EMPLOYMENT TRIBUNALS

Claimant: Mr M Baxendale

Respondent: UK Healthcare Corporation Limited t/a D-Energi

Heard at: Manchester **On:** 3 and 4 September 2019

Before: Employment Judge Rice-Birchall

REPRESENTATION:

Claimant: Mr Martin, Solicitor
Respondent: Mrs Peckham, Solicitor

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim for notice pay is dismissed on withdrawal.

2. The respondent made an unlawful deduction from the claimant's salary of £1053.88 (gross).

3. The claimant was automatically unfairly (constructively) dismissed by the respondent.

REASONS

The Issues

1. The claimant's claim for notice pay was withdrawn at the outset of the hearing and is therefore dismissed on withdrawal. This left the remaining issues as follows:

Unlawful Deduction from Wages

2. The claimant alleges that the respondent made an unauthorised deduction from wages, in contravention of section 13 of the Employment Rights Act 1996 (ERA 1996), by, in September 2018 paying him £696.12 rather than £1,750. This gives rise to the following issues:

a. Was the sum of £1,750 properly payable to the claimant in September 2018?

b. Was the sum of £1,750 payable as wages within the definition in section 27 of the Employment Rights Act 1996?

c. What was the total amount of wages actually paid to the claimant on the occasion in question?

d. Did the claimant signify in writing his agreement or consent to the making of the deduction (or part of it) before the event on account of which the deduction was made?

e. Was the deduction (or part of it) required or authorised to be made by virtue of a term of the claimant's contract?

f. Was it a written term of which the respondent gave a copy to the claimant before the deduction was made?

g. Did the respondent notify the claimant of the existence and effect of that term before the deduction was made?

Breach of contract

3. Alternatively, the claimant alleges that the respondent was in breach of his contract of employment by paying him £696.12 rather than £1.,750. The issue before the Tribunal is: was the respondent in breach of the claimant's contract of employment by paying him £696.12 rather than £1,750?

Automatically Unfair Dismissal (asserting statutory right)

4. Was the claimant constructively dismissed by the respondent? The claimant was not pursuing any argument that he had been actually dismissed by the respondent. This gives rise to the following issues:

    a. Did the claimant terminate the contract under which he was employed in circumstances in which he was entitled to terminate it without notice by reason of the respondent's conduct? This, in turn, gives rise to the following issues:

        i. Did the respondent breach the implied term of trust and confidence as alleged by the claimant?

        ii. Was the breach repudiatory in nature?

        iii. Did the claimant affirm the contact and/or waive the breach?

        iv. Did the claimant terminate his employment in response to the breach?

Reason for Dismissal

5. If the claimant was (constructively) dismissed by the respondent:

a. Did the claimant make an allegation that the respondent had infringed a relevant statutory right (on 7 September 2018)?

b. Did this constitute an allegation that the respondent had infringed a right of his?

c. If the claimant alleged the respondent had infringed a relevant statutory right, was that the principal reason for dismissal? In a claim of constructive unfair dismissal, that requires the employee to show that the respondent's actions which constitute the repudiatory breach related to the claimant's assertion of a statutory right.

Background

6. At the outset of the hearing, the respondent shared a skeleton argument with the claimant and identified that the grievance on which the claimant had sought to rely in relation to his assertion that he was dismissed in contravention of section 104 of the Employment Rights Act 1996 was not sufficient for him to bring that claim. As a result, the claimant asked to change the alleged assertion of the statutory right, from the grievance submitted by the claimant on 28 August 2018 to a conversation the claimant had with the respondent's Mr Zico Ahmed, on 7 September 2018. For reasons given orally at the hearing I concluded that this change should be allowed.

Evidence

7. I had the benefit of a bundle of documents and also a bundle of witness statements, which included statements from the claimant, Miss Wendy Wilks, the respondent's Partnership Manager, and Mr Shak Ahmed, the respondent's Managing Director.

8. I heard oral evidence from all three witnesses after their witness statements had been taken as read.

The Facts

9. The claimant commenced employment with the respondent on 4 September 2017 as a Broker Account Manager. His contract of employment appeared in the bundle. It was common ground that there was a bonus/commission structure in place. The contract specifically says:

> "There may be a bonus structure in operation in respect of your employment, details of which will be issued to you separately. The company reserves the right to review the scheme periodically and any changes that affect you will be notified to you in advance."

10. During the induction process, the claimant ticked a box which stated, "Employee is aware of their bonus structure and is subject to change to business targets with 1 months' notice". This was signed on 3 October 2017.

11. The respondent has a "Commissions and claw back policy" which states, inter alia, "..payments are paid monthly in arrears, in some cases we may have to arrange instalments of payments due to sales risk or on affordability ground depending on annual or actual profit." It goes on to state that "Clawback of your

commissions/bonus will only apply if sales person or the any TPI (broker) have made misrepresentations to the business to overclaim or the value of the sales contract or contract has not gone live or it has been cancelled for any reason, or valued less due to an administrative error during processing…."

12. On 8 September 2017, Ms Wilks wrote to the claimant and his colleagues and set out the level of commission payable. It said, inter alia, that there would be 4% of the total deal profit on all sales done with customers direct.

13. As the level of commission was set at a lower level than the claimant expected, he wrote an email to his line manager on 12 November 2017 (page 77 of the bundle). He explained that he was advised that the commission structure was 4% of all new business revenue generated. The claimant added to the letter:

> "I respectfully request that the commission structure for the Broker Team is reviewed as a whole and that the company stands by their original verbal offer of remuneration made to myself."

14. On 14 November 2017 Mr Ahmed, Managing Director, wrote to the claimant and the other colleagues to say that the commission structure had been changed. In an email from Ms Wilks to the claimant and his colleagues dated 14 November 2017 the structure was set out as follows (Michael being the claimant):

> "Any sales Michael, Emma, Lee or Lara do will get 4% of the total deal profit as well as the £10 per contract."

15. Aside of some issues with the claimant's absence reporting, for which the claimant had never been disciplined, the claimant continued in employment with no additional issues until August 2018.

16. Commission earned is paid in arrears and so the claimant was expecting any July commission to be paid in August. He believed he was due to be paid £3,593.52 on or around 30 August 2018.

17. In August 2018, the respondent became suspicious of a number of contracts from Smart Energy Review (SER) with unusually high uplift/commission rates. Mr Ahmed considered that these contracts presented a high risk and decided to impose an interim commission cap on them to safeguard the respondent. There is no doubt that that was a commercially sensible step to take.

18. Accordingly, on 24 August 2018, the claimant met with Mr Ahmed and was told, along with his colleagues, that all commission payments would be capped at £1,000 a month and that this would retrospectively include July and August commission, neither of which had yet been paid. The claimant had not previously been notified of this change and he did not agree with it. He considered that it amounted to a breach of contract. According to him, the respondent had agreed to pay commission at an agreed rate, and any change had to be notified to him in advance.

19. The reason for the cap was that Mr Ahmed and Ms Wilks had suspicions about certain contracts which they needed to check. However, Mr Ahmed stated that, whether or not the contracts proved to be valid, there would be a cap of £1,000

on the commission paid. This meant that the claimant would suffer a shortfall of £2,593.52 from what he was expecting to be paid whether or not the contracts were valid. In other words, what was imposed was a cap, not just a delay on payment until such time as they could verify (or not) the contracts.

20. On 28 August 2018 the claimant set out his concerns in an email (page 137 of the bundle). The claimant confirmed that he was verbally advised that:

> "All commission payments to the Broker Team with immediate effect and retrospectively are to be capped at £1,000 per month. This would therefore include all commission that I have earned for July and August and this has not yet been paid and due."

21. The claimant went on to set out the figures he expected to earn in commission in both August and September which amounted to £4954 (plus £10 per contract) for September alone. He continued:

> "I can confirm that your proposal to cap my commission payments for July and up to 24 August is a breach of the Employment Act 1986 and specifically relates to section 13 ……and is an unlawful deduction from wages.
>
> In addition to this it is also a breach of my employment contract."

22. The claimant also, in that e-mail, referred to his employment contract which provides that any changes to the bonus scheme would be notified in advance. He set out that no advance notice had been given and requested a meeting so that the matter could be fully discussed and resolved given that pay day was imminent. In fact, the claimant had booked a holiday on the basis of the commission he believed he would be entitled to.

23. Mr Ahmed wrote back to the claimant just over an hour later in the following email:

> "I have been advised that you're off sick today again, but you have no problem taking legal advice during this time. I noted you also left on Friday shortly after the meeting, again being sick and making a real big fuss, please bring in a doctor's note on your return to work if you want to continue working for us, however this is not the way to deal with below issue, you can take legal advice as much as you like and good luck to you, I will try to organise a meeting with HR in due course but this could be sometime next week as Kate and Wendy are on annual leave, furthermore I have given you my business reasons, change is necessary due to risk we face as a business mainly due to change in source supplier and method of securing the rates etc., which I have already explained to you as best as I could, if you insist on payment you will leave me no choice but to review your employment with D-Energi on affordability/costs basis, I have decided not to pay you your commission payments as we still need to further validate your contracts versus risk, to ensure all is ok, once this is resolved we could then possible pay out as normal if all is ok, up to the cap of £1,000 – the broker you have mainly been working with has been using very higher than average uplifts which is cause of concern.

> As for the commission payments these is discretionary, as not part of your basic salary, please refer to your handbook."

24. Mr Ahmed, in evidence, maintained that there was nothing threatening about that email.

25. Following that email there was a discussion between the claimant and Mr Ahmed in which a "deal" was carved out, in which the bonus cap to be applied to the claimant was significantly higher than that paid to other staff. The claimant was asked to confirm the deal by email, which he promised to do. However, Mr Ahmed had to chase for the claimant's confirmation. The claimant responded to Mr Ahmed's chasing email by saying: "Shak, sorry I'll do it now, my phone's not stopped ringing with queries and lockins". He subsequently confirmed his agreement by writing to Mr Ahmed as follows:

> "As per our discussions I would wish to confirm that my commission payments for July and August are to be capped at £1,750. I would also confirm that for future payments I agree to the temporary cap of £1,000 per month whilst the TPG situation and associated commissions are resolved."

26. As far as Mr Ahmed was concerned, agreement had been reached and the situation was resolved. However, the claimant understood that he would be paid £1,750 in respect of his commission for each of July and August, on the basis that he was owed far more than that, and that, once the situation was resolved, he would be paid the remaining commission he was due. For the avoidance of doubt, by "commission payments for July and August" the claimant was referring to the payment periods of August and September respectively.

27. In fact, in respect of his July commission (paid in August) the claimant was paid £1,750. However, he remained aggrieved because he wanted the balance of the £3,500 to which he believed he was entitled and on which he had relied. Accordingly he took the opportunity to speak to Mr Ahmed's brother, Zico, just over a week later about the commission. Following that meeting, Zico Ahmed sent the following email to Ms Wilks, copying in his brother, Mr Ahmed:

> "Hi,
>
> Mike approached me earlier as I was having a cup water asked me if I have spoke to my brother yet about his comms. Sort of threatened me (not in a violent way) that if we don't pay his comms he will be taking legal action as he has holiday to go to next week. I said in a polite professional way if he is not happy he can always walk away. Anyway he then sort of backtracked.
>
> Bottom line. I don't trust Mike the way he is acting. I understand him being upset. I get a feeling this negativity is not going to settle down unless he gets what he wants. I think he is being very negative and I feel he may be egging on all the negativity in the Broker Department. If there is a fair way of dismissal looking at his HR record then I would be in favour of him exiting the company."

28. It is clear from the content of that email that the claimant was referring to the balance of the commission which should have been paid in August because he wanted the money before he went on holiday the following week.

29. Ms Wilks replied to Zico Ahmed as follows:

> "I had a team meeting today about the anniversary payments and also found Mike to be very negative compared to the rest of the team and rather than suggesting possible solutions he just kept saying it was all wrong what was happening with the commissions and changing to anniversary payments is holding everyone to ransom. I dealt with it as best I could and told him to email me any concerns as I didn't want to cause a scene in front of the team."

30. The claimant was expecting to be paid £1750 in September. However, on 27 September 2018, the claimant was sent an email from Ms Wilks as follows:

> "Due to recent concerns with Smart Energy Review sending in fraudulent contracts we have had to open up all the opportunities while we investigate their authenticity. This has resulted in your commissions for September payroll being adjusted to the below figure (£696.12). So sorry this has happened to you but we have no choice due to the severity of the complaints received from customers. Feel free to let me know if you wish to discuss this further."

31. Consequently, in September, the claimant was again paid significantly less than he believed he was entitled to, considering that he believed he would get at least £1,750 of the commission (over £4,500) he believed he was due.

32. On 2 October 2018, the claimant was off sick and went to speak to his bank. He was also absent on 3 October 2018 and had not called Ms Wilks with an update of when he expected to return to work. Accordingly, Ms Wilks, on 3 October 2018, wrote to the claimant, by email only, to invite him to a disciplinary hearing. The email was sent on 3 October 2018 at 10.39am. The disciplinary hearing was scheduled for 4 October 2018 at 11.00am, giving the claimant just over 24 hours' notice.

33. The allegations faced by the claimant were that, "on 2nd October you confirmed you would call me with an update of your return to work time after the conclusion of a meeting at your bank. I have not heard from you. Today, 3rd October, you have not followed our absence reporting procedure which is to call and speak to me as your manager. My attempts to reach you have also been unsuccessful."

34. It is clear from the letter to the claimant that Ms Wilks knew he had lost his mobile phone, as she states that she has been informed that it had "been handed in at a school office."

35. The claimant was also "reminded", in that email, that he should take all reasonable steps to attend the hearing and that failure to do so without good reason "is deemed to constitute a failure to follow a reasonable management instruction and can amount to gross misconduct which if proven can warrant summary dismissal. In these circumstances, your failure to attend will be considered alongside the above matters and a decision may be made in your absence."

36. The claimant, as Ms Wilks knew, did not have his phone and therefore did not receive the letter, and did not attend the hearing.

37. Ms Wilks summarily dismissed the claimant in his absence. The claimant was informed of his dismissal by an email dated 4 October 2018 which confirmed that the disciplinary hearing had proceeded in his absence, and that what had been considered was his failure to follow the absence reporting procedure on 3 October 2018 and failing to follow a reasonable instruction by failing to attend the disciplinary hearing meeting. The letter goes on to state that Ms Wilks considered the claimant's failure to attend the meeting as a deliberate failure to follow a reasonable management instruction, that his actions amounted to gross misconduct and that a reasonable sanction was summary dismissal. The claimant was dismissed with immediate effect and was not entitled to notice or pay in lieu of notice.

38. On 10 October 2018 the claimant appealed the decision to summarily dismiss him. The appeal hearing proceeded on 1 November 2018 in the claimant's absence, despite the claimant being unable to attend on 1 November, and expressing a desire to attend. At that time he had been signed off work for eight weeks from 4 October 2018.

39. Mr Ahmed overturned the decision to dismiss the claimant and reinstated the claimant with immediate effect. He reduced the sanction to a final written warning. No explanation was given and the only explanation Mr Ahmed could give in his oral evidence was that that was the outcome he was advised to give. The letter confirming his decision was sent to the claimant on 1 November 2018.

40. The claimant sent the respondent an email on 12 November 2018:

> "Hi Shaq
>
> I am sorry it has taken me a while to respond but I wasn't very well last week. I would really like to talk to you and try and get things back on track. Perhaps we could have a bit of lunch together, your choice of where, at some time to suit yourself and discuss bits bats and my return.
>
> Please feel free to call me.
>
> Kindest regards"

41. Mr Ahmed sent back an email, on 13 November, as follows:

> "I have no further bits and bats to discuss with you. Please make contact with Kate Tynan in HR should you have anything specific you need to discuss regarding your return back work."

42. The claimant resigned by email dated 21 November 2018. He gave one week's notice.

The Law

<u>Unlawful deduction from wages</u>

43. Section 13(1) of the ERA 1996 states: "An employer shall not make a deduction from the 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 relevant provision of the workers contract, or (b) The worker has previously signified in writing his agreement or consent to the making of the deduction."

44. The wages must have been properly payable.

45. Section 13(3) ERA 1996 provides: "where the total amount of wages paid on any occasion by an employer…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 …as a deduction made by the employer from the worker's wages."

46. The date on which a payment is due is crucial. If there is a shortfall on any particular occasion that is to be treated as a deduction

47. If the deduction is made pursuant to a contractual provision, the terms of the contract must have been shown to the worker or, if not in writing, its effect notified in writing to the worker before the deduction is made (**Kerr v Sweater Shop (Scotland) Ltd [1996] IRLR 424).**

48. Where a tribunal finds a complaint to be well founded, it must make a declaration to that effect and order the employer to reimburse the worker for the amount of any unauthorised deduction made (section 24 ERA 1996).

49. I have been referred to the case of **Robertson v Blackstone Franks Investment Management Limited [1998] IRLR 376** as authority for the proposition that an employer is entitled to set off sums paid as an advance against future commission in assessing the amount payable, and that to do the contrary would contravene section 25(3) ERA 1996 which obliges a tribunal to take into account sums already paid or repaid by the employer to the worker.

50. Finally, I have been referred to section 14 ERA 1996 which disapplies section 13 if the deduction is made in order to reimburse the employer for any overpayment of wages or expenses made for any reason.

<u>Constructive Dismissal</u>

51. Section 95(1)(c) of the ERA 1996 states:

> "An employee is treated as having been dismissed if, but only if, –
>
> (c) the employee terminates the contract with or without notice in circumstances such that he is entitled to terminate it without notice by reason of the employer's conduct."

52. The claimant must show that the respondent has committed a repudiatory breach of contract. Such a breach must be a significant breach going to the root of the contract (**Western Excavating (ECC) Limited v Sharp [1978] ICR 221**). He must also show that he has left because of that breach rather than for some other reason. The question is whether a repudiatory breach of contract was the main,

predominant or “effective” cause of the employee’s resignation (**Wright v North Ayrshire Council [2014] ICR 77**).

53. I referred to the summary of the principles of law which apply in claims of constructive dismissal as set out by the Court of Appeal in **London Borough of Waltham Forrest v Omilaju [2005] IRLR 35**.

54. The first question is whether the employer committed a fundamental breach of the terms, express or implied, of the claimant's contract of employment. A Tribunal must decide in each case whether a breach of contract is sufficiently serious to enable the innocent party to repudiate the contract. This is question of fact and degree.

55. In **Malik & Another v Bank of Credit and Commerce International SA [1997] ICR 606** the Supreme Court (then the House of Lords) held that a term is to be implied into all contracts of employment stating that an employer will not, without reasonable or proper cause, conduct his business in a manner likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee. A breach of the implied term of trust and confidence is inevitably fundamental.

56. Brown Wilkinson J in **Woods v WM Car Services (Peterborough) Limited [1981] ICR 66** describes how a breach of this implied term might arise: “To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract: the Tribunal’s function is to look at the employer’s conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.”

57. A course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a last straw incident even though the last straw by itself does not amount to a breach of contract.

58. In **Lewis v Motorworld Garages Limited [1985] IRLR 465** Neil LJ said that the repudiatory conduct may consist of a series of acts or incidents, some of them quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence. Glidewell LJ said: “The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so…The question is, does the cumulative series of acts taken together amount to a breach of the implied term?”

59. The employer’s repudiatory breach must be the effective cause of the employee’s resignation but it does not have to be the sole cause: **Jones v F Sirl & Son (Furnishers) Ltd [1997] IRLR 493**.

60. It is not necessary for an employee, in order to prove that a resignation was caused by a breach of contract, to inform the employer immediately of the reasons for the resignation: it is for the Tribunal in each case to determine, as a matter of fact, whether or not the employee resigned, wholly or partly, in response to the

employer's breach rather than for some other reason: **Weathersfield Ltd v Sargent [1999] IRLR 94**.

61. Further, the Court of Appeal in **United First Partners Research and Carreras [2018] EWCA Civ 213** stated that: "Where an employee has mixed reasons for resigning, the resignation will constitute a constructive dismissal if the repudiatory breach relied upon was at least a substantial part of those reasons.

62. The employee must not delay too long in terminating the contract in response to the employer's breach, otherwise the employee may be regarded as having elected to affirm the contract and the right to accept the employer's breach would be lost." (**W E Cox Toner International v Crook [1981] ICR 823**).

Reason for dismissal

63. The ERA 1996 specifies various reasons for dismissal that make such a dismissal automatically unfair. This means that there is no requisite qualifying period of employment.

64. It is for the employee to allege that his dismissal was for one of those reasons. Where the employee does so allege, the question of who has the burden of proving the real reason for dismissal will depend upon whether or not the employee has sufficient length of service to claim "ordinary" unfair dismissal.

65. Where an employee has less than the requisite period of service to bring an "ordinary" unfair dismissal claim, the onus of proving that the reason for dismissal was the automatically unfair one alleged will be on the employee, because it is only if the employee proves this that the Tribunal will have jurisdiction to hear the claim at all. It is open to the Tribunal to find that the true reason for dismissal was not that advanced by either side since the identification of the reason or principal reason is merely a question of fact which turns on direct evidence and permissible inferences from it.

66. Where the Tribunal does conclude that the reason or principal reason for the dismissal was one of those specified as making a dismissal automatically unfair, there will be no need for further consideration of the issue of fairness. Dismissal will be regarded as being automatically unfair where dismissal was because the employee had asserted a statutory right, whether by bringing proceedings to enforce that right or alleging that the employer had infringed that right. It is insufficient for the employee to allege that the employer may, or would, or threatened to, or intended to infringe such a right.

67. Section 104 of the ERA 1996 states:

> "The dismissal of an employee will automatically be regarded as unfair if the reason or principal reason for it was that the employee brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or alleged that the employer had infringed a right of his which is a relevant statutory right."

68. The relevant statutory rights are: "Any right conferred by the ERA 1996 for which the remedy for its infringement is by way of a complaint or reference to an

Employment Tribunal." The respondent accepted that this would include protection of wages rights under sections 13, 15, 18 and 21 ERA 1996.

69. The claimant's case is predicated on the latter sentence of section 104 ERA 1996, namely "allege that the employer had infringed a right of his which is a relevant statutory right".

70. The respondent referred the Tribunal to the case of **Spaceman v ISS Mediclean [UKEAT-0142-18 JOJ]**. In that case it was held that a claimant bringing a claim that his dismissal was automatically unfair under section 104(1)(b) of the ERA 1996 because he asserted a statutory right "must show that he made an allegation that there had been an infringement of a statutory right, not merely that his employer may or would or threatened to or intended to infringe such a right".

71. Section 104(2) provides:

> "It is immaterial for the purposes of subsection (1)(a) whether or not the employee has the right, or (b) whether or not the right has been infringed, but for that subsection to apply the claim to the right and that it has been infringed must be made in good faith."

72. Section 104(3) provides:

> "It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was. The employee need not have specified the right concerned if he made it reasonably clear."

Conclusions

Unlawful Deduction from Wages

73. The claimant alleges that the respondent made unauthorised deductions from wages, in contravention of section 13 of the ERA 1996, by, in September 2018, paying him £696.12 rather than £1,750. The claimant accepts that he agreed to a cap of £1,750 for September 2018.

74. What was the total amount of wages properly payable to the claimant in September 2018? The claimant says it was £1750. The respondent says it was £696.12 once the contracts (which are now known to be fraudulent, but were only suspected to be fraudulent at the time) have been discounted.

75. I do not accept that the claimant was entitled to be paid £1750 as a matter of contract. The email, which records the claimant's agreement to Mr Ahmed's proposal on 29 August 2018, clearly states that the claimant is agreeing to a "cap" of £1750. That means he was entitled to be paid all commission due subject to the cap of £1,750.

76. Prior to agreeing the cap, the claimant had been expecting a payment of approximately £5000. Absent the agreement, the claimant would have been due that amount on the relevant pay date.

77. The respondent relies on the fact that the full £1750 was not properly payable as the contracts in question were fraudulent. It says that "total deal profit" can only be payable on genuine contracts. Although I accept that proposition in principal, at the time the commission was due, although there were suspicions about the authenticity of the contracts, it was not known that these were fraudulent contracts, a matter which did not become apparent until much later.

78. Although the respondent achieved a contractual variation by agreeing the cap to commission payments, there was nothing in place which indicated that the claimant was not entitled, in the September payroll, to the £1750 commission he was expecting. The focus of the contractual variation was solely the cap which the respondent imposed, by agreement with the claimant. There was nothing in place contractually to indicate that the respondent might withhold certain commission payments due, if, for example, it suspected payments to be fraudulent.

79. The respondent's position is that where there is fraudulent activity, there would be no entitlement to commission. The claimant agreed with this proposition in cross examination. The respondent also seeks to rely on the fact that, if the £1750 had been paid, this would have subsequently turned out to have been an overpayment, and so would have had to have been clawed back in any event as per the Clawback policy referred to above. However, for the purposes of establishing what was properly payable in the claimant's September pay packet, that is not relevant, albeit that I find as a fact that the respondent could have clawed it back once the contracts were found to be fraudulent.

80. Accordingly, the sum of £1,750 was properly payable as wages within the definition in section 27 of the Employment Rights Act 1996 and the total amount of wages actually paid to the claimant on the occasion in question (the September pay period) was £696.12.

81. The claimant did not signify in writing his agreement or consent to the making of the deduction before the event on account of which the deduction was made. Moreover, the deduction was not required or authorised to be made by virtue of a term of the claimant's contract, nor was there a written term of which the respondent gave a copy to the claimant before the deduction was made.

82. The deduction in question was made because there had been an overpayment.

<u>Automatically Unfair Dismissal (asserting statutory right)</u>

83. I have concluded that the claimant terminated the contract under which he was employed in circumstances in which he was entitled to terminate it without notice by reason of the respondent's conduct.

84. I consider that the respondent breached the implied term of trust and confidence as alleged by the claimant.

85. The respondent breached the claimant's contract of employment in this regard by a course of action which included dismissing him for gross misconduct; re-instating him with a final written warning; and its subsequent communication with the claimant whilst he was trying to sort out his return to work.

86. In terms of the dismissal, the claimant was dismissed for gross misconduct despite there being no gross misconduct. The claimant failed to notify his absence in circumstances where he had previously had not so much as received a formal warning in similar circumstances.

87. A second reason given for the claimant's dismissal was the fact that he failed to turn up to a disciplinary hearing for which he was given approximately 24 hours' notice, in circumstances in which Ms Wilks knew that he had lost his phone and was therefore unlikely to have been able to read the invitation to the disciplinary hearing.

88. Although, following his appeal, the claimant was re-instated, Mr Ahmed did not give him any reason why he had issued him with a final written warning, and was still unable to provide a reason, other than the fact that that was what he had been advised to do, at the hearing.

89. Mr Ahmed then responded to the claimant in a dismissive and high-handed manner when the claimant reached out to him to discuss his return to work.

90. I consider that the respondent's conduct was a breach of the implied term of trust and confidence and was repudiatory in nature. Any breach of the implied term of trust and confidence goes to the heart of the contract and is fundamental.

91. The claimant did not affirm the contact and/or waive the breach. He resigned just days after Mr Ahmed's abrupt and dismissive response and there were no relevant intervening events. I therefore find that the claimant did terminate his employment in response to the respondent's repudiatory breach of contract. Accordingly, the claimant was constructively dismissed by the claimant.

92. In this case the employee does not have adequate service to bring a claim of "ordinary" unfair dismissal, hence he will not have a claim for unfair dismissal unless he can show one of the automatically unfair reasons for dismissal. In this case, the claimant relies on his assertion of a statutory right.

Reason for Dismissal

93. I have also concluded that the claimant did make an allegation that the respondent had infringed a relevant statutory right on 7 September 2018, namely the right not to have unauthorised deductions made from his wages.

94. Zico's email written following his discussion with the claimant confirmed that the claimant had said that, if his commission wasn't paid, he would take legal action. The claimant was clearly referring to the commission which he believed should have been paid previously because it related to the last month's payment which had been capped.

95. I also find that the respondent's actions related to the claimant's assertion of his statutory right. It is rare to find such clear evidence of an employer's intentions and desires as set out by Zico Ahmed in his email to Ms Wilks. Although Mr Ahmed tried to argue that there was nothing wrong with the email, because it said it wanted the claimant's employment terminating "lawfully", I find that this email is evidence that the reason he wanted to terminate the claimant's employment was because he had raised the issue of payment of the money he felt he was entitled to.

96. I further find that the reason that the claimant was invited to a disciplinary hearing on this occasion, by Ms Wilks, was the email from Zico Ahmed which specifically requested that the claimant's employment should be terminated as a result of the conversation he had had with him in which he had raised the respondent's failure to pay him his full commission payment.

97. I also find that the claimant alleging the respondent had infringed a relevant statutory right, was the principal reason for dismissal. In reaching that conclusion I rely on the emails from Mr Ahmed to the claimant and the email from Zico, both of which make the respondent's motives clear.

98. Accordingly, the claimant's dismissal was automatically unfair.

99. A remedy hearing will be listed and case management orders will be made.

Employment Judge Rice-Birchall

Date: 24 October 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON
7 November 2019

FOR THE TRIBUNAL OFFICE

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: **2400221/2019**

Name of case: **Mr M Baxendale** v **Uk Healthcare Corporation Limited T/A D-Energi**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: 7 November 2019

"the calculation day" is: 8 November 2019

"the stipulated rate of interest" is: **8%**

MR S ARTINGSTALL
For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at **www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426**

If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".

3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.

4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).

5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.

6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.