Case Number: 2402429/2022

EMPLOYMENT TRIBUNALS

Claimant: Ms Rachel Broderick

Respondent: Recruitment Panda Limited

Heard at: Manchester **On**: 1 September 2022

Before: Judge Miller-Varey (sitting alone)

Representation

For the Claimant: Miss Baylis (Counsel)

For the Respondent: Mr Ratledge (Counsel)

RESERVED JUDGMENT

1. The Respondent has made unlawful deductions from the Claimant's wages and is ordered to pay to the Claimant the gross sum of £3,139 in respect of the amount unlawfully deducted.

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REASONS

*For ease of reference, all page numbers within these reasons are to the correspondingly numbered **pdf page** of the bundle.*

1. At the heart of this case is the status, operation and validity of a detailed mechanism which provides that "clawback/adjustment" may be made to the Claimant's salary. It is found in an appendix to the Claimant's offer of employment.

THE ISSUES

2. At my request, Counsel prepared an agreed list of issues. An earlier claim of constructive unfair dismissal and a counterclaim for breach of contract had both previously fallen away. Correspondingly, the issues for me to decide were these:

   1. Did the Respondent make a deduction or deductions from the Claimants wages in the following manner? (The amounts are agreed)

   a) December 2021: £548

   b) January 2022: £2591

   2. Were the deductions excepted deductions by virtue of s14(1)a in that they were reimbursement of the employer in respect of overpayment of wages? The Claimant will say that the payments made to the Claimant during her employment were not an error or oversight but were a considered decision.

   3. If not, was the deduction authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract? S13(1)(a). The term relied upon is subject headed 'Clawback/Adjustment' and is at paginated p44, electronic bundle page 46. The court will need to decide:

   3.1 Whether the term was incorporated into the contract

   3.2 Whether it was sufficiently clear

   3.3 Whether it was a valid clause (e.g. it was not contrary to statute)

   3.4 Whether the deduction was authorised in the manner prescribed by the contract

   3.5 Whether it breached with the Minimum Wage Act 1998 which prevents workers and employers from agreeing to be paid less than minimum wage. The Court will need to consider this by reference to the prescribed period (eg whether the Claimant was paid the minimum wage the month it was deducted)

   3.6 Whether it breached the Working Time Regulations 1998

3. I shall refer to the contentious term as "the clawback provision". I recite it in full here:

"Clawback/adjustment

- *Consultants are entrusted not to claim commissions early where there is a knowable risk of drop out/rebate and*
- *Quarterly bonus is paid in arrears, which means that clawbacks are a very rare thing at Recruitment Panda.*
- *However, we have a unique rule that promotes professional conduct in the interests of the whole team/company and removes the incentive to 'sandbag'.*
- *The rule is that an adjustment of 30% (deliberately matching the rate commission is paid at) is applied to each 'threshold shortfall month' in each quarter.*
- *A threshold shortfall month is any month in which less than £6k revenue is banked.*
- *The 30% penalty is applied to the difference between the actual revenue generated that month and the £6K threshold that the company needs to bank per month in order to ensure maximum operational effectiveness.*
- *The resulting amount is deducted from the total pay (**salary + commission + bonus)** that is otherwise awarded at the end of each business quarter.*
- *The net effect is simply that the commission and bonus structures integrity is maintained without fail.*
- *Total pay is thereby awarded correctly in every case, having maintained proper threshold and irrespective of any irregular billing patterns. There are simply no ways to game the system and thus everyone is rewarded fairly and properly.*
- *Still, they can be extreme cases and when they arise, they can be made up over several subsequent months of commissions.*
- *However, it needs to be noted that persistent failure to achieve revenue targets is considered underperformance and the persistent failure to achieve threshold considered serious underperformance.*
- *In short, no one should be subject to extreme cases, and if you are, then something is wrong, which the company will be addressing via training, performance management etc."*

[My emphasis]

THE HEARING

Procedure, documents and evidence heard

4. There was a significant problem with the hearing bundle provided to the Tribunal in advance; it was not properly legible past page 38, which was coincidentally the point at which the key documents started (offer letter, employment contract etc). This was not the fault of the Claimant's solicitors who had ran into difficulties because of having to compress the bundle in order to lodge it electronically. Both Counsel were told of my difficulty and advised to read parts out where relevant, on the basis I would keep a

detailed note and revisit this alongside a legible copy of the bundle when available. The witness statements, together with the pleadings – which I could read fully – gave sufficient narrative for me to understand the issues and hear the evidence. In the event, a secure link was provided for me to access a substantially legible bundle shortly around 12.30pm. Regrettably, it still was not possible to read the spreadsheets. However, a further clear copy of the only one referred to by Counsel was furnished to me immediately following the hearing.

5. In addition to the bundle of 167 pdf pages, I received a witness statement from each of the Claimant and Sam Sanderson, managing director of the Respondent. I use his name in full since his father, who shares the same surname, also works for the Respondent. On behalf of the Claimant, Miss Baylis also provided a chronology and outline submissions.

6. I decided that the Claimant should lead evidence first (although both Counsel agreed my suggestion that the evidential burden in relation to section 14 ERA 1996 rested with the Respondent). The Claimant was the sole witness. Shortly into re-examination I directed a short adjournment for the parties to take instructions on the narrow question of what was the Claimant's salary. The Respondent accepted that the salary included the guaranteed bonus and was £29, 617 gross per annum, on a pro rata basis (84.62% of full time equivalent). It was accepted too that the Claimant in her payslips had instead been paid the gross sum of £2450 per month (and not £2468.08) from February 2021 which represented a modest shortfall of £18.08 per month, to which I shall come.

7. Mr Ratledge sought leave to ask Sam Sanderson further questions about matters not dealt with in his witness statement. He set out the intended areas for additional questioning. They were opposed by Miss Baylis, in part. Having heard argument, I excluded questions eliciting evidence that the sum of £659.86 shown banked in the December 2021 section of the commission spreadsheet [p.139], had not ultimately been received by the Respondent from the relevant client. I gave oral reasons for my decision which briefly were: disclosure in this area had not taken place; the Respondent had not contradicted the Claimant's case about the receipt of that money (a matter relied upon in the Further and Better Particulars – paragraph 8) and I calculated the effect of excluding that evidence was, at worst, to deprive the Respondent of a potential factual defence in respect of around £197 (i.e. clawback, if valid, for December 2021 would then be 30% of £6000 and not 30% of (£6000 - £659.86)).

8. The evidence and submissions of the parties took until 4.15pm. I reserved my judgment.

FINDINGS OF FACT

9. Having considered all the evidence, I find the following facts on the balance of probabilities i.e., on the basis of what I think is more likely than not to have happened. The parties will note that not every matter that they told me about

is recorded in my findings of fact. That is because I have limited them to points that are relevant to the legal issues. It is also right to observe that the factual differences were narrow – chiefly confined to two connected areas:

- At what point in time did the parties agree that there would be a period of time over which clawback would not accrue and was any condition attached to that agreement; and
- Related to the above, who was responsible for completing the spreadsheet (described in the bundle index as "Commission Schedule for the Claimant" pp.136 - 140) which includes the words "ADJUSTMENT AMNESTY FINAL MONTH" in reference to the month of June 2021.

10. In November 2020, the Claimant pursued a role with the Respondent. She was interviewed by Sam Sanderson at which point the Claimant's salary expectations were discussed. She made clear her requirements for a minimum salary. This took into account the cost to her of childcare for her two children. She then had one child under 4 years and one at primary school. The childcare costs were around £1400 per month.

11. The Claimant was an experienced recruitment consultant. Barring necessary maternity leave, she had worked in the sector for 20 years. I accept, as she told me, her experience previously of working in that role was for clawback to be made from overpaid commission in the event relevant thresholds were not met. During her career she had never come across a scheme that deducts money from a recruiter's salary. It was not therefore in her frame of reference. No contract or offer of employment was made at this stage.

12. Under cover of an email of 11 December 2020 [p.41], the Respondent sent to the Claimant a letter setting out two alternate offers of employment, to which an attached appendix (sent as a stand-alone attachment) was described in the body of the email as detailing "*the nuts and bolts of our various commission and bonus schemes and rules"*.

13. There were four references to the appendix in all within the offer letter [pp. 43-45], of which two were within the details of the two different job offers.

14. The second paragraph of the offer letter stated that the offer was made subject to satisfactory references, the terms detailed in the contract of employment (not then provided to the Claimant for obvious reasons given the options being given), as well as *"the details of the various schemes we operate as described in the attached appendix*" [p.43].

15. I am not concerned with what is described as "offer 2" within the accompanying letter of 9 December since it is common ground that Offer 1 proved to be the overall model chosen by the Claimant.

16. Offer 1 had the job title of senior consultant. Its particulars were set out in short form as follows (where the terms set out in bold reflect the use of bold type in the document and were mainly defined in the appendix):

Job title:	Senior Consultant
Grade:	Senior Consultant 3
Probation Period:	6 months
Monthly Revenue Target:	£12k per month
Basic Salary:	£30k per annum
Commission:	30% of net revenue above a threshold uncapped
Threshold:	£6k per month (please note appendix details)
Quarterly bonus:	Quarterly bonus is an additional guaranteed commission, increasing your total gross pay to 38% of revenue for the achievement of target quarterly revenue
Discretionary annual bonus:	£5k pa guaranteed for the first 2 full calendar years, paid monthly in addition to salary, giving you an effective salary of £35k per annum

17. After setting out the second offer in the same style, the offer letter went on to set out conditions of employment common to both offers. These included contractual hours of work, office hours, annual leave entitlement, annual leave year, business year, appraisal, share schemes, health cash plan and other benefits. In the final substantive paragraph, the letter stated as follows:

    "Please also take the time to read the enclosed appendix. It contains important details of the various schemes that you will be entering into when accepting a position with us. We trust you will see that those details are special ingredients forming essential parts of our formula for best practice recruitment consultancy."

18. No part of the offer letter referred to clawback or adjustment. This was dealt with exclusively within the appendix [pp.46-49]. Six of the nine sections are concerned with the inter-related concepts of commission payments, threshold intro, threshold details, quarterly bonus, annual bonus and clawback and discretionary bonus.

19. In the appendix, after all of those provisions came the following:

Although no item within this appendix can be considered to supersede your contract of employment, this appendix is a comprehensive statement of all of the above.
Your acceptance of an offer of employment with recruitment and is taken in good faith to be your willing entry into all of the above.

[p.49]

20. The Claimant read the documentation, including the appendix. That is obvious from a reply which she sent to Sam Sanderson on 13 December 2020 which contained detailed queries relevant to the operation of clawback [p.50]. The most material one (together with the answer given) is this:

Claimant's question

In the "Clawback/Adjustment" section there is mention of adjustments at the end of a quarter if target met. However if for example the monthly target was £12k per month/£36K a quarter and it was achieved via the example below:

Month 1 16k

Month 2 16k

Month 3 4k

Would there be a clawback on Month 3 for being below the £6k threshold even though the quarter target had been achieved?

Respondent's answer (via Sam Sanderson at p.53)

Yes, there would clawback for Month 3 in order to ensure that the company has paid commission on everything above £18k in the quarter and not on anything less than that. The adjustment would be £30% of £2k in this example (this is the "anti-sandbag" rule) and it would be adjusted against the pay at the quarter end, therefore against a pay day which is likely to also include bonus for the previous quarter (and this minimise impact).

21. Despite the exchange, I am amply satisfied that the Claimant did not heed from her reading of the clawback provision that the Respondent was reserving a right to recover money from her directly from her salary (as distinct from commission or bonus). I take that view for a number of reasons. First, the evidence demonstrates clearly in my view, her determination to obtain an effective salary which could allow her to discharge the costs of going to work and then make some money on top. Putting aside for the present, the efficacy of the provision, the Claimant would be signing up to a mechanism by which potentially her de facto monthly salary - outside of amnesty periods - could be reduced by nearly three quarters (£2468 – a maximum of £1800), depending on her performance. That performance was not uniquely within her gift. There would be market factors and otherwise. The revenue had to banked, not merely invoiced. She could not control the creditworthiness or reliability of clients. At its lowest, a reduced salary of

£668 would not meet half of her childcare costs. Second, it does seem to me from the detailed enquiries that she raised that had the Claimant had any expectation that her salary could be reduced in real terms, then, consistent with the careful thought shown in her email of 13 December 2020, she would have made additional enquiries: especially about what constituted an "extreme case", meaning that clawback repayment might be deferred, as well as how/who would decide this.

22. Of relevance besides this within her email of 13 December 2020, was that she expressed a preference for option one i.e to work as a senior consultant but undertaking an 84% equivalent role.

23. The Respondent provided clarification on clawback and other points. The Claimant commented in her reply that this was "all fine" adding just three comments none of which directly related to clawback.

24. A contract of employment was prepared by the Respondent and signed by it on 17 December 2020 and by the Claimant on 23 December 2020 [pp. 56 - 75] .

25. The contract expresses in its opening paragraph to set out particulars of the terms and conditions. At clause 2 it states that the contract "*together with your offer of employment letter dated 9 December 2020 a copy of which has been supplied to the Employee and which is incorporated into this document by reference constitutes your Contract of Employment with the Employer"* [p.56]

26. The most material other provisions of the contract are clause 6, (headed remuneration), clause 24 (headed authorised deductions) and clause 28 (headed miscellaneous).

27. The salary was described in the following way (clause 6.1) *"...the gross sum of £30,000 per annum with the addition of a £5000 per annum guaranteed bonus, subject to review, that is inclusive of income tax and employee national insurance contributions where applicable"*.

28. The authorised deductions section says that

"24.1 You may agree that the company may recover from you any sum which you may, from time to time, owe to the company. The Company may recover any such sum by

(a) Deducting it from any sums payable to you whether during or on termination of your employment (including your salary) whether by way of one such deduction or a series of deductions and/or

(b) *Requiring you to repay the relevant amount… Under [sic] (i) above as the company sees fit whether immediately or in terms otherwise acceptable to the company.*

29. Clause 24.2 provides examples of sums which may be owed to the Respondent and the circumstances in which the company may exercise its right to recover money from an employee. The list, described within the clause as not exhaustive, includes, so far as material *"(a)any overpayment of any sum payable to you (including over payments of salary and overpayments of expense claims)."*

30. Clause 28 states that *"the agreement supersedes all or any previous agreements made between yourself and the Company*".

31. The Claimant commenced work. Her gross salary was £29, 617 which reflected a pro rata calculation for her agreed hours of work applied to a gross annual figure of £35,000. Her payslips show that from February 2021 she was paid £2450 basic gross monthly salary.

32. In June 2021 the Respondent and the Claimant discussed details of the new business plan for the Respondent and its implications for the Claimant's role. In a three and half page letter [pp.76-79] the Respondent's intentions about this were set out extending to a new role as team manager from September 2021 and related guaranteed bonus. The Respondent did not raise any performance issues at this point.

33. In terms of the Claimant's performance in respect of the threshold for the ensuing months (and putting aside the legal effect), the position is this:

- A spreadsheet (which the index describes as a "commission schedule") was kept in which key figures such as "Total banked" and "Unredeemed threshold value" were noted on a monthly basis and then aggregated quarterly figures were shown which then included "Total banked" and "Commission paid", "Qtrly bonus uplift" and "and/or Qtrly adjustment". Sam Sanderson says of the spreadsheet that Lucy, a support staff member, would copy and paste figures from a deal form completed by the recruiter into the spreadsheet but that the individual recruitment consultants had the power to make amendments to the spreadsheet. I am satisfied that the Claimant was never responsible for making any alterations to it relevant to this claim.

- The quarters identified on that spreadsheet were June, July and August 2021 (Q1), September, October and November 2021 (Q2) December, January February 2022 (Q3).

- In respect of Q4 of the previous year, the Claimant secured one placement securing a fee to the company of £9750 [p.161]. She did not bank any further monies in the period from the commencement of her employment on 4 January 2021 and 31st May 2021.

Quarter 1

- In June 2021 the Claimant banked no revenue.

- In July 2021 the Claimant exceeded threshold.
- In August 2021 the Claimant exceeded threshold.

Quarter 2

- In September 2021 the Claimant exceeded threshold.
- In October 2021 the Claimant banked no revenue. This was £6000 under threshold.
- In November 2021 she banked no revenue. This was £6000 under threshold.

Quarter 3

- In December 2021 she is treated – given my refusal of further evidence by the Respondent - as having banked £659.86. This was £5,340.14 under threshold.
- In January 2022 she banked £10, 784. This was over threshold.
- In February 2022 (after her employment ended) the Claimant banked £7320.

34. That was the raw financial output of the Claimant's efforts. However, none of this was a surprise to the Respondent; it may have hoped for more revenue but it knew exactly the Claimant's progress. Led by Sam Sanderson, who I consider had a fastidious grasp of these remuneration structures and I am certain had an equally strong day-to-day grip, it had a continuous sightline through its various deal forms, commission spreadsheet and credit control. The Claimant was, as the Respondent knew, building up work in her "territory".

35. There is a dispute of fact between the parties as to whether, at some time prior to July 2021, an amnesty period was agreed by which the Claimant would not incur liability to clawback or adjustments by reference to her performance in those months. The Claimant in her witness statement asserted that at the commencement of her employment there was an agreement that the clawback arrangements would not apply during the first six months of her employment. She relies in this respect on words which appear in the commission schedule in reference to June 2021: ADJUSTMENT AMNESTY FINAL MONTH which she says Sam Sanderson completed. The Claimant says (her witness statement refers at paragraph 15) her understanding was that any shortfall in billing targets once the amnesty period ended would be deducted from future bonus payments.

36. Sam Sanderson disagrees. As I shall come to in further detail, in an email of 27 July 2021 [p. 164 – 165] he wrote in reference to a conversation between himself and the Claimant that day to say that he was putting in place an "adjustment amnesty" for new starters and that he intended to

extend the same benefit to the Claimant "retrospectively". However, he wrote, the Respondent needed to put a caveat on this. The Claimant says the caveat was never mentioned in their meeting or before, and was new news. Putting to one side the caveat, on the Claimant's case therefore, Sam Sanderson was purporting to confer upon her a benefit which she already felt she enjoyed from him. I prefer the Claimant's evidence about the amnesty. Overall, I am satisfied that:

(a) Well before the meeting and email in July 2021, Sam Sanderson gave the Claimant assurances that the threshold would be not be applied during the first 6 months i.e., there would be an adjustment amnesty until the end of June 2021. The email represented the first time it's agreed scope (excluding the new issue of a caveat) was committed substantively to writing. I find the understanding she was given is corroborated by the words placed in the spreadsheet in reference to June. The Claimant had nothing to do with the inclusion of those words which had already been put in by the Respondent at the time of the meeting of 27 July 2021. I found the Claimant persuasive that she did not amend the spreadsheet in general.

(b) This also fits *better* (albeit not entirely) with the Respondent's position in response to the grievance which was that the Claimant's grievance *"ignored the amnesty period of 3 months with up a further three months agreed at management discretion. In your case, 2 months further were agreed..."*. I consider that response to be inconsistent with the Respondent's case in the hearing. The email of 27 July was also somewhat disingenuous in that it referred to the Respondent *"putting in place"* an amnesty.

(c) At the July meeting, I find Sam Sanderson did re-confirm verbally an adjustment amnesty up to and including June 2021. There was no mention of a caveat at all. The most striking piece of evidence in support of that is the Claimant's response email of 28 July 2021 [p.164] which in very clear terms stated *"there was no conversation around caveat"*. Sam Sanderson's reply [p.163 - 164] that same day did not contradict that assertion in any way rather, he was happy to discuss but had made a decision. I found it telling too that in cross examination Sam Sanderson did not identify the caveat had ever been discussed. Rather he described it as immaterial as to the order in which the amnesty and caveat were arrived at because, the overarching point was that the Respondent was giving to the Claimant a benefit she did not have to start with. He sought to anchor the Respondent's position uniquely by reference to the written contractual documentation, disregarding what verbally had become well-understood, in good faith by the Claimant and relied upon by her.

Disagreement about salary and resignation

37. The circumstances leading to the Claimant's resignation were fractious. The key events relevant to the claim, as now put, are these:

- In June 2021 there were discussions between the Claimant and Sam Sanderson about a new business plan with three key changes altering the nature of her current employment. Sam Sanderson wrote to the Claimant on 25 June 2021 [p.76-77] indicating that from September 2021 subject to successful hiring efforts, the Claimant was being made a team manager responsible for internal recruitment, training and personnel management and human resource matters.

- The Claimant did not accept that offer but continued in her existing role as senior consultant.

- In June or early July 2021, the Claimant successfully passed probation and this was signed off at a meeting. No performance issues were raised.

- On 27 July 2021, there was the meeting and email exchange to which I have already referred. It is necessary to say a little more about the details. In the first email of 27 July 2021 Sam Sanderson identified the benefit of the six-month amnesty in financial terms was £5400, represented by £3600 from Q4 of 2020/21 and £1800 from Q1 of 2021/22.

- The email gave reasons for needing to put a caveat on this credit which included that the amnesty was not part of the offer of employment but that the Claimant had received a guaranteed bonus. The terms of the caveat were that the Claimant must achieve £10,000 per month revenue on average for the remainder of the business year to 31 May 2022. The email went on, if that is achieved and then *"the caveat will expire, the retrospective application of the adjustment amnesty will be deemed to have been applied and the company shall make no further claim to a pay adjustment from this period"*.

- A further detailed provision was set out in the event that the target was not achieved. It said this:

  "If that target is not achieved then, instead, the company will honour an amnesty adjustment for the 4 months in which it was agreed that your threshold would be frozen...

  In the event that you do not hit the 10k per month on average by 31st of May 2022, adjustment of £1800 (£1800 comes from the £0 in June, XXX covered you for May) will then be recouped by the company deducting £600 from your gross pay for three months subject to the circumstances at the time and entirely at management discretion but with your agreement sought."

- The Respondent therefore was not seeking to supplant the pre-existing arrangements for clawback so far as they related to the period from July 2021 onwards but rather to create a separate side agreement by which the debt which the Respondent says had accrued by June 2021 (described by it is a credit), would be payable. To say this was all a highly complex and contingent structure for salary would be a gross understatement. The

Respondent did not index this to this caveat, any performance concerns about the Claimant. It was couched as if to suggest that she was being given parity with new recruits and was a mere formality.

- In September 2021 the Respondent awarded the Claimant an internal award as “Recruiter of the Month” [p.82].
- By November 2021 there were discussions between the Claimant and Sam Sanderson in reference to the business plan version 2. Some of this was documented in emails within the bundle. The Claimant within such an email detailed the struggles which she would face in committing to further physical time in the office prior to September 2022.
- On 30 November 2021 the Claimant queried the calculations underpinning her payslip for that month. She identified a shortfall of £18.08 per month to which I have said already referred (paragraph 6 above).
- A meeting followed on 1 December 2021. Sam Sanderson emailed the Claimant the same day to document this. It is common ground the Claimant was then told that in respect of Q2 of 2021 - 2022 (September October and November 2021), £12,000 of threshold has not been achieved by the company because the Claimant had generated zero revenue. She was therefore required to make an adjustment in the sum of £3600.
- The Claimant was told that her performance constituted *“serious underperformance”*.
- The Respondent adopted the position that there was no revenue and thus no commission in the pipeline from which the amount could foreseeably and reliably be deducted; that the adjustment was due to be applied at the end of February 2022. This (the £3600 adjustment being proposed to be taken between December 2021 and February 2022) would mitigate the impact of the adjustment being applied in one go in February.
- Sam Sanderson therefore asked the Claimant to volunteer how much she could afford to repay between now and then. Both parties understood (and it follows directly from the Claimant not being due commission) that the repayment being proposed was from her salary.
- I find this discussion was the very first time the Claimant realised that it was proposed to take clawback from salary.
- The Claimant explained that if a minimum guaranteed salary was to be reduced, it would place her in a difficult situation where she would not be able to cover her outgoings. She urged consultation to consider suggestions on alternative proposals.
- Sam Sanderson emailed with two different proposals for a reduction to salary [p. 88], describing part of his most motivation as being wish to avoid

any recoverable situation in February 2022 by which time a further quarter may have passed without revenue generating a further shortfall.

- It is not necessary to set out the two formulas, suffice to say that both harnessed elements of direct deduction from the Claimant's salary in December 2021 and February 2022.
- When the Claimant indicated she could not agree to volunteer deductions from salary, the Respondent made arrangements with its payroll department to deduct her pay for December 2021. She was paid £2100 as basic gross pay. Her payslip [p.154] then showed entitlement to "incentives" of £180.80 (in truth her arrears of underpaid salary) and "guaranteed bonus" of £368.08 (in truth a sum which all agree always was salary). From this cumulative sum was then deducted £548.88, which was referred to as a "commission" and not clawback.
- The Claimant resigned verbally from the Respondent's employment on 4 January 2022, confirming this in writing the same day.
- The Respondent accepted the Claimant's resignation in writing on 4 January 2022, describing her contract termination date as that of 1 February 2022. She was placed on gardening leave. The letter went on to set out that there were three commission adjustments outstanding, amounting in total to £7200. The constitution of that sum was by reference, it seems, to: the failure to achieve the alleged caveat (I.e.,£10,000 target turnover consistently until May 2022 in order to be relieved of the £1800 clawback for June 2021), £3600 the subject of meeting of 1 December 2021 and a further £1800 due to December 2021's zero revenue.
- As such and despite the paid garden leave (something to which the Claimant was acknowledged to be entitled in the sum of £2278.23), the deductions would be applied and she would still have a balance owing of £4059.63.
- The Claimant on 10 January 2022 challenged the entitlement of the Claimant to make any deduction from her salary [pp.99-102]. She maintained that the action in December 2021 was unlawful. She raised queries about the calculations involved. She raised a grievance having regard to the fact that she was still employed. She made clear her expectation of payment of her full salary during the period of her notice.
- The Respondent provided its formal response and indicated it had taken legal advice confirming the validity of its scheme and its lawfulness under "the Wages Act 1986".
- The Claimant enlarged the scope of her grievance by letter of 13 January 2022 to encompass complaints unrelated to wages.
- Between the 24 January and 14 February 2022, there was also correspondence by email between respective solicitors for the parties, in

which detailed positions on the applicability of the relevant provisions of ERA 1996 were set out.

- In the event, the Claimant did not participate in the grievance hearing which proceeded in her absence on 2 and 3 February 2022. The grievance was not upheld [pp.126-133]. The overall conclusion in relation to the allegations of wage deductions were that the minimum wage legislation was not breached. The situation, the HR Consultant found, was analogous to a clawback for training or a relocation package on termination and, in essence, had the Claimant continued in post the likelihood of her suffering a deduction of £1800 to her monthly earnings was low.
- The Claimant received no wages for the period of January 2022. Her final payslip is that of 31 January 2022 [p.155] which itemised entitlements in the following way: holiday pay £313.26, notice pay £2278.23 equaling £2591.49 which sum was then set out as a *"total deduction"* (without itemisation).
- The Claimant issued proceedings, following ACAS conciliation, on 30 March 2022.
- The Respondent intimated a breach of contract claim for £4059.63 of which particulars were to be provided following further and betters of the claim.
- The parties are well acquainted with the respective withdrawal and strike out which resulted in the reduced scope of the final hearing on 1 September 2022.

The Law

38. I summarise the key legal principles that apply to the case. I do so in the order which reflects the same hierarchy in which the list of issues has been formulated.

Deductions from wages – unauthorised and excepted deductions

39. The statutory provisions applicable to the claim are section 13, 14 and 27 of the ERA 1996. Section 13 enshrines the right not to suffer an unauthorised deduction from wages other than in prescribed circumstances. So far as relevant, it provides as follows:

13.— Right not to suffer unauthorised deductions.

(1) An employer shall not make a deduction from wages of a worker employed by him unless—
(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.
(2) In this section "relevant provision" , in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or
(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.
(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

40. Section 14, under the title "Excepted Deductions", sets out that the bar to employer deductions under s.13 (and the concomitant right of the employee not to suffer those deductions) does not apply to a deduction which has one of two defined purposes. So far as relevant in the circumstances of this case where expenses do not arise, it provides that:

"the reimbursement of the employer in respect of—
(a) an overpayment of wages,
….
made (for any reason) by the employer to the worker…"
is an excepted deduction.

41. The onus is upon the employer to show that one of the exemptions in section 14 applies. If an employer shows the relevant deduction comes within the ambit of section 14(a) then the deduction is lawful and no remedy can be claimed under section 13.

42. As to wages:

27.— Meaning of "wages" etc.
(1) In this Part "wages" , in relation to a worker, means any sums payable to the worker in connection with his employment, including—
(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,

43. Miss Baylis relied on two authorities. Mr Ratledge did not take issue as to their relevance or otherwise. Mr Ratledge did not rely on any case law but on the statutory wording of ERA 1996, allied to the "proper" interpretation of the contractual documentation.

44. Miss Baylis referred to ***Newland v Mick George Limited ET Case No 2601456/08b***. This is summarised in the IDS Handbook, Volume 13 as follows:

N was employed as a lorry driver by MG Ltd between March 2000 and February 2008. In 2005 the company introduced a bonus payment system.

N signed a copy of the bonus scheme terms, which included a power for the company to withhold the weekly bonus following a disciplinary hearing to take account of any accidental damage caused by negligent driving. The scheme further provided that this 'will be notified to you in writing as part of your disciplinary meeting result'. N had an accident on 22 November 2007, when he reversed his lorry into a parked car. As a result, the company withheld £300 from N's wages in £100 monthly instalments between December 2007 and February 2008. N accepted that he was partly to blame for the accident. However, there was no disciplinary meeting. Furthermore, the company did not notify N in writing regarding the outcome of its investigation into the accident and the implications for him as far as his bonus was concerned. A tribunal held that withholding the weekly bonus amounted to an unlawful deduction from N's pay because there had been no disciplinary hearing or notification in writing. These were essential components of the company's contractual procedure for making deductions.

45. I accept as sound the principle reflected in that case.

46. In the context of deductions, she also relies on ***Hayter v Rapid Response Solutions Ltd ET Case No.1401308/20*** *a*s support for the proposition that a contractual provision authorising deductions should be drafted as precisely as possible. The note of this case, also from the IDS Handbook, Volume 13 states:

In Hayter a clause in the contract stated that the employer 'shall be entitled to deduct from your pay or other payments due to you, any money, which you may owe to the company at any time'. The tribunal found that this was far too vague to authorise a deduction for the cost of a course that H was taking at the time she resigned.

47. I also accept the principle established here.

Incorporation and construction of the contract

48. A term (which I will call "an extraneous term") that is not directly rehearsed in a written employment contract may be incorporated expressly by reference to another source containing that term for example, an employee policy. Whether incorporation has happened is a question of law.

49. Miss Baylis urges, as a matter of principle, that the test for incorporation is not merely the existence of a reference to the source containing the extraneous term within the contractual document. Relying on ***Spurling v Bradshaw [1956] 1 WLR 461*** (a case concerning the validity of a blanket exclusion clause in a commercial contract) she submits a relevant factor is whether the extraneous term is onerous or unusual. Where it is, this demands that fair and reasonable attention is brought to it by the party tendering the document. She drew my attention to the following passage from the judgment of Denning LJ at p.466 (which I quote more fully than in her submissions):

"… This brings me to the question whether this clause was part of the contract. Mr. Sofer urged us to hold that the warehousemen did not do what was reasonably sufficient to give notice of the conditions within Parker v. South Eastern Railway Co. I quite agree that the more unreasonable a clause is, the greater the notice which must be given of it. Some clauses which I have seen would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient. The clause in this case, however, in my judgment, does not call for such exceptional treatment, especially when it is construed, as it should be, subject to the proviso that it only applies when the warehouseman is carrying out his contract, and not when he is deviating from it or breaking it in a radical respect."

50. The essence of Miss Baylis' submission is that incorporation requires a level of prominence proportionate to the term's objective importance.

51. Mr Ratledge made no particular submission about the law on this point, different or additional to his overarching submission that the clause in this case had been incorporated and was manifestly clear to the Claimant who had raised queries about it.

52. I have considered ***Spurling*** closely and have not found support for it being applied directly ever in a reported case concerning employment contracts. Nor have I identified other relevant case law which implies a differential threshold for incorporation of a term in an employment contract, depending on the nature of the term at hand. Clauses which seek to limit liability in negligence or contract have long been the subject of quite specialist jurisprudence and indeed, post-***Spurling***, statutory treatment under the Unfair Contract Terms Act 1977.

53. I should add that I have taken into account the Supreme Court authority of ***Autoclenz v Belcher and others 2011 ICR 1157***, from which it is clear the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreements truthfully represent what was agreed. It is also fair to say that although not confined to instances of alleged sham or mutual mistake, the related line of authorities is much concerned with employee status and the true nature of the parties' contractual relationship. That is not an issue placed before me. I do not consider those cases to be really apposite therefore.

54. On the other hand, what I extract from the authorities and am happy to accept is that for any extraneous term to be incorporated either it/the other document within which it is found, must have been brought to the employee's attention other than by glancing reference and the employee should be furnished with access to it ***Leader v Trafford Council ET Case No.2400230/16.***

55. In terms of construction the contra proferentem rule applies to resolve any ambiguity. However, in the case of a contract reduced exclusively to writing,

the subjective beliefs of a party about the operation or meaning of a particular term in the contract are not *generally* admissible as a tool to aid construction, unless there is such ambiguity. The starting point, absent ambiguity, is the contract itself. As such the position is that employees *may* be bound by clear written contracts to which they have signed freely however they may personally have misread or not read their contents, and so harboured misbeliefs about their operation.

56. The following paragraph of the Master of the Rolls' lead judgment in ***Adams and Ors v British Airways plc 1996 IRLR 574*****,** I find, is instructive:

Whatever the difficulties of application, I cannot regard the governing principles as contentious.
The court is not concerned to investigate the subjective intentions of the parties to an agreement (which may not have coincided anyway). Its task is to elicit the parties' objective intentions from the language which they used. The starting point is that the parties meant what they said and said what they meant. But an agreement is not made in a vacuum and should not be construed as if it had been. Just as the true meaning and effect of a mediaeval charter may be heavily dependent on understanding the historical, geographical, social and legal background known to the parties at the time, so must a more modern instrument be construed in its factual setting as known to the parties at the time. Where the meaning of an agreement is clear beyond argument, the factual setting will have little or no bearing on construction ; but to construe an agreement in its factual setting is a proper, because a common sense, approach to construction, and it is not necessary to find an agreement ambiguous before following it.

Illegality

57. The Claimant has not asserted that the clawback provision – in and of itself - was expressly prohibited or rendered void under a statutory provision. Rather she says that the clause is invalid because, when applied in the maximum amount of £1800, it could result in a breach of minimum wage legislation. I have identified no relevant law (and none was placed before me) to suggest that the mere potential for a cause to operate in an illegal way causes it to be incapable of incorporation or invalid. As a matter of law, I do not think that is sound.

58. On the other hand, a clause or contract may become illegal and unenforceable if performed in an illegal way. This most routinely arises where there is some form of tax evasion in the way that the employee is paid, and the employer relies on such illegality as defence to a claim. Here the Claimant is invoking the illegality of the clawback provision's operation upon her to preclude reliance upon it by the Respondent as a defence, under s. 13(1)(a), to her deductions claim. The correct legal principles to be applied, I think, are those in ***Patel v Mirza 2017 AC 467 SC*** meaning (and I paraphrase from the IDS Handbook, Volume 3, Chapter 7, paragraph 7.30) the key question is not whether the contract should be regarded as tainted

by illegality but whether, in the circumstances of the case, the relief claimed should be granted. Accordingly, the fact that a contract is 'illegal' does not, by itself, determine whether or not the contract is void or unenforceable.

59. The "relief claimed", in my judgment, is the right of the Respondent to rely on the clawback provision in relation to the deductions in December 2021 and January 2022. It is therefore necessary for me to consider, following principles from ***Patel v Mirza***:

    - the underlying purpose of the minimum wage legislation, and whether that purpose would be enhanced by the defence being refused
    - any other relevant public policy which might be affected by the denial of the defence, and
    - whether denial of the defence would be a proportionate response to the illegality (bearing in mind that punishment is a matter for the criminal courts);

    Taking into account:

    - the seriousness of the illegal conduct
    - its centrality to the contract
    - whether it was intentional, and
    - whether there was a marked disparity in the parties' respective culpability

60. The law relating to penalties is also relevant. At common law deductions from wages clauses may be void where they constitute a fine or deduction that is not a genuine pre-estimate of the loss suffered by the employer as a result of the employee's breach.

Conclusions

Issue 1 – the deductions

61. The wages to which the Claimant was entitled in December 2021 included her monthly gross salary of £2468.08. The Respondent also included in her payslip (before deductions) the sum due to her of £180.80 for the consistent underpayment of her salary between January and November 2021. The Respondent's description of this as an "incentive" on the December payslip is unexplained and plainly wrong. It was wages within the meaning of s.27, albeit paid belatedly. It was also properly payable under s.13(3) on that occasion (as well as before, as a matter of contract), given the Claimant had fully intimated the claim [p.86].

62. From the aggregated s.27 wages of £2648.88 was deducted the sum of £548.

63. The wages to which the Claimant was properly entitled in January 2022 – again using the s.27 definition – were her accrued but untaken holiday pay and salary down to the 1 February 2022, in the combined sum of £2591.49 The whole of this amount was deducted by the Respondent.

Issue 2 – Excepted deductions?

64. I find these were *not* excepted deductions, from which the Claimant is barred from complaining under s.13. That is because the Respondent has not persuaded me that the amounts deducted were a reimbursement of an overpayment of wages. I will explain why.

65. To find for the Respondent I would need to be satisfied that identifiable salary payments made to the Claimant prior to December 2021 and January 2022 had been overpaid and it was these salary overpayments (or part of them) which the deductions I have found, reimbursed the Respondent for.

66. This brings to the fore the question of what is meant by an "overpayment" of salary; the Claimant contends that requires some form of mistake and the statute is not apt to capture payments made to an employee which were the result of considered decisions. I would add there is no doubt in my mind that they were. It is manifest from a number of his key emails and his command of matters shown at the hearing; Sam Sanderson knew full well what the intimate workings and timings of the clawback were, as well as the Claimant's performance.

67. The Respondent submitted the overpayment did not need to be either unintentional or a mistake; the clear statutory language did not import such a requirement. In essence, the deduction can be made if the Claimant has had more salary in the past from the Respondent than she was entitled to.

68. Neither side has directed me to any case law or Hansard on this issue. Looking at the plain meaning of the language used, I note the definition of overpayment in the current OED:

> *The action or fact of paying in excess of what is due; an instance of this; an amount of money thus paid.*

69. The most obvious circumstances in which an employer might pay an excess of salary are twofold: where they have made a mistake of fact (e.g. transposing the bank accounts of two differently paid employees or mistakenly adding extra zeros to a BACS salary payment) or where they have made a mistake of law (e.g., misunderstanding their legal obligations such as where an excess of holiday pay is made on termination). I can see an "excess" might also be said to be paid where, on an ex-gratia basis or even as a non-contractual bonus, an employer knowingly pays an employee more than, contractually, they were obliged to pay to them at the time. But this to me is much less obviously or characteristically an overpayment. On one view, the employer has actively decided that in all of the circumstances the larger payment is due.

70. Looking then at the facts, the Respondent's clear case is that the sum of money deducted in December 2021 was by reference to a then accrued "total clawback" (the emails of 1 and 20 December 2021 refer) of £3600, arising in respect of October 2021 (as to £1800) and November 2021 (as to £1800). Of those overpayments, it was recovering £548. The position with January 2022 is that the Respondent was saying it could then deduct the balance of those monies, as well as clawback from the "conditional" amnesty that endured until June 2021.

71. However, this is to overlook that although liability for the clawback purportedly crystallises each month there is a threshold shortfall, the facility to make a deduction from salary is expressly confined, in time, to the last month of each financial quarter. The only month there could *potentially* be said to have been an excessive salary payment therefore (because no clawback that could be deducted, had been deducted) would be November 2021. There was no excess of salary on the August quarter day, because no clawback had accrued in that quarter or was then outstanding from the previous quarter. I have found this was covered by a binding and unconditional amnesty.

72. The maximum amount of overpaid salary as at December 2021 therefore would have a ceiling of the amount actually paid in November (£2450). Turning to January 2022, with the exception of the fact that "overpayment" had been reduced by the December deduction of £548, nothing had changed. Clearly the balance of the theoretical overpayment of salary (£2450-548= £1902) was not enough to cover the total removal of wages in January 2022 (£2591), in any case.

73. Putting that to one side, the narrow issue then becomes: is the effect of section 14 to allow the Respondent to deduct this sum of £2450 - across December 2021 and January 2022, free of challenge under the 1996 Act, even though it was paid in November 2021 both in knowledge of the facts and the Respondent's clear regard to its perceived legal rights to pay a lesser salary amount? I am not persuaded that can have been Parliament's intention. It was legislating for "employment rights" and section 14 carves out a limited exception to the employee's right not to suffer unauthorised deductions. Were deliberate overpayments (i.e., contemporaneously known overpayments) excluded under s.14 an employer could perennially revisit earlier decisions about payments long after they were made, creating a perpetual Sword of Damocles over the employee in regard to their current salary.

74. It is not an answer to this that an employee may in some circumstances be circumspect about the "extra" salary received because the employer did not communicate their rationale for deliberately "over-rewarding" them, compared to their strict rights at the time. The prejudice of later recovery to the employee would seem reduced in those circumstances. As it happened, that was not the case here and the Claimant was wholly unaware that the

Respondent, in paying her basic salary in November 2021, was affording her anything additional or excessive. Nevertheless, consistent with its emphasis on rights, I think the ERA 1996 favoured giving employees certainty about the amount of salary they can expect. It would not fulfill that purpose if protection from unauthorised deductions could be obviated when an employer had simply changed their mind about a past payment. I also expect in the majority of cases, it will not be as clear as it is in this case that that is what happened i.e., that the payment was made knowingly and then later repented. An employee may sometimes have little evidence to contradict the obvious and usual inference that an overpayment is a genuine and complete mistake. In that sense my conclusion does not denude s.14 of any substantial force.

75. Finally on this point, I have also had regard to the words *"made (for any reason)"* which appears in s.14. These words might suggest that the cause of an overpayment being made is wholly irrelevant, and a matter which the employer does not need to evidence. This does not alter my conclusion. The first hurdle for the employer is to establish that there was an "overpayment" at all. For the reasons I have given, a deliberate, reasoned payment is not apt to come within the meaning of that word as used in s.14 ERA 1996.

Issue 3 – incorporation, conformity with the deductions' procedure and illegality

76. For convenience, I deal with these issues together.

77. I am satisfied that the appendix (and thus the clawback clause) was incorporated into the contract by reference. It is right that in paragraph 2 of the contract, only the "Offer of employment letter dated 9 December 2020" is incorporated into this document. However, I accept Mr Ratledge's submission that the absence of an explicit reference to the appendix too does not cause it to be outside of the contract. I have set out above, the four direct and clear references to the appendix inside the offer of employment letter. In my judgement these have the effect of making the two documents inseparable. Hence the reference to the offer letter carries with it necessarily the appendix and meaningful separation is not possible.

78. Having regard to the legal principles I have set out, I do not regard the references to the appendix, in paragraph 2 of the offer letter especially, as "glancing". It was right at the top. Without the appendix, the Claimant could not make sense of the key terms in the two job options. It is also abundantly clear that the offer letter and appendix had – as the contract rehearsed - been supplied in full previously to the Claimant who, patently, had read it.

79. As a matter of law therefore it was incorporated

80. I also consider it is sufficiently clear in its key respects as to its operation. Indeed, it might be said that the Claimant's own arguments about a lack of compliance with the procedure are revealing about just how clear it is. I do

not accept that there was any lack of clarity or sleight of hand about the monies from which clawback could be claimed. It states expressly *"salary + commission + bonus"*. There is no sufficient ambiguity or confusion there that admits of me considering either the contra proferentem rule, the Claimant's subjective expectation or her own industry experience to disregard what is clearly stated. That would involve a complete distortion of what is said. I would add that her industry experience was disputed as reflective of the industry by Sam Sanderson.

81. The Claimant also draws attention to the conflict between the contractual entitlement to salary (clause 6.1) and, in effect, the facility for the Respondent to contingently remove it, which the clawback provision creates. As a matter of interpretation, I do not think this is grounds to strike down the clawback provision because the operation of the two clauses can be reconciled. The authorised deductions provision in the contract makes it clear that in the case of sums which the Claimant may owe to the company, these may be deducted from *"sums payable during...employment"*.

82. In terms of legal validity, the Claimant contends that the potential for the clause to result in an employee paying their employer £1800 per month (30% of £6000), which would always break minimum wage regulations, causes it to be legally invalid. In my judgment the mere potential for a clause, in abstract, to operate so as to cause a breach of the MW regulations, does not mean it is void per se.

83. The Claimant in my view is correct to say that the Respondent did not follow its own contractual terms meaning that it is precluded from relying on section 13(1)(a). Put simply, the deductions actually made in December 2021 and January 2022 were not authorised to be made under a relevant provision of the contract, because the clawback term, interpreted correctly, delineated clear limits on the exercise of the authority to deduct from salary.

84. The clause expressed unequivocally when the clawback arising would be deducted. November 2021 was the time for that in relation to the amount deducted in the December 2021 payslip. In January 2022 (there being no caveat to the amnesty granted to the end of June 2021) no other clawback was available for the Respondent to take.

85. The Respondent says the clause does not limit its right to collect a clawback that arose, after a quarter date because of the wording *"there can be extreme cases and when they arise they can be made up over several subsequent months of commissions"*. Mr Ratledge described this as an "empowering provision" that can benefit employees to help them spread out the consequences of their poor performance. The corollary of that must be that the employer's authority to deduct is not limited in time. I do not agree with that interpretation, which, because it is vague, does fall to be interpreted contra proferentem. To the extent that the words have any legal effect in favour of the employer (and I consider it strongly arguable that they are so

loosely framed as to be no more than a recital of the parties' facility to mutually agree, in the case of a large clawback, something different than the formula), the "empowering provision" *could* be of benefit to the employee. But by no means would it uniformly work in that way. The point is that it would only benefit an employee if they agreed to and were aware of the decision to defer, the exact amount deferred and had certainty about the duration of any such deferral. The Respondent does not assert the "empowering provision" affords any specific rights to the employee in these respects.

86. I appreciate the Respondent says employees, aware of their own performance had a sightline to matters. And, it says, in the Claimant's case, this was in no sense a surprise. I do not agree. Both in general and in the Claimant's particular case.

87. The Claimant was blindsided by the discussion and ensuing email on 1 December 2021. This was partly for her own reasons in failing to heed that salary was, under her contract, at risk from clawback now she out of the amnesty period but also because of the Respondent's actions in giving her internal award(s) and job offers, and not raising any performance issues. The Respondent says as a matter of fact performance had been raised as a problem in the email of 27 July 2021. I do not accept that it was. As I have found, the email was attempting to pull the rug from under the Claimant. It came on the heels of the already-agreed amnesty, denoting that her slower revenue performance was acceptable to and understood by the Respondent in all the circumstances.

88. Consistent with my findings on incorporation, I do not criticise the Respondent in terms for the Claimant not appreciating how the contract had the potential to impact salary. I suspect that although she clearly read the clause, there was a degree of confirmation bias given her previous experience. However, she still remained entitled to have the deductions process observed according to that same contract, which it very clearly was not. I accept Miss Baylis' submission that's strict adherence is a key protection of the contract.

89. I also agree with her that there were two further aspects of non-compliance – the deduction from holiday pay in January 2022 which the clawback provision did not allow for at all, and the failure to afford a pro rata adjustment to threshold (p.6 of her submissions refers). However, I am less convinced that the these variances from the contract, independently, render the entire deductions of December 2021 and January 2022 flawed. They operate pro tanto. But given my primary finding, nothing turns on this.

90. I also heard argument about whether the clawback provision was an unlawful penalty and it is sensible I express my view about this too, for completeness.

91. The evidence of Sam Sanderson at the hearing was that the 30% clawback *"means that we have our costs covered and all of the resources at our disposal to hit and exceed targets where people are developing to allow them to accede to go up the pay grade scale... combination of most overheads and additional things like our advertising budget"* and "*the cost per desk for the time when Rachel was in employment was £7 - 8,000 per month, the figure will only decrease when we increase economies of scale"*. Mr Ratledge submitted that what was being recovered by the clawback was the best estimate the Respondent could give as to what money it was spending if the employee is not meeting the necessary threshold. He observed that it is obvious that to have the Claimant present in the business, trying to generate revenue, comes at a cost to the business.

92. It seems to me that an employer cannot describe, vis-à-vis an employee, the normal payment of that staff member, to whom it has contracted already to pay salary from its own funds, as "a loss" suffered when the employee underperforms. It is antithetical to the whole concept of employment that an employee is contractually required to finance their own salary by way of banked profits for their employer.

93. On the other hand, wasted expenditure associated with supporting an underperforming employee, I can see, might be a loss.

94. On the basis the Claimant's salary was never as high as £4200 gross (£6000 - the £1800 maximum clawback deduction) I cannot identify that she was ever being asked to contribute to her own salary. However, that is not a complete answer.

95. Miss Baylis makes the point that the operation of the clause, as explained clearly to the Claimant in the response I have set out in paragraph 20 above, demonstrates that it is not a genuine pre-estimate of loss. That's because an employee who earned more money for the Respondent over the same period would still suffer a larger clawback. I find this persuasive. Sam Sanderson contended that the rationale was anti-sandbagging but he did not identify in any way convincingly how the requirement for consistent attainment of threshold over the quarter was financially better for the company, or less "loss-inducing", than some months of high achieving and others which were under threshold. Stopping sandbagging, which is where recruiters orchestrate that commission comes in when most advantageous to them, was a bone of contention between recruiters. The motivation and outcome therefore were not of managing genuinely estimated losses to the company.

96. Taking all of this together I am satisfied that the clawback provision falls foul of the common law on penalty clauses.

97. The clawback provision was not illegal of itself. This leaves over the question of whether, in its actual operation, the clause breached Minimum

Wage Regulations and cannot therefore be relied upon by the Respondent in its specific defence of these proceedings. I am satisfied that it did.

98. The Claimant was not paid minimum wage for her work in December 2021 and January 2022. Mr Ratledge submitted that this was all induced by the Claimant's decision to resign. With this, he argued, went the opportunity for the Respondent to take the clawback over a longer period, making it less likely she would receive less than the minimum wage. Having regard to the principles on illegality to which I have referred, that is not material. Subject to notice, it is open to an employee to resign at any point, for any reason. As it happened, the Claimant here left in response to the Respondent's conduct but it could equally have been any other supervening event, such as illness. It would drive a coach and horses through the protection intended to be afforded by minimum wage legislation if - in order to ensure achievement of that minimum wage – the Claimant's right to leave her employment was somehow circumscribed. The Respondent was responsible too for the incorporation of the clawback provision and its presence was a quite intentional benefit to its business. These are factors I can take into account which make it proportionate to decline the Respondent the facility to rely on the clawback clause in this case on the further grounds of illegality.

99. The Claimant accordingly succeeds on all bases, save for the question of incorporation.

Tribunal Judge A Miller-Varey
(Acting as an Employment Judge)
12 October 2022

Sent to the parties on:

13 October 2022

For the Tribunals Office

Case Number: 2402429/2022

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990 ARTICLE 12

Case number: **2402429/2022**

Name of case: **Ms R Broderick** v **Recruitment Panda Limited**

Interest is payable when an Employment Tribunal makes an award or determination requiring one party to proceedings to pay a sum of money to another party, apart from sums representing costs or expenses.

No interest is payable if the sum is paid in full within 14 days after the date the Tribunal sent the written record of the decision to the parties. The date the Tribunal sent the written record of the decision to the parties is called **the relevant decision day**.

Interest starts to accrue from the day immediately after the relevant decision day. That is called **the calculation day**.

The rate of interest payable is the rate specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as **the stipulated rate of interest**.

The Secretary of the Tribunal is required to give you notice of **the relevant decision day**, **the calculation day**, and **the stipulated rate of interest** in your case. They are as follows:

the relevant decision day in this case is:13 October 2022

the calculation day in this case is: 14 October 2022

the stipulated rate of interest is: **8% per annum**.

Mr S Artingstall
For the Employment Tribunal Office

Case Number: 2402429/2022

GUIDANCE NOTE

1. There is more information about Tribunal judgments here, which you should read with this guidance note: www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

   If you do not have access to the internet, you can ask for a paper copy by telephoning the Tribunal office dealing with the claim.

2. The payment of interest on Employment Tribunal awards is governed by The Employment Tribunals (Interest) Order 1990. Interest is payable on Employment Tribunal awards if they remain wholly or partly unpaid more than 14 days after the **relevant decision day**. Sums in the award that represent costs or expenses are excluded. Interest starts to accrue from the day immediately after the **relevant decision day**, which is called **the calculation day**.

3. The date of the **relevant decision day** in your case is set out in the Notice. If the judgment is paid in full by that date, no interest will be payable. If the judgment is not paid in full by that date, interest will start to accrue from the next day.

4. Requesting written reasons after you have received a written judgment does **not** change the date of the **relevant decision day**.

5. Interest will be calculated as simple interest accruing from day to day on any part of the sum of money awarded by the Tribunal that remains unpaid.

6. If the person paying the Tribunal award is required to pay part of it to a public authority by way of tax or National Insurance, no interest is payable on that part.

7. If the Secretary of State has claimed any part of the sum awarded by the Tribunal in a recoupment notice, no interest is payable on that part.

8. If the sum awarded is varied, either because the Tribunal reconsiders its own judgment, or following an appeal to the Employment Appeal Tribunal or a higher court, interest will still be payable from **the calculation day** but it will be payable on the new sum not the sum originally awarded.

9. The online information explains how Employment Tribunal awards are enforced. The interest element of an award is enforced in the same way.