EMPLOYMENT TRIBUNALS

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

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at North Shields **On 30 July 2019**
Before Employment Judge Garnon (sitting alone)
Appearances
For the Claimant no attendance
For the Respondent Ms K Jeram of Counsel

JUDGMENT ON RECONSIDERATION

It is in the interests of justice to reconsider the judgment I made on 10 April 2019. Paragraph 1 is revoked and the decision will be taken again by me, to the extent explained in the reasons below, and following compliance with Orders made in a separate document

Reasons (bold print is my emphasis throughout)

1. Introduction and the Applications

1.1. On 10 April I issued the following "Judgment on Preliminary Issues"
1. The claimant was entitled to be paid, at variable rates, a share of the commissions received by the respondent in respect of contracts she had brokered between energy suppliers and consumers. She was entitled to be paid such sums on the monthly pay date by which it was practicable for them to be calculated. The respondent has failed to pay those sums.
2. The claimant was not entitled to any incentive payment.
3. The tribunal cannot consider her claims in respect of deductions preceding number 13 on the schedule at page 65 of the agreed document bundle.
The parties were to inform the Tribunal within 28 days if they required a further hearing. This application is by the respondent, in connection with paragraph 1 of the judgment only, on two grounds . The claimant has not asked for reconsideration of paragraphs 2 or 3.

1.2. In advance of the hearing I had received electronically and read the very lengthy witness statements of the claimant and, for the respondent, Ms Leah Barrett who joined it on 1 July 2016 and Mr Paul Gleghorn who had worked for it since June 2017. The claimant was employed from 3 October 2016 as a Business Account Managers (BAM)until she was dismissed with immediate effect on 21 September 2017. On 26 September 2016 before she started work and before whatever "induction" she had, she signed her contract which contained in clause 9

“ *You are* ***eligible to receive*** *commission under the following commission structure:*

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

1.3. At the hearing the claimant was represented by Ms L Mankau of Counsel and the respondent by Ms Jeram. I had not seen the document bundle. I noted in the witness statements allegations of the claimant “mis-selling”, a term which was not defined. There were 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.

1.4. At 10:10 am on 8 April I started a brief discussion with Counsel as to how they were putting their cases.I asked Ms Jeram whether the respondent’s case was it had the right to withhold commissions and/or “clawback” if a contract was downvalued or “lost” . Ms Jeram said it could, and my note reads: ”*irrespective of why it may be clawed back i.e. no distinction between no fault clawback and clawbacks for churning and overestimating”.* I recall explaining my use of the word “churning” by reference to the insurance industry in which it means a broker, having sold a policy on behalf of one insurance company to an insured person and received a commission, persuades the insured person to cancel that policy and take out another with a different insurance company so the broker can receive another commission. Ms Jeram’s submission was “*eligible to receive*” does not mean “**entitled** to receive” and “*will be paid* ***when***” does not mean “will be paid **upon** receipt”.

1.5. Ms Mankau’s case was when the respondent received commission from energy suppliers, the claimant’s right to a percentage of it crystallised. The respondent could not withhold payment because its commission **may be** clawed back, still less offset sums clawed back by the energy suppliers in respect of contracts which underperformed or been lost against commissions properly earned by her on other contracts.

1.6. Counsel asked for some time to discuss matters and I needed to read several pages of the large document bundle so we broke until 12.10 pm. The main issue between the parties was their opposite readings of clause 9. I said I would determine the issues:
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?

1.7. Ms Barrett said that **during 2017** it became apparent a small number of individuals, including 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 and the claimant was dismissed as a result of 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. I fully agreed this role was necessary. However, it did not exist at the time the claimant entered into her employment contract.

1.8. Ms Barrett said the payment of commission to a BAM was subject **at all times** to the respondent's internal quality and compliance checks , a high risk sale would be flagged on a computer system called CRM as being **held** or placed into **objection** and no commission was payable to a BAM unless those checks have been completed and no issues with the sale have been identified. I held this was not a contractual term. No " retention" or "claw back" provisions, were notified to the claimant when she accepted the offer of employment. She 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**. If she brokered a contract which produced 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 was a major downside to the bargain from her point of view. All commercial contracts are about apportionment of risk and this had fairly high risks for both, apportioned crudely but in a balanced way.

1.9. What the respondent was doing , and cannot lawfully do, was unilaterally imposing conditions after the contract was made. There would have been absolutely no reason why a retention and/or clawback provision could not have been incorporated into the contract of employment when it was made , **but it was not .There was no warrant for me to imply one** . Thus far, I have no reason to change my decision for which I gave much fuller written reasons later.

1.10. I believed at the time it was agreed I would give judgment on the construction of the contract which is exactly what I did, with brief oral reasons on the last day Although I was not asked for written reasons at the time, I anticipated I would be, so they were in the course of preparation when the respondent's letter of 24 April making this application arrived. Written reasons were sent on 30 April.

1.11. At numbered paragraph 2 on page 1 the respondent's solicitors said
" *It was always part of the respondent's case that the claimant was not entitled to the commission payments sought,* ***by reason of her deliberately submitting inflated consumption figures and/or knowingly selling or attempting to sell contracts based on false changes of tenancy in order to generate commission for her personal gain***"
and at paragraph 7 on page 2
" *Furthermore whilst EJ Garnon expressed reservation about making findings of improper conduct,* ***they are, and always were, central to the respondent's case.*** *Submissions were closed off after the primary issue and arguable points in relation to items 16 to 21 were not concluded in submissions*".
and at paragraph 10 on page 3 it " *is* ***an implicit term*** *that in order to be eligible for commission on a contract, the claimant must have had reasonable grounds at that date of sale of the contract to believe that the respondent would be entitled to earn* ***and retain*** *the payments upon which she was to be paid commission*"
and at the end of paragraph 12" *EJ Garnon closed off submissions without hearing from the respondent on* ***its secondary position***".

1.12. I agree submissions were confined to the issue of whether , as the respondent's statements said, it had the contractual right to retain commissions on sales which it described as being "placed into objection" and/or to clawback the claimant's share of commissions where the energy supplier clawed back the commission from the respondent.

I did not “close them off” in the sense of imposing a cut off on them. I was of the view the respondent had **no secondary position**. Unless I had believed I was acting with the consent of both Counsel that the only issue I had to determine was whether the terms of the contract contained the provisions for which the respondent argued , I would not have given judgment on a preliminary issue, but adjourned the case part heard to complete the evidence and submissions on all matters contained in the pleadings and witness statements. Because of the exchanges I had with Counsel , I did not see the respondent would be advancing any argument that, even if contract properly construed did not permit retentions or clawbacks , some doctrine of law prevented the claimant having a right to a share of commission on contracts which she had knowingly mis-sold.

1.13. A contract, lawful when made. can become illegal if it is performed in an illegal way, which often only comes to light when the employee brings a claim which the employer seeks to defend it by asserting the contract was performed illegally and should not be enforced against it. Where the tribunal accepts the employer’s assertion, the consequences for the employee are that she is barred from remedy in any statutory claims founded on the contract. The Court of Appeal considered in Hall -v- Woolston Leisure illegal performance could act as a bar to the claimant’s enforcement of her contract of employment, but it was necessary for the respondent to show on balance of probability both knowledge of and participation in the illegality on her part. In the non-employment case of Patel v Mirza 2016 UKSC 42, the Supreme Court held by a majority the key question was whether allowing the claim would harm the integrity of the legal system.

1.14. A term I could have found implied under the officious bystander test and/or in order to give the contract business efficacy was that the claimant would not knowingly broker a contract by misrepresentation to the energy supplier causing it to pay any or greater commission to the respondent than it would had it known the true material facts.

1.15. At the end of my reasons, and after reading the respondent’s letter of 24 April , in a section headed “postscript” I wrote, “*Absent from my above findings are any decision on whether the claimant was guilty of ”mis-selling*” and added

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".

This shows I saw the potential argument, but did not think at the time Ms Jeram was running it. There are essentially two applications before me today or rather two grounds for the one application for reconsideration. What I will term the second of these is to admit new evidence and I will deal with that later. The first ground is that I mis-interpreted her words as an abandonment of any arguments such as outlined in 1.13 and 1.14 above.

2 Today's submissions and My Conclusions

2.1. The claim originally related to 5 customers (i) The Island Free School (ii) Treadmill Gym Ltd (iii) Sheridan Fabrications Ltd (iv) Blue Harbour Ltdand (v) Stanley Dock Hotel Ltd. They are as numbered 1 to 21 on a schedule at page 65 of the trial bundle.

2.2. Most of the Island Free School contracts and that for Treadmill Gym Ltd are out of time. The claimant did not pursue Sheridan Fabrications Ltd. Ms Jeram agreed claims numbered 13 and 14 in respect of The Island Free School.

2.3. In respect of number 16 for Blue Harbour Ltd and 17 to 21 for Stanley Dock Hotel Ltd Ms Jeram contends she did not expressly abandon a secondary argument that, even if the express terms of the contract did not permit retentions or clawbacks, in circumstances where the claimant had acted as described in the next paragraph when concluding the contract between the consumer and the energy supplier, her right to any share of commission was negated. Therefore, it is in the interests of justice that any elements of the judgment which appear final on the issue of whether the claimant is "entitled" the respondent has "failed" to pay what is properly payable should be reconsidered.

2.4. Ms Jeram says her words to me at the beginning of the hearing meant only that the respondent's primary position was it had the right to make retentions and clawbacks for whatever reason a contract failed, for example a prospective consumer failing a credit check, however, if I were not with her on that, in circumstances where the claimant had acted as alleged in paragraphs 9(b) and (c) of the letter of 24 April no commission was "properly payable" to her. I quote those paragraphs for the avoidance of doubt :
9 (b) " whether the claimant improperly generated sales so as to generate commission for her personal financial gain in circumstances where she knew or ought to have known they were likely to fail. In respect of each of the sales the tribunal heard that the claimant sold new contracts for the supply of energy during the lifetime of an extant energy supply contract in circumstances where there was no genuine change of tenant.
9 (c) whether the claimant improperly inflated the energy consumption rates so as to generate an inflated commission in circumstances where she knew or ought to have known that it was likely to fail .

2.5. These points were covered in evidence. Ms Barrett 's witness statement contained

<u>Sale ID 9706 (MPAN 0806)</u>
70. This meter was a Nomination sold by the Claimant on 9 June 2017 on the basis that the meter serviced a high usage premises (a hotel) resulting in AQ figures of

approximately 2.4millon kWh, equating to a TCV of £418,800.40 (see page 126 for the CRM screenshot); in fact, the reality was that this meter was a sub-meter on a derelict site with historic consumption figures of just 3,000 kWh. I remain at a loss as to why the Claimant would have sold the contract based on AQ figures of 2.4m kWh.

71. There was an initial issue with this sale as a result of an outstanding debt on the meter that was not cleared until 13 July 3017. Following the resolution of this issue, on 27 July 2017 the discrepancy between the estimated and actual AQ figures was then flagged to the Respondent by the existing supplier (Eon). At the same time, Eon confirmed that the meter had not in fact been connected since March 2017. This meter was ultimately disconnected and the sale confirmed as lost on 6 November 2017.

<u>Sale ID 9091 & Sale ID 9083 (MPAN 1801 & 8600)</u>
73. These two gas supply contracts were sold as COTs. The existing energy supply contract with Engie was held by Blue Harbour Ltd; these original contracts were sold to the customer by Matt Harrison. The Claimant attempted to terminate these existing contracts early (they were due to run until 31 August 2017) by claiming that the occupier of the premises had changed to Stanley Dock Hotel Ltd in March 2017, thereby giving rise to a COT situation permitting early termination (see page 263 for an email from the Claimant to Engie stating this position). Blue Harbour Ltd and Stanley Dock Ltd were subsidiaries of the same corporate group and so essentially ***these were manufactured COTs.*** *This fact was picked up by the existing energy supplier (see the email at page 261) who ultimately objected to process the COTs; Engie's policy is to refuse to process COTs between companies within the same group structure, presumably for reason that* ***there is a high likelihood that they are simply being engineered so as to permit the end user to re-negotiate more beneficial supply contracts.***

74. Upon it becoming clear that the COTs would not be approved, in early September 2017 the Claimant sought to transfer the existing Engie contracts from Blue Harbour to Stanley Dock by way of a novation and sell Stanley Dock an extension to the existing contract. However, this novation was rejected when Stanley Dock failed the supplier's credit checks (see pages 319 to 324 for the relevant email exchange between the Claimant and the supplier). The fact that the Claimant was attempting to novate the original supply contract and sell an extension with Engie for these meters on 14 September 2017 demonstrates that the Claimant was aware at this point that the contracts she had sold in June 2017 (Sale ID 9091 and Sale ID 9083) were never going to go live. Despite this, the energy supplier the Claimant had sold the new contracts with, Dong Energy, paid the Respondent an initial upfront commission payment for the contracts in August 2017 on the assumption that the COTs would go through. As it was, the COTs were ultimately refused and the Dong contracts were confirmed as lost sales, requiring the Respondent to repay the commission payments it had received from Dong in full.

<u>Sale ID 8749 & Sale ID 8750 (MPAN 3456 & 0392)</u>
75. These two electricity supply contracts were sold as COTs, though they were originally uploaded to the CRM by the Claimant as renewals. The existing energy supply contracts with Haven were held by Titanic Belfast Ltd; these contracts were also originally sold to the customer by Matt Harrison. The Claimant processed these sales on the basis that the occupier of the premises had changed to Blue Harbour Ltd, thereby giving rise to a COT situation permitting early termination and re-sale (see page 193A confirming the COTs and page 290 confirming that Matt Harrison's original sale was subsequently confirmed as

lost). Again, Titanic Belfast Ltd and Blue Harbour Ltd were subsidiaries of the same corporate group and so, essentially, these were also manufactured COTs to enable the Claimant to complete two new sales. Whilst Haven agreed to process these COTs (the energy supply was remaining with Haven under the new contracts) queries were raised by Haven regarding the AQ figures which were not resolved until mid-August 2017. However, shortly after this the Respondent was informed that the site where MPAN 3456 was located had in fact been sold, resulting in Sale ID being placed into objection in September 2017 and ultimately being confirmed as a lost sale in December 2017. (For completeness I can also confirm that Sale ID 8750 was also a lost sale, however as the Claimant is not claiming any commission in respect of this sale it does not form part of these proceedings.)

The claimant denied wrongdoing on any of these contracts.

2.6. The claimant did not attend and was not represented today . I make no criticism of her or her representatives. Having held a case management discussion by telephone with Ms Mankau and Ms Jeram on 22 May ,ordered the respondent to make clear its applications and given the claimant the opportunity of reply, both parties did precisely that. I well understand the claimant's desire to save costs where possible. Her solicitor's letter of 5 July argues the secondary position the respondent takes was not pleaded. I disagree in that the assertion it had made no deductions from the sums properly payable to the claimant is sufficient in my judgment to come encompass both arguments.

2.7. They also argue the secondary position was expressly abandoned. I have had the opportunity of reflecting at length on what happened at the hearing. Ms Jeram accepted she did not make her position clear and I accepted I did not pin her down on the point. Suffice to say that had I realised it was being run , I would have asked more questions of both the claimant and Ms Barrett as to precisely why they took the positions they did.

2.8. On the first ground of application I am invited , so it seems to me , to do no more than accept the respondent had not abandoned the secondary argument so we should turn the clock back to what I would have done had I realised that which was (i) asked more questions of both Ms Barrett and the claimant than I did (ii) hear the parties further submissions . I would certainly have had to adjourn part heard to do so.

2.9. I do exactly that. Ms Jeram had prepared a note of her submissions today which she had not had time to copy to the respondent but she volunteered to do so afterwards . I accept that although finality of litigation is important, on the authority of <u>Trimble-v-Supertravel Ltd</u> the respondent has not had the opportunity fully to argue its secondary position. The claimed sums are in excess of £120000 even on the six contracts still in issue. My initial reaction when I read the letter of 24 April was, using Ms Mankau's words, the respondent was seeking to have a second bite at the cherry. Upon reflection, in circumstances where I was trying, as I believed the parties wanted, to reach a conclusion in the time allotted for the hearing, I misinterpreted Ms Jeram's position. On the basis more detailed evidence will be taken and more submissions heard another 2 days will be required, even if no "new" evidence is admitted.

2.10. This brings me to the second ground of the application. Evidence sent to the respondent some time ago being a statement of a Mr Rawlingson, has been supplemented by a statement from Mr Scott High sent on 23 July. If accepted, they tend to show the claimant had been dishonest in the claiming of commissions in employment she obtained

subsequent to her dismissal ,not in the field of energy brokerage but in a recruitment business arranging contracts between prospective employers and employees. Ms Jeram says it is in the interests of justice for the judgment to be reconsidered even if I was not with her on the first ground. She contends on the Ladd-v-Marshall test this evidence could not reasonably have been known of at the time of the hearing and is relevant . The email of 23 July at 13:59 arrived a little late for the claimant to reply to fully. However an email from her solicitor sent at 17:42 that day contains

For the avoidance of doubt the Claimant maintains that the 'New Evidence' provided by the Respondent is not relevant to the her claim before the Employment Tribunal given that the allegation of mis-selling is not a matter which requires determination. As the Judgment confirms that there are no circumstances in which the Respondent can claw back commission payments the reason for the purported claw back is irrelevant. **The Claimant maintains her position that the second reconsideration therefore has no reasonable prospects of success.**

As EJ Garnon has already confirmed (by letter dated 9 July 2019) that the Claimant must be given an opportunity to make further written representations on the second application, if it is decided that it has reasonable prospects of success, the Claimant writes to confirm that she intends to rely only on written submissions (as set out in this email and in our correspondence of 5 July 2019, attached for ease) at the reconsideration hearing due to be held on 30 July 2019.

2.11. In my letter to the parties on 11 June I said that if either application succeeded I would fix a hearing and the question of what exactly it would encompass which could be discussed on 30 July. At that time, and until an hour before this hearing started , I had anticipated both parties representatives would be attending because an email sent by the respondent's representative at 12:22 on 26 July had not been linked to the file. As I am with Ms Jeram on the first ground , this becomes only an application to admit new evidence. Also on 23 July further evidence from a Mr Gary Nolan was sent by the respondent's representative to the claimant and the Tribunal. It relates to her alleged dishonesty in a previous employment with "Utilitywise ". I agree with Ms Jeram that all I have to decide today is whether the application to admit this evidence has a reasonable prospect of success . If I so decide, the claimant must be given an opportunity to make further submissions on whether it should be admitted.

2.12. To show any contention has no reasonable prospect of success is a very high hurdle as explained in Balls-v-Downham Market. Now I have decided that the allegation of mis-selling is a matter which requires determination, the application to admit new evidence must in my view have a reasonable prospect of success. Ms Jeram will. when the point comes from determination. heavily on the speech of Lord Bingham in O'Brien -v-Chief Constable of South Wales Police at paragraphs 4 and 5 and the other authorities she quotes in her note.

2.13. Of the two categories of new evidence which the respondent seeks to introduce one is of her conduct in subsequent and different employment but the recently disclosed statement Mr Nolan relates to her conduct in a previous employment in the energy brokerage sector. The claimant in her witness statement says she was dismissed for gross misconduct on 21 September 2017 without being provided with a copy of Ms Barrett's Investigation which purported to show detailed reasons for the termination of her employment. She says "*Had I been provided any opportunity to put aside my version of events and provide an explanation for these findings I would have done so (although as this is not relevant to the proceedings, I have not included it here)"*. She adds

“ From my point of view I cannot understand why I was dismissed or why my commission payments have been withheld. 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. I am frankly astonished at the allegations levied against me and deny that I ever committed any acts of gross misconduct****. I am equally surprised at the number of sales it is alleged have been lost since my employment ended particularly when one considers that since my dismissal, Mr Islam has offered me my job back on a number of occasions”.*

2.14. By the words I have emboldened she makes an assertion as to her previous good character which may also be relevant to whether Mr Nolan’s evidence should be admitted.

2.15. Finally, Ms Jeram had earlier said my judgment had not made clear the claims I found to be out of time were dismissed and should be amended to do so . We did not cover this today so the matter remains to be addressed at some stage.

2.16. The orders which I agreed to make at Ms Jeram’s suggestion give to the claimant an opportunity to be heard further . I believe the claimant’s representatives probably have enough information to submit written submissions as to whether these two categories of evidence should be admitted. If they cannot do so within the time allotted, they are welcome to apply for more time. They may also apply for a telephone hearing if there is any doubt as to what it is they have to answer. If the parties agree, I could determine the issue of the admissibility of new evidence without a hearing but if they want a hearing in person or on the telephone they need only ask. If it is in the interests of justice to admit this further evidence it could add a day or two to the resumed hearing but I do not view that as a relevant consideration to whether it should be admitted.

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Employment Judge Garnon
Signed on 31 July 2019.