



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms B Solomons

**Respondent:** Athene New Build Limited

**Heard at:** London Central (remotely, by video) **On:** 10 June 2021

**Before:** Employment Judge Smailes (sitting alone)

## Appearances

For the claimant: Mr S Jones QC, Counsel

For the respondent: Mr L Wilson, Counsel

## RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The respondent made unauthorised deductions from wages by failing to pay the claimant the declared bonus of £20,000 and is ordered to pay the claimant the sum of £20,000, being the total gross sum deducted.
2. The respondent made unauthorised deductions from wages by failing to pay the claimant the full amount of commission payable for 2019 and is ordered to pay the claimant £9591.15, being the total gross sum deducted.

## REASONS

### Introduction

1. The Claimant submitted a claim form on 21 March 2020, claiming arrears of pay and other payments. She submitted a second claim on 01 April 2020 on a precautionary basis in case the Respondent defended the original claim on the basis that liability to make one payment did not arise until 31 March 2020. The claims were consolidated.
2. I heard evidence on oath from the Claimant. The Claimant provided witness statements from 7 additional witnesses: former colleagues Ms Baines, Mr Dewitt, Ms Mawson, Mr Graham and Mr Beynon Davies, and a couple who brought a property marketed by the respondent, Mr and Mrs Bradbury. Mr Graham was unable to attend. I admitted his witness statement and will give the appropriate level of weight given that he was not available for cross examination. I note that the respondent had no objection to this as it considered that the

contents of the statement were not relevant to the issues in the claim. The other witnesses were sworn in but likewise the respondent did not wish to cross examine them. None of the witnesses were involved in decisions relating to the Claimant's salary.

3. I heard evidence on oath for the Respondent from Mr Stone, founder, director and CEO of Athene New Build Limited and Mr Pollock, a minority shareholder. Mr Pollock was not called as an expert witness. He gave evidence of what he considered to be the usual practice in relation to basic salary and commission arrangements. He confirmed that he was not involved in decisions relating to the Claimant's salary package.
4. I considered the following documents: a final pleadings bundle of 121 pages, a final supplementary bundle of 117 pages, the witness statements, the agreed list of issues, the claimant's cast list and chronology, the respondent's counter schedule and 2 pages that had been omitted from the bundles.
5. The statements of the additional witnesses and Mr Pollock do not provide information about the agreement between the parties and I make no findings about the contents of those statements.
6. References to documents are: FP[xx] – final pleadings bundle [page number], FS[xx] – final supplemental bundle [page number], Initials of Witness WS[xx] – witness statement [paragraph number].
7. After hearing live evidence, I directed the parties' Counsel to provide written submissions, which I received on 16 and 18 June 2021. I am grateful to them for their helpful submissions. I apologise that it has not been possible to send this Judgment sooner.

### **The claim and Issues for the Tribunal to decide**

8. The Claimant was employed by the Respondent in its real estate business from 28 April 2018 until her employment ended on 29 December 2019. The claim concerns an unpaid bonus of £20,000, entitlement to which is disputed by the respondent; and unpaid commission payments, in the region of £9,591.15. It had been anticipated at a Preliminary Hearing that some or all of the unpaid commission might have been paid following disclosure, but the issue remained unresolved by the date of the hearing.

#### **£20,000 BONUS**

9. This is a claim under Part II of the Employment Rights Act 1996 that the non-payment by the Respondent of the alleged bonus entitlement to £20,000 constitutes an unauthorised deduction from the Claimant's wages.
10. Alternatively, it is a claim under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 for the recovery of damages for alleged breach of contract by the Respondent in the sum of £20,000.

#### **UNPAID COMMISSION**

11. This is a claim under Part II of the Employment Rights Act 1996 that the non-payment by the Respondent of the unpaid alleged commission of £9591.15 constitutes an unauthorised deduction from the Claimant's wages.

12. Alternatively, it is a claim under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 for the recovery of damages for alleged breach of contract by the Respondent in that sum of £9591.15

**The issues**

£20,000 BONUS

13. The Claimant claims that on 22 December 2019 a bonus of £20,000 was agreed by the Respondent (see paragraph 12 of Grounds of Claim), the Respondent admits that it has not paid that sum or any part of that sum to the Claimant and relies upon its “discretion” as a reason for not having paid the same.
14. The issues for consideration by the Tribunal, in order to determine whether the non-payment of the bonus constitutes in law an unauthorised deduction from the Claimant’s wages and/or a breach of contract, are:
- a. What was discussed between the parties about a bonus of £20,000?
  - b. Was an agreement reached and, if so, was a contractual obligation created and, if so, in what terms?
  - c. On a proper construction of those terms was the Respondent’s obligation to pay that bonus conditional or unconditional?
  - d. If conditional, were the conditions satisfied or not?
  - e. If conditional and those conditions were satisfied, or if the obligation to pay that bonus was unconditional, was the Respondent lawfully released nevertheless from its obligation to pay the bonus, and if so, how?

UNPAID COMMISSION

15. The Respondent admits an express term in the Claimant’s contract of employment entitling the Claimant to commission payments in addition to her basic salary subject to the conditions of the commission arrangements agreed between the parties. The Respondent seeks to rely upon a clause in the Claimant’s contract which entitles it to vary the commission payments and terms.
16. The issues for consideration by the Tribunal, in order to determine whether the non-payment of commission constitutes in law an unauthorised deduction from the Claimant’s wages and/or a breach of contract, are:
- a. What were the commission terms agreed between the parties applicable to 2019?
  - b. What were the sales transactions during 2019 which engaged those commission terms?
  - c. What were the commission-values of the material sales transactions during 2019?
  - d. On a proper construction of the commission terms what consequent commission sums became payable to the Claimant?

- e. How in law did the termination of the Claimant's employment affect her entitlement to receive commission sums due for payment but unpaid as at her leaving date?
- f. How in law did the termination of the Claimant's employment affect her entitlement to receive commission sums which had not yet fallen due for payment as at her leaving date, because conditional on pending exchanges of contracts and/or completions but which sales transactions subsequently completed after the Claimant left the Respondent's employment?

### **Findings of fact**

- 17. The relevant facts are as follows.
- 18. The Claimant was employed by the Respondent from 28 April 2018 until she was dismissed on 29 December 2019. She was paid in lieu of notice. She was initially employed as a sales negotiator.
- 19. The Claimant was not given a written contract or written statement of employment particulars when her employment started. In an email exchange between the Claimant and Mr Stone, founder, director and CEO of the Respondent company, dated 12 March 2018 Mr Stone said there was 'no need for you to sign anything official', FS[1,2].
- 20. The Claimant's starting salary package was, as stated in emails dated 07 and 08 March 2018, FS[3-7], £20,000 per annum basic salary plus commission at a rate of 7% of the first £75,000 commission earned through sales achieved by the claimant (individual commission), 10% of commission between £75,000 and £150,000 and 15% of commission above £150,000. The Claimant's income was guaranteed to be at least £22,000 per annum, pro rata, for the first 3 months.
- 21. Targets and commission relate to a calendar year, 01 January to 31 December.
- 22. The Claimant received £6,985.87 commission in 2018. The Claimant had not been given specific figures for what she could expect to earn by way of individual commission, but this figure fell short of what she had expected from discussions with Mr Stone before she took up the appointment.
- 23. The Claimant raised her concerns about her income with Mr Stone. The outcome was an offer of promotion to sales team manager for the East London team, with an increase in basic salary and a change to the commission structure. The Claimant's expectation was that she could achieve an income, including commission, in the region of £65,000 per annum (SBWS[82]). Mr Stone considered that this was an achievable figure (MSWS[14]).

### Change to salary package with effect from 01 January 2019

- 24. In January 2019 the Claimant was promoted to Sales Team Leader for the East London Team. The salary package was changed. The Claimant was not given a statement of these changes to her contract at that time. She was sent a statement of Terms and Conditions of Employment contract in April 2019 (FP[79-87]). Although neither party signed this document and the Claimant had been reluctant to accept the change to commission, the parties agree that the Claimant's basic salary and entitlement to commission are as set out at clauses 6 and 7 of that statement.

25. With effect from 01 January 2019, the Claimant's basic salary was increased to £24,000. Save for any amount in respect of transactions prior to her promotion, the Claimant was no longer entitled to individual commission. Commission was now payable on the value of fees earned on sales of property made by the East London team (team commission) in a calendar year as set out in clause 7:

Value of fees earned on sales of property (excluding VAT)	Commission (%)
<£200,001	2
£200,001 - £450,000	3
£450,001 - £700,000	4
£700,001 - £950,000	8
>£950,000	10

26. By May 2019 the Claimant was concerned that her income for 2019 would fall short of her expectation of £65,000 by a considerable margin. She sent an email to Mr Stone setting out her concern and proposing a change to commission so that she would receive individual as well as team commission (FS[16]). This proposal was not agreed.

Change to salary package with effect from 01 June 2019

27. The parties had further discussions. There are no minutes of discussions or a revised statement of employment particulars. The parties agree that the Claimant's basic salary was to be raised to £50,000 with effect from 01 June 2019.
28. The parties do not agree about further changes to commission or the introduction of a discretionary bonus. There is no revised statement of particulars of employment.
29. Mr Stone's evidence is that he made it clear that the Claimant would no longer be entitled to any commission, but there was the possibility of a discretionary bonus based on company performance, including the performance of the Claimant's team (MSWS[16-19]).
30. The Claimant's evidence is that there was no agreement about removing entitlement to commission entirely and no discussion about the introduction of a discretionary bonus. She would not have agreed to the removal of commission.
31. I prefer the evidence of the Claimant on this point and I find that the parties did not agree a change to the terms relating to team commission from 01 June 2019 for the following reasons:
- a. The Claimant's email of 20 May 2019 (FS[20]) was written to follow up the discussion that had taken place. The Claimant asks for confirmation of the date of a change to her basic salary and to have commission changes written out so that she could understand them. There is no reference to a change from a defined commission structure to an undefined discretionary bonus.
  - b. Mr Stone's reply by email dated 24 May 2019 (FS[25]) does not say anything about changes to commission or the introduction of a bonus. It says 'All noted Beth. New salary starts from June 1<sup>st</sup>'.

- c. The Claimant's email dated 20 August 2019 (FS[30]) to Mr Kadiri, who dealt with payroll matters for the Respondent, copied to Mr Stone, says 'I am still waiting for Michael to confirm the commission brackets and hopefully will have these in place for this month...'
  - d. Mr Stone did not respond to that email. He did not take the opportunity to say that the Claimant was mistaken in her understanding or that she had agreed changes. He did not set out what changes he says were agreed.
  - e. Mr Stone did not provide the Claimant with a statement of the changes to her terms and conditions.
  - f. The Claimant continued to raise her lack of clarity about the Respondent's proposals to change the commission structure throughout 2019.
32. Clause 7 contains a provision permitting the Respondent to vary commission or withdraw commission arrangements on giving reasonable notice. The Respondent did not invoke this clause.

### Bonus

33. As to a bonus, the first reference to a bonus in documents is an email by Mr Stone to the Claimant dated 03 October 2019 (FS[32]). It was written after a discussion between the Claimant and Mr Stone on 02 October 2019. Mr Stone sets out the position on commission as he sees it prior to the basic salary increase. This is the individual commission in 2018 and the team commission from 01 January 2019 to 31 May 2019. The parties agree that this was the position up to 31 May 2019. Mr Stone then quotes 2 paragraphs of the Claimant's 20 May 2019 email (FS[20]). In his final paragraph he says, without saying whether he says there was a conclusion:
- 'At the point of the basic salary adjustment we discussed the opportunity to top up your salary with either a bonus incentive related to East London Team sales or an end of year discretionary bonus based upon the combination of East London Sales/SRE total sales figures.'
34. The Claimant replied that day (FS[34]). Mr Stone's email did not clarify what she would be paid. She asked for an exact figure for outstanding individual and team commission owing to her, which she had calculated at roughly £5,364. She stated that 'I'm unsure why I am waiting for a 'discretionary bonus' for work I have done and figures that are already very clearly in place.'. She noted that her current projected earnings were less than £30,000, less than half of what she had expected in her role as Team Leader.
35. There were further discussions between the Claimant and Mr Stone. There are no formal records of these discussions. The Claimant was concerned about the informal nature of such discussions and sent emails to Mr Stone to have a written record. The email correspondence between them is set out in the bundle. The exchanges relevant to the question of commission and bonus are as follows.
36. The Claimant raised the lack of clarity about her pay again in an email to Mr Stone dated 27 November 2019 (FS[46]). The email was written following a meeting with Mr Stone and another member of staff. The Claimant had expressed concern about the behaviour of a member of staff towards her and members of her team. Those concerns do not form part of this claim. In the email

the Claimant asks Mr Stone to address the lack of certainty regarding her pay. She said:

‘It feels unbelievably inappropriate to have been offered a base pay plus commission for my role as team leader, to then in October after almost a whole calendar year, to be told you want to give me a discretionary bonus instead. This is a significant departure from what we discussed and what you indicated as agreed – I would never have taken on this role on that basis. In any event, this is not reflective of the written terms of my contract and, whilst your unacceptable proposals have been discussed, they have never been agreed. At the very least, I remain entitled to payment in respect of the commissions generated on the basis set out in my signed contract.’

37. Mr Stone replied by email on 29 November 2019 (FS[45]). The reply refers to the other matter but there is no direct reference to pay. Mr Stone says that the matters raised amount to a grievance and the company would deal with it in accordance with the grievance procedure.
38. In a further follow up email dated 09 December 2019 (FS[49]), Mr Stone asked the Claimant to provide details about outstanding individual commission owing so that he could ‘consider this with an open mind’. There is no reference to a discretionary bonus.
39. The Claimant replied on 11 December 2019 (FS[50-51]), with a table setting out her calculation of individual and team commission for 2019 and the first quarter of 2020. The Claimant’s calculation was £28,049.60 for 2019 and £6,815.69 for first quarter 2020. The projected commission for 2020 is based on figures in ‘the pipeline’, the tool used to calculate commission. The pipeline is described by Mr Stone as ‘effectively a spreadsheet of all new homes sold and by whom and at what price’ (MSWS[37]).
40. The Respondent’s payroll record for 2019 shows commission payments of £3,127.72 paid to the Claimant (attachment to email from Mr Kadiri to Mr Stone 13 December 2019 (FS[52-54])).
41. The Claimant and Mr Stone had further conversations in December. The Claimant’s earnings from her basic salary and commission for 2019 were going to be around £41,000. Mr Stone had said on various occasions that the Claimant was a valued and highly regarded member of staff. In his witness statement he said he did not want the Claimant to leave (MSWS[31]). There was some discussion about a further change of role for the Claimant. In her email of 18 December 2019 (FS[55]), the Claimant states

‘if you feel that I deserve a discretionary bonus on top of the commission I am owed then I am happy to receive that in March 2020, however my commission again, as clearly stated in my previous email is due for 2019.’

The Claimant asked for confirmation of when commission would be paid by the close of business on 19 December 2019 as her last working day would be 20 December 2019.

42. In a meeting on 19 December 2019, Mr Stone told the Claimant that he was awarding her a discretionary bonus of £20,000. This was confirmed by email dated 20 December 2019 sent at 21:13 (FS[56]), which states:

'Following our conversation yesterday, I can confirm your discretionary bonus is £20k for 2019 payable as follows:

December 2019 - £5,000 (payment to be made week commencing Dec 23<sup>rd</sup> 2019)

March 2020 - £15,000.

This is much deserved and I just want to say thank you for all your hard work throughout the year.

All the best

Michael.'

43. The email did not contain a request for an acknowledgement or any requirement for the Claimant to indicate acceptance and it did not say anything about whether and when the Respondent would pay outstanding commission.
44. Although there is no explanation of how the level of the bonus had been calculated in that email, it is an amount that would meet the shortfall between the Claimant's earnings for 2019 and the lower end of the £60-65,000 range that had been discussed as a realistic target and expectation throughout 2019. In his live evidence, Mr Stone said that it was his intention to get the Claimant to her target income.
45. The Respondent did not make a payment on 23 December 2019.
46. The Claimant was on leave from the close of business on 20 December 2019 and spent her leave outside the UK. She emailed Mr Stone on 27 December 2019. She said she was not available to speak to Mr Stone on 28 December 2019 and asked for contact over the holiday period to be by email. In relation to the email of 20 December 2019, the Claimant stated:

'Putting aside what you had proposed which does not reflect the commissions and figures I had provided, you had offered to make an initial payment in the commencing week of December 23 which is the week that has just now passed. I note that this has not been paid.'
47. Mr Stone asked Mr Kadiri to provide information about the Claimant's Employment Contract. Mr Kadiri replied on 28 December 2019, sending a copy of the Statement of Terms and Conditions with the Claimant's salary stated as £24,000 per annum at paragraph 6 (FS[60-71]). This is the same document as provided to the Claimant in 2019 (see also FP[79-87]). There is no reference to a bonus in that statement.
48. By email dated 29 December 2019 timed at 2:40 p.m. (FS[72]), Mr Stone dismissed the Claimant with immediate effect. The email deals with pay in lieu of notice and holiday pay, which are not relevant to the appeal. As to bonus, the email says:

(in a list of reasons why Mr Stone says it is not possible to resolve differences) 'more recently, I have sought to agree with you a discretionary bonus payment and an advance of that bonus in a break from the usual and



have received criticism from you for not making an advance payment when you failed to acknowledge my communications on the matter.’ and

‘While the business was prepared to pay you a discretionary bonus, there is no contractual requirement to do so and you have disputed the business approach in that regard. We will, therefore, be in contact shortly to see if an agreement can be reached on the basis of a clean break payment, in the meantime we reserve our position in that respect.’.

49. In the dismissal email the Respondent did not expressly withdraw the bonus. In his witness statement the respondent says, ‘we would not pay any bonus due once an individual is under notice or once their employment is terminated’ (MSWS[33]). This is not a reference to any contractual provision. Terms relating to payment after the end of employment are in clauses 7 and 9 of the Statement of Terms and Conditions. Clause 7 provides that ‘should you resign or your employment be terminated on grounds of misconduct or gross misconduct, prior to the Company receiving any initial or final payments for properties sold by you, you will not be entitled to receive those post-employment.’. Clause 9 deals with the termination of employment generally. It sets out what will happen if an employee leaves without giving notice or during a notice period without prior agreement. In that situation the respondent may make a deduction from any final payment. Clause 9 states: ‘It is not intended to act as a penalty upon termination.’.
50. The Claimant was not subject to any misconduct procedures when she was dismissed. Mr Stone said several times that he wished to keep the Claimant in employment. She was not dismissed for misconduct or gross misconduct. She did not resign. The provisions set out above do not apply to the circumstances of the Claimant’s dismissal.
51. There were email exchanges following the Claimant’s dismissal. In her email of 07 January 2020 (FS[74]), the Claimant set out her surprise at the dismissal and her response to the content of the dismissal email. In his substantive response on 27 January 2020 (FS[81]), Mr Stone set out his conclusions. He does not refer to the bonus but he does end by saying ‘I trust that you now understand and agree the position set out above concerning your total remuneration and termination of your employment.’.
52. The Claimant sent a further email on 03 February 2019’ (FS[85]). She put the Respondent on notice of her intention to take legal action in relation to withholding commission. The respondent replied through solicitors on (FS[92]). The letter states: ‘It is clear in the dialogue that ensued over email that Mr Stone of our Client reassured you, and explained that your then current package would be varied to guarantee a basic salary of £50,000 per annum (gross), which would then be topped up at the end of the year by way of a discretionary bonus as circa an amount which would then ensure that your take home for the year would be ‘in the region of’ £60,000 to £65,000, as per your request’ and ‘Had your employment not terminated, you would probably have been paid the ‘discretionary’ bonus proposed regardless of the fact whether your department had performed or underperformed due to the generosity of our Client and consistent with the premise of a discretionary bonus.’.
53. Having reserved its position on 29 December 2019, the Respondent does not say in terms that the bonus has been withdrawn. I find that the comments about ‘total remuneration’ and ‘had your employment not terminated you would

probably have been paid...' can only be understood as a statement that the Respondent would not pay the bonus.

54. In conclusion, I find that the parties did not agree a change in the Claimant's terms to include a discretionary bonus scheme in place of commission with effect from 01 June 2019. The Claimant was not ever told that she was no longer entitled to team commission at the rate set out in clause 7 of the Statement of Terms and Conditions. The Claimant did not resign and her employment was not terminated on grounds of conduct or gross misconduct. In relation to commission, the dismissal email of 29 December says:

'You will be paid any outstanding commission in accordance with clause 7 of your contract of employment...'

55. I find that Mr Stone awarded a bonus but he did not pay it. The bonus was in recognition of work done in 2019. It was not conditional upon the Claimant remaining in employment with the Respondent in 2020. It was not conditional upon acceptance by the Claimant. There are no terms in the Claimant's contract about a bonus and therefore no express term that a bonus is no longer payable on termination of the contract.

### ACAS

56. The claimant notified ACAS under the early conciliation process of a potential claim on 02 February 2020 and the ACAS Early Conciliation Certificate was issued on 02 March 2020. The claim 2201685/2020 was presented on 21 March 2020.

### **The law**

#### Unauthorised deduction from wages

57. Section 13(1) Employment Rights Act 1996 (ERA) provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract or the worker has previously signified in writing his agreement or consent to the making of the deduction. An employee has a right to complain to an Employment Tribunal of an unauthorised deduction from wages pursuant to Section 23 ERA.

58. For the purposes of a claim of unauthorised deductions from wages, so far as relevant, 'wages' are defined in section 27(1)(a) of the ERA as:

*any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise.*

59. A claim about an unauthorised deduction from wages must be presented to an employment tribunal within 3 months beginning with the date of payment of the wages from which the deduction was made, with an extension for early conciliation if notification was made to ACAS within the primary time limit, unless it was not reasonably practicable to present it within that period and the Tribunal considers it was presented within a reasonable period after that.

60. Where the claim is about a series of deductions, the three-month time limit starts to run from the date of the last deduction or payment in the series, section 23(3) ERA. For a number of deductions to be a series there has to be 'sufficient frequency of repetition', **Bear Scotland v Fulton** [2015] IRLR 15.

61. Where the employer operates a discretionary bonus scheme, Burton J set out the test to be applied when analysing the exercise of the employer's discretion in Clark v Nomura International Plc [2000] IRLR 766 at paragraph 40:

*"My conclusion is that the right test is one of irrationality or perversity (of which caprice or capriciousness would be a good example) i.e. that no reasonable employer would have exercised his discretion in this way.*

62. Further, the Court of Appeal confirmed in IBM UK Holdings Ltd v Dalgleish [2017] EWCA Civ 1212; [2018] IRLR 4 that where an employer exercises a discretionary power, the test to be applied is a rationality test equivalent to the *Wednesbury* test, namely: a) whether relevant matters and no irrelevant matters had been taken into account, and b) whether the decision was such that no reasonable decision maker could have made it.

63. In the context of discretionary bonuses, the EAT held in Farrell Matthews & Weir v Hansen [2005] IRLR 160 at paragraph 40:

*In the case of a discretionary bonus, whether contractual or by custom, or ad hoc, the discretion as to whether to award a bonus must not be exercised capriciously (see *United Bank Ltd v Akhtar* [1989] IRLR 507 and *Clark v Nomura International plc* [2000] IRLR 766). But until the discretion is exercised in favour of granting a bonus, provided the discretion is exercised properly, no bonus is payable. Once, however, an employer tells an employee that he is going to receive bonus payments on certain terms, he is, or ought to be obliged to pay that bonus in accordance with those terms until the terms are altered and notice of the alteration is given (*Chequepoint (UK) Ltd v Radwan* CA 15 September 2000). This situation applies equally where a discretion to award a bonus is granted under contract, as in *Chequepoint*, or by custom or by ad hoc decision.*

### Breach of Contract

64. Jurisdiction to consider claims for breach of contract is conferred on the Tribunal by **Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, Para 3:**

"Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries if –

(a) the claim is one to which section 131(2) of the [Employment Protection (Consolidation) Act 1978] applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine; ...

(c) the claim arises or is outstanding on the termination of the employee's employment."

65. Recoverable compensation is subject to a cap of £25,000. (see Para 10 of the Order).

### **Conclusions**

Time Limits

66. I found that the claimant's employment was terminated on 29 December 2019 when she received the email from Mr Stone.

67. The claim was presented in time.

Unauthorised deductions from wages

Commission

68. It was not in dispute that the Claimant was entitled to team commission with effect from 01 January 2019. I found that the parties did not agree a change to those terms with effect from 01 June 2019. The discussions and the correspondence between the parties indicate that the Claimant asked for clarification about potential changes up to the date of her dismissal but there had been no agreement. The Respondent did not argue that it had invoked the provision in clause 7 permitting it to change or withdraw commission on reasonable notice. The entitlement to team commission did not vary in 2019.

69. The Respondent has made an unlawful deduction from wages in failing to pay the Claimant her full entitlement to team commission in 2019. As the Claimant did not resign and her employment was not terminated on grounds of conduct or gross misconduct, she is entitled to receive the team commission, despite no longer being employed by the Respondent. The Respondent confirmed in the dismissal email of 29 December 2019 that the Claimant would be paid any outstanding commission.

70. There are various figures in the documents. The provisional figures for commission can change, e.g. where a sale does not proceed to completion. The Claimant invites me to award £9591.15, being the amount stated in the agreed list of issues, on the basis that this is the best possible calculation following disclosure of the pipeline documents during the course of these proceedings. The Respondent did not make a counter-proposal for the period from 01 June 2019, having argued that no commission was payable. The figures provided by the Respondent in the grounds of resistance at FP[68] relate to commission on sales agreed up to 31 May 2019, some of which had not completed by 16 June 2020, when the grounds were drafted. That figure was revised in the Respondent's counter schedule to £1,745.52 but still expressed as a provisional figure.

71. Having found that the Claimant was entitled to team commission at the rate set out in the table in clause 7 and in the absence of a counter-proposal, the Claimant is entitled to a payment of £9,591.15.

72. I have calculated the amount on a gross basis, but the respondent is to make any deductions which are due for tax and national insurance contributions before payment is made to the claimant.

73. I award compensation on the basis of an unlawful deduction from wages but in the alternative, the Respondent was in breach of contract by failing to pay the Claimant the commission of £9,591.15 arising on termination of her employment.

Bonus

74. There was no term in the Claimant's contract relating to a bonus. The Claimant did not agree to an amendment to her contract replacing team commission with a

discretionary bonus. The bonus awarded by the respondent on 19 December 2019 and confirmed by email on 20 December was an exercise of discretion by the Respondent but it crystallised as a contractual entitlement. There was no contractual term that a bonus once awarded would not be payable on termination of the Claimant's employment.

75. The discretion to award the bonus was not exercised capriciously. The parties had discussed the Claimant's remuneration for some time. It was clear that the combination of basic salary and team commission would result in a significant shortfall against the expectation that the Claimant would earn £60-65,000 for 2019. The bonus was expressly awarded in 2019 in recognition of work done in 2019. Mr Stone's evidence at the hearing was that he intended it to get the Claimant to her target income for 2019. The email of 20 December 2019 says: 'This is much deserved and I just want to say thank you for all your hard work throughout the year.'
76. The Claimant was not required to take any action to accept the bonus. She was not required to accept it in writing. There were no conditions attached to it. Although the Respondent did not intend to pay the balance of the bonus until March 2020, the Claimant was not required to remain in employment in 2020 as a condition of entitlement.
77. The Respondent relies on the discretionary nature of the bonus as enabling it to argue that the figure was unenforceable. Mr Stone's assertion that the Respondent would not pay following termination of employment is not supported by any policy document. It appears to be applying provisions in Clause 7 and Clause 9 of the Statement of Terms and Conditions by analogy. The analogy is not appropriate because those clauses relate to very different circumstances.
78. Following the principle in Farrell Matthews, the Respondent exercised its discretion to award a bonus, at which point the bonus crystallised as wages for the purposes of s27(1)(a) ERA and became properly payable for the purposes of s13(3) ERA.
79. The Respondent did not pay the first instalment in the week commencing 23 December 2019. This amount was outstanding on termination of the Claimant's employment. The Respondent made no payment of any part of the bonus. The claim for the balance of £15,000 arose on termination of the Claimant's employment.
80. The Respondent made an unauthorised deduction from wages by failing to pay the bonus of £20,000.
81. I have calculated the amount on a gross basis, but the respondent is to make any deductions which are due for tax and national insurance contributions before payment is made to the claimant.
82. I award compensation on the basis of an unlawful deduction from wages but in the alternative, the Respondent was in breach of contract by failing to pay the Claimant the bonus of £20,000.

Julia Smailes

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Employment Judge Smailes

\_\_\_\_10 September 2021\_\_\_\_\_

JUDGMENT SENT TO THE PARTIES ON

20/09/2021

FOR THE TRIBUNAL OFFICE

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