WRITTEN REASONS

EMPLOYMENT TRIBUNALS

Claimant: Mr Iain Hay

Respondent: Amberstone Security Ltd

Heard at: Bristol ET (hybrid hearing with the Claimant in person and the Respondent and witnesses via CVP)

On: 8,9,10,11 August 2022

Before: Employment Judge Horder

Appearances
For the Claimant: Ms D Gilbert
For the Respondent: Mr K Zaman

JUDGMENT

The judgment of the Tribunal is that:

1. The Claimant was constructively dismissed and his dismissal unfair.

2. The Respondent made an unauthorised deduction from wages by failing to pay the Claimant commission payments for work done between April 2019 and 30.10.20. As agreed by the parties, the sum is to be determined by the tribunal if not agreed.

3. The Respondent was in breach of contract by dismissing the Claimant without notice.

REASONS

Preliminary Issues

1. At the start of the hearing both parties addressed the Tribunal about the agreed list of issues recorded in the CMO dated 9.3.22. The Claimant sought to add a further alleged breach of contract as issue 1.1.2, namely “Demoting the Claimant”. The Respondent did not object and the Tribunal observed that that issue had been dealt with in the witness statements served as well as in documents that formed the agreed trial bundle. Both parties also agreed that, in the circumstances of this case, issue 1.3 should be divided into two parts (as reflected in issues 1.3 and 1.4 below)

and that issue 1.5 (was dismissal otherwise fair) was unnecessary on the fact of this case. As a result, the list of issues was amended to the form set out below.

2. After cross-examination of the Claimant, the Respondent sought to adduce further evidence, namely an internal email relating to the Boots account dated 10.1.20. The Claimant expressed concern about the lateness of such evidence, but did not object. On that basis the Tribunal allowed the Respondent to admit the email in evidence.

3. Shortly before cross-examination of the Respondent's Ian Morl, the Claimant sought to adduce and rely upon a schedule (created by the Claimant) that detailed further figures relating to commission payments due. The Respondent objected on the grounds that it was too late and they had not had an opportunity to consider it. After hearing arguments on the schedule, the Tribunal concluded that this was not new evidence, rather a helpful summary and consolidation of figures already available within the bundle. The schedule could be used in cross-examination and the Respondent was allowed any necessary time to consider it.

4. During the hearing, at the request of the Tribunal, both parties cooperated to produce a schedule setting out, in respect of commission payments, their respective positions for each month, identifying areas of dispute.

Claims and Issues

5. The Claimant, was employed initially as an Account Manager and then an Account Director by the Respondent between 1.4.14 and 30.10.20, when he resigned with immediate effect.

6. In his first ET1 Claim form, dated 27.5.20, he claimed unauthorised deduction from wages in relation to unpaid commission on sales between May 2019 and May 2020 of approximately £144,000.

7. In a further ET1 Claim form dated 6.1.21, he claimed a further unauthorised deduction from wages (up to 30.10.20) and brought a claim for constructive unfair dismissal and breach of contract. There were two main strands to his claim for constructive unfair dismissal; (1) the failure to pay him commission contractually due and (2) the fact that shortly before he resigned, he was effectively demoted.

8. The Respondent's case is that the Claimant had no contractual entitlement to commission payments. In any event, there are no sums outstanding. There was no breach of contract and no basis for him to resign. He was paid what he should have been and was not demoted.

9. The list of issues agreed between the parties (as amended at the start of the hearing with the agreement of both parties) was as follows:

<u>Constructive unfair dismissal</u>

1.1 The Claimant claims that the Respondent acted in fundamental breach of contract in respect of the express terms of the contract. The breach was as follows;
    1.1.1 Failure to pay commission in accordance with the contractual terms.

1.1.2 Demoting the claimant.

1.2 The Claimant claims that the Respondent acted in fundamental breach of contract in respect of the implied term of mutual trust and confidence. The Tribunal will need to decide:
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
1.2.2 Whether it had reasonable and proper cause for doing so.

1.3 Was the breach so serious that the claimant was entitled to treat the contract as being at an end?

1.4 Did the Claimant resign because of the breach?

1.5 Did the Claimant delay before resigning and affirm the contract? The Respondent does allege that affirmation applied here. It contends that the Claimant threatened resignation on several occasions before he did actually resign.

Wrongful dismissal; notice pay

2.1 What was the Claimant's notice period?

2.2 Was the Claimant paid for that notice period?

2.3 If not, was the Respondent guilty of a fundamental breach of contract which entitled him to resign without notice?

Unauthorised deductions (Part II of the Employment Rights Act 1996)

3.1 Did the Respondent make unauthorised deductions from the Claimant's wages and if so how much was deducted?

3.2 Specifically;
3.2.1 Were any terms relating to commission contractual?
3.2.2 Were payments made to the Claimant in accordance with those terms?
3.2.3 If not, what was the value of the deductions made?

Breach of Contract (Extension of Jurisdiction Order 1994**)**

4.1 Did this claim arise or was it outstanding when the Claimant's employment ended?

4.2 Did the Respondent do the following fail to pay commission in accordance with the contract of employment (see paragraph 3 above).

Evidence

10. The Tribunal was provided with an agreed bundle, totaling 457 pages. A further agreed supplementary bundle of 40 pages was provided shortly prior to the start of the hearing, arising out of documents disclosed by the Respondent at the request of the Claimant.

11. The Claimant gave live evidence as did Andrew Gilles (Now CEO, Managing Director at the time) and Ian Morl (Charted Accountant and Financial Advisor) for the Respondent.

Fact Finding

12. The following findings of fact were made on the balance of probabilities. Findings were limited to matters relevant to determine the key issues between the parties.

13. The Claimant worked for the Respondent from 1.4.14 until he resigned with immediate effect on 30.10.20. The Respondent provides and installs security systems (CCTV, door entry systems etc) to clients include large retailers.

14. The Claimant had previously worked for Sainsburys for 17 years. A key part of his role with the Respondent was to develop the commercial relationship with Sainsburys. He helped establish them as a significant client and by 2019 the Sainsbury's contract was valued at at least £3.5m and growing (there was evidence that it was approaching £7m by the time of his resignation). The success that the Claimant had in growing the Sainsbury's account was not in dispute.

15. The Claimant's contract of employment, dated 11.4.14 contained at paragraph 2.1 a term that the Claimant shall serve the Company as an Account Manager or in such other capacity as the Respondent may determine provided that was "*commensurate with the Employee's position".*

16. The notice period provided was for 3 months.

17. The contract also contained the following further provisions under the heading "renumeration"

    7.4: The Employee may be entitled to work towards the achievement of a performance related bonus/commission details of which will be made available on a separate schedule and agreed on an annual basis. Any annual agreement in terms of bonus/commission will not set a precedent for future years.

    7.5: Payment of salary and bonus to the Employee shall be made either by the Company or by any other member of the Group and, if by more than one company, in such proportions as the Board may from time to time think fit.

    7.6 The Company reserves the right to withhold any bonus/commission payments if a customer or supplier fails to deliver or settle their account to the board's satisfaction.

18. What was titled a "Commission Scheme", relating to the Respondent's financial year, had been agreed each year between 2014 and 2018 [see p.106,108,110, 112, 114[1]] and was committed to writing. The written terms changed little between 2014 and 2018.

19. The Commission Scheme agreed for the financial year 30 September 2018 – 30 September 2019 [p.114-115] provided for the payment of commission as follows:

    a. 4% of the gross margin on director accounts, defined as *"an account that a Director hold the key relationship with or has negotiated the sale before handing the account over to a Business Development Manager/Account Manager".* Gross Margin must be 30% or above or the commission rate will be agreed per project.

    b. 5% of the gross margin on Sainsbury's Supermarket Limited (SSL) below 30%, defined as the commission that will be paid on the actual gross margin achieved at the end of the project after all costs have been factored against the project.

    c. 7.5% of the gross margin on Sainsbury's Supermarket Limited above 30.1%, defined as above.

    d. 10% of gross margin on New Business Accounts, defined as business new to the Respondent where an order had not been received before or not in the last 24 months.

    e. 10% of turnover on Service Maintenance Accounts, defined as the sale or any new or extension of a maintenance contract to a customer.

20. Gross margin was left otherwise undefined. Another term of the agreement relating to commission was as follows: "*No commission payments will be made until a sales person has covered their individual operating costs in the month. The AM's operating costs excluding expenses are £4500 per month so this is the GM profit required each month as a minimum before the commission package detailed in this document becomes eligible".*

21. The Commission Scheme for year-end September 2019 referred to a target of £3 million. Whilst the Respondent suggested (solely in cross-examination of the Claimant) that that was a target to be personally achieved by him, the Tribunal does not agree. It was a notional figure used as an example on which to base example figures contained within the agreement. There is no other evidence at all of the Claimant being set a £3 million target. In any event, the Claimant's unchallenged evidence was that he exceeded that target by a considerable margin.

22. The agreement was, as both parties accept, poorly drafted and open to interpretation. Mr Morl, a charted accountant and the Respondent's Financial Advisor accepted during his evidence that he found it unsatisfactory and that in his experience all such agreements result in an argument. It was not the type of agreement he would ever use.

[1] References are to page numbers in the agreed trial bundle unless otherwise indicated.

23. What the written Commission Scheme agreement conflated was a Commission Scheme and a Bonus Scheme. Whilst the Respondent submitted that they are one of the same, the Tribunal disagrees. The final paragraph on page one of the agreement (p.114) refers to "final month" and "year-end" bonuses that will be paid *"following production of the audited accounts of the company".* The Claimant never received any such final month or year-end bonus, nor did he ever assert a right to one. That final paragraph on p.1 of the 2018 agreement (bundle p.114) was intended to apply to a bonus scheme, not the calculation of the Claimant's commission.

24. Payments made as part of the Commission Scheme formed a significant and important part of the Claimant's renumeration. His base salary of £40,000 was relatively modest in terms of his role (certainly as Account Director) and the value of business he helped to generate. The Commission Scheme was designed to incentive performance and increase the Respondent's revenue. The Claimant's commission was uncapped. His evidence that when he joined Amberstone he was told (by Mr Gilles) that for every £1m of sales, he could expect to earn a further £30,000 was not challenged by the Respondent.

25. In contrast to the paragraph relating to "final month" and "year-end bonuses", the Claimant was paid commission payments at regular intervals throughout the year at the same time as monthly salary payments, albeit there was always a delay between work being invoiced and him being paid commission on account of what were typically 90 day payment terms.

26. The Tribunal accepts that the original intent of both parties was for a scheme that could deliver regular payments throughout the year if sales were achieved. It was intended to be one that could be delivered and understood without unnecessary accounting complexity.

27. Central to this case is the Respondent's decision to change the way in which the payments made under Commission Scheme were calculated and applied to the Claimant.

28. The change is summarised in an internal email from the Respondent's Strategy and Transformation Director to Andrew Gilles dated 13.1.20: "*There appears to be a misunderstand in how Iain is paid commission from our structural changes…..Iain's understanding of this agreement (and Amberstone's legacy approach to it) is the costs attributed to a job as per the agreement, payable on gross margin linked to that specific project as recorded on Cash [a job management programme] - These total project costs as per quoted are not including unattributed head office costs - Cash displays actual costs per job, as per Iain's understanding. This is how this agreement has been paid since Iain started with Amberstone in 2014, but this approach changed this summer without consultation. Iain had quoted that the business used to retain 2% of the commission payment as a gentleman's agreement, to cover unattributed business project costs" [p.405].*

29. How the Commission Scheme had been interpreted and applied by both parties since 2014 is further detailed in an email from the Respondent's Matt Allen to others

including the then managing director Andrew Gillies dated 31.1.20 [supplementary bundle p.21]

"The process I worked to when I was completing the incentive plan calculations was as follows:

- *Finance would send me monthly a CASH spreadsheet detailing all the payments that Tech had received for the previous month.*
- *I would filter the spreadsheet down by for the account managers by their various customers and any sub companies that were involved with those customers (M&E contractors, Shop fitters etc).*
- *After the filtering was done and the spreadsheet had been tidied up I would then need to check CASH for the delivered margins for the projects that we had received payments on. I would manually deduct the 2% management fee that had been agreed when Rob Stonehouse had been responsible for commission payments.*
- *I would then email a PDF copy of the calculation document to the Account manager and upload a copy of the excel document and the PDF copy into a shared (with finance) folder in Dropbox where finance could check and verify the calculations before sending on to payroll for payment.*
- *It was completed this way from when Rob Sto*nehouse left the business nearly 3 years ago until I stopped completing the task."

30. The payment of the Claimant's commission had been calculated and then authorised in the first 2-3 years of his employment by finance director Robert Stonehouse and then sales director Matt Allen. When administered by them, the Claimant would receive monthly emails with a list of payments made by clients and the relevant commission payable [there is an example in an email dated 15.3.19 at p.451]. This allowed the Claimant to check the commission owed and raise any necessary issues.

31. However, in about May 2019 the task was handed over to Jon Brett, then finance manager, who consulted with Ian Morl. They adopted, without any prior discussion or consultation with the Claimant, a very different approach.

32. By May 2019 there had also been a change to Claimant's job title. In February 2019 he was asked to take on an additional account, Boots, and to become an Account Director. However, in what would become a consistent complaint, the Claimant was never provided with any updated contract nor even a written job description for the new role. Although Mr Gilles, the Respondent's Managing Director, said in evidence that the job descriptions of Account Manager and Account Director would have been virtually identical, he also added that Account Directors would look after larger customers to ensure they were looked after by someone with "gravitas". The Tribunal finds that the change to Account Director was a promotion and was intended to be a more senior role than an Account Manager. This is supported by the definition of "Director's Account" in the Commission Scheme agreement [i.e. p.114].

33. Following the change of job title there was discussion about a new contract and financial and incentive package to reflect the Claimant's promotion. On 4.4.19 Matt Allen, sales director, emailed the Claimant to say that whilst he waited for Mr Gilles to approve a new incentive plan *"lets work to the old one",* i.e the September 2018/2019 commission scheme already in place.

34. There has been dispute between the parties as to the significance of that email and the correct end date, if any of the 2018/2019 commission agreement. In this context it is common ground that that financial year end was in fact changed from September 2019 to the end of March 2020.

35. Mr Gilles, in cross-examination, accepted the proposition that the 2018/2019 commission agreement was to remain in place until a new agreement was reached. In fact, no new arrangement was proposed to the Claimant until July 2020, and no new agreement reached prior to the Respondent's resignation.

36. Despite previous commission scheme agreements starting and ending at the financial year end, the Tribunal accepts that it was agreed that the September 2018/2019 agreement was to continue until a new scheme reflecting the Claimant's new Account Director role had been agreed by both parties. It was therefore still in place at the time of his resignation. In light of the importance to the Claimant of commission payments the Tribunal finds that he would not have continued in his role, nor remained silent on the issue, had it been agreed (as was originally argued by the Respondent) that the scheme terminated without replacement at the amended financial year end in March 2020.

37. Mr Morl had recorded in his witness statement that the Claimant's Commission Scheme agreement was for 12 months *"extended to 18 months to match the extended accounting reference period".* However, when cross-examined on this point he frankly accepted that he could not say whether that was ever communicated (or agreed with) the Claimant. Further, there is no documentary evidence suggesting that it was terminated at that stage. Whilst a later letter sent to the Claimant dated 14.7.20 asserted that the commission agreement had lapsed at the financial year end, for the reasons set out above the Tribunal does not accept that it had.

38. Mr Morl was instrumental in the change to the way in which the Claimant's commission was calculated and paid. He noticed that the CASH system had been used instead of the management accounts. As a result ,there could be differences in terms of income between them, i.e. cancelled purchase orders and credit notes.

39. However another significant change that he implemented was a change to the way previously unassigned labour costs relating to the Respondent's salaried staff who worked on jobs subject to the Commission Scheme was calculated.

40. He came up with a formula of 12.3% as a direct labour cost to be factored into the Commission Scheme calculations. In his evidence he accepted that calculating the precise costs of such labour was very complicated for a number of reasons but that he had adopted what he considered an interpretation generous to the Claimant. However, it remained a notable increase from the 2% previously assigned to otherwise unattributed costs that had been previously agreed (as referenced in the email of 13.1.20) and that had been applied since 2014.

41. Mr Morl described being brought in to "pick up the pieces" and to help rescue the overall business that had sustained overall losses in 2018. The Tribunal concludes from his evidence that he had concerns about the previous financial management of

the company, concerns about the commission scheme in place and the way it had been implemented. He was also concerned about the fact that the Claimant had become the Respondent's highest earning employee. The changes he implemented were intended to address all of those issues.

42. As a result of the changes Mr Morl helped implement, the Claimant's commission payments reduced significantly. He first noticed and challenged that in an email dated 20.9.19 [p.128]. He was advised to take it up with Jon Brett and the Managing Director Andrew Gilles, which he did.

43. On 21.11.19 the issue was discussed by the Respondent internally via email with the Managing Director messaging John Brett saying: "Matt Allen used to deduct a value on the basis that project managers, commissioning engineers, operating costs were not allocated against the jobs…. I can only presume that for whatever reason he [the Claimant] is now looking at this and trying to claim a higher margin basis again at an unrealistic number as it does not contain all the costs that should be against those works - I.e. the true operating margin .. now I'm happy to apply that and he would be very unhappy with that number…"

44. From December 2019 onwards, the Respondent made no commission payments at all to the Claimant, save for what was in essence a payment against any outstanding commission of £5000 in February 2020. That came after the Claimant had informed the Respondent in February 2020 that the situation was adversely impacting his financial situation. By email dated 19.12.19 the Claimant was informed that "the commission calcs are being reviewed and signed off by AG [Andrew Gilles] [p.135]".

45. On 13.1.20 the Claimant sent a detailed breakdown of the commission figures he was due for the period May to November 2019. The total sum was £36,978.32 [supplementary bundle p.10].

46. On 21.1.20 there was a meeting between the Claimant, Andrew Gillies and Iain Morl. Recollections of that meeting differ. The Claimant was offered £70,000 to settle all outstanding commission and any future commission payments due during the life of the agreement. The Claimant rejected that, seeking via email an explanation as to how £70,000 had been calculated. Whilst Mr Morl had offered to show the Claimant on his computer at that meeting how he was calculating commission, he was not provided with any clear written information to assist him.

47. After a further meeting with Geraldine Locke, an HR partner, the Respondent wrote to the Claimant on 14.2.20 telling him that historic calculations had included credit notes and re-charges which had artificially inflated the true value of the perceived profit. She further informed him that according to the Respondent's calculations he had been overpaid and owed the Respondent £5000.

48. That letter also made a revised and much reduced offer of £46,000 to recognise the Claimant's "hard work and loyalty". It was claimed that such a sum would lead to a 7% increase over and above his earnings for the previous year.

49. The Claimant responded by requesting further information to allow him to calculate what he was owed including "paid invoice/customer details for December, January

and February to date along with the expected (due) payments against my contracts for works complete at the earliest opportunity" [p.146]. He recorded in that response that his previous requests for such information had been described by the Respondent as "unhelpful".

50. The Tribunal accepts that the Claimant consistently requested information to allow him to be able to calculate the commission he was owed, based on how he had previously been paid. He did not receive it. Whilst the Respondent expressed that they were prepared to meet him to explain how they now calculated his commission, they consistently refused to provide him with any data by which he could independently calculate what he reasonably believed he was owed.

51. The Claimant submitted a 'Formal Grievance Letter' on 10.3.20. He requested all commission owed to him and again detailed figures upon which the commission payments had been calculated. He also stated that he was continuing to work only under protest.

52. A grievance meeting was held on 23.3.20. The Claimant detailed that he was, by his calculations, owed £60,848.31 in commission for the period September 2019 to January 2020 with a further potential £20,000 owing for the period January to March. The Respondent's position remained that he had in fact potentially been overpaid £5,000. The Claimant also raised the fact that he had been told he had been offered an Account Director role but he had never received a formal offer or job description.

53. 3 weeks after that meeting, the Claimant chased the Respondent for an outcome to his grievance. He again confirmed that he was continuing to work only under protest, He chased a response again on 20.4.20, a month after the grievance meeting.

54. The outcome of the grievance was communicated by letter dated 24.4.20. The grievance was rejected. However, whilst that letter purported to determine the issue of outstanding commission figures, it did not deal with or even attempt to deal with what if any commission the Respondent was going to pay him or what the correct figures were. The reason given for this was as follows: "*It is a time-consuming exercise to break down how your historic figures had been calculated. As it is a busy time in terms of financial reconciliation, we will look to provide these figures outside of the grievance process as soon as they are available."* Given that the Claimant had first raised issue with the calculation of his commission back in September 2019, the Tribunal observes that the Respondent was consciously dragging their feet in providing this important information to the Claimant.

55. The grievance outcome letter also dealt with other issues. One was the Claimant's suggestion that the Respondent had instigated conversations with Sainsbury's, the Claimant's most significant account, in an effort to deliberately remove him from it. That would have had a significant impact on his ability to earn commission payments.

56. The Tribunal does not find that Sainsbury's request to have a single point of contact was deliberately instigated by the Respondent in bad faith. Emails between the Respondent and Sainsbury's in early February 2020 [p.141] demonstrate that Sainsbury's requested a single point of contact via an Account Manager role. However, that arose at a convenient time for the Respondent who clearly at that

stage had formed the view that the Claimant was being overpaid and wanted to reduce his commission payments.

57. The Tribunal also accepts Mr Gilles evidence that Sainsbury's had, by telephone prior to that email expressed concern about their working relationship with the Claimant. Mr Gilles' explanation as to why there is no note or email to this effect, namely that it was a difficult and sensitive issue for Sainsburys to raise in light of their previous relationship with the Claimant, is an understandable one. However that concern, relating to the Claimant's most important account and a significant source of his commission income, was not raised with the Claimant at the time. The Tribunal finds that the Respondent did not try to rescue the situation nor did they consult with or involve the Claimant in finding a workable solution.

58. The grievance letter concluded by informing the Claimant that he had a right to appeal within 5 days. He did not do so, explaining in evidence that he did not think there was any point as it would achieve nothing. However, he did not accept the outcome and continued to protest the failure to pay the commission due. There was yet further correspondence in which he asked for clarification of whether the £46,000 offer reflected work done up to the current financial year end.

59. By early May of 2020 the Claimant had sought legal advice including on the issue of constructive dismissal. As a result of that advice, on 1.5.20 he wrote to the Respondent stating that unless an amicable solution together with a new contract was agreed he reserved his right to litigate matters in the ET, adding: "I have lost trust and confidence in Amberstone and am considering my position within the company. Should I leave, I understand I can issue proceedings for constructive unfair dismissal and breach of contract." He added that he would be prepared to accept £115,000 in respect of outstanding commission.

60. He received a reply on 18.5.20 apologising for the delay in responding but informing him that "we are still awaiting the end of year figures to factually assess the calculations, I would hope to be in a position to respond by the end of the week".

61. On 27.5.20 he issued a claim to this tribunal for unauthorised deduction of wages relating to the period May 2019 to May 2020.

62. He had to wait almost two months for the figures promised in that email of 18.5.20. On 14.7.20 he was sent a letter headed "New Salary and Bonus Arrangement". That letter was the first such written proposal since he had assumed the Account Director role. The letter also contained a detailed breakdown of commission payments paid between April 2019 and March 2020 and what, according to the Respondent, he was in fact owed. The table demonstrated that the Respondent was now applying a 12.34% figure for labour otherwise not directly assigned as a cost to the job, in place of the 2% figure used previously. The conclusion was that, even on the Respondent's figures, the Claimant was owed £12,045.98 in respect of the financial year ending March 2020.

63. The remainder of the letter set out a new contractual terms, back dated to April 2020 with an increased basic salary of £70,000 but a revised "non-contractual" bonus scheme that would be reviewed on a monthly basis. Under the terms of that bonus

scheme the maximum sum achievable per month was £3,600. By contrast, the same letter revealed that the Claimant had, even on the Respondent's figures, achieved £9,350 commission in February 2020. The proposal would cap the Claimant's maximum earnings at £113,200. It is worth comparing this with the figures, including commission he had achieved in the previous tax year, namely £138,719 and the offer made to him as recently as 14.2.20 in which he was offered a proposed settlement of £46,000 making his 2019/2020 total gross earnings £148,126.

64. That 14.7.20 letter was an attempt to limit the commission and total pay package achievable by this Claimant. The tribunal concludes that that was part of a pattern of behaviour prompted by a change in the way the Respondent perceived and valued the Claimant. There was firstly the dispute about commission, then the failure to consult fully with him or work with him to resolve the Sainsbury's issue. A further issue not previously dealt with, was the fact that another key account that the Claimant was asked to manage, Boots, ended with Boots requesting on 10.1.20 a change in "senior lead" (i.e. the Claimant). Whilst such a change was not put in place immediately by the Respondent, the Tribunal accepts that the Claimant was not aware of that email or Boot's request until these proceedings commenced. He had believed that a move away from working on the Boots account was for other reasons. The Respondent made no attempt to inform the Claimant of the issue nor to work with him on finding a solution.

65. That change in the Respondent's perception of the Claimant came across clearly during the cross-examination of Mr Gilles. At times when challenged on points Mr Gilles responded by making the point that he was not the Claimant's line manager so could not assist with points of detail. However, at other times he displayed an impressive grasp and recollection of events relating to the Claimant. The Respondent's frustration with the Claimant was evident when he made the remark that it was unprecedented for two customers to ask to remove someone from their accounts.

66. The Claimant never accepted the revised contract terms set out in the 14.7.20 letter. He replied stating that he had not "agreed to the conclusion of my commission scheme". He asked on 17.7.20 for further details of the proposed new contract raising issues relating to medical insurance, car allowance, pension contribution and holiday. He re-stated that until those were provided he continued to work "under protest".

67. There was considerable delay in responding to the Claimant. He signalled his frustration in an email on 18.8.20 stating that he had no response and that whilst the Respondent had said that they wanted him to stay working for them, they had not answered his questions. He further stated that he felt he was being forced into a situation where his only option was to leave. He also raised the fact that he had just received £5400 from the Respondent with no explanation as to what it related to. He again requested full terms and conditions as to the proposed new contract.

68. He received an email reply on 12.9.20 explaining recent salary payments made to him. He was being paid sums back dated to April on the basis of a new £70,000 basic salary. That was despite the fact that he had never accepted the proposed new contract offer contained in the 14.7.20 letter. The Respondent's reply also dealt with

his request for more details as to the contract he was being offered in a very brief manner; "*Your terms and conditions of employment have not changed as your contracted role has not changed; we have only made changes to your remuneration. If you would like us to re-issue a new contract to consolidate the changes then we can do this for you*." Of course his original contract referred to him as Account Manager rather than Account Director, a point he had made repeatedly.

69. The Claimant responded on 14.9.20 expressing his frustration and the fact that the proposed new bonus agreement he had been sent removed certain customers from his role and that he had today been asked to use an email address that did not reveal his name when communicating with Sainsburys. He further raised that he had still not been provided with the information he had sought relating to his commission payments and that he had wrongly been deducted £3,500.

70. A substantive reply came on 12.10.20, dealing with a number of issues, including confirmation of a meeting in which Sainsbury's desire to remove the Claimant completely from the contract (rather than simply an Account Manager, Paul Baker being the point of contact as had previously been discussed). The overall effect of the letter was to inform the Claimant that there would be no change to the offer made at the end of July.

71. The Claimant responded expressing his dissatisfaction and a meeting between the Claimant, Geraldine Locke and Graham Allison was held on 15.10.20. That meeting was recorded and detailed minutes are available. The Respondent set out his frustration that despite having been an Account Director since February 2019 his contract had not changed. He also detailed earlier and ongoing complaints relating to the calculation of his commission.

72. Another issue discussed in that meeting was a shift in the Claimant's role to develop business with a new client group including Etel, Mace, Asda and Wilko. When put to him in cross-examination Mr Gilles was reluctant to accept that i) dealing with those accounts was more consistent with an Account Manager rather than Account Director role and ii) was an effective step down with less commission. However, the Tribunal accepts the Claimant's evidence that it was. In the minutes of that same meeting it was accepted by the Respondent's Graham Allison that those accounts were "significantly smaller" albeit that the potential for growth transition will be "much easier to achieve". The Claimant's position is also supported by the contemporaneous correspondence. In an email dated 28.10.20, whilst the Respondent describes the account as with blue-chip clients it refers to the "significant potential for growth" and the fact that they have "every potential to be just as long lasting and wide reaching as Sainsbury's" and that the Account Director role is not exclusively for "large well established clients". That is of course at odds with Mr Gilles earlier evidence that "Account Directors would look after larger customers to ensure they were looked after by someone with gravitas".

73. Having been promoted to the role of Account Director managing two well established and large accounts, the Claimant was being re-assigned to try to develop clients that were a very different proposition. They may or may not have blossomed as the Sainsbury's account had, in large part due to the Claimant. He was being asked to do so on what was, as per the 14.7.20 letter, an overall reduced financial package

in comparison to his previous years renumeration. That proposed offer was for his basic salary to be increased by a significant sum - £40,000 to £70,000. However the "bonus scheme", expressly described as non-contractual and renewable on a monthly rather than annual basis had what was, in comparison to before, a relatively low and hard ceiling. There was no evidence to suggest that those accounts would have resulted in the Claimant getting close to the ceiling of the proposed bonus scheme in the short term.

74. In an internal email dated 23.10.20 Mr Gilles describes the Claimants concerns about his proposed new role and client base as "the ridiculous assertion that they are too small"… [p.223]. The Tribunal accepts that the Claimant's concerns were legitimate ones in light of his role as an Account Director.

75. The Respondent crystalised the position in the conclusion of an email dated 28.10.20: "Your Sainsbury's handover is now complete, therefore your new Client group will be effective from Friday 30th October. You have indicated a reluctance to lead these accounts, however you cannot continue working in your position without an assigned Client group. If you are declining to manage these accounts, then I would appreciate if you could confirm you intentions towards your employment with us."

76. The Claimant's response on 30.10.20 was to resign with immediate effect: "In light of the way I have been treated regarding the commission I am owed and the changes you are imposing on me, I have no alternative but to resign with immediate effect. I have lost all trust and confidence in you as an employer to behave reasonably."

77. By way of letter dated 2.11.20 the Claimant accepted that resignation.

Law

78. In closing submissions, both parties presented this case as being one about a dispute of fact rather than involving any dispute about the law. The Claimant referred the Tribunal to Lucy v British Airways PLC UKEAT/0033/08/KA and Dunlop Tyres Ltd v Blows [2001] EWCA (see below). The Respondent referred to Tullett Prebon PLC v BGC Brokers LP [2011] IRLR 420, CA.

Unauthorised Deductions from Wages

79. Section 13(1) Employment Rights Act 1996 (ERA) provides that an employer shall not make a deduction from the 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.

80. 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. The Respondent did not seek to argue that

payments due under the Commission Scheme would not amount to 'wages' under the Act.

81. The Tribunal considered the requirement that wages properly payable must be capable of quantification to found a claim under s.13. However, there is an important distinction between cases where such wages are unquantifiable and those were quantification is disputed and/or difficult, *Lucy and others v British Airways plc UKEAT/0033/08/LA* and *Coors Brewers Ltd v Adcock and Ors 2007 ICR 983, CA* considered. The Tribunal was assisted by both parties agreeing that whilst the quantification of Commission Scheme payments was not a simple task this was not a case in which such sums were unquantifiable.

82. The Tribunal also considered *Agarwal v Cardiff University and anor 2019 ICR 433*, CA and the jurisdiction there is to interpret contractual terms as to whether wages are properly payable.

Contractual terms, bonus and commission

83. Whether there is a contractual entitlement to commission is a matter of construing the contract in accordance with standard contractual principles, ascertaining the objective intention of the parties at the time they entered the contract. What would a reasonable person having all the background knowledge available to the parties have understood them to be, using the language in the contract? It is well-established in the employment field that the written terms may not always accurately reflect what was actually agreed between the parties and the Tribunal may disregard a written term that is not part of the true agreement: see *Arnold v Britton [2015] 1 AC 1619*; *Autoclenz Ltd v Belcher [2011] ICR 1157 SC*.

84. In *Dunlop Tyres Ltd v Blows [2001] EWCA Civ 1032*, cited by the Claimant, the following was observed [at para.19]: "*Where the language of a contract of employment is ambiguous, that practice is self-evidently powerful evidence of the parties intentions to which the court can turn in order to resolve the ambiguity. A contract can be brought to an end and new terms agreed, but until that is done the practice indicates the proper interpretation of the terms of the contract".*

85. In *Horkulak v Cantor Fitzgerald International 2005 ICR 402*, CA a contractual term that the employer "may in its discretion' pay a bonus was held to be contractual where it related to a high earning and competitive activity and the bonus scheme was part of a renumeration structure designed to motivate and reward the employee.

86. In *Chequepoint (UK) Ltd v Radwan, Unreported 14.9.00, CA* the contract provided for a discretionary bonus scheme, the terms of which would be notified to employees from "time to time". The Court of Appeal held that once the terms of the scheme had been notified, the employee became contractually entitled to the bonus set out in the scheme until such time as the scheme was changed or withdrawn.

87. If an employer fails to give notice as required under a scheme as to its termination, the employee will be entitled to rely on the original scheme until such time as proper notice is given - *Ikon Office Solutions plc v Steen, EAT 236/02*

88. Where the calculation of commission is subject to a measure of discretion on the employer's part, the employer does not enjoy a broad and untrammelled discretion, see for example *Hills v Niksun Inc 2016 ILR 715, CA*.

89. In *Re an Arbitration between Rubel Bronze and Metal Co Ltd and Vos 1918 1 KB 315, KBD*, the principle was established that there is a general implied term to the effect that if an employee earns all or part of his renumeration by way of commission, the employer will not act in such a way as to deprive him of the opportunity of earning it. Further, in *Star Newspapers Ltd v Jordan EAT 344/93*, the EAT upheld a first instance decision that there was an implied term that if the employer proposed to reduce an employee's sales area, it would seek to reach agreement so that she would not suffer a reduction in income.

90. In *Pendragon plc v Jackson (No.2) EAT 108/97* it was observed that parties are free to stipulate that a discretionary bonus scheme is non-contractual. Such a term could be a clear and unambiguous indication that the employer did not intend to create a legally binding term.

Constructive dismissal

91. A dismissal is defined by section 95 of the ERA and includes the employee terminating 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 95(1)(c). This is otherwise known as a constructive dismissal.

92. An employee will be entitled to terminate his contract without notice to his employer only if the employer is in repudiatory breach of contract: see *Western Excavating (ECC) v Sharp [1978] ICR 221*.

93. In *Cantor Fitzgerald International v Callahan and ors 1999 ICR 639, CA*, the Court of Appeal held that the question of whether non-payment of agreed wages was or was not fundamental to the continued existence of the contract depended on a distinction between an employer's inadvertent failure or delay in paying wage against its deliberate refusal to do so on the other, Where an employer unilaterally reduced an employee's pay or diminished the value of his or her salary package, the entire foundation of the contract of employment was undermined. As Judge LJ observed: "*it was difficult to exaggerate the crucial importance of pay in any contract of employment. In simple terms, the employee offered his skills and efforts in exchange for his pay".*

94. Breach of the implied term of trust and confidence will mean inevitably that there has been a fundamental or repudiatory breach going necessarily to the root of the contract (*Morrow v Safeway Stores Ltd [2002] IRLR 9, E*AT).

95. In *Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606, [1997] IRLR 462*, the House of Lords held the implied term of trust and confidence 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.' The italicised word 'and' is thought to be a transcription error and should read 'or'.

96. In employment relationships both employer and employee may from time to time behave unreasonably without being in breach of the implied term. It is not the law that an employee can resign without notice merely because an employer has behaved unreasonably in some respect. The bar is set much higher. The fundamental question is whether the employer's conduct, even if unreasonable, is calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

97. There is no breach of trust and confidence simply because the employee subjectively feels that such a breach has occurred no matter how genuinely this view is held. If, on an objective approach, there has been no breach then the employee's claim will fail (see *Omilaju v Waltham Forest London Borough Council [2005] EWCA Civ 1493, [2005] ICR 481,* CA). The legal test entails looking at the circumstances objectively, ie from the perspective of a reasonable person in the claimant's position. (*Tullett Prebon PLC v BGC Brokers LP [2011] IRLR 420, C*A.)

98. The repudiatory breach or breaches need not be the sole cause of the claimant's resignation. The question is whether the claimant resigned, at least in part, in response to that breach. (*Nottinghamshire County Council v Meikle [2004] IRLR 703, CA*; *Wright v North Ayrshire Council UKEATS/0017/13*.)

99. The duty not to undermine trust and confidence is capable of applying to a series of actions by the employer which individually can be justified as being within the four corners of the contract (*United Bank Ltd v Akhtar [1989] IRLR 507, E*AT).

100. A claimant may resign because of a 'final straw'. The final straw act need not be of the same quality as the previous acts relied on as cumulatively amounting to a breach of the implied term of trust and confidence, but it must, when taken in conjunction with the earlier acts, contribute something to that breach and be more than utterly trivial. An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely (and subjectively) but mistakenly interprets the employer's act as destructive of the necessary trust and confidence. See for example the judgement of Langstaff J in *Lochuak v L B Sutton UKEAT/0197/14.*

101. The claimant must not 'affirm' the breach. A claimant may affirm a continuation of the contract in various ways. He may demonstrate by what he says or does an intention that the contract continue. Delay in resigning is not in itself affirmation, but it may be evidence of affirmation. Mere delay, unaccompanied by any other action affirming the contract, cannot amount to affirmation. However, prolonged delay may indicate implied affirmation. This must be seen in context. For some employees, giving up a job has more serious immediate financial or other consequences than others. That might affect how long it takes the employee to decide to resign.

102. In the context of affirmation, the Tribunal has considered in particular *Abrahall v Nottingham City Council [2018] ICR 1425, CA* in which it observed that it was not

right to infer that an employee had agreed to a significant diminution in their rights unless the conduct, viewed objectively, clearly evidenced an intention to do so.

Conclusions

103. The Tribunal now applies the law to the facts to determine the issues.

104. Before considering the agreed list of issues it is necessary to consider the terms of the Claimant's contract of employment and whether that Commission Scheme agreement was or became a contractual term. If it did, what were its terms?

105. Whilst the Commission Scheme agreement was expressed (paragraph 7.4 of the employment contract) in terms that it "may" be made available, such an agreement had been agreed annually in near identical terms. Once agreed between the parties it formed a key component of the Claimant's renumeration that he was entitled to during the life of the agreement subject to its terms. It was clearly designed to motivate and reward him as part of his pay structure. It was not a purely discretionary bonus.

106. The Tribunal therefore rejects the submission that, during the life of the commission scheme agreement, it was a non-contractual term. The parties were free to expressly stipulate that the commission agreement was non-contractual. They did not. It is notable that when in July 2020 the Respondent set out a proposed new scheme to the Claimant they sought to describe the proposed replacement scheme as "non-contractual and reviewed on a monthly basis" [p.177] . They had not previously done so. Whilst at the agreed end date of the scheme the parties were free to renegotiate a new scheme, it had contractual force during its duration.

107. What then were the terms of the Commission Scheme? The dispute between the parties comes down to this.

108. The Claimant asserts that in the event of any ambiguity about the written terms of the commission agreement (i.e. the definition of "gross margin") the Tribunal should look to, as powerful evidence of the parties intention, the practice of how the agreement had been implemented and operating since 2014. The Claimant argues that in calculating "gross margin" under the scheme i) the payments due under the Commission Scheme were to be calculated using the CASH system and ii) as previously agreed between the parties the only sum to be deducted for otherwise unassigned costs was 2%.

109. The Respondent asserts that the final paragraph of the Commission Scheme agreement, notwithstanding that it refers to bonuses rather than commission, applies and is a clear written express term. The "gross margin" commission was therefore to be the "reported margin per the management accounts (after any year end audit adjustments)" Further, pursuant to that the Respondent was entitled to factor in the true cost of any unassigned labour costs. 12.3% fairly reflects that.

110. Both sides accept that the Commission Scheme was badly drafted and is open to interpretation. It falls on the Tribunal to construe what the nature of the agreement truly was. That is a task that courts and Tribunals have to do on a frequent basis. In

doing so the tribunal considers all of the evidence before it and looks to and takes account of both the intention of the parties and, as evidence of that, how the agreement had been implemented and the reality of what had been agreed.

111. The commission payments were made at regular intervals throughout the year and were intended to reflect the gross margin at the end of a project, via figures available to both sides as reflected in the CASH system. They were not dependent on the reported margin in the management accounts subject to year-end audit and any write offs. The Tribunal also concludes that it was agreed between the parties that the only figure in respect of otherwise unassigned costs to be factored in was 2%. Whilst that sum was not reflected in the written terms of the Commission Scheme itself it was one that was clearly agreed and implemented by both sides as evidenced in the available emails. The Tribunal finds that the terms of how the Commission Scheme was intended and did operate is as described in the email from Matt Allen dated 31.1.20.

112. The Respondent has argued that under the terms of the Commission Scheme it was entitled to rectify mistakes and that the Claimant should not be unjustly enriched or entitled to rely on such mistakes. That in itself cannot be controversial. Further paragraph 7.6 of the employment contract specifically refers to commission being withheld if a supplier failed to deliver their account. If a contract had not been paid or a refund had to be made to the customer then commission would not be due in respect of such sums. However, there was no untrammelled right to vary the terms of the scheme during its life without agreement.

113. As to the duration of the Commission Scheme, as already indicated above, the Tribunal concludes that the parties did agree that it should remain in place until a new incentive scheme could be agreed. No such scheme was ever agreed, despite the Respondent's attempt to impose a much reduced scheme in July 2020, backdated to April 2020. The 2018 Commission Scheme Agreement therefore continued on a rolling basis beyond the March 2020 year end and was still in existence at the point of the Claimant's resignation in October 2020. The Claimant was entitled to payments under the scheme up until that time.

Fundamental breach of contract - failure to pay commission in accordance with the contractual terms (issue 1.1.1)

114. It was not disputed that Commission Scheme payments were halted in November 2019, nor was it disputed that the sums eventually paid to the Claimant as indicated in the July 14.7.20 letter were paid pursuant to the Respondents amended formula, applying a 12.3% additional labour cost as opposed to a 2%.

115. What the Respondent did was to unilaterally amend the basis on which commission was payable in breach of the agreement actually in place. That was a breach of the Commission Scheme that was, during its duration, a fundamental contractual term and key component of the Claimant's renumeration.

116. Further, the Respondent ceased payments under the scheme in November 2019, until later, as indicated in the 14.7.20 letter, admitting that the Respondent was owed £12,045.98. Whilst that payment was made, no further actual commission payments

or calculation of commission payments were provided to the Claimant for the period March 2020 until the Claimant resigned.

Fundamental breach of contract – Demoting the Claimant (issue 1.1.2)

117. The Tribunal has concluded that there was an effective demotion of the Claimant from the Account Director role that he had been promoted to in February 2019. A reassignment of client accounts would not in itself amount to a breach of contract and an employer can of course reassign staff to new clients.

118. However, having promoted him to Account Director the changes to his role (that were due to come into force on the day he resigned) were not commensurate with that promoted role contrary to paragraph 2.1 of his contract.

119. Notwithstanding this conclusion, the issue of demotion forms part of the Respondent's breach of the implied term of mutual trust and confidence.

Fundamental breach of implied term of trust and confidence (issue 1.2, 1.2.1, 1.2.2)

120. The Tribunal reminds itself that this is an objective test and not whether the Claimant subjectively feels that such a breach has occurred. It is not sufficient that the Claimant subjectively feels there has been such a breach nor is it enough that the Respondent acted unreasonably in some regards. The bar is set higher than that.

121. Nevertheless, the Respondent's overall conduct towards the Claimant in respect of the Commission Scheme payments amounts to a breach of the implied term of trust and confidence (issue 1.2, 1.2.1, 1.2.2), as does the conduct relating to the demotion. The two issues are dealt with separately and then collectively.

122. Commission payments were a substantial and significant part of the Claimant's renumeration. They had previously been paid in regular intervals and accompanied by information that allowed him to check or query sums paid.

123. Whilst some of the sums the Claimant genuinely believed he was owed may have been inflated (i.e. because of the need to factor in refunds/credit notes not at first apparent), he was at a disadvantage throughout. He was not provided with the information he had been in the past nor any intelligible breakdown until 14.7.20. Even then, information was only provided up to the end of March 2020 and specific detail as to how payments had been calculated was lacking.

124. As the Claimant's correspondence to the Respondent demonstrates, the cessation of commission payments caused him understandable concern about his financial position. His monthly take home pay fell dramatically.

125. The Respondent did behave in a way that was calculated or likely to destroy the trust and confidence between the Claimant and the Respondent by reason of the cumulative impact of the following: a) unilaterally adopting a new formula as to the calculation of his commission that disadvantaged him, without any prior consultation, b) ceasing all commission payments in November, c) failing to provide him with figures for what the Respondent said he was properly owed until July 2020,

d) failing to send him information he had reasonably requested relating to invoices/payments in order to allow him to calculate what he believed he was owed e) delaying the payment of commission that even the Respondent came to accept he was owed (namely £12,045.98) f) failing to make any commission payments or providing clear figures in for commission post March 2020 and f) failing to pay him sums of commission owed.

126. There was no reasonable and proper cause for those actions. The Respondent's actions went far beyond simply correcting obvious errors. Whilst Mr Morl no doubt genuinely believed that the Commission Scheme had been wrongly interpreted and applied before, there was no regard to the reality of what the agreement with the Claimant actually was (including the 2% unattributed costs provision). Further, the unilateral variation of the scheme was motivated at least in part by a desire to reduce his renumeration and the belief he was being paid too much.

127. A further factor that the Tribunal concludes also amounts to a fundamental breach of the implied terms of mutual trust and confidence is the effective demotion of the Claimant and the way in which that was dealt with. The demotion must be seen in the context of the Respondent neither consulting nor seeking to work with the Claimant to resolve the issues set out above in relation to his two key accounts, namely Sainsburys and Boots. It was also motivated, at least in part, by the Respondent's desire to cap his renumeration and a belief that his value to the company was much reduced

128. The proposed new role, to come into force on the day he resigned, was commensurate with the Account Manger role, not the Account Director role he had been promoted to in February 2019. It was a regression in terms of the Claimant's career and a lesser role.

129. The Respondent in closing submissions sought to argue that the Respondent could have made the Claimant redundant following his removal from the Boots and Sainsbury's account but, to his advantage and in good faith, did not. In fact, the reality was that whilst purporting to still be employing him as an Account Director he was moved back to what was an Account Manger's role where he would be highly unlikely to achieve similar commission payments. There was no meaningful effort to preserve his Account Director status or role.

Was the breach so serious that the Claimant was entitled to treat the contract as being at an end [issue.1.3].

130. The Respondent has not sought to argue otherwise in the event that the Tribunal was to find against the Respondent on issue 1.2 above, albeit no concession was made in the event of adverse findings on issue 1.1.1 and 1.1.2.

131. As to those issues, the breaches went to the central issues of pay and job role. Both went to the root of the contract and the terms of the Claimant's employment.

132. The breaches were so serious that the Claimant was entitled to treat the contract at an end.

Did the Claimant resign because of the breach [issue 1.4].

133. A repudiatory breach or breaches need not be the sole cause of the claimant's resignation. The question is whether the claimant resigned, at least in part, in response to that breach.

134. Focusing firstly on the commission issue, the Respondent has argued that he did not, on the grounds that he filed a grievance, it was determined on 1.5.20 and he did not appeal that determination. Such an argument may have been a persuasive one had that been that end of the matter. However, it was not. The 14.7.20 letter very much brought alive again the commission payment issue with the provision of figures never before provided and an admission that he was owed £12,045 in respect of the period ending March 2020. The Claimant questioned that sum and clearly did not accept it as the subsequent correspondence and meetings demonstrate.

135. The Tribunal concludes that the Claimant resigned in substantial part in response to the breach of contract relating to his commission, as well as those additional factors detailed above relating to the commission issue that the Tribunal has found cumulatively destroyed the trust and confidence between the Claimant and Respondent.

136. That would be enough. However, a further factor that could be described as the final straw, but was in itself both a fundamental breach of contract and something that also destroyed the trust and confidence between the parties was his effective demotion.

Did the Claimant delay before resigning and affirm the contract [issue 1.5].

137. Even if viewing the breach of commission scheme in isolation on the basis that the Commission Scheme Agreement ended at the end of March 2020, the relevant period would not have been, as the Respondent suggested, from the end of the grievance procedure on 24.4.20 until resignation in October. The commission issue was brought alive again by the Respondent by reason of the 14.7.20 letter.

138. Thereafter the Claimant made it clear that he was working under protest and any delay on his part is not conduct for which there is no other reasonable explanation save for acceptance. He continued to seek information as to how the figures provided to him in July had been calculated, sought clarification of the terms and conditions of a new contract set out in that same letter and continued to seek return of a further £3500 he reasonably believed he was owed by the Respondent. He also continued to seek recovery of commission payments owed. He did not affirm the contract.

139. Further, there is the issue of his effective demotion that would not have become fully apparent until the meeting of 15.10.20. Quite apart from any other conclusions that the Tribunal has made, the Tribunal accepts the submission that that was, in any event, an event that engages the final straw doctrine.

Wrongful dismissal; notice pay – issues 2.4, 2.5, 2.6

140. The notice period, agreed by both parties, was 3 months. The Claimant was not paid for that notice period. For the reasons already set out above, the Respondent was guilty of a fundamental breach that entitled the Claimant to resign without notice.

Unauthorised deductions – issue 3.3, 3.4.1, 3.4.2, 3.4.3

141. The Respondent did make unauthorised deductions from the Claimants wages, namely commission payments due under the Commission Scheme agreement between April 2019 and October 2020.

142. The terms relating to commission, during the life of the Commission Scheme agreement were contractual, for the reasons already given. Whilst some payments were made, they were less than should have been paid. Further, no payments were made in respect of the period April to October 2020.

143. As to the value of deductions made, as agreed by both parties, that sum is to be determined by the Tribunal (unless agreed) at a future remedy hearing.

144. Directions were made for such a hearing.

Breach of Contract - 4.3, 4.4

145. The Tribunal has concluded that there was a failure to pay commission in accordance with the contract of employment. Such a claim was outstanding when the Claimant's employment ended.

Remedy

146. At the conclusion of the hearing and with the agreement of both parties, a further case management order was made in the following terms:

Disclosure

1. The Respondent is to provide the Claimant with the following disclosure by 4pm on 9.9.22:

a. Monthly CASH system spreadsheets relating to the Claimant's commission between 1.3.20 and 31.1.21

b. Any records reflecting unpaid sums or refunded/cancelled contracts/credit notes relating to payments relevant to the Claimant's commission in that period.

Remedy hearing

2. A 1 day remedy hearing is listed via Cloud Video Platform for 16.11.22, before EJ Horder.

3. The Claimant is to provide a final schedule of loss by 4pm on 23.9.22.

4. The Respondent is provide any counter schedule by 4pm on 7.10.22.

5. The parties are to notify the Tribunal as to whether agreement on remedy has been achieved by 4pm on 21.10.22, confirming whether the remedy hearing is required or not.

6. If the remedy hearing is required, both parties are to provide an agreed remedy bundle and any witness statements relied upon by 4pm on 4.11.22.

Emplomynet Judge Horder
Written Reasons Dated: 11 August 2022

REASONS SENT TO THE PARTIES ON
23 August 2022 by Miss J Hopes

FOR THE THE TRIBUNAL OFFICE

Useful information

1. The Tribunal is required to maintain a register of all judgments and written reasons. The register must be accessible to the public. It has recently been moved online. All judgments and reasons since February 2017 are now available at: *https://www.gov.uk/employment-tribunal-decisions.*
The ET has no power to refuse to place a judgment or reasons on the online register, or to remove a judgment or reasons from the register once they have been placed there. If you consider that these documents should be anonymised in any way prior to publication, you will need to apply to the ET for an order to that effect under Rule 50 of the ET's Rules of Procedure. Such an application would need to be copied to all other parties for comment and it would be carefully scrutinised by a judge (where appropriate, with panel members) before deciding whether (and to what extent) anonymity should be granted to a party or a witness.

2. There is information about Employment Tribunal procedures, including case management and preparation, compensation for injury to feelings, and pension loss, here: *https://www.judiciary.uk/publications/employment-rules-and-legislation-practice-directions/*

3. The Employment Tribunals Rules of Procedure are here: *https://www.gov.uk/government/publications/employment-tribunal-procedure-rules*

4. *Presidential Guidance - General Case Management*: *https://www.judiciary.gov.uk/wp-content/uploads/2013/08/presidential-guidance-general-case-management-20180122.pdf*

5. You can appeal to the Employment Appeal Tribunal if you think a legal mistake was made in an Employment Tribunal decision. There is more information here: *https://www.gov.uk/appeal-employment-appeal-tribunal*