EMPLOYMENT TRIBUNALS

Claimant **Respondent**
Ms A Dunnington **NGP Utilities Ltd**

REASONS OF THE EMPLOYMENT TRIBUNAL

Held at North Shields **On 8 to 10 April 2019**

Before Employment Judge Garnon (sitting alone)

Appearances
For the Claimant Ms L Mankau of Counsel
For all Respondents Ms K Jeram of Counsel

Reasons (bold print is my emphasis throughout)

1 Introduction and Issues

1.1. The claim is now of unlawful deduction from wages only. There are many complex issues of fact which is why it was set down for a three-day hearing, but that was not enough to enable me to give a reasoned judgment on all of them.

1.2. However, there are some general points to be determined. Counsel agreed I should determine the following issues and give a judgment in the hope they would be able to agree the remainder. If they cannot, a further hearing will take place.
1.2.1. What were the express and/or implied terms of the claimant's contract as regards her entitlement to be paid commission and any incentive payment? In particular. what was payable and when?
1.2.2. Did the respondent fail to pay to the claimant when it was due (a) her commission (b) an incentive payment?
1.2.3. Are any of the claims time barred?

1.3. On the first day of the hearing, I asked Ms Jeram whether the respondent's case was it had the right to withhold commissions and/or clawback **irrespective of "fault"** on the part of the claimant for the contract being downvalued or "lost" . She confirmed that was its case. An application made by the respondent dated 24 April suggests otherwise. It concludes with a request for written reasons and I believe I should consider the other aspects of that application at a telephone hearing once the parties have had the opportunity to consider these reasons.

2. Relevant Law

2.1. Section 27 of the Employment Rights Act 1996 (the Act) defines ""wages", so as to include any sums payable to a worker in connection with his employment, by way of commission, or other emolument referable to his employment, whether payable under his contract or otherwise. Section 13 of the Act , so far as relevant, provides

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or ***more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or***

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has ***notified to the worker in writing on such an occasion.***

(3) Where the ***total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion*** *(after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.*

2.2. The phrase "properly payable" in section 13(3) means properly payable under her contract. The Court of Appeal have in Agarwal v Cardiff University held tribunals are entitled to determine questions of contractual interpretation, including whether a term should be implied, in the context of a wages claim.

2.3. Terms of contracts are **express or implied.** If express they may be ambiguous**.** Rules set out by Lord Hoffman in Investors Compensation Scheme-v-West Bromwich Building Society are helpful in resolving ambiguity from which I will quote selectively :

(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties ***in the situation in which they were at the time of the contract.***

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude the parties must, for whatever reason, have used the wrong words or syntax. (see Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd. [1997] 2 W.L.R. 945

(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an

intention ***which they plainly could not have had.*** *Lord Diplock made this point more vigorously when he said in The Antaios Compania Neviera S.A. v. Salen Rederierna A.B. 19851 A.C. 191, 201:*

". . . if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."

2.4. Terms cannot usually be implied into a contract contrary to express terms. I cannot imply a term simply because I think it is "reasonable". There are four common reasons for implying terms into a contract.

2.4.1. To give effect to Custom and Practice which subsists in an industry.

2.4.2. To give "Business Efficacy" to a contract which. without the implied term. would be practically unworkable.

2.4.3. The remaining two , which overlap to an extent are (a) to reflect the conduct of the parties during the contract to the extent it shows they both must have understood what happens in practice was what both always intended to happen and (b) to insert terms which are obviously what the parties intended but failed to say, sometimes called the "officious by-stander test" .

2.5**.** Caution is needed on point (a). One party may of its own initiative do something repeatedly, for example paying late, and the other party may for commercial reasons tolerate it. That would not evidence a term of the contract at its inception that payment could as of right be made late or any lawful variation of contract, a point Ms Jeram rightly did not argue. There may be cases where the evidence shows the employee, after an employment contract is entered into, for valid consideration, agreed to a change of terms. It takes a contract to vary a contract. Change cannot be imposed unilaterally by an employer. Simple forebearance by a party in enforcing a right does not prevent him or her doing so later (Pinnell's Case)

2.6. Contracts are made when one party makes an offer which the other accepts , valid consideration usually in the form of mutual promises is given and there is an intention to create legal relations. The essential question is what were the terms of the contract **agreed at the time it was made**. Parties may enter into a bargain which one of them later regrets. This is particularly common where both parties are anxious to complete a bargain for commercial reasons. To adapt the old proverb "contract in haste, repent at leisure". The party who regrets the bargain cannot change it. It is a fundamental principle of law that terms which restrict a party's liability must be **notified** to the other party at or before the contract is made (Olley-v-Marlborough Court Hotel and Thornton -v- Shoe Lane Parking) . Such notice may be inferred from previous dealings between the parties or a practice so commonplace in the industry the party affected by the limitation must have realised existed. The emboldened words in Paragraph 2.1. above are a statutory addition to this common law principle

2.7. A feature of this case which sets it apart from many employment contracts is that both parties had some bargaining power at the time the contract was made . In recent cases, where bargaining power has been manifestly disparate, Courts have been willing to interpret a contract in a way advantageous to the party with little bargaining power at the time it was made. There is no need to do so here.

3. Findings of Fact and Conclusions

3.1. I heard the claimant and, for the respondent, Ms Leah Barrett who joined the respondent on 1 July 2016 as a Sales Team Leader but is now Service Operations Director and Mr Paul Gleghorn, a Sales Ledger Manager who has worked for the respondent since June 2017. The claimant was employed from 3 October 2016 until she was dismissed with immediate effect on 21 September 2017.

3.2. The respondent brokers contracts between business consumers of energy and suppliers of gas and electricity. Energy suppliers purchase gas and electricity from companies which produce or generate and compete to enter into contracts with consumers of energy. Energy suppliers are prepared to pay brokers to arrange contracts with consumers which tie them to paying a certain rate for a certain period for the energy they consume. The broker is paid commission built into the contract (known as an uplift) by adding it to the unit price being paid for the gas/electricity. It is paid to the broker directly by the energy supplier. The terms on which the broker receives commission is determined by the contract between the broker and each individual supplier (the supplier payment terms).

3.3. The respondent employs Business Account Managers (BAMs), of which the claimant was one, to negotiate the terms of energy supply contracts. They cold call prospective consumers to ascertain if they are willing to use an energy broker. If they are, the BAM negotiates the terms of a contract between it and an energy supplier.

3.4. In addition to basic salary, BAMs are paid commission on the contracts they sell. The amount is determined by their contracts of employment. Clause 9 says .
" *You are **eligible to receive** commission under the following commission structure:*

Quarterly Achieved Target	*Your Percentage*
£0-£30k	*0%*
£30-59k	*4%*
£60-£79k	*8%*
£80-£99k	*12%*
£100-£115k	*16%*
£116+	*20%*

Commission will be paid when the company is in receipt of payment from the suppler whilst you are [in] employment"

3.5. In practice, commission is paid in the next available pay run. As salaries are paid on or about the last working day of the month, so to enable the accounts department to process the payments, the commission from the supplier would need to be received by the respondent at least a week before the end of the month, otherwise commission would be paid in the following month.

3.6. I accept the claimant's evidence, which neither of the respondent's witnesses could contradict, that no caveats on the commission payment terms. and importantly no " retention" or "claw back" provisions, were notified to her at of before she accepted the offer of employment on the terms quoted above. The supplier payment terms set out clawback and other limiting provisions as between the respondent and the energy supplier but have no bearing on how the employee's share of such commission payments are calculated or when they are paid. The claimant never agreed to terms other than her being entitled to a **share** of commission payments received by the respondent on sales she had negotiated, **when** it received its

commission, **provided at that date she was still employed**.

3.7. On a literal reading if the claimant brokers a contract which results in a commission payment being made to the respondent on a day when she is still in employment, she is entitled to **a percentage** of that commission. On that date her right to **a** payment accrues. However, at that date the amount cannot be determined because her percentage share depends upon her sales performance in a quarter. There is need to imply a term to give the contract business efficacy as to the date upon which a liquidated payment becomes due, later than that upon which the right to some payment accrues. It is the next practically workable monthly pay date. Mr Gleghorn succinctly explained how this is achieved in practice. Apart from that, the written terms of the contract need nothing to supplement their effect.

3.8. Ms Jeram's submission is the wording is plain but to the opposite effect. She says "*eligible to receive*" does not mean "**entitled** to receive" and "*will be paid **when***" does not mean "will be paid **upon** receipt". I disagree. I am looking for the intention of both parties at the time the contract was made. A major factor in deciding this point comes from Ms Barrett's statement (TCV stands for Total Contract Value):
*As is standard practice within the industry, for the majority of sales the Respondent will pay BAMs a proportion of their commission **upfront** upon a sale being completed, based on the speculative TCV figures prior to the actual consumption of the meter becoming known. .. **From the BAMs' perspective this is an extremely attractive aspect of the remuneration package as they start receiving payment far sooner than if they were paid once the actual TCV could be confirmed**. The eligibility to receive forward payments also acts as powerful psychological driver to motivate them to secure more sales. However, this practice exposes the Respondent to a substantial financial risk; as the actual TCV of a contract may end up being a lot lower than initially anticipated (or the contract may subsequently be confirmed as an entirely lost sale) in which case the Respondent will have overpaid commission to the BAM for that sale.*

3.9. One reason for reading a contract in a way which is not literal is that it flouts business common sense. At the time it was made, this one did not. A good indicator of whether a contract does, is a manifest imbalance of advantageous and disadvantageous terms as between the parties on a literal reading. In this instance, if a BAM worked hard to broker a contract which would produce a large commission payment from the energy supplier to the respondent and that payment arrived on the day after her employment ended, for whatever reason including her death, she would be entitled to nothing. The respondent could retain all of the commission without paying her any share of it at all. That is a major downside to the bargain from her point of view. The corresponding upside for the claimant of payments "upfront" is exactly as Ms Barrett sets out .Most suppliers pay a percentage on three dates (a) signing of a contract (the sign date) (b) the supply being started (" the live date") and (c) and its end (" the end date ") . Dates (a) and (b) may be the same . A typical split of percentages would be 30/50/20 or 40/40/20. The 20% is meant to be a margin to cater for initial overestimation of TCV. As a contract may last several years, any BAM who leaves before the end date will receive no share of the 20 %. The downside for the respondent of paying a share of its commission to the BAM is that they may overpay a BAM and not be able to claw it back. The upsides for the respondent are (a) to motivate its staff to earn commissions for it by making it clear they will have their share early and (b) not having to pay commissions to any BAM who leaves. All

commercial contracts are about apportionment of risk and this has fairly high risks for both, apportioned crudely but in a balanced way.

3.10. The claimant signed her contract which contained the above terms on 26 September 2016 before she started work and before whatever "induction" she had. She had not previously dealt with the respondent. Both the claimant and Ms Barrett are young ladies who have worked for several companies in their career in the energy broking business, and there is no industry norm.

3.11. The respondent says when a BAM receives commission is determined by the applicable "agent payment terms", which are based on who the supplier is and what type of contract has been sold. My first decision of principle is there were no such express oral terms in the claimant's contract and no reason to imply such terms. The respondent's standard basic annual salary for a BAM ranges from £30,000 to £45,000, depending on the individual's experience. The respondent does not cap the amount of commission a BAM can earn. Over the last 12 months its highest earning BAM received £118,000 in commissions. The claimant's sales experience was considerable but she accepted a basic salary of £35000, very probably because of the attractive commission terms . Successful sales people are in demand. Ms Barrett started on 1 July 2016. She does not know who put what offer of employment to the claimant in late 2016. At that time the respondent was a "young" company, incorporated in early 2015, doubtless trying to attract good salespeople.

3.12. Ms Barrett's statement says

"*As is the case industry wide, the Respondent has a high turnover of sales staff; the Claimant herself was in employment with the Respondent for just under 12 months.*" and later
"*At all times, the* ***only individual within the Respondent with authority to determine how agent commission payments are structur****ed for any given supplier at any given time is the Respondent's founder and Chief Executive Officer, Fokhrul Islam*".
The claimant's statement says" *I was a very successful saleswomen for the Respondent and generated exceptional revenue. Not only this, I have successfully worked for three separate employers in the same role since entering the industry over a decade ago. I have never lost sales, been accused of amending consumptions or experienced any delays in commission payments with any other company.* She says since her dismissal, Mr Islam has offered her job back on a number of occasions and she produces a text message from Mr Islam on 31 March 2018 (page 380) saying she should let him know if she ever wanted to "come back to NGP". and saying she "*did decent rev*[enue]". What neither Mr Islam nor anyone else at the respondent can lawfully do is unilaterally impose conditions after the contract is made. In the financial services industry, commissions are paid " upfront " on sales of such products as life insurance policies which may lapse. Clawbacks in employment contracts which mirror those between the broker and insurance company are common, but I have never seen a contract in that industry which does not have some corresponding provision for a salesperson receiving some payment for commission " in the pipeline" for a "run off " period after termination .

3.13. Ms Barrett's main responsibilities **now** are overseeing sales processing, revenue protection, supplier billing and sales "objections". **During 2017** it became

apparent a small number of individuals, including she says the claimant, were facilitating the early termination of existing energy supply contracts in circumstances that did not legally allow them to do so in order to sell the customer a new supply contract, or were selling contracts on inflated projected consumption rates in the knowledge the meter would never consume that level. The claimant was dismissed as a result of serious allegations of this nature. Ms Barrett's new role was created in October 2017 to introduce much more stringent internal verification and compliance checks to put a stop to any mis-selling, which, even by just a couple of BAMs, was costing the respondent money as a result of lost sales and commission payments being made to BAMs that were not always properly payable. I fully agree this role was necessary. However, it did not exist at the time the claimant entered into her employment contract. Ms Barrett says the payment of commission to a BAM remains subject at all times to the respondent's internal quality and compliance checks so no commission will be paid to a BAM unless those checks have been completed and no issues with the sale have been identified. This too is not a contractual term. On the contrary, it flies in the face of the plain wording of clause 9.

3.14. I find it to be instructive to note what has happened since. Clause 9 no longer figures in contracts of employment issued by the respondent. In its place has been introduced a commission policy. The respondent's rights to retain commission which Ms Barrett argues have always existed, are now express terms of employees contracts. My conclusion is that they were not terms of such contracts before.

3.15. Ms Barrett's statement says
Ultimately the Respondent has no control over the mechanics of any supplier clawbacks and may receive a supplier statement out of the blue for a significant clawback it was not expecting; If internal provisions are not made to account for this risk it is easy to see how several significant clawbacks might result in a broker becoming insolvent; I believe one of the factors that contributed towards the Respondent's direct competitor, Utilitywise plc, going into administration earlier this year was significant supplier clawbacks.

The Respondent does what it can to mitigate this financial risk by undertaking its own internal verification checks and, to the extent it is able to do so, monitoring live consumption rates by reference to the customer's supplier invoices in order to try to identify for itself any contracts on which a clawback may potentially be applied. If a high risk contract is identified (such as an under-consuming meter or notification of a potential COT) then the Respondent will take steps internally to provide for the anticipated clawback. Specifically, the sale will be flagged on the CRM as being ***held*** *or placed into* ***objection*** *meaning that any commission the Respondent has already received for that contract will be notionally set aside and not treated as revenue for the Respondent's internal accounting purposes.* ***Further, no commission will be payable in respect of that sale to the relevant BAM until the Respondent is comfortable that no clawback will be applied.***

3.16. Ms Barrett 's present method is to check if a contract is high risk **first,** before paying any share of commissions to BA's. Energy supply companies pay first and , if they have overpaid or the sale is "lost", demand the money back. I accept her oral evidence that if commission payments were to be made to BAM's and a clawback provision incorporated in their contracts mirroring that which is incorporated in the contracts between the respondent and the energy suppliers, it may cause a BAM

who does not have the self-discipline to treat her share of the commission as unsafe to spend, problems when clawback is applied. However none of that entitles the respondent unilaterally to retain commissions for any time after the express terms of the contract, supplemented by the one term I have implied, say they should be paid.

3.17. There is another example of the respondent altering the rules to suit changing circumstances. What Ms Barrett terms a "compliance issue" includes a BAM failing to ensure the individual in the customer's business with whom they are negotiating has legal authority to sign the contract on its behalf. The claimant failed to do so she says and I have been taken to one example. The claimant is making no claim in respect of the particular transaction thereby acknowledging her error. The extension of principle which the respondent makes is that because the claimant has had a compliance issue in regard to one contract she **may have** such issues in respect of others. Therefore, it claims the right to be able to embargo her commissions on other contracts. There is no legal warrant for that.

3.18. Once an energy supply contract has been sold there are a number of reasons why it might not ultimately generate the revenue originally expected. Should there be any discrepancy between the estimated meter consumption and the actual meter consumption, all suppliers reserve the right to **clawback** some/all commission payments already paid to the broker. Such clawbacks are industry standard. Herein lies the problem for the respondent. There would have been absolutely no reason why a clawback provision mirroring that in the contract it had with the energy supplier could not have been incorporated into the contract of employment it had with its BAMs , **but it was not** .**There is no warrant for me to imply one** .

3.19. Ms Barrett says she knows **from her own induction**, the mechanics of the agent payment terms are explained to all BAMs **during the first week of their employment** and it will have been made clear to them (as it was to her when she started) these were subject to change from time to time. She adds agent payment terms are recorded on the computer system the respondent calls " CRM" and at " *the outset of their employment*" BAMs are informed any commission paid may be clawed back through the CRM at any time. As I took care to confirm with Ms Barrett and Mr Gleghorn, what operates as between the energy supply company and the respondent can best be termed a "running account" . Any commissions which fall to be returned by the respondent to the supply company are commonly offset against other commissions that become payable. The respondent uses CRM in a similar way as between itself and the BAM's with a notable difference they have no contractual right to do it. Ms Barrett says that at all times the claimant was aware from CRM commission was being withheld or clawed back, and at no point during her employment did she query this. Two conclusions follow. The first is that as she had no access to CRM at the time the contract was made she cannot have known about this other than if she were expressly told which I find she was not. It is a classic example of the principle established in Olley and Thornton . The second is that the claimant cannot reasonably have been expected to follow the detail of what was happening to her commission share from CRM even when she gained access to it.

3.20. I find she did query the situation on several occasions. When she started it took some time to build up a pipeline of sales. She later knew she had a lot of commission outstanding and so queried this . She had a conversation with a Ms Lynne Gilroy on 29 November 2016 and sent an email the following day (page 157). She emailed Ms

Gilroy on 25 July 2017 requesting various payments specifically commission payments for The Island Free School (which at that time made up the majority of sales on which she was entitled to commission). Orally she regularly complained about various non-payments of commission to Damon Peer, Zara Anderson and Andy Laird. The response was almost always it would be paid "next month".

3.21. In summary on the first issue I conclude that if the regime the respondent has in fact been applying to the claimant had been explained to her before she entered into the contract she may well have replied "*Fair enough, **but in that case** I want some protection against having to forfeit commissions I have earned which are being held in objection but are then cleared for payment shortly after I leave.*" That negotiation never happened. Instead she took the high risk of forfeiting such commissions in return for the benefit of being paid as soon as practically possible after the respondent received its commission from the energy supply company. That was the express contractual term, and neither the respondent nor I can rewrite it.

3.22. The claimant is also claiming an incentive payment, known as a **Beast Mode** payment, in respect of a month she sold contracts with a combined TCV in excess of £100,000. From time to time the respondent operates additional incentive schemes but I accept it does so at its absolute discretion. In the month of June for which she claims, a manager senior to her queried why she had not received the payment which does tend to suggest, as Ms Mankau submits, there was a legitimate expectation of payment upon satisfaction of the monthly target. However, the claimant cannot have it both ways. The written commission terms in her contract dictate what she receives and when. There is no mention in her contract of a beast mode payment being an entitlement and no need to imply a term it should be.

3.23. I turn to the final issue of time limits. Section 24 contains
*(2) Subject to subsection (4), an employment tribunal **shall not consider** a complaint under this section unless it is presented before the end of the period of three months beginning with—*

(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or

(3) Where a complaint is brought under this section in respect of—

(a) a series of deductions or payments, or

the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

(4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

3.24. In Bear Scotland-v-Fulton Langstaff P said
Whether there has been a series of deductions or not is a question of fact: "series" is an ordinary word, which has no particular legal meaning. As such in my view it involves two principal matters in the present context, which is that of a series through time. These are first a sufficient similarity of subject matter, such that each event is factually linked with the next in the same way as it is linked with its predecessor; and second, since such events might either be stand-alone events of the same general

type, or linked together in a series, a sufficient frequency of repetition. This requires both a sufficient factual, and a sufficient temporal, link.

3.25. Pausing there I have no difficulty in finding this was a series. The link is that from the start the respondent was applying policies which contradicted contractual terms I have found to exist. However, Langstaff P went on to say
Since the statute provides that a Tribunal loses jurisdiction to consider a complaint that there has been a deduction from wages unless it is brought within three months of the deduction or the last of a series of deductions being made… I consider Parliament did not intend that jurisdiction could be regained simply because a later non-payment, occurring more than three months later, could be characterised as having such similar features that it formed part of the same series. The sense of the legislation is that any series punctuated from the next succeeding series by a gap of more than three months is one in respect of which the passage of time has extinguished the jurisdiction to consider a complaint that it was unpaid.

3.26. There is a gap of over three months identified in Ms Jeram's submissions which would mean any unlawful deductions made prior to number 11 on page 65 are out of time. Ms Mankau submits it was not reasonably practicable for the claimant to present her claim in respect of those before she did. I do not accept that submission.

3.27. In Palmer v Southend on Sea Borough Council 1984 IRLR 119 the Court of Appeal held to limit the meaning of "reasonably practicable" to that which is reasonably capable physically of being done would be too restrictive a construction. The best approach is to ask "Was it reasonably feasible to present the complaint within three months?" The question is one of fact for the Tribunal taking all the circumstances into account. It will consider the substantial cause of the failure to comply with the time limit and investigate whether and when the claimant knew she had the right to complain. There is ample case law eg. Dedman v British Building and Engineering Appliances Ltd 1974 ICR 53, to the effect time limits are just that—limits not targets so even a day late is still out of time. The burden of proving it was not reasonably practicable rests on the claimant.

3.28. The claimant may have had difficulty in understanding the situation by looking at CRM but she must have known she was not getting paid anything like the amount she should have been had the terms of the contract, as she understood them to be and as I have found them to be, been complied with. One does not need to be able precisely to identify a liquidated sum in order to bring a claim of unlawful deduction from wages. Applying Palmer, her earlier claims are ones I cannot consider.

4. Postscript

4.1. Absent from my above findings are any decision on whether the claimant was guilty of "mis-selling". Ms Jeram did not base her case on a right to deduct for mis-selling. Section 25 (4) says:
(4) Where a tribunal has under section 24 ordered an employer to pay or repay to a worker any amount in respect of a particular deduction or payment falling within section 23(1)(a) to (d), the amount which the employer is entitled to recover (by whatever means) in respect of the matter in relation to which the deduction or payment was originally made or received shall be treated as reduced by that amount.

4.2. Once the terms of a sale have been agreed, the end user enters into a binding contract with the relevant supplier. Misrepresentation is an untrue statement of fact or law made by Party A (or its agent) to Party B, which induces Party B to enter a contract with Party A thereby causing Party B loss. There are three types of misrepresentation, fraudulent negligent and innocent for which the remedies are **rescission** and/or damages. Where the contract is rescinded and the parties are put back into the position in which they were before it was made. In Salt v Stratstone the Court of Appeal confirmed it was possible to set aside a contract despite the claimant having had some enjoyment of a car he bought as "new" which was not.

4.3. I see instances where the supply company may well have had, and exercised, the right to rescission where statements made by the claimant on behalf of the consumer turned out not to be true. If that would have led to the respondent having a claim in the County Court for the return of the share of its commissions paid to her, it may no longer pursue such a claim because it has contravened what Parliament has always intended Part II of the Act to achieve, which is to protect wages which have become payable at a certain date from being withheld in any way other than as required by law or authorised by prior contractual agreement. The reason I gave an ex tempore judgment on 10 April was I understood, subject to arithmetic checking, the claimant would be paid the commissions she claims save where her claim is time barred. I would not have done so had I understood arguments referred to in the application by the respondent dated 24 April, numbered paragraph 2 ,of deliberate mis-selling remained "live".

T M Garnon

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T M Garnon EMPLOYMENT JUDGE

REASONS SIGNED BY EMPLOYMENT JUDGE ON 30 April 2019