needed to be addressed immediately. The claimant had to be spoken to on the following day because it had become clear that he had not correctly instructed his Sales Team.

22. By this point in time (April 2017) Mr Garland was becoming even more concerned about the state of sales. He had very regular discussions with the claimant on this and other matters. He, the claimant and the Sales Team shared a large office and he and the claimant regularly had a meal together or went out for a drink and this was a regular topic of conversation. The problem of sales had two broad aspects. The first was the lack of the new product MPOS. It was agreed that the development of MPOS had been unacceptably delayed and smoothing the path for its successful development and deployment had been one of the reasons to bring in Ms Charlton. The second was the apparent lack of any significant volume of sales of the existing products. The claimant consistently promised to Mr Garland that large volumes of sales (especially in the North which he had taken over) were in the pipeline. Yet little materialised. Mr Garland was

about to go on holiday and proposed cancelling so that he could help address the problems with sales, but was persuaded by the claimant that all was well and that he had everything in hand.

23. I accept the respondent's evidence (not challenged by the claimant) that the claimant did express such optimism and that, in the event, there were next to no sales in the pipeline generated by the claimant or any of his team.

24. Before turning to the claimant's resignation, I need to deal with two matters in May upon which he relied as being breaches of contract:

    24.1 He complained that on about 2 May he was given a new contract of employment and pressurised to sign it before the end of the day. That he was given such a contract is not in dispute. This was part of an effort to standardise terms and conditions of employment across the respondent. The claimant was not pressed to sign on the day he was given the contract. Rather I accept that he was encouraged to take it away and consider it and to raise questions if he had any. The only pressure to move matters along came when in an email a day or so later the claimant suggested that he was so busy that he would not be able to look at the new contract for some two to three weeks. In fact, his diary showed little in the way of sales activity or planned meetings. The focus of concern was the change of notice that he had to give from three months to six weeks should he wish to terminate his contract. I consider that he was by now planning to resign and wished to preserve his three-month period so that he would have work (and income) for that period after resignation should he eventually decide to resign.

    24.2 He also complains that on 22 May he was handed his payslip in an open office and not in an envelope. This is the last incident relied upon before his resignation some two days later. In closing submissions, the claimant indicated that this was no longer relied upon as a breach of contract. However, I make appropriate findings of fact because of the placing in time of that incident and the resignation. I find that the payslip was handed to him just as all payslips were handed to those in the office on the morning when she entered the office by Ms Garland. She did so because she was about to go out. All of the payslips were folded over. Ordinarily, she would have placed them in envelopes, but because she was about to go out did not do so. No one could see what was on anyone else's payslip.

25. Two days later, on 24 May, the claimant resigned. He did so on three months' notice which he expected to work out (in whole or in part). His letter was short and gave no reason for his resignation other than stating that "the time has come for me to move on."

26. The Managing Director was away on holiday at this time and he and the other Directors were not in the office. It is clear that Mr Garland regarded the resignation and in particular it being done at that time and without reason as an act of personal betrayal. He convened a meeting with the

claimant on 30 May at which he sought an explanation. The claimant initially declined to give one, but eventually spoke (in very general terms) about his concerns that the Board was being excluded from planning and dictated to by Mr Garland, that he had no faith in Mr Garland and Ms Charlton's plans and that he had had no input into them. He complained that he had not been supported over the past six months and did not want to deal anymore with Mr Garland and Ms Charlton's attitude and "personal humiliation." This was an ill-tempered meeting.

27. Attempts were made to negotiate a leaving package whereby sums were paid *ex gratia* and without deduction of tax in return for restrictive convenance relating to the approaching of customers and the use of confidential information. Hence, the claimant's salary otherwise due on 21 June was not paid as negotiations were ongoing. The claimant ceased to work on 26 June in reliance upon the respondent's conduct since his resignation. That this amounted to a further constructive dismissal was an allegation ultimately not proceeded with. Hence, I need not deal with these post resignation events in any greater detail.

28. The parties have what appear at face value to be diametrically opposed views as to why the claimant resigned. The claimant says that he was resigning because of the way in which he was treated. He now focuses on the recent past and especially upon the meetings on 3, 4 and 5 April, the content of the presentation made at the last of those meeting and the downgrading of his job which it and the new job description are said to demonstrate. The respondent says that the claimant resigned to set up a new business, choosing the most damaging time for the respondent and having devoted himself to that (as distinct from selling its products) in the recent past.

29. I consider that the parties are not as far apart as might at first appear. I consider that the claimant was upset at the intrusion of the PMO into his part of the business. I have no doubt that he was also concerned about the lack of sales and about his ability to organise a turnaround in the sales figures. Hence, understandably, he began to consider his future and the possibility of moving on to pursue a business idea which was not competitive with the respondent but which the respondent accepts had been discussed with Mr Garland in the past. I reject the idea that the claimant chose the moment to resign so as to harm the respondent. However, it may well be that he found it easier to resign in Mr Garland's absence. The key question for me is whether the way in which change was introduced and the nature of the changes amounted to a breach of the implied term as to trust and confidence as it alleged by the claimant.

The law

30. I need say little about the relevant law. The parties agree upon the basic principles of law on constructive dismissal and I will deal with other aspects of the claim separately. In summary:

30.1 Constructive dismissal is the acceptance by a claimant of a repudiatory breach of contract on the part of an employer.

30.2 That repudiatory breach maybe a single act on the part of the employer or a series of acts which together amount to such a breach. The last in the series is often referred to as "The last straw", and need not itself be a repudiatory breach of contract.

30.3 It is not enough that the employer behaves unreasonably, that behaviour must amount to a repudiatory breach of contract, that is one which shows that the employer does not intend to be bound by one or more the fundamental terms of the contract.

30.4 One term the breach of which will be repudiatory is the implied term of trust and confidence found in all contracts of employment.

30.5 A repudiatory breach of contract can be waived and the contract affirmed. This can happen, for example, by the employee continuing to work over a substantial period or by his renegotiating parts of the contract and working on under that revised contract.

30.6 The employee must accept the repudiatory breach. An employee who leaves for a different reason does not do so. That the employee did not leave in response to the breach also casts doubt upon whether the employer's contract was so serious as to amount to a repudiatory breach in the first place.

Applying the laws to the facts

31. The submissions of the parties in this case understandably concentrated upon the issues of fact. The claimant focused on the three meetings in April 2017 and the effective demotion which he said amounted to his removal from the Board and the interposition of the PMO into the corporate hierarchy. The respondent contended that all of its actions were lawful efforts to address serious problems on which the claimant was appropriately consulted and his views taken into account. It was argued that his role did not change and, in particular, his status as an Associate Director was unaffected.

32. As often happens in such cases as this I consider that both sides have reviewed the history of their relationship with a decent measure of hindsight. The claimant has searched for instances of treatment he disagreed with and concerns he had and sought to elevate them into breaches of contract. The respondent looks to find deliberate hostility in the claimant's resignation and its timing, has suggested that he resigned in order to set up a business, the planning and foundation of which he had devoted himself to in the recent past and has somewhat played down the difficulties faced by the claimant in accepting the change in the corporate structure.

33. Against that background I turn to consider the twelve allegations of repudiatory breach, considering each in turn, but having in mind that the cumulative effect of these matters is also relied upon:

34. The claimant now places little emphasis on the allegation of working excessive hours. Indeed, I reject the factual basis for that allegation. However, I accept that at times when he was struggling with his divorce and with serious family illness and the like, he probably did find it difficult to do all of this and his job.

35. The allegations in respect of reduced and unpaid commission are in two cases (concerning Old English Pawnbrokers and Madison) somewhat ancient history. They date from 2010 and 2011 and whatever may have been the dispute at the time (on which I heard very little evidence) the parties had long since moved on from it. The third instance concerned Artielli and is more recent. It relates to a client which complained that it had been sold by the claimant a package which did not meet its requirements as it would not operate on the hardware with which that client used. This was a matter debated in contemporaneous correspondence and the claimant well understood why commission was reduced, because of the need to renegotiate with the client. There was, in my view, no breach of the commission related terms of the contract in this case and, hence, no breach of the implied term as to trust and confidence.

    35.1 The variation of salary and commission in 2010 is no longer relied upon. It is clear that on this occasion (and all others I have seen or heard evidence of) the claimant and Mr Garland discussed changes, each adopting the position that the other was asking for either too much (or offering too little) and a deal was then done. It calls into question the claimant's approach to this aspect of his case and, to extent, the reliability of his evidence on other alleged breaches, that he has gone back and sough to recharacterize what happened as a breach of a contract.

    35.2 I leave to one side, for the present, the allegation that from 2006 onwards he was not consulted as he should have been.

    35.3 The reduction in commission in 2005 is no longer relied upon. I make the same comments in that regard as I made in relation the variation of salary and commission in 2010.

    35.4 The alleged failures to review the claimant's salary annually and following specific requests in September and December 2016 are no longer relied upon as showing breaches of contract. Again, I repeat the comments I made in respect of the variations in commission and salaries set out above. The most recent refusals (in 2016) were tentatively relied upon as supporting the assertion that the claimant's status had been reduced. I reject that. His salary package was not reviewed in late 2016 because the annual review was not due to take place until March 2017 and because the company's organisation was

in transition and sales were poor so that there was no justification for an earlier review.

35.5 The changes in the claimant's job description and in the management structure I will deal with later.

35.6 The request to sign a new contract of employment and the circumstances in which this was done are still relied upon. Everyone at the company, not just the claimant, was given a new contract. The respondent hoped to standardise matters such as notice periods. I do not consider than any undue pressure was put upon the claimant to sign the new contract (and indeed he never did) but his suggestion that he could not consider the contract for some two to three weeks because he was so busy was questioned and understandably so. I do not consider that there was any breach of contract involved. The claimant's concern not to sign the new contract stemmed from the fact that he was seriously contemplating resignation and wanted to retain the period of notice he had to give at three months. I also note, in passing, that his willingness to serve notice, and, indeed, to have as long a period of notice as possible, casts some further doubt upon his assertions that the respondent had behaved in such a manner as to repudiate the term of his contract as to trust and confidence.

35.7 The handing of the payslip in an open office is no longer relied upon and I need say no more about it.

36. I can deal with the remaining matters together. They occurred after resignation and the claimant no longer seeks to run a case that there was a second (or alternative) constructive dismissal on the 23 June. In any event, I am satisfied that the conduct relied upon amounted to no more than negotiations (or the consequences of negotiations) intended to seek to agree a leaving package for the claimant which might involve his leaving early and being paid sums without deduction of tax. I am also satisfied that the claimant left early because working on after resignation proved to be far more difficult than he had envisaged.

37. That leaves the allegations relating to the lack of consultation in 2016 onwards and the revisions to the job description and management structure. In this context, the claimant relies upon the meetings of 3, 4 and 5 April as exemplifying his reduced status. I do not consider that the respondent's conduct amounted to a breach of the implied term of trust and confidence or of any other term of the contract of employment for these reasons:

37.1 The claimant was consulted about the changes to the business in 2016 and 2017. He met with Ms Charlton on several occasions and discussed matters at length. When the PMO was proposed he objected to the way that it was intended to work in relation to quotations and this was changed.

37.2 The meeting with his staff on 3 April was undertaken because of a pressing business need to achieve clarity. Efforts had been made to

have him attend. The meeting with him the following day was a necessary follow-up. The claimant was undoubtedly embarrassed because it was clear that he had not properly organised his team. This all took place against a background of falling sales and with little in the sales pipeline. I consider it probable that the claimant had begun to consider whether he could turn matters around and he was considering leaving some considerable time prior to his eventual resignation on 22 May. However, I emphasise that there is nothing improper or unlawful in an employee in those circumstances considering his options.

37.3 The claimant resented the advent of the PMO and its role in sales. He wanted to run sales and marketing as a self-contained department. However, the PMO was not there to manage the Sales Team, as I consider the job description makes clear, that remained his responsibility. The PMO was providing the kind of support which an efficient HR Department would provide in a larger company and the review of paperwork was something that should have been happening anyway. Whether the claimant's reluctance to have things run in a more orderly way with all sales paperwork being checked resulted from a concern that this would further highlight the paucity of future sales and prospects seems to me quite possible, but I make no finding on that as the matter was not fully explored in evidence. It is enough for me to find that this reorganisation did not breach the implied term as to trust and confidence.

37.4 The claimant's job description did not change the essential nature of his job. The reference to the PMO being his "line manager" for certain matters might, if looked at in isolation, suggest the possibility of demotion. However, the claimant fully understood what was intended, which was not day-to-day management of his work. He was asked to work in the office two days a week and do his visits to clients on the other days. Given the need for internal meetings (for example, to undertake appraisals and review quotations) and for certainly as to when his team could book site visits for him, couple with the uncertainties as to where he was at various times (for example, when he was needed to attend the meeting on 3 April) the need for such a regime seems a matter of common sense. The need was discussed with the claimant at a meeting and agreed by him. The job description itself was fully discussed and he agreed to it. I consider that the characterisation of these matters as breaches of contract owes a great deal to hindsight. The claimant was undoubtedly unhappy with the proposed changes, but that does not establish a breach of contract.

37.5 The presentation on 5 April did not elicit the response from him and his team that he had suggested. He was not concerned that his status had been reduced. The documents do not describe him as Sales Manager. He was given his proper title on those documents and in the job description. I do not consider that he was then concerned that he was, in effect, being removed from the Board. This was not a point

that he made when explaining his reasons for leaving: his concern then was that the Board was being dictated to by Mr Garland not that the Board, as decision maker, was a body that he was no longer a member of.

38. For those reasons the claim for the constructive unfair dismissal must fail and is dismissed.

Other claims

39. I can deal with the remaining claims quite shortly:

    39.1 The claim for June expenses cannot succeed. I have no evidence before me of what expenses were incurred and no claim was made to the respondent for their payment prior to his contract being terminated.

    39.2 The claim relating to car insurance monies deducted from the final payment made to the claimant is no longer pursued.

    39.3 The respondent admits that the claimant was owed a half day's holiday on termination. However, it says that he was not paid as there was no evidence of his actually having done any work on the morning of his last day of work (in contrast to the afternoon where the respondent accepts that me made business phone calls). This provides no basis for non-payment of wages. The claimant was at the material time an employee, he had not taken holiday and it was a working day where he worked in the afternoon. Hence, I consider that this is a sum owing to him at termination (it can equally be viewed as an unlawful deduction from his wages) and is recoverable in the agreed sum of £84.52.

    39.4 That leaves the claim to outstanding commission. I have no evidence on which I could make a finding that there was sums by way of commission owing to the claimant as at the date of termination of his employment. However, it is accepted by the respondent that there were contracts entered into by the respondent in respect of which deposits and final payments were made after that date, but the contract was made before that date. Payments have not been made to the claimant in respect of those sums. Having regard to the fact that the claimant would have done all that he needed to do to earn commission by getting a signed contract, I regard it as necessary to have clear words in the contract of employment to the effect that this entitlement would be lost on termination in order to deprive him of that commission. There are no such clear words and I have not heard any evidence which could establish and implied term (by custom and practice) to that effect. I am satisfied that the entitlement to such commission survives the termination of the contract.

40. Such a claim is not clearly spelt out in the ET1 and would come, in any event, only relate to sums due to the date of its issuance. However, the claim in respect of unlawful deductions from wages is unparticularised. The

respondent did not oppose an amendment to claim such sums due as at today's date. I am satisfied that I have jurisdiction to determine such a claim under Part II of the Employment Rights Act 1996. A failure to pay is a deduction from wages (s.13(3)), commissions are wages (s.27(1)(a)) and a worker (being the person who may make a claim) includes a person who have "worked under" a relevant contract (s.230(3)). Hence, I allow the amendment. The agreed sum then said to be owing is £1,235.50 and I award that sum.

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Employment Judge Clarke QC

Date: 5/10/2018

Sent to the parties on: 15/10/2018

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For the Tribunal Office