



EMPLOYMENT TRIBUNALS

Claimant
Mr V Sharma

Respondent
Lily Communications Ltd

Heard at: CVP

On: 25 March 2021

Before: Employment Judge Davies

Appearances

For the Claimant:

In person

For the Respondent:

Mr D Bunting (counsel)

RESERVED JUDGMENT

1. The complaint of breach of contract in respect of the failure to include mobile phone and car allowances in the Claimant's pay in lieu of notice is dismissed on withdrawal by the Claimant.
2. The complaint of breach of contract/unauthorised deduction from wages in respect of commission payments is well-founded and succeeds. The Respondent shall pay the Claimant **£5093.82**.

REASONS

Introduction

1. These were complaints of breach of contract/unauthorised deduction from wages brought by the Claimant, Mr V Sharma, against his former employer, Lily Communications Ltd. The Claimant represented himself, and the Respondent was represented by Mr Bunting, counsel. The Claimant withdrew the complaint about failure to include his car and phone allowances in his pay in lieu of notice at the start of the hearing. That left his complaint that he was not paid for commission he had earned and was entitled to.
2. The Claimant had also referred in recent documentation to a shortfall in his holiday pay. I explained that he would need to amend his claim to bring a complaint about that and he asked for permission to do so. I refused his application. It was brought outside the time limit for bringing a claim for holiday pay. The Claimant knew how much holiday pay he had been paid when it was explained in an email in December 2020. His claim form was presented a

month later. It was reasonably practicable for him to include the complaint about holiday pay in his original claim form. Allowing the amendment would cause real prejudice to the Respondent, because it would require a separate hearing on a later date. Balancing that against the prejudice to the Claimant, I decided that the application should be refused.

3. The Respondent had produced a file of documents. The Claimant had produced a separate file in response. I made sure everybody had a copy of all the documents. I heard evidence from the Claimant and from Mr P Morrissey, Director of Finance, for the Respondent.

The Claims and Issues

4. The issues for me to decide were:
 - 4.1 Was the complaint about failure to pay for commission brought within the time limit in Article 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994/ s 23 Employment Rights Act 1996?
 - 4.2 If not, was it reasonably practicable to do so?
 - 4.3 If not, was it brought in a reasonable period?
 - 4.4 Was the Claimant contractually entitled to be paid commission on his sales?
 - 4.5 If payment for commission was purely discretionary, did the Respondent breach the implied contractual obligation to exercise that discretion rationally and in good faith?
 - 4.6 If the Respondent breached any of the above terms, what damages should be paid to the Claimant?

The Facts

Basis of commission payment

5. The Claimant applied for the role of Business Development Manager at the Respondent in late 2019. He responded to a job advert that listed among the benefits an “excellent bonus scheme.” The salary was given as £30,000-£100,000 per year. The Claimant was interviewed by Mr J Robertshaw. He specifically asked him about commission, and Mr Robertshaw told him that he would earn 15% commission on all profit. He explained it by reference to the salary range, telling the Claimant that his monthly target would be £35,000 which equated to £420,000 per year. Commission on that figure at 15% would be £63,000 giving rise to OTE salary of £98,000. That was the basis on which the Claimant accepted the role. Mr Robertshaw did not give evidence to me and I accepted the Claimant’s account of the interview. Mr P Morrissey said that Mr Robertshaw had told him yesterday that he, “Did not deny referring to 15% being a possible commission.”
6. The Claimant was provided with a written contract. It did not give the correct figure for his car allowance and he queried that. Once it was corrected, he

signed it. He did not query any of the clauses dealing with commission. The contract included the following clauses:

6. COMMISSION SCHEME

6.1 in addition to your salary the Company may pay you commission of such amount as shall from time to time be determined by the Company in its absolute discretion. Any commission payments will be paid at such intervals and subject to such conditions as the Company may in its absolute discretion determine from time to time.

6.2 Any commission payment to you shall be purely discretionary and there is no contractual entitlement to receive it and it shall not form part of your contractual remuneration or salary for pension purposes or otherwise. If the Company makes a commission payment to you, it shall not be obliged to make subsequent bonus payments in respect of subsequent financial years of the Company.

6.3 Notwithstanding clause 6.2, you shall in any event have no right to commission or a time-apportioned amount of commission if:

(a) Your employment terminates for any reason or you are under notice of termination (whether given by you or the Company) at or prior to the date when a bonus might otherwise have been payable.

6.4 the Company reserves the right in its absolute discretion to terminate or amend any commission scheme without notifying you.

...

12. TERMINATION AND NOTICE PERIOD

...

12.2 Notwithstanding clause 12.1, the Employer may, in its sole and absolute discretion, end the Employment at any time and with immediate effect by notifying the Employee that it is exercising its right under this clause 12.2 and that it will make within 28 days a payment in lieu of notice (Payment in Lieu), or the first instalment of any Payment in Lieu, to the Employee. This Payment in Lieu will be equal to the basic salary (as at the date of termination) which the Employee would have been entitled to receive under this Contract during the notice period referred to at clause 12.1 (or, if notice is already been given, during the remainder of the notice period) less income tax and National Insurance contributions. For the avoidance of doubt, the Payment in Lieu shall not include any element in relation to:

(a) any bonus or commission payments that might otherwise have been due during the period for which the Payment in Lieu is made;

...

7. The Claimant did not consider these provisions or what they meant when he signed the contract. His understanding, based on the interview, was that he was entitled to 15% commission on all sales upfront, which he described as being in line with industry standard practice.
8. The Respondent said first, that there was no contractual entitlement to any commission payment; and, secondly, that the discretionary commission scheme did not in any event provide for 15% upfront. Mr Morrissey's evidence was that commission was not payable at all if the employee did not meet their target; and that if it was payable, there was a range of percentages depending on factors such as the duration of the deal and whether more than one of the Respondent's employees was involved. The Respondent also said that commission on hardware was paid upfront but commission on monthly

recurring services was paid monthly over the duration of the relevant customer contract.

9. In his oral evidence Mr P Morrissey was asked about his calculations of whether the Claimant had met his targets. In his answer he said, “under the rules he was entitled to attribute half of the gross profit [on a particular deal] to his target.” He was asked what rules he was referring to, and he said that the Respondent’s commission structure was changed on 1 January 2020. He referred to a spreadsheet, which had been provided to counsel that day. He went on to say that the new scheme was introduced at a sales meeting on 6 January 2020 by Mr Robertshaw, who handed round a photocopy of the spreadsheet. Mr P Morrissey was not present at the meeting, but Mr Robertshaw had told him yesterday that this happened.
10. The Claimant said that he had never been provided with any commission spreadsheet. At the sales meeting on 6 January 2020 the Claimant had spoken about a presentation he had sent in as had other team members and a representative from a supplier talked about his products. The Tribunal documents included emails about the Claimant’s presentation and the relevant slides.
11. I preferred the Claimant’s evidence about this. It was the only first-hand evidence about the meeting. Further, it was clear from the Claimant’s calculations sent to the Respondent on 22 February 2021 that his case is that he was entitled to commission at 15% of gross profit on all deals. A document setting out a different basis of calculation would obviously be centrally relevant to that, but it was not provided to the Tribunal or the Claimant. In addition, Mr P Morrissey gave evidence in his witness statement that the payment of commission was contingent on the Claimant hitting sales targets. He set out in detail in his witness statement his explanation of why the Claimant must have been aware he had targets. If, as he said in his oral evidence, the whole commission scheme had been provided in writing to the Claimant on 6 January 2020, it is surprising that rather than giving an elaborate explanation of why the Claimant was aware he had targets, his witness statement did not simply refer to the written commission scheme that had been provided to him. I noted that in his email on 22 December 2020 Mr Robertshaw asked the team to prepare presentations for the new business sales conference in January and said that he would send an agenda out. No copy of the agenda was provided to me. The conference was mentioned in the company newsletter on 24 January 2020, and again no mention was made of the new commission scheme being circulated at that conference.
12. I therefore find that the Claimant was not provided with any written commission scheme on 6 January 2020 (or at all). His understanding remained that he was entitled to 15% of gross profit on all deals, upfront. He was not told that it was contingent on his hitting targets. No documentary evidence to suggest that

payment of commission was contingent on targets being met was provided to me and I find that it was not.

13. I further find that it was the expectation and understanding of all parties at this time that, whether or not it was discretionary, commission would be paid in accordance with the applicable scheme. That was clear from the way Mr Morrissey used the language of “rules” and “entitlement.” The Claimant gave evidence, which I accept, that in March 2020 when he was laid off and then put on furlough, both Mr Robertshaw and Mr C Morrissey (Managing Director) assured him that his commissions would come through. That, too, is consistent with an understanding that he would be paid commission he had earned in accordance with the applicable scheme.
14. The Claimant was paid an element of commission on 31 March 2020 (see further below). It was not calculated at 15% of gross profit on the relevant deal. I asked him if he did anything about that. He said that he tried calling Mr Robertshaw and did not get a reply. He did not take it further, in essence because he did not want to cause trouble and having been assured that his commissions would come through.
15. On 23 April 2020 Mr C Morrissey emailed everyone about commissions. He referred to the current commission structure, which he said had been put in place in January for most people. He said that the structure was designed to promote the understanding of Contracted Gross Profit generated by sales and the lifetime value of the contract. It was designed to recognise both immediate and future revenues and reward people on both, “upfront.” The COVID 19 situation had dramatically changed the business landscape and the Company had to regard all its customers as representing greater financial risk than previously. They had therefore decided not to pay sales commissions upfront for contracted revenue the business had not yet received upfront. They would pay commission percentages ongoing on a monthly basis as the business received the revenue. That included all Lily Finance deals, Network Services and any other form of monthly revenue generating CGP. This would not affect the allocation of CGP against people’s targets, which would still be measured and reported, and would not affect upfront GP commissions for lease and [illegible] deals where the business had received monies in advance of commissions being paid.
16. That email was again written in terms that suggested an expectation on all sides that commissions would be paid in accordance with the applicable structure at any relevant time: the email was making clear that because of the changed situation, the Respondent was changing its approach to commissions going forward. The email is also consistent with the Claimant’s understanding that prior to this all commission was payable upfront. Given the terms of Mr C Morrissey’s email, I find that the Claimant’s understanding about this reflected the true position up to 23 April 2020. There was therefore a change in April 2020 as a result of the pandemic, which affected the date at which commission

would become payable. The email did not say anything about the applicable percentage or any other conditions to which the payment of commission was subject.

17. As indicated above, the Claimant was put on furlough with effect from 19 March 2020. On 3 June 2020 the Claimant emailed Mr Robertshaw. In his email he said that he had not been paid any commissions for any deals, which did not sound right because he knew that most of his had been installed and paid. He asked if there was any reason for it. Mr Robertshaw forwarded the message to Mr C Morrissey, who replied on 4 June 2020. He said that no furloughed employee was entitled to or receiving any form of bonus incentive. He said that “morally paying ‘sales’ bonuses to some furloughed staff and not others was unacceptable.”
18. The Claimant remained on furlough until the scheme changed, when he was laid off with effect from 12 August 2020. He was then paid an element of commission in his wages, on 31 August 2020. Mr P Morrissey explained in his oral evidence how that came about. He said that each month he would calculate the commissions due for all staff. For furloughed staff he marked them “deferred.” He discussed each with Mr C Morrissey and Mr C Morrissey decided whether to make any commission payment. A payment was made to the Claimant in August 2020 because he had been laid off. I asked Mr P Morrissey what he meant by “deferred” for the commission payments for furloughed employees and he said, “deferred until they returned to work.” I asked him if that meant the payments would be made when the employees returned to work and he said, “they could have been.”
19. I therefore find that two things happened in respect of commission payments as a result of the pandemic. First, from 23 April 2020, a change was made to the date at which commission would become payable. Secondly, a decision was made that commission for furloughed employees would be deferred and they would not receive any payments *whilst on furlough* but they might receive them when furlough ended.
20. The Claimant did not return to work. It seems he was telephoned on 29 October 2020 and told that he was being dismissed by reason of redundancy with payment in lieu of notice with immediate effect. That dismissal was confirmed in writing the following day.

Specific deals and commission

21. That brings me to the specific deals for which the Claimant says he should have been paid commission. I start by saying that the Claimant supported his figures with detailed calculations for each deal using the Respondent’s profit calculator tool, and the other limited evidence he had available, such as screenshots from the Respondent’s sales ledger and admin reports/deals not completed. The Respondent did not provide any specific evidence in relation to any of the deals, despite having the Claimant’s schedule since 22 February

2021. It simply made assertions without providing any documentary evidence. I had the distinct impression that the Respondent was trying to make it seem that the Claimant had earned little or no commission, without paying proper attention to the underlying factual position. For example, in his written witness statement Mr P Morrissey suggested that the Claimant had not met his target by significant margins in January, February and March 2020. The Claimant then produced a copy of the company newsletter for January 2020, which explicitly recorded that he had met his target in January, his first month. When he gave oral evidence Mr P Morrissey corrected his witness statement. He gave a detailed explanation of why he had initially miscalculated, which suggested a failure to consider the position as of January 2020. No doubt that would not have been corrected if the Claimant had not happened to have the January newsletter. Mr P Morrissey also failed to mention, with reference to targets, that the Claimant had been on furlough for almost half of March. The Claimant also asked Mr P Morrissey about the Sales Performance data for 31 January 2020 that the Claimant had produced. Mr P Morrissey said that the calculation he had made was "based on different data." The Respondent had not provided any different data to the Tribunal. I therefore approached Mr P Morrissey's evidence with a degree of scepticism; it seemed to me more concerned with presenting the lowest possible figures than with presenting accurate figures.

22. I make the following findings about specific deals. I refer to the clients in the Claimant's schedule by their initials, so as to preserve their confidentiality.
- 22.1 *AR*: The deal was concluded on 13 January 2020 and a deposit was taken. The total profit calculated using the Respondent's GP calculator was £2018.36. No commission was ever paid. The Respondent says with no supporting evidence that commission was payable on this deal at 6.75%. The Claimant says that it was payable at 15%. In the absence of any supporting evidence from the Respondent and given my doubts about Mr P Morrissey's evidence, I prefer the Claimant's evidence that £302.75 was payable.
- 22.2 *BA*: the deal was concluded on 22 January 2020 and a deposit was taken. The total profit calculated using the Respondent's GP calculator was £7727. No commission was ever paid. The Respondent said that the deal did not go through, but it did not provide any supporting evidence. The Claimant did not know whether the deal had gone through or not. Although I am doubtful about the Respondent's evidence generally, the burden of proof is on the Claimant and he fairly accepted that he did not know if the deal had gone through or not. I find that it had not.
- 22.3 *BT*: the deal was concluded on 26 February 2020 and a deposit was taken. The total profit calculated using the Respondent's GP calculator was £6315.86. No commission was ever paid. The Respondent says with no supporting evidence that commission was payable on this deal at 5.63%. The Claimant says that it was payable at 15%. In the absence of any supporting evidence from the Respondent and given my doubts about Mr P Morrissey's evidence, I prefer the Claimant's evidence that £947.38 was payable.

- 22.4 *ERA*: the deal was concluded on 2 January 2020 and a deposit was taken. The total profit calculated using the Respondent's GP calculator was £3032.54. No commission was ever paid. The Respondent says with no supporting evidence that commission was payable on this deal at 11.25%. The Claimant says that it was payable at 15%. In the absence of any supporting evidence from the Respondent and given my doubts about Mr P Morrissey's evidence, I prefer the Claimant's evidence that £454.88 was payable.
- 22.5 *LL*: the deal was concluded on 25 February 2020 and a deposit was taken. The profit calculated using the Respondent's GP calculator was £2112.86. This was one of the deals for which an element of commission was paid on 31 August 2020. The Claimant was paid £42.15. The Respondent says with no supporting evidence that commission was payable on this deal at 3.38%. The Claimant says that it was payable at 15%. In the absence of any supporting evidence from the Respondent and given my doubts about Mr P Morrissey's evidence, I prefer the Claimant's evidence that £316.93 was payable.
- 22.6 *MJGM*: the deal was concluded on 17 March 2020 and a deposit was taken. The total profit calculated using the Respondent's GP calculator was £1522.09. The Respondent says with no supporting evidence that commission was payable on this deal at 11.25%. The Claimant says that it was payable at 15%. In the absence of any supporting evidence from the Respondent and given my doubts about Mr P Morrissey's evidence, I prefer the Claimant's evidence that £228.31 was payable.
- 22.7 *MU*: the deal was concluded on 30 January 2020 and a deposit was taken. The total profit calculated using the Respondent's GP profit calculator was £910.18. This was the deal for which an element of commission was paid on 31 March 2020. The Claimant was paid £37.64. The Respondent says with no supporting evidence that commission was payable on this deal at 6.75%. The Claimant says that it was payable at 15%. In the absence of any supporting evidence from the Respondent and given my doubts about Mr P Morrissey's evidence, I prefer the Claimant's evidence that £136.53 was payable.
- 22.8 *MDC*: the Claimant quoted for the deal before going on furlough. At the end of April 2020 the client emailed the Claimant to say that he wanted to go ahead with it. The Claimant explained that he was on furlough and could not deal with it personally at that time. He asked the client whether he was happy for the Claimant to pass him to a colleague to implement or whether he wanted to wait until the Claimant was back. The client said that he wanted to go ahead ASAP and asked to be referred to a colleague. The Claimant passed this on to Mr Robertshaw. In his email he asked Mr Robertshaw to send a contract out on his behalf and said explicitly that he did not want to miss out on commission for a £5000 deal. He had attached the GP calculator. The deal was concluded and the Respondent received cash from the client on 30 July 2020. The total profit calculated in accordance with the Respondent's GP calculator was £5114.19. The Claimant was never paid any commission because the

Respondent attributed the deal to Mr Robertshaw. I accept the Claimant's evidence that £767.13 commission was payable. The Respondent did not provide a figure.

- 22.9 *PG*: the deal was concluded on 6 March 2020 and a deposit was taken. The total profit calculated using the Respondent's GP calculator was £2815.44. No commission was ever paid. The Respondent said that the deal did not go through, but it did not provide any supporting evidence. The Claimant did not know whether the deal had gone through or not. Although I am doubtful about the Respondent's evidence generally, the burden of proof is on the Claimant and he fairly accepted that he did not know if the deal had gone through or not. I find that it had not.
- 22.10 *RWT*: the deal was concluded on 12 March 2020 and a deposit was taken. The total profit calculated using the Respondent's GP profit calculator was £2626.36. This was one of the deals for which an element of commission was paid on 31 August 2020. The Claimant was paid £161.38. The Respondent says with no supporting evidence that commission was payable on this deal at 6.75%. The Claimant says that it was payable at 15%. In the absence of any supporting evidence from the Respondent and given my doubts about Mr P Morrissey's evidence, I prefer the Claimant's evidence that £393.95 was payable.
- 22.11 *SU*: the deal was concluded on 14 January 2020 and a deposit was taken. The total profit calculated using the Respondent's GP calculator was £1670. No commission was ever paid. The Respondent says with no supporting evidence that commission was payable on this deal at 11.25%. The Claimant says that it was payable at 15%. In the absence of any supporting evidence from the Respondent and given my doubts about Mr P Morrissey's evidence, I prefer the Claimant's evidence that £250.50 was payable.
- 22.12 *SO*: the deal was concluded on 16 March 2020 and a deposit was taken. The total profit calculated using the Respondent's GP calculator was £1852.63. No commission was ever paid. The Respondent says with no supporting evidence that commission was payable on this deal at 3.38%. The Claimant says that it was payable at 15%. In the absence of any supporting evidence from the Respondent and given my doubts about Mr P Morrissey's evidence, I prefer the Claimant's evidence that £277.89 was payable.
- 22.13 *TP*: the deal was concluded on 4 February 2020 and a deposit was taken. The total profit calculated using the Respondent's GP calculator was £8391.60. No commission was ever paid. The Respondent says with no supporting evidence that commission was payable on this deal at 11.25%. The Claimant says that it was payable at 15%. In the absence of any supporting evidence from the Respondent and given my doubts about Mr P Morrissey's evidence, I prefer the Claimant's evidence that £1258.74 was payable.
- 22.14 *TO*: the deal was concluded on 2 June 2020 and a deposit was taken. The total profit calculated using the Respondent's GP calculator was £1030.96. No commission was ever paid. The Respondent said that the

deal did not go through, but it did not provide any supporting evidence. The Claimant did not know whether the deal had gone through or not. Although I am doubtful about the Respondent's evidence generally, the burden of proof is on the Claimant and he fairly accepted that he did not know if the deal had gone through or not. I find that it had not.

23. Furthermore, for all deals prior to 23 April 2020, I find that all commission was payable upfront. The only deal after that date was *MD*. Mr P Morrissey's oral evidence was that cash was received from the client at the end of July so the commission would have been payable at the end of August if payable.

Legal principles

24. Breach of contract claims in the Employment Tribunal are governed by the Employment Tribunal's Extension of Jurisdiction (England and Wales) Order 1994. A breach of contract claim can be brought if it arises or is outstanding on the termination of the person's employment. It must be brought within three months of the effective date of termination of the contract (plus early conciliation extension). If it is not reasonably practicable to do so, then time can be extended if it is brought within such further period as the Tribunal considers reasonable.
25. Complaints of unauthorised deduction from wages are governed by the Employment Rights Act 1996. Employers may only make deductions from a worker's wages if they are authorised by a written term of the contract or a prior written agreement. Where the total amount of wages paid on any occasion is less than the total amount of wages properly payable on that occasion, the deficiency is treated as a deduction from the worker's wages. A complaint of unauthorised deduction from wages must be presented to the Tribunal within three months (plus early conciliation extension) of the date of payment of the relevant wages, or, if there is a series of deductions, the date of payment of the last relevant wages. Time can be extended on the same basis as in a breach of contract claim.
26. A failure to pay wages after the termination of employment can be pursued as a breach of contract claim or as a complaint of unauthorised deduction from wages.
27. Whether there is a contractual entitlement to commission is a matter of construing the contract in accordance with standard contractual principles, ascertaining the objective intention of the parties at the time they entered the contract. What would a reasonable person having all the background knowledge available to the parties have understood them to be using the language in the contract to mean? It is well-established in the employment field that the written terms may not always accurately reflect what was actually agreed between the parties and the Tribunal may disregard a written term that is not part of the true agreement: see *Arnold v Britton* [2015] 1 AC 1619; *Autoclenz Ltd v Belcher* [2011] ICR 1157 SC.

28. Where a commission scheme is discretionary, there is still a contractual obligation to exercise that discretion rationally and in good faith: see e.g. *Clark v BET* [1997] IRLR 402 CA; *Horkulak v Cantor Fitzgerald* [2005] ICR 402.

Application of the Law to the Facts

29. Applying those principles to the findings of fact my conclusions on the issues are as follows.
30. The claim was presented within the Tribunal time limits. It can simply be regarded as a breach of contract claim, whether it is based on a contractual entitlement to the commission or on the contractual obligation to exercise discretion rationally and in good faith. The claim was outstanding on termination of the Claimant's employment and was brought within three months (plus early conciliation extension) of the termination of his employment. He started early conciliation on 30 November 2020 and his certificate was issued on 30 December 2020. The claim was presented on 18 January 2021.
31. If the claim is treated as a complaint of unauthorised deduction from wages, the last payment in which commission was paid to the Claimant was 31 August 2020. This was a situation where the Claimant had been assured in March by the managing director and his line manager that his commission would come. He was told that he would not be paid any commission when he was on furlough. He was in fact paid commission in August, when he came off furlough. In those circumstances, this should not be regarded as a complaint about a series of deductions, but as a complaint about a single deduction in August, when the Claimant says the Respondent did not pay him all the commission he was owed and had been assured would come through. The claim was presented within three months plus early conciliation extension of the August payment.
32. I find that the Claimant was not contractually entitled to be paid commission. The written contract was in clear terms. He queried parts of it, but not this part, before he signed it. The terms are unambiguous. The job advert for which he applied did not promise contractual commission and it gave a broad salary range. It did not refer to OTE. Mr Robertshaw may have told him that commission was at 15% and talked him through the calculation that led to OTE of £98,000 with 15% commission, but he was provided with a clear written contract after that date that made clear that the commission was discretionary, and he did not query it. The conduct of the parties after the contract was signed was consistent with commission being discretionary: Mr C Morrisey imposed unilateral changes on 23 April 2020 in view of the pandemic, and there was no suggestion from the Claimant that he was not entitled to do so. I therefore find that under the contract it was a matter for the Respondent in its discretion to decide whether to pay commission, and on what basis.
33. However, it chose to exercise its discretion to pay commission and, having done so, it was contractually obliged to act rationally and in good faith in respect of commission payments. I have found that Mr P Morrisey spoke of "rules" and "entitlements" and that it was the clear expectation and

understanding of both parties that commission would be paid in accordance with the applicable scheme at the relevant time. For the reasons explained in the findings of fact, I have found that the sums payable in principle under the applicable scheme at the relevant time were as set out above.

34. For the reasons explained, I have found that the payment of commission was not contingent on the Claimant meeting targets. To the extent that the Respondent has withheld commission for January on the basis that he did not meet targets, that is not rational. Mr Morrissey accepts that he did meet his target for January. To the extent that the Respondent has withheld commission for February or March on the basis that he did not meet targets, I find that this was irrational or not in good faith, because there was no requirement that he meet targets to be paid commission.
35. I find that the decision not to pay commission to employees on furlough was rational and in good faith. The uncertainty arising from the pandemic was perhaps a paradigm example of a situation in which an employer would want to exercise its discretion as regards commission payments in a different way. However, in view of Mr P Morrissey's evidence, I find that the decision was not to cancel commission payments for furloughed employees, but to defer them. They were marked as "deferred" in the relevant paperwork. That is consistent with Mr C Morrissey's assurance to the Claimant in March 2020 that his commission payments would come through. After his furlough ended, a decision was taken to pay the Claimant some commission. No rational basis or other explanation for paying some but not all of the outstanding commission at that stage was identified in the Respondent's evidence to me. I find that the failure to do so was not in good faith. All parties expected and understood that commission would be payable in accordance with the applicable scheme. The Claimant had earned commission. Mr C Morrissey assured him in March that it would come through. It was marked as "deferred" when he was on furlough. When that ended, payments were made. Those payments should have included all the commission the Claimant was "entitled" to and in the absence of any rationale or justification for that, I find that it was irrational.
36. That includes the commission on the *MDC* contract. The email correspondence provided by the Claimant makes quite clear that this was "his" deal. The client was accepting his quote and wanting to move ahead ASAP. Mr Robertshaw was simply putting the paperwork through because the Claimant was on furlough. Attributing the commission on this deal to Mr Robertshaw is not rational.
37. For all these reasons the Respondent was in breach of its contractual obligation to exercise its discretion with respect to the payment of commission rationally and in good faith. The damages payable to the Claimant are the outstanding commission sums on the deals that did in fact complete, as set out above:
 - 37.1 *AR*: £302.75.
 - 37.2 *BT*: £947.38.
 - 37.3 *ERA*: £454.88.
 - 37.4 *LL*: £316.93 - £42.15 = £274.78.

37.5 *MJGM*: £228.31.
37.6 *MU*: £136.53 - £37.64 = £98.89.
37.7 *MDC*: £767.13.
37.8 *RWT*: £393.95 - £161.38 = £232.57.
37.9 *SU*: £250.50.
37.10 *SO*: £277.89
37.11 *TP*: £1258.74.

38. The total payable is: £5093.82.

Employment Judge Davies
26 March 2021

Date: 29 March 2021