EMPLOYMENT TRIBUNALS

Claimant: Mr C Bursnell

Respondents: Apollo Lighting Limited

Heard: Remotely (by video link) **On:** 24, 25 and 26 May 2021

Before: Employment Judge S Shore

Appearances

For the claimant: In Person
For the respondent: Ms S Cakali, Solicitor

RESERVED JUDGMENT

The decision of the Tribunal is that:

1. The claimant's claim of unfair dismissal (contrary to section 94 of the Employment Rights Act 1996) was not well-founded and fails.

2. The claimant's claims of unauthorised deduction of wages in respect of:

    2.1. Commission on sales not paid for the period between 30 September 2020 and 28 October 2020 when the claimant was suspended from work pending a disciplinary hearing;
    2.2. A failure to pay company sick pay for the period 5 October 2020 to 28 October 2020 as provided for in his contract as Managing Director but, instead, paying SSP;
    2.3. Commission not paid on a deal with White Rose paid at 2.5% of invoice value, rather than 5% of invoice value;
    2.4. Commission on sales recorded in two ledgers in the respondent's accounts systems known as "DMS" and "House";
    2.5. Underpayment of commission paid between September 2019 and August 2020 in the sum of £1,046.88;
    2.6. Commission not paid in October 2020 for sales recorded in September 2020;
    2.7. Commission not paid on a deal with Thornleigh; and
    2.8. Underpayment of holiday pay by not including commission earnings in the calculation of 'a week's pay'.

all fail.

3. The claimant's claim of breach of contract (failure to pay notice pay) is not well-founded and fails.

4. The claimant's Employer's Contract Claim was not well-founded and fails.

REASONS

Introduction

1. The claimant was employed by the respondent, which is a company that manufactures lighting for commercial customers, from 13 June 2011 to 28 October 2020, when his employment ended by his resignation. He was initially employed as a Sales Engineer but was appointed as Managing Director of the respondent on 1 October 2018. He stepped down from the role of Managing Director on 18 March 2019 and became a Specification Sales Engineer. He held that position until his employment ended. The terms and conditions upon which the claimant was employed at various times are a central question in this case.

2. The claimant started early conciliation with ACAS on 15 October 2020 and obtained a conciliation certificate on 13 November 2020. The claimant's ET1 was presented on 21 November 2020.

3. The claimant presented claims of:

    3.1. Unfair dismissal (contrary to section 94 of the Employment Rights Act 1996).

    3.2. Unauthorised deduction of wages (contrary to section 13 of the Employment Rights Act 1996) in respect of:

        3.2.1. Commission on sales not paid for the period between 30 September 2020 and 28 October 2020 when the claimant was suspended from work pending a disciplinary hearing;
        3.2.2. A failure to pay company sick pay for the period [ ] to [28 October 2020] as provided for in his contract as Managing Director but, instead, paying SSP;
        3.2.3. Commission not paid on a deal with White Rose paid at 2.5% of invoice value, rather than 5% of invoice value;
        3.2.4. Commission on sales recorded in two ledgers in the respondent's accounts systems known as "DMS" and "House";
        3.2.5. Underpayment of commission paid between September 2019 and August 2020 in the sum of £1,046.88;
        3.2.6. Commission not paid in October 2020 for sales recorded in September 2020;
        3.2.7. Commission not paid on a deal with Thornleigh; and

3.2.8. Underpayment of holiday pay by not including commission earnings in the calculation of 'a week's pay'.

3.3. Breach of contract (failure to pay notice pay) contrary to Article 4 of The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 by suspending him outside the terms of his contract.

4. The respondent brought an Employer's contract claim relating to some items of property that the claimant had retained on the termination of his employment. However, it offered no evidence of that claim.

5. The unfair dismissal case is about a series of events that the claimant says constitute a breach of the implied term of trust and confidence in his contract of employment with the respondent that culminated in his resignation without notice on 28 October 2020. He set out a series of breaches that led up the final straw in his ET1 [15-16] and produced a further list on the first morning of this hearing.

6. His claims of unauthorised deduction of wages are about failures to pay him commission on sales; paying SSP instead of company sick pay; and miscalculation of holiday pay, which the claimant says was paid at his basic rate of pay and not at an average of his weekly wage that included commission payments.

Issues

7. There was no preliminary hearing in this matter that would have set out the issues to be determined in the case (questions that the Tribunal has to find answers to). I therefore discussed with the parties what the issues were on the first morning of the hearing and we agreed the following list:

8. ***Unfair Dismissal***

8.1. Was the claimant dismissed?

8.1.1. Did the respondent do the acts or omissions listed by the claimant?

8.1.2. Did that breach the implied term of trust and confidence? The Tribunal will need to decide:

8.1.2.1. whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and

8.1.2.2. whether it had reasonable and proper cause for doing so.

8.2. What was the reason or principal reason for dismissal?

8.3. Was it a potentially fair reason?

8.4. Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

8.5. What was the reason or principal reason for dismissal? The respondent says the reason was conduct or some other substantial reason. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

8.6. If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

8.6.1. there were reasonable grounds for that belief;
8.6.2. at the time the belief was formed the respondent had carried out a reasonable investigation;
8.6.3. the respondent otherwise acted in a procedurally fair manner;
8.6.4. dismissal was within the range of reasonable responses.

8.7. If the reason was SOSR, was it a substantial reason capable of justifying dismissal?

8.8. Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

9. ***Remedy for unfair dismissal***

9.1. Does the claimant wish to be reinstated to their previous employment?

9.2. Does the claimant wish to be re-engaged to comparable employment or other suitable employment?

9.3. Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

9.4. Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

9.5. What should the terms of the re-engagement order be?

9.6. If there is a compensatory award, how much should it be? The Tribunal will decide:

9.6.1. What financial losses has the dismissal caused the claimant?
9.6.2. Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
9.6.3. If not, for what period of loss should the claimant be compensated?
9.6.4. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
9.6.5. If so, should the claimant's compensation be reduced? By how much?

9.6.6. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
9.6.7. Did the respondent or the claimant unreasonably fail to comply with it?
9.6.8. If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
9.6.9. If the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?
9.6.10. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
9.6.11. Does the statutory cap of fifty-two weeks' pay apply?

9.7. What basic award is payable to the claimant, if any?

9.8. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

10. ***Holiday Pay (Working Time Regulations 1998)***

10.1. What was the claimant's leave year?

10.2. How much of the leave year had passed when the claimant's employment ended?

10.3. How much leave had accrued for the year by that date?

10.4. How much paid leave had the claimant taken in the year?

10.5. Were any days carried over from previous holiday years?

10.6. How many days remain unpaid?

10.7. What is the relevant daily rate of pay?

11. ***Unauthorised Deductions***

11.1. Were the wages paid to the claimant less than the wages he should have been paid?

11.2. Was any deduction required or authorised by statute?

11.3. Was any deduction required or authorised by a written term of the contract?

11.4. Did the claimant have a copy of the contract or written notice of the contract term before the deduction was made?

11.5. Did the claimant agree in writing to the deduction before it was made?

11.6. How much is the claimant owed?

12. Once the issues had been agreed on the first morning of the hearing, I advised the parties that I would determine liability only in the first instance and would then move on to remedy if the claimant was successful in one or more of his claims. At the end of closing submissions, I advised the parties that I felt that I had enough information and evidence to make a determination on remedy in respect of the money claims, but would make a decision on liability only in respect of the unfair dismissal claim. If the claimant succeeded in that claim, I would relist the case for a remedy hearing. In the light of my decision on unfair dismissal, no remedy hearing is required.

Law

7. For the purposes of the unfair dismissal claim, the relevant sections of the Employment Rights Act 1996 are ss.95(1) and 98.

> *"Section 95: Circumstances in which an employee is dismissed*
>
> *(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) ..., only if)—*
>
> *(a) the contract under which he is employed is terminated by the employer (whether with or without notice),*
>
> *[(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or]*
>
> *(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."*
>
> *"Section 98 Employment Rights Act 1996*
>
> *(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-*
>
> *(a) the reason (or, if more than one, the principal reason) for the dismissal, and*
>
> *(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
>
> *(2) A reason falls within this subsection if it-*
>
> *(a) Relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,*
>
> *(b) Relates to the conduct of the employee,*
>
> *(c) Is that the employee was redundant, or*

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a)"capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b)"qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal was fair or unfair (having regard to the reason shown by the employer)-

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

8. The House of Lords established that there is an implied term of trust and confidence between employer and employee in ***Malik v Bank of Credit and Commerce International SA*** [1997] ICR 606.The term (often referred to as 'the T & C term') was held to be as follows:

> *"The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."*

9. The test was refined by the EAT in ***Leeds Dental Team Ltd v Rose*** *[2014] IRLR 8*. As Judge Burke put it:

> *"The test does not require a Tribunal to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and confidence, then he is taken to have the objective intention spoken of…"*

10. A deduction from a worker's wages is unlawful unless one of the limited exceptions set out in section 13(1) of the Employment Rights Act 1996 is satisfied. Section 13(1)(b) provides for one such exception where the worker has previously signified in writing his consent to the making of the deduction. This case was about alleged underpayments by the respondent.

11. Under Regulation 14 of the Working Time Regulations 1998, employees are entitled to accrued untaken holiday outstanding at the date of termination. This can be enforced by way of a claim for an unauthorised deductions from wages under section 13 of the Employment Rights Act 1996.

12. Breach of contract claims are based on the common law (a set of rules built up over a very long period time by decisions of the Courts.

Housekeeping

13. The claimant was unrepresented. I advised him that the Tribunal operates on a set of Rules. Rule 2 sets out the overriding objective of the Tribunal (its main purpose), which is to deal with cases justly and fairly. It is reproduced here:

> *The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable —*
>
> *(a) ensuring that the parties are on an equal footing;*
> *(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;*
> *(c) avoiding unnecessary formality and seeking flexibility in the proceedings;*
> *(d) avoiding delay, so far as compatible with proper consideration of the issues; and*
> *(e) saving expense.*
>
> *A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.*

14. I tried to ensure that I answered any questions that the claimant had about the procedure of the Tribunal and the relevant law. I also attempted to deal with the hearing in a flexible way that maximised the possibility of achieving a just and fair result.

15. The parties produced a joint bundle of 638 pages. The claimant and respondent did not agree on some documents and the claimant produced his own bundle, which I did not need to refer to. If I refer to pages in the bundle, the page number(s) will be in square brackets [ ]. I discussed the issue of documents with the parties, as I had seen correspondence between the parties and the Tribunal that suggested that the claimant was unhappy that some documents that he regarded as important had not been included in the final bundle. It was also intimated that he had produced his own bundle.

16. The claimant confirmed that there had been some disagreements about the contents of the bundle, but that many of the disputed pages had been added to the bundle late in the day by the respondent. The claimant was still unhappy that some documents had not been included, so I asked him to send me his bundle, which he did. I have not referred to any of the documents in the claimant's bundle in this decision.

17. Neither party asked for an adjournment to seek further disclosure or for any other reasons. Both were content to proceed with the documents that were available.

18. There were some additional documents added to the bundle on the final day. The respondent produced some additional payslips for the claimant for January, April, May and August 2020, a spreadsheet of commissions paid to the claimant from August 2019 to October 2020, and a chronology and cast list.

19. I had not finished reading the bundle when the hearing started at 10:00am on the first morning, so I adjourned the hearing to complete my reading until 1:30pm, after I had confirmed what the claimant was claiming, what the issues were, and how the hearing would be timetabled.

20. The claimant gave evidence in support of his claims. His evidence in chief was a witness statement dated 29 April 2021 that consisted of 147 paragraphs.

21. Evidence was given in person on behalf of the respondent by:

    22.1. Lynn Parker, the Commercial Director of the respondent. Her witness statement dated 6 May 2021 consisted of 23 paragraphs.

    22.2. Geoff Falkingham, the Chairman of the respondent. His witness statement dated 10 May 2021 consisted of 29 paragraphs.

    22.3. Julie Merritt, Sales Support Manager of the respondent. Her witness statement dated 6 May 2021 consisted of 16 paragraphs.

    22.4. Rajendra Lilapurwala, Senior Lighting Design Engineer with the respondent. His witness statement dated 5 May 2021 consisted of 7 paragraphs.

23. All the witnesses gave evidence on affirmation. The claimant gave evidence first and was cross-examined by Ms Cakali. The respondent's witnesses were cross-examined by the claimant. I asked some questions of some of the witnesses.

24. At the end of the evidence, at the start of the third day, I received written and heard closing submissions from Ms Cakali and Mr Bursnell. I indicated that my decision could be reserved if I was not able to complete my deliberations and write a judgment and reasons in the time available. I realised by lunchtime on the third day that my Judgment would have to be reserved and asked my clerk to contact the parties and advise them that they would not be required to attend a remote video hearing to hear the Judgment and Reasons.

25. The hearing was conducted by video on the CVP application and ran reasonably smoothly, with some technical issues. I am grateful to all who attended the hearing for their patience and good humour in the face of a few technical glitches.

Findings of Fact

26. All findings of fact were made on the balance of probabilities. If a matter was in dispute, I will set out the reasons why I decided to prefer one party's case over the other. If there was no dispute over a matter, I will either record that with the finding

or make no comment as to the reason that a particular finding was made. I have not dealt with every single matter that was raised in evidence or the documents. I have only dealt with matters that I found relevant to the issues I have had to determine.

27. Some of the facts in this case were not disputed, so I set them out here:

    27.1. The respondent is a company that manufactures and supplies lighting for the healthcare, commercial, and sports sector and architectural lighting.

    27.2. The claimant was employed by the respondent from 13 June 2011 to 28 October 2020, when his employment ended by his resignation. He was initially employed as a Sales Engineer but was appointed as Managing Director of the respondent on 1 October 2018.

    27.3. He stepped down from the role of Managing Director on 18 March 2019 and became a Specification Sales Engineer. He held that position until his employment ended.

    27.4. The claimant was a valued member of the respondent's workforce and was one of its top salespeople.

    27.5. The claimant started early conciliation with ACAS on 15 October 2020 and obtained a conciliation certificate on 13 November 2020. The claimant's ET1 was presented on 21 November 2020.

    27.6. The respondent had a sales team that earned commission on sales. I will discuss the way that commissions operated below. It was agreed by the parties that, in addition to sales ledgers kept for individual sales people, the respondent had formed two ledgers called "RMS" and "House". Sales that were not allocated to an individual member of the sales team were placed in the RMS or House ledgers. The parties spent a lot of time arguing whose idea the accounts had been and how the respondent had used them. I find that I do not need to determine either issue, as both parties agreed that the amount of sales recorded in the accounts were correct, as were the dates of the transactions, so I was able to use the records to determine some of the issues in the case.

    27.7. The parties spent a lot of time on the issue of the share options (EMI) granted to the claimant. I find that the only relevance of the Emi options was as part of the claimant's claim of unfair dismissal, as one of the acts of the respondent that led to the alleged breach of the duty of trust and confidence.

28. In general, I found the respondent's methods of dealing with HR issues to lack expertise. No evidence was produced that indicated that any of the witnesses for the respondent had any HR expertise and it was mentioned that a previous HR Business Partner had been dismissed and not replaced. I will highlight in these reasons a number of instances where the absence of an HR professional in the respondent's business led directly to it making decisions about HR that it may not have done with better advice.

29. It was not disputed that the claimant entered into a contract dated 13 June 2011 with the respondent [32-33]. The provisions relating to the disciplinary policy and procedure were contained in a separate document that was attached to the contract, but not produced in the bundle. It was agreed by both parties that the relevant disciplinary provisions were contained in the Company Handbook, and were produced at pages 589 to 592 of the bundle.

30. On taking up the role of Managing Director of the respondent on 1 October 2018, the claimant entered into what was described as an "Amended Director's Service Agreement" that was dated 1 October 2018 [43-54]. This agreement stated that the Company Handbook contained the relevant disciplinary provisions. I therefore find that whatever contract the claimant was on in 2020, he was subject to the disciplinary provisions in the respondent's Company Handbook.

31. It was agreed by the parties that the claimant's remuneration as Managing Director contained no provision for commission payments of any kind. I find that it was agreed by the parties that Mr Falkingham proposed to grant the claimant options to purchase shares in the respondent at a very considerable discount. The negotiations and preparation of legal documents meant that the final EMI Option Agreement ("the EMI") was not executed until 12 April 2019 [58-92].

32. I find that the EMI only granted the claimant an option to buy discounted shares because this was obvious from the document. I also find that the option could only be exercised by the claimant if he was an employee of the respondent because this was clear from the document (Clauses 4.5.5 and 5 – [66 and 67]). The option could only be exercised if an "Exit" occurred (Clause 4 [65-66]). An Exit was defined as either a share sale; an asset sale; a listing; or a capital raising that the Board of the respondent determined was an Exit. It was not suggested by the respondent that the EMI contained a clause requiring the claimant to relinquish his option if he ceased to be Managing Director or a member of the Board of the respondent. I could find no such clause in the EMI.

33. I find that the claimant sought to relinquish the role of Managing Director in early 2019. The reason why he did this was disputed, but I find that the claimant's motivation is not relevant to the issues in this case. It was agreed that the claimant entered into a single-page agreement with the respondent dated 18 March 2019 [55], the principal clauses of which were:

    33.1. Role: Specification Sales Engineer;
    33.2. 4 days per week;
    33.3. Area: North Midlands and Ireland. Inclusive of postcodes ST, TF, SY, LL, BT, CH, CW, WA, L, WIN, BL, OL, FY, PR, BB and M;
    33.4. 20 days holiday per year;
    33.5. Claimant's existing company vehicle to remain until the expiry of its lease, whereupon the position will be reviewed;
    33.6. £25,000 salary p.a.;
    33.7. Existing remuneration package [as MD] to remain in place for the claimant's 3-month notice period in order to regain sales presence in the target region;

33.8. Whilst existing sales figures will remain valid, sales invoiced for the region during the 3-month notice period will not be subject to commission;
33.9. Commission @ 5% will be paid on all invoiced sales from 18 June 2019
33.10. Pension contribution £7,000 p.a.
33.11. Commission on invoiced sales – 5% on all sales above £100k in the company financial year, August 1 to July 31; and
33.12. EMI Scheme – to be discussed and % agreed.

34. As was obvious from the positions taken by the parties in their respective evidence in chief and oral evidence, the agreement left a number of significant matters unresolved. I have to determine what the clauses above mean and how they should have been applied.

35. It is very basic law that in order for there to be a contract between parties there must be an offer that is clearly accepted and that consideration has to pass between the parties to the contract.

36. Where a contract is varied, the party to whom the variation is offered, must unequivocally to agree the change. Sometimes it is possible to imply such an agreement by conduct but not always. In **Abrahall v Nottinghamshire County Council** [2018] ICR 1425, Underhill LJ said that whether there has been agreement by conduct will very much depend upon the circumstances.

37. Where a party offered a contract makes a counter-offer, the same rules apply. It must be unequivocally accepted by the Respondent, but in some cases, conduct will be evidence that a party has accepted the change.

38. The contract should be interpreted according to the natural meaning of its words and to ensure that it is internally consistent.

39. The agreement opened with the statement that the conditions set out in the single page document [55] were "…in addition to all standard terms of employment." I therefore have to determine what the 'standard terms of employment' were. The claimant says that they are the terms within his contract as Managing Director [43-54], whilst the respondent says that they are the terms in the claimant's original contract from 2011 [32-33].

40. I find that there was agreement between the parties as to the terms of the new agreement, as I was not presented with any evidence that the claimant did not agree with the new agreement and did not seek to challenge any of its provisions until this litigation began.

41. It was agreed that the claimant was removed as a director of the respondent at Companies House on 18 March 2019. The claimant says he was unaware of this at the time, but I find that whether or not he was aware of his removal is not a material factor in this case because he agreed that he had stepped down as Managing Director to a post that did not carry a title that included the word 'director' and that he could not have reasonably expected to have remained on the Board. I also note

that there was no evidence produced that the claimant protested his removal or queried why he was no longer invited to Board meetings.

42. I find that whilst the terms of the agreement that were in dispute before me took some thought to ascertain, by using the natural meaning of the words in the amendment dated 18 March 2019, the terms of the claimant's employment from that date were as follows:

    42.1. The claimant's role had changed to that of Specification Sales Engineer. That is a substantially different role to that of Managing Director, as it removed virtually all the claimant's function as the chief executive of the respondent, as was agreed in evidence;
    42.2. His working week was reduced to 4 days per week. This was agreed between the parties and demonstrated in the oral and written evidence and the documents;
    42.3. The title of the document "Changes to Contract of Employment" does not mean that all the terms of the claimant's contract as Managing Director [43-54] were preserved with the exception of the specific terms set out in the 19 March 2019 document [55] because that document specifies that the changes in the 19 March document were "…in addition to all standard terms of employment."
    42.4. The "standard terms" were those issued to all employees and are distinguishable from the enhanced terms issues to the claimant as Managing Director. I make this finding by applying the natural meaning of the words in the document [55];
    42.5. The fundamental nature of what the claimant did in his employment had changed from a managerial role with some sales to a sales role with very little, if any, management. That was accepted by both parties;
    42.6. The claimant was to paid a basic salary of £25,000 p.a., which was a substantial reduction from his previous salary as MD of around £50,000 p.a.;
    42.7. The reason for the substantial reduction in the basic salary was that it was the intention of both parties to reintroduce a commission element to the claimant's earnings. It was the claimant's undisputed evidence that it was the intention of the parties that the claimant would end up with a total remuneration package under the new agreement that made him no worse off than his package as MD;
    42.8. As there would be a transition from a salary-only post as MD to a small basic salary with large substantial potential commission, it was agreed that the claimant's existing remuneration package as MD would remain in place for three months to 19 June 2019, in order to regain sales presence in the target region;
    42.9. The claimant's target region was agreed as North Midlands and Ireland, inclusive of postcodes ST, TF, SY, LL, BT, CH, CW, WA, L, WIN, BL, OL, FY, PR, BB and M;
    42.10. Any sales invoiced for the region during the 3-month period to 19 June would not be subject to commission;
    42.11. Commission at the rate of 5% will be paid on all invoiced sales from 18 June 2019;

42.12. The 5% commission was only payable on sales above £100k in the company financial year, August 1 to July 31;
42.13. The claimant became subject to the standard term on commission in the Company Handbook [56];
42.14. The claimant's pro-rata holiday entitlement was 20 days holiday per year, as he worked a 4-day week;
42.15. The claimant was permitted to keep his existing company vehicle until the expiry of its lease, whereupon the position was to be reviewed;
42.16. The respondent would make a contribution to the claimant's pension of £7,000 p.a.; and
42.17. The EMI Scheme was to be discussed and the terms agreed.

43. I find that the question of the EMI Scheme was discussed and agreed, as evidenced by the document dated 12 April 2019 [58-62]. Whilst it is an obvious point, I note that the EMI agreement was signed after the claimant stepped down as MD, which makes some of Mr Falkingham's subsequent actions puzzling.

44. I will now deal with the claimant's money claims that arose before his employment ended, as it is accepted law that a failure to pay an employee can be a fundamental breach of contract on its own. These claims are set out in paragraph 3.2 above:

41.1. A failure to pay company sick pay for the period 5 October 2019 to 28 October 2020 as provided for in his contract as Managing Director but, instead, paying SSP;

41.2. Commission on sales not paid for the period between 30 September 2020 and 28 October 2020 when the claimant was suspended from work pending a disciplinary hearing;

41.3. Underpayment of commission on a deal with White Rose paid at 2.5% of invoice value, rather than 5% of invoice value;

41.4. Commission on sales recorded in two ledgers in the respondent's accounts systems known as "DMS" and "House";

41.5. Underpayment of commission paid between September 2019 and August 2020 in the sum of £1,046.88;

41.6. Commission not paid on a deal with Thornleigh;

41.7. Underpayment of holiday pay by not including commission earnings in the calculation of 'a week's pay'; and

41.8. Commission not paid in October 2020 for sales recorded in September 2020.

<u>General Findings on Money Claims</u>

42. I find that the respondent and the claimant have both contributed to the confusion on the whole issue of commissions and other money claims. The respondent has not been open and transparent in the preparation of its case (best demonstrated by the late production of sales figures) and the claimant has made a number of assumptions and projections about his entitlements. The parties used different methods of calculating commission payments, wages and holiday pay: the respondent calculated only the commission element, which was the only part in dispute, whilst the claimant calculated his total entitlement.

43. The respondent acknowledged that it had historically failed to apply the correct method of calculating holiday pay. It had based holiday pay on the basic salary of all its employees. As a result of the complaint made by the claimant, it recalculated back holiday pay for all its employees (including the claimant) and repaid the sums it admitted were due.

44. The respondent also acknowledged that it had miscalculated the commission due to the claimant over a period of time and had to make the payments of £7,201.93 in September 2020 and £4,390.33 in November 2020.

45. The issue of commissions was raised by the claimant on his return from furlough in July 2020 with Ms Parker. The claimant notice that he had not been credited with commission on a project called "White Rose". Ms Parker pointed the claimant in the direction of Mr Falkingham.

46. The claimant then started to investigate other projects and emailed Mr Falkingham on 11 August 2020 [357] raising concerns about commissions and holiday pay.

47. Mr Falkingham responded by email on 13 August 2020 [356-357] with a brusque rebuttal of the commission claim on White Rose. He did accept that the method of calculating holiday pay had been incorrect, promised that the error would be corrected and offered an apology for any distress caused. I will return to this email, as it plays a central part in the unfair dismissal claim.

48. The claimant raised points about unauthorised deductions from wages in an undated grievance letter [388-389] attached to an email dated 23 August 2020 [387]. For the avoidance of doubt, I do not find the claimant's letter to be privileged (i.e. written 'without prejudice'), as it is a grievance. The letter rehearses the claimant's view of the history that led him to step down as MD of the respondent before moving on to the issue of his share options, which I find to be of limited importance to the issues of this case, other than as an act leading to the alleged breakdown of trust and confidence.

49. The claimant raised queries about the lack of commissions credited to him and raised the possibility that sales had been allocated somewhere other than his ledger [389].

50. He also raised the calculation of a week's pay for holiday pay.

51. Ms Parker responded to the claimant's letter on 25 August 2020 and advised that Mr Falkingham was coming into the office that day and would respond. In fact, Ms Parker responded herself and advised the claimant that she had discovered that he had sent emails to his personal email account from his work email account, and whilst his grievance would be dealt with separately, he was required to attend an investigatory meeting into the emails on 3 September 2020 [395].

52. The claimant wrote to the respondent on 25 August 2020 [396]. The letter was marked 'without prejudice' and I find it attracts litigation privilege, so I did not consider its contents in making this decision. Neither party objected to my decision.

53. The meeting on 3 September 2020 discussed the emails that the claimant had sent to his personal account, but also went into some detail about commission and other payments that the claimant said he was due. The claimant made a recording of the meeting and produced a transcript that the respondent initially accepted as accurate [461-475]. There was a dispute about whether the claimant's recording of the meeting was covert or not. I find the point immaterial. As the claimant produced

a copy of the recording to the respondent which produced no alternative transcript, I find that the claimant's transcript [461-475] is an accurate record of the meeting.

54. During the meeting, Ms Parker advised the claimant that she'd report to the claimant about the commission and thought it was "…just over £9,000...". I find that it is highly likely that she was talking about the total of the figures for White Rose, ATEX and ZZZ ledger, which I have set out in paragraph 56 below.

55. The respondent produced its own notes of the meeting [405-406], which are materially different from the claimant's transcript. Where the two documents are contradictory, I prefer the claimant's transcript.

56. Ms Parker, on behalf of the respondent, advised the clamant that she would investigate and pay the claimant what he was owed [467]. Ms Parker emailed Mr Falkingham on 7 September 2020 and advised him that she thought that the claimant was owed £9,617.66, which was made up of:

    56.1. White Rose - £4,831.47 (agreed by the parties to be 5% of sales);

    56.2. ATEX - £2,581.58; and

    56.3. ZZZZ ledger - £2,204.61

57. Ms Parker advised that the claimant was not entitled to commission on the Thornleigh project because it was brought in while he was MD. She indicated that work was ongoing on the commission element of holiday pay.

58. Ms Parker wrote to the claimant on 11 September 2020 [413-416] setting out her response to his grievance and her calculation of his entitlement to commission of £4,786.19 (the ATEX and ZZZZ figures) plus £2,415.74, being 2.5% of the White Rose sales. The reason given for the rate on the White Rose project was that it was not accepted by the respondent that the claimant had been involved in phases 2 and 3 of the project, but 2.5% was offered as a gesture of goodwill.

59. The issue of the calculation of holiday pay was addressed and the claimant was advised that the respondent acknowledged that holiday pay should be calculated inclusive of commission and would be recalculated and paid for a period going back 2 years.

60. The end of Ms Parker's letter contained a declaration that "Grievances raised as per my letter to Lynn Parker (Commercial Director) on 13 August 2020 have been responded to a satisfactory manner on 11 September 2020 and are now settled" [416]. There was then a space for both parties to sign and date the agreement.

61. The claimant returned the letter with his signature dated 16 September 2020. He accepts that he had added the words "WITHOUT PREJUDICE" in very faint type and had signed over the top of them.

62. I find that the claimant had accepted the terms contained in the respondent's letter of 11 September, as it had contained a definite offer that he had accepted. The use of the words "without prejudice' did not stop his signature from binding him. He has misunderstood how privilege works.

63. It was agreed by the parties that the respondent made two payments to the claimant in respect of commission and holiday pay. The first was through a payslip dated 25 September 2020 [419]; which included:

63.1. Commission = £7,201.93.

The second was through a payslip dated 25 November 2020 [454], which included:

63.2. 15 days' holiday pay outstanding at the date of termination at £119.62 per day = £1,794.30;

63.3. Back pay of holiday pay for 2018 to include commission = £1,656.13;

63.4. Back pay of holiday pay for 2109 to include commission = £1,794.18; and

63.5. Back pay of holiday pay for 2020 to include commission = £1,036.02.

SSP

64. The claimant's entitlement to sick pay was at the SSP rate, as provided for by the 'standard contract', not the company sick pay scheme that he was formerly entitled to under his contract as MD. I make that finding on my interpretation of his contractual position with the respondent following 19 March 2019 as set out in paragraph 42 above.

Non-payment of commission whilst suspended

65. The claimant was suspended from 30 September 2020 to 28 October 2020, when his employment ended. The key point in this head of claim was the calculation of the claimant's sales and commission after 19 March 2019. The claimant argued in his schedule of loss that he was entitled to payment whilst suspended calculated in the same way as holiday pay: an average of his basic salary plus an average of his commission.

66. I find that the claimant's rationale as set out in his schedule of loss is too simplistic because it did not take into account the term of the claimant's contract (as set out in paragraph 38.14 above) that commission was only due on sales once a threshold level of sales of £100,000 had been met each year, beginning with the start of the respondent's financial year on 1 August. He did address the issue, however, in evidence and closing submissions.

67. The respondent's position is that the claimant's sales from 1 August 2020 to the end of his employment did not hit the £100,000 threshold, so no commission was payable. The claimant said that he was paid arrears of commission of £7,201.93 gross in September 2019 and 34,390.33 in November 2019, which equate to sales of approximately £192,000, so commission should be calculated and paid. His rationale was commission accrues on the date that the sales are credited to him, which was on payment in September and November.

68. The spreadsheet that the respondent produced on the final morning of the hearing recorded that the claimant had achieved sales of £16,280.00 in August 2020; £14,334.00 in September 2020; and £7,856.00 in October 2020. His total sales in the financial year starting on 1 August 2020 was therefore £38,470.00. The claimant did not raise objection to the figures produced, so I find that he accepted them as an accurate record of his contemporaneous sales.

69. I find that the correct analysis of the historical underpayments of commissions payable to the claimant are that they were accrued in the months that they were recorded to the DMS or House ledgers, not when they were actually paid to the claimant. I make that finding because the Company Handbook on commissions [56] states that "Commission is only payable in respect of monies actually received from clients or customers…", which I find means that the commission is due and payable when the customer pays. The outstanding sums paid in September and November 2020 had been accrued in the previous financial year.

70. I therefore find that the claimant's argument on commission during his period of suspension fails because he did not achieve the threshold of £100,000 of sales, so the claimant's assertion that he had hit the £100,000 threshold is not made out and that part of his claim fails.

Commission on the White Rose Deal

71. I find that it was agreed by the parties that the amount in dispute in this head of claim was the difference between commission paid at 2.5% of the sales value following the claimant's grievance and his claim that he should have been paid 5% commission as provided for by his contract. The amount in dispute was £2,415.35.

72. The respondent's rationale for paying commission at the rate of 2.5% was that the claimant had initiated contact with the original contractor on the White Rose project some years earlier, but the CRM system had not logged any input from him for some time. The original contractor had been removed from the project and replaced, and the claimant had played no part in landing the new contractor. The claimant said that he had made the initial contact, so the deal was his.

73. I find that whilst the claimant may have had an argument for a payment of 5% commission on the White Rose deal, he accepted an offer of 2.5% when he signed the respondent's grievance outcome on 16 September, so that claim fails.

Commission on "Hidden" Sales

74. The claimant's claim under this head relates to sales that he says were his, but which were allocated to "House" ledger. The schedule made no reference to the DMS ledger and his witness statement was silent on the matter. In his schedule of loss, he says that House accounts extrapolated for the missing month [July 2020] indicate House sales of £872,324 for the year.

75. He then refers to page 481 of the bundle, which is his calculation of sales for the period 1 August 2019 to 30 June 2020. The claimant calculates that the total House sales for the 11-month period was £799,631, so by dividing this figure by 11 and multiplying it by 12, the total annual sales credited to the House ledger were £872,324 and that as he was responsible for 28% of the respondent's sales, he is entitled to 5% of that figure.

76. The Court of Appeal in **Coors Brewers Ltd v Adcock** [2007] EWCA Civ 19 decided that in order for an employment tribunal to have jurisdiction to hear an

unlawful deductions claim; the claim must be in respect of an 'identifiable sum.' I find it impossible to say how much commission that claimant would have been eligible for in July 2020.

77. The first task that a judge has to determine in these cases is what the contractual entitlement of the claimant was. I have already done that: it is 5% of the value of sales credited to him over a threshold of £100,000 in any financial year beginning on 1 August. The figures from the House ledger must exist, but were not produced. The claimant made no application to adjourn for specific disclosure of the figures and I therefore find that the figure cannot be extrapolated and that the Tribunal has no jurisdiction to hear this head of claim. It therefore fails.

Underpayment of commission paid between September 2019 and August 2020

78. This head of claim relates to the claimant's interpretation of a screenshot showing his total sales for the financial year to 31 July 2020 at £485,849.68. He says that 5% of that figure would be £19,292.48 and he only received £18,245.60, leaving a shortfall of £1,046.88.

79. However, under cross-examination, the claimant accepted that an invoice from a customer had been entered twice in his ledger and that he had not noticed it until it had been pointed out to him. He agreed that the claim for £1,046.88 was incorrect because of the double entry in the account. I find that it was agreed between the parties that this head of the claim fails.

Commission not paid on a deal with Thornleigh

80. The dispute between the parties on this head of claim concerned the timing of the deal. The respondent's position was that the deal had been brought in when the claimant was MD and therefore was not entitled to commission. The claimant's position was that the 'sale' was invoiced to the claimant's area on 21 June 2019. The fact of the sale and the date it was credited were not disputed by the respondent.

81. I have to look at the terms of the contract between the claimant. I repeat my findings on those terms at paragraphs 42.10 and 42.11 above:

    81.1. Any sales invoiced for the region during the 3-month period to 19 June would not be subject to commission;
    81.2. Commission at the rate of 5% will be paid on all invoiced sales from 18 June 2019;

82. I find that any analysis of the terms using the natural meaning of the language of the contract results in a finding that the claimant was entitled to commission in the sum of £1,046.88.

83. However, the claimant signed an agreement with the respondent dated 16 September 2020 that accepted a sum of money in full and final settlement of all his outstanding claims for commission at the time, which included the Thornleigh commission. He is therefore estopped from pursuing the matter in the Tribunal.

84. Further, as this payment is the only money claim for unauthorised deduction of wages that I find to be meritorious, the claimant did not bring the claim within the prescribed time period for making a complaint to the Tribunal: within three months from the date that the payment was due to him. He therefore would fall foul of the provisions of section 23(2) of the Employment Rights Act 1996, as he never suggested that it was not reasonably practicable for him to have presented the claim in time.

Underpayment of holiday pay by not including commission earnings in the calculation of 'a week's pay'

85. The claimant's case is that he was paid £1,036.02 for the recalculated entitlement that included commission in November 2020, but that he had been underpaid by £509.44 for 5 days taken in July 2020 and £1,695.56 underpaid for the 15 days he had accrued but not taken in the holiday year.

86. I find that the claimant's case was founded on a misunderstanding of the law on holiday pay. I have some empathy with his position. The claimant's standard terms [32-33] state that "Holiday will only be paid where entitlement has been accrued" [32].

87. It was agreed by the parties that the respondent's holiday year began on 1 January each year, so as at the date of termination of employment (28 October 2020), the respondent submitted that the claimant had accrued a right to 19.5 days' leave. I respectfully disagree with this figure. I calculate his total holiday entitlement on termination for the expired portion of the holiday year to be 18.5 days, inclusive of Bank Holidays.

88. It was agreed by the claimant that he had been paid for 6 Bank Holidays in 2020 and took 5 days' leave in that holiday year.

89. I therefore find that on termination of employment, the claimant was entitled to 7.5 days' holiday accrued but not taken. The respondent accepted in Ms Cakali's closing submissions that the correct method of calculating the claimant's entitlement to holiday pay is by a rolling 52-week average.

90. The claimant had gone to a considerable amount of time and trouble to create a rolling 52-week average of his daily wage in his schedule of loss (his figures were gross, not net). I was faced with the task of either going through the claimant's 52-week rolling average, or looking at the case that the claimant presented against what had been agreed he had been paid. I decided to take the second option and see what that produced when considered in the light of my findings of fact. In doing so, I have not made any finding as to the accuracy of the claimant's rolling daily rate figure, but have made the logical deduction that his claim could not be higher than the figure produced by using his mathematics.

91. In his schedule of loss, the claimant said that he had been paid £528.02 in holiday pay for the 5 days taken in July 2020. He claimed that at this time, he was earning

£207.02 per day, so his entitlement should have been £1,087.46. The difference he claimed he was owed was £509.44.

92. His calculation for his closing holiday payment in October was that he had been paid £1,794.30 for 15 days' holiday accrued but not taken, was entitled to 15 x £232.66 = £3,489.86, so was owed £1,695.56.

93. The claimant submitted that the total owed was £509.44 + £1,695.56 = £2,205.00 less the £1,036.02 paid in November 2020 = £1,168.98.

94. I find that (using the claimant's rolling daily rate figures and applying my findings of fact) he was entitled to 7.5 days' holiday pay accrued but untaken on termination of employment. 7.5 x £232.66 = £1,744.95.

95. Using the claimant's own rolling figures for his gross daily rate of pay, the total holiday pay that the claimant was entitled to for the holiday year to 28 October 2020 was £1,087.46 (5 days x £207.49 in July) + £1,744.95 (7.5 days x £232.66) = £2,832.41.

96. I find that the parties agreed that the claimant was paid £528.02 (July 2020 payslip) + £1,794.30 (October 2020 payslip) + £1,036.02 (back pay of holiday pay for 2020 to include commission paid in November 2020) = £3,358.34.

97. I therefore find that the claimant was paid more holiday pay for 2020 than that to which he was entitled by £525.93. His claim for underpayment of holiday pay for the holiday year 2020 therefore fails.

<u>Unfair Dismissal</u>

98. I start this section of my reasons by noting that the respondent did not deal with the claimant with much empathy from March 2019 to the end of his employment. I can understand why he was aggrieved at the way he was treated in that period.

99. I should also note that I found the claimant's evidence in chief tended to drop into hyperbole from time to time and that he made several leaps of narrative that sought to attribute sinister motives to the respondent's actions that were not supported by the evidence on the balance of parobabilities.

100. I repeat my findings in paragraphs 26 to 41 above.

101. The claimant set out a list of 12 acts or omissions by the respondent that led to his decision to resign at paragraph 7 in the document titled "Claim of Constructive Dismissal" appended to his ET1. At the start of the hearing I asked him to confirm what the steps were, as they were not set out clearly in his witness statement and I needed a definitive list in order to make findings on each of them individually and collectively.

102. The claimant produced an email on the first day of the hearing, which I have cut and pasted into this decision, that set out the steps as they appeared in his witness

statement as follows (with the relevant paragraph numbers from his witness statement in brackets):

102.1. I was issued EMI share options after stepping down as MD (9);
102.2. I received an EMI asking for the share options back (17);
102.3. Geoffrey Falkingham acted in a manner calculated to destroy the relationship of trust and confidence between myself and my employer (23);
102.4. Geoffrey Falkingham had admitted moving commission due according to my contract into house accounts. I estimated £30,000 of my wages had been moved into 'house' accounts for which he is beneficiary (25);
102.5. Geoffrey Falkingham implicates me in his dishonest behaviour (30);
102.6. Observing the confidentiality policy, I moved information that evidenced I wasn't involved in Geoffrey's behaviour, and that Geoffrey was acting unlawful to the detriment of other employees, out of Geoffrey's control. This involved moving a small number of emails addressed to me, between two accounts allocated to me in the company authorised email address book (32);
102.7. I speak to ACAS who confirm my holiday pay had not been paid correctly (37);
102.8. The company claim I had moved information to my own email address (redacted by the Tribunal) They claim this is an unknown third party, despite the address being logged under my name in the company address book by the respondent for confidential communication with me and had been for many years. This email address is regularly used by the respondent for such as evidenced in the bundle (40);
102.9. I explain why I recorded the meeting. The recording was open, in the knowledge of the chair (42);
102.10. I list evidence in the bundle showing that the respondent regards my private email address as equivalent to my Apollo email address (48-49);
102.11. The respondent removed emails from my Apollo server that were MD related when I stepped down from MD (51);
102.12. Lynn Parker confirms I have been denied nearly £10,000 in wages by the wrongful allocation of my sales into house accounts (53);
102.13. Following my request for Lynn to begin a 'disclosure in the public interest', Lynn Parker promised an investigation into how sales were being wrongly allocated to house accounts. She never followed this up (the schedule said it was paragraph 35, but I am sure the claimant meant to say 53);
102.14. Lynn Parker concludes the investigatory meeting, having accepted my explanations for the alleged breach of confidentiality and offers that I report to her, not Geoffrey Falkingham in future (54-56);

102.15. Despite saying she wouldn't be dealing with my grievance until the unpaid wages are settled, Lynn Parker sends a surprise grievance outcome, despite there never being a grievance meeting to company policy (67);
102.16. Lynn Parker tells me if I want to stop the disciplinary as agreed I have to sign the letter. The letter was without prejudice and had a separate document to sign, so I signed it without prejudice (68);
102.17. The grievance outcome is written in such a way to conceal Geoffrey Falkingham's intent to recover his share options. He uses the offer to further reduce the amount of unpaid wages due to me (72-75);
102.18. After my signed return was received, Geoffrey Falkingham restarts the disciplinary against me, three weeks after the matter was resolved to the satisfaction of all in the investigatory meeting. Despite me being forced to sign a grievance outcome agreement on the basis it wouldn't be (86);
102.19. Geoffrey Falkingham invites me to a disciplinary hearing, but won't advise how, especially given that the exact same claim had already been resolved, he now holds me guilty of the claim (89-90);
102.20. Discusses my lack of grievance, lack of information regarding the claim by the respondent and the respondent disallowing my grievance appeal (99);
102.21. The respondent suspends me as a punishment. There is no contractual right to suspend me 8 days after a claim of gross misconduct, and there is no formula showing how my commission will be calculated (100);
102.22. Explains that with no formula for how I will be paid, any suspension will have a negative effect on my remuneration. As such, there must be a calculation showing how this commission will be paid (104-105);
102.23. After crediting my account with over £130,000, the respondent fails to credit my account, or pay me commission for September and October (106);
102.24. The damaged caused the suspension further damaged my relationship of trust and confidence with my employer (109);
102.25. The respondent still refuses to explain by what means the confidentiality clause was breached (110);
102.26. Just 3 days after I am signed off sick for 3 weeks with stage 2 hypertension caused by the unreasonable behaviour of the respondent, the respondent writes to me to reschedule the disciplinary (113);
102.27. I file a dispute for unlawfully withheld wages with ACAS (115);
102.28. Geoffrey Falkingham sends me a fabricated document, written entirely to support my dismissal, claiming it to be the minutes of the investigation meeting. The minutes are entirely biased and demonstrate that the investigation was unfair (116);
102.29. The offer by Lynn Parker to resolve the disciplinary had been rewritten in a way that no offer was made (118);

102.30. A report evidences that 98 of my sales had been moved into house accounts. Denied by Geoffrey Falkingham. Further commission payable under my contract had been denied (121);
102.31. The respondent still refuses to explain how confidentiality was considered to be breached, after the matter had been resolved (122); and
102.32. I resign claiming constructive dismissal. The suspension and non-payment of commission being the last straw in a long line of serious breaches by the respondent (128).

103. The first point I noted about the above list is that it contained 20 more steps along the way than the list appended to the claimant's ET1. The steps in the ET1 began in time with the alleged failure to pay commission, which I have found that the claimant raised in August 2020, but went back to his stepping down as MD on 19 March 2019. As can be seen from the list of 32 steps above, the claimant covers the same time period, but adds many more incidents. I find that the way that the claimant has presented this aspect of his claims reduces his credibility, as all the facts that he set out in his email on the first morning must have been known to him when he submitted his ET1.

104. My findings on the 32 points are as follows:

104.1. It was agreed that the claimant was offered and accepted share options in the respondent. I find that this could not be a breach of the implied duty of trust and confidence;
104.2. It was agreed that in his email to claimant of 25 June 2020 [319], Mr Falkingham sent an email to the claimant in which he asked the claimant to confirm that he would relinquish his share options, as he was no longer eligible, having stepped down as managing director. This was a breach of contract as there was no clause in the EMI agreement that required the claimant to relinquish his option, but the claimant did not object to the email immediately and instead asked about an allowance for the loss of his company car. It was obvious from the evidence and documents that the claimant had no qualms about challenging the respondent about perceived underpayments, so the fact that he did not mention the EMI position again until his grievance letter of 23 August 2020 leads me to conclude that it was not a major concern for him at the time that he received Mr Falkingham's email. I find that by Mr Falkingham's email, the respondent did not behave in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent. I make that finding because the respondent rowed back from the position expressed by Mr Falkingham in its response to the claimant's grievance dated 11 September 2020 [413-416];
104.3. I find that Mr Falkingham did not act in a manner calculated to destroy the relationship of trust and confidence between the respondent and the claimant. I find that the claimant produced little actual evidence that met the balance of probabilities test,

which demonstrated that he had much input into the process of the grievance or disciplinary. Both appear to have been handle by Ms Parker, who seems to have been supportive of the claimant (for example, by inviting him to work for her) and took a position of supporting the claimant's claim for commission and holiday pay;

104.4. I find that the claimant has not shown on the balance of probabilities that Mr Falkingham moved approximately £30,000 of commission into the House account in order to defraud the claimant. I make this finding because I find that if Mr Falkingham had acted as alleged, it was a very clumsy attempt at deception that had no chance of going unnoticed. The claimant (and all the other sales staff) must have known what projects they had worked on and the information on sales appears to have been available freely. The claimant found out about the misallocation of commission easily, challenged it and, on my findings, was paid all but £1,000 of what he was owed. The respondent made a genuine effort to meet its responsibility to the claimant on the calculation of holiday pay and ended up overpaying the claimant, on my findings;

104.5. The claimant places much on the email from Mr Falkingham of 13 August 2020. Unfortunately for him, I do not share his analysis of what Mr Falkingham said;

104.6. I find that whilst the tone of the email is combative and brusque, it was no different from the tone in which Mr Falkingham gave his evidence, which I found to be very assertive, but not offensive. The claimant had worked with Mr Falkingham for 11 years and must have been aware of his style of communication. They had bumped heads previously and had found a way to remain in the same organisation. I do not find that any officious bystander would regard the mail as stating or even implying that the claimant had acted dishonestly;

104.7. I do not find that the email stated or implied that Mr Falkingham was going to sack the claimant by using the phrase "…are you up for discussing an alternative future?"

104.8. In the context of this case, the most important effect of the email of 13 August is that the claimant said that it resulted in his losing all trust and confidence in the respondent. This statement was made in oral evidence and was tested by me asking him questions, as I wanted to be absolutely sure that the claimant meant what he had said. He confirmed that he did. I therefore make the finding that the claimant believed the respondent had destroyed the implied duty of trust and confidence on 13 August 2020.

104.9. I reject the claimant's assertion that his complaints about commission and holiday pay were made as protected disclosures. In his early exchanges, the claimant speaks only of the impact on himself. It is only after he took legal advice that he hints at whistleblowing. I find his change to be disingenuous and not in good faith;

104.10. I do not find that the email of 13 August implicates the claimant in the allegedly dishonest behaviour of Mr Falkingham because I do not find that Mr Falkingham was dishonest or that he linked the claimant's actions to his own;

104.11. I find that the claimant has completely misunderstood the nature of the disciplinary allegations made against him. I find that the fact that the respondent corresponded with him at his personal email address to have little relevance to the disciplinary investigation that was undertaken. I make that finding because it is one thing for an employer to correspond with an employee via their personal email account, but it is another for the employee to send information from the employer's server to his home account. I have already indicated that I do not find the claimant's assertion that he acted as he did to whistleblow on behalf of himself and others in the public interest. I find that he sent the emails to his home address so he could build his claim against the respondent;

104.12. I find that the claimant's argument that because he did not look at the attachments to the emails that he sent, he could not be culpable. It is a well-established principle that an employee can commit an offence of misconduct through carelessness or negligence. I find that the attachments to the emails sent by the claimant contained confidential and commercially sensitive information belonging to the respondent that the claimant had no right to possess on his own account on the dates that he sent them;

104.13. The failure by the respondent to correctly calculate holiday pay to include commission is a potential breach of contract, but I do not find that the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent because once its error was pointed out, it set about rectifying the situation and, on my findings, made good the underpayment to the claimant. The irony that the claimant had been MD of the respondent at a time when it had failed to pay the proper amount of holiday pay to employees on commission, whist he was not paid commission is not lost on me;

104.14. I find that the fact that the claimant recorded the meeting on 3 September cannot be a breach of the implied term of trust and confidence. Neither party objected to the transcript of the recording being entered into evidence;

104.15. I find that Ms Parker's findings as expressed in her email to Mr Falkingham of 13 August 2020 [356-357] is no more than a conscientious report that confirms that the claimant is entitled to a large repayment of commission. I find she undertook her task in good faith and with the best interests of the claimant at heart;

104.16. I find that there was nothing in the meeting on 3 September 2013 that could be interpreted as behaviour by the respondent

that was calculated or likely to destroy or seriously damage the trust and confidence between it and the claimant;

104.17. I disagree with the claimant's assertion that there was no grievance meeting. The claimant raised issues about commission, holiday pay and his EMI options in his grievance letter. The meeting on 3 September dealt with all three matters at some length and the claimant received a grievance outcome. There may be procedural errors in how the process was carried out, but I find that the claimant had the opportunity to put his grievance in person and note that it was largely resolved in his favour;

104.18. I disagree with the claimant's assertion that ms Parker told him that if he wanted to stop the disciplinary procedure, he had to sign the letter of 11 September. I do not find that the claimant has shown on the balance of probabilities that there was an agreement between the claimant and the respondent in the meeting of 3 September 2020 (as evidenced by the transcript[461-475]) because the exchange about the disciplinary process [472-473] contains no such agreement.

104.19. The letter of 11 September 2020 was marked 'without prejudice' but I find that the claimant accepted the terms. The fact that he marked his signature as 'without prejudice' does not make his acceptance of the grievance outcome conditional. The claimant has not shown on the balance of probabilities that he signed the agreement under duress. I find that the claimant's signature on the document was an acceptance of an offer made in the document and that the consideration for the agreement was the payment of monies due to the claimant;

104.20. I find that by signing the grievance agreement, the claimant had waived any alleged breaches of contract that were resolved by the agreement;

104.21. I do not find that the claimant has shown on the balance of probabilities that the grievance outcome was written in such a way to conceal Mr Falkingham's intent to recover his share options. The outcome is clear: the options remain on the table for the claimant;

104.22. I do not find that the fact that the respondent recommenced the disciplinary process against the claimant after dealing with his grievance and holding an investigatory meeting, was conduct that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent;

104.23. I find that following the disclosure of documents and the investigatory meeting on 3 September, the claimant knew enough of what allegations he faced to constitute a fair process using the reasoning in the case of **Sainsbury's Supermarkets Limited v Hitt**;

104.24. I find that the claimant's appeal against the outcome of grievance was not legitimate, because, although he had not been paid the entirety of the monies that Ms Parker had indicated were due to him, he had signed a document accepting

the terms of settlement. I therefore find that the rejection of the appeal by the respondent was not conduct that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent;

104.25. I find that whilst the timing of the claimant's suspension is unusual, it is a step open to the respondent using the reasoning in the case of **Sainsbury's Supermarkets Limited v Hitt.** I find that the suspension was not an act that no reasonable employer would have done;

104.26. As the suspension came early in the new financial year and I have found that the claimant had not met the £100,000 threshold for commission, I find that there was no requirement to set out commission payments during suspension;

104.27. I have already found that there was no obligation on the respondent to pay the claimant commission for September and October, so this was not conduct that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent;

104.28. I find that as the claimant had said that the bond of trust and confidence had been broken on 13 August 2020, the bond was not capable of being broken further. Therefore, I find that the suspension of the claimant could not 'further' damage the relationship of trust and confidence;

104.29. I find that the rescheduling of the disciplinary was not a breach of contract, as the hearing had to be rescheduled and the respondent took into account the claimant's representations about the date and agreed to reschedule; and

104.30. I do not find that the respondent's minutes of the investigatory meeting on 3 September were 'fraudulent'.

105. In summary, I find that the claimant regarded the duty of trust and confidence to have been breached on 13 August 2020. I find that the respondent did not fundamentally breach the duty of trust and confidence prior to 13 August 2020. Any breach prior to 16 September 2020 was waived by the claimant when he signed off his agreement to the grievance matters. I find that there was no fundamental breach of the duty of trust and confidence between 16 September 2020 and the termination of his employment.

106. I find that if the claimant regarded the duty of trust and confidence to have been broken on 13 August, he delayed in his response and waived breaches prior to 16 September 2020. I therefore find that as at 28 October 2020, the claimant had waived any breach and had affirmed the contract of employment, so his claim of unfair dismissal fails.

Breach of Contract

107. On my findings above, I find that the respondent was not in breach of contract by suspending the claimant on 30 September 2020 and did not suspend him outside the terms of his contract.

Applying the Findings of Fact to the Law and Issues

108. Using the list of issues above, I make the following findings.

Unfair Dismissal

108.1. I find that the claimant was not dismissed, so I do not have to decide on any of the other issues relating to unfair dismissal.

107.2 I have set out my findings on what the respondent did above.

107.3. The respondent's acts and omissions did not breach the implied term of trust and confidence.

Holiday Pay (Working Time Regulations 1998)

107.4. The claimant's leave year was 1 January to 31 December.

107.5. Ten months and 4 weeks of his leave year had passed when the claimant's employment ended.

107.6. The claimant had accrued 18.5 days' leave for the year by that date.

107.7. He had taken 11 days' paid leave in the year.

107.8. There were no days carried over from previous holiday years.

107.9. No days remained unpaid because the respondent made additional payments that exceeded the accrued unpaid holiday pay.

Unauthorised Deductions

107.10. The wages paid to the claimant were less than the wages he should have been paid, but only in respect of the Thornleigh deal, which was presented to the Tribunal out of time, when it was reasonably practicable for it to have been presented in time.

107.11. The claimant is not owed any outstanding wages.

Breach of Contract

107.12. The respondent did not breach the claimant's contract by suspending him.

108. Because of my findings above, I did not need to address any of the other issues in the agreed list that have not been addressed in paragraph 107 above.

Note: This has been a remote hearing. The parties did not object to the case being heard remotely. It was not practicable to hold a face to face hearing because of the Covid19 pandemic.

Employment Judge Shore
4 June 2021