Case No: 2203834/2022

EMPLOYMENT TRIBUNALS

Claimant: Mr A Peartree

Respondent: Prinsegate Developments Ltd

Heard at: London Central (CVP) **On: 7 December 2022**

Before: Employment Judge A.M.S. Green

Representation

Claimant: In person
Respondent: Mrs A Ralph - Solicitor

RESERVED JUDGMENT

1. The claim for constructive unfair dismissal is dismissed upon withdrawal.

2. The claim for holiday pay is well founded and the respondent will pay the claimant £395.24.

3. The claim for arrears of pay is well founded and the respondent will pay the claimant £1789.50 calculated as follows:

    a. £1897 (salary for March 2022) plus
    b. £474.25 (one week's notice pay) less
    c. £581.75 (training expenses).

4. The claim for a commission payment is well founded and the respondent will pay the claimant £350.

5. The claim for expenses is well founded and the respondent will pay the claimant £355.

6. The claim for a bonus payment is well founded and the respondent will pay the claimant £100.

REASONS

Introduction

1. For ease of reference I refer to the claimant as Mr Peartree and the respondent as PDL.

2. Mr Peartree's employment started with PDL on 1 March 2021 and ended on 5 April 2022. He was employed as a Graduate Building Surveyor. PDL are a company that provides surveying services.

3. Mr Peartree presented his claim form to the Tribunal on 9 June 2022. This followed a period of early conciliation starting on 20 April 2022 and which ended 31 May 2022. In his claim form he ticked several boxes indicating that he was making these claims:

    a. Unfair dismissal
    b. Holiday pay
    c. Arrears of pay
    d. Other payments

4. In summary, Mr Peartree claims that on 28 March 2022 he was given four significant tasks for the day. He did not think that he would be able to complete those tasks to an adequate standard in the time allowed. Consequently, he told PDL that he would do three of the tasks. He suggested that the fourth task (a survey) should either be reassigned or postponed. He also raised concerns about the direction in which PDL was going (e.g. unkept promises, workloads significantly increasing, and expenses being significantly cut). He alleges the PDL ignored his suggestions, and he was told to do all of the assigned tasks that had been given to him. Mr Peartree did three of the tasks. Mr Peartree then alleges that Mr Nicholas Prinse, a director of PDL, wanted to speak to him. Mr Peartree said that he would only communicate with him in writing. This was unacceptable to Mr Prinse. Mr Peartree says that he was not paid his salary on 31 March 2022, and he did not receive a payslip. He eventually received a payslip on 1 April 2022. However, he noted that he had not received his commission or his bonus. Mr Peartree raised this with Mr Prinse. Mr Prinse said that he would only pay the March salary if Mr Peartree agreed to the deductions. Mr Peartree alleges that his contract of employment only permits deductions upon PDL giving him one month's notice of that intention. PDL did not give him the requisite notice. Mr Peartree attempted to confirm with Mr Prinse that he would be paid at least his March salary prior to 28 March 2022, his expenses, his April salary, and holidays. He did not receive a response. Consequently, Mr Peartree regarded the un-authorised deductions as a repudiatory breach of contract and resigned. He alleges that he had reasonable grounds for believing that further significant contractual breaches would occur, and he left PDL on 5 April 2022.

5. On 20 July 2022, the Tribunal administration wrote to Mr Peartree warning him that it was minded striking out his claim for unfair dismissal on

the basis that he did not have the requisite two years qualifying service to make such a claim. He was given until 3 August 2022 to give reasons in writing why his claim for unfair dismissal should not be struck out. In the interim, PDL were told that no response to the unfair dismissal claim was necessary at this stage.

6. The Tribunal administration wrote to PDL on 20 July 2022 enclosing a copy of the claim. They also notified PDL that they were not required to enter a response to the unfair dismissal claim at this stage and intimated to PDL that a strike out warning had been issued to Mr Peartree.

7. PDL did not file their response with the Tribunal before the deadline of 17 August 2022.

8. On 21 August 2022, the Tribunal administration wrote to Mr Peartree to inform him that they had not received a response from PDL, and that Regional Employment Judge Wade was not satisfied that PDL had been properly served with the claim form. Mr Peartree was asked to forward to the Tribunal the email address for whoever was responsible for HR at PDL or any other suitable email address and any other information that would assist the Tribunal to ascertain whether PDL had received the claim form.

9. Mr Peartree wrote to the Tribunal administration on 23 August 2022 enclosing documents to assist the Tribunal to serve the claim form on PDL.

10. The claim form was eventually served on PDL and Croner were instructed to represent them and to file a response. Croner wrote to the Tribunal administration on 14 October 2022 requesting an extension of time to present the response. They indicated that PDL had not received the necessary paperwork from the Tribunal to submit the response on or before the deadline of 17 August 2022. They enclosed a copy of the proposed response.

11. The draft response deals with each of the allegations in some detail. It says that it did not breach Mr Peartree's contract justifying his resignation. It says that it is entitled to make deductions because it has contractual entitlement to do so. It alleges that that there are outstanding costs which may be legitimately deducted from his final salary. It says that it has suffered a loss as a result of Mr Peartree not completing the work that he was required to perform. It also says that Mr Peartree has been negligent in respect of other work, and it has suffered loss as a result. It says that it is not required to pay Mr Peartree his April salary because he resigned without justification. It also alleges that Mr Peartree is not entitled to the payment of any commission because such payments are entirely discretionary. Mr Peartree did not meet the targets for the Surveying team and would not have qualified for a bonus or commission in any event.

12. The question of allowing the response to be accepted was held over to be dealt with at this hearing.

13. At the beginning of the hearing, I identified two preliminary issues:

a. Given Mr Peartree's length of service, he could not claim constructive unfair dismissal and I sought his clarification on this. He confirmed that he was not pursuing a claim and I have dismissed this upon withdrawal.

b. Whether the late response should be accepted. In this regard Mr Prinse provided a supplementary witness statement explaining why the response had not been served in time and why an extension of time as necessary.

14. In dealing with the application to extend time to allow the late response, I reminded myself of the principles to be followed set out in **Kwik Save Stores Ltd v Swain and ors 1997 ICR 49, EAT.** When exercising a discretion in respect of the time limit, a judge should always consider the following:

a. The employer's explanation as to why an extension of time is required. In the EAT's opinion, the more serious the delay, the more important it is that the employer provide a satisfactory and honest explanation. A judge is entitled to form a view as to the merits of such an explanation. Having read Mr Prinse's witness statement and heard Mrs Ralph's submissions and Mr Peartree's submissions, I accept PDL's explanation for why time should be extended. I take particular note of Regional Employment Judge Wade's observation of 22 August 2022 that she was satisfied that the claim form had not been served. There were also issues with failed postage attempts to deliver the claim form.

b. The balance of prejudice. Would the employer, if its request for an extension of time were to be refused, suffer greater prejudice than the complainant would suffer if the extension of time were to be granted? The balance of prejudice favours PDL. They would be denied an opportunity to defend the claim and judgment could be issued against them.

c. The merits of the defence. If the employer's defence is shown to have some merit in it, justice will often favour the granting of an extension of time, otherwise the employer might be held liable for a wrong which it had not committed. PDL has lodged a defence; it has merit which justifies extending time. There are justiciable issues which, if not determined, could mean that the PDL is liable for a wrong it did not commit.

I exercised discretion to extend time and allowed the response to be entered into process.

15. We worked from a digital bundle The following people adopted their witness statements and gave oral evidence:

a. Mr Peartree
b. Ms Sinead George
c. Mr Prinse

Mr Peartree and Mrs Ralph made closing submissions.

16. Mr Peartree must establish his claims on a balance of probabilities. In reaching my decision I have carefully considered the documentary and oral evidence. The fact that I have not referred to every document produced in the bundle should not be taken to mean that I have not considered it.

The issues

17. I am required to determine the following issues:

    a. Holiday pay: did PDL fail to pay Mr Peartree for the annual leave that he had accrued but not taken when his employment ended?

    b. Arrears of pay: did PDL make unauthorised deductions from Mr Peartree's wages and, if so, how much was deducted?

    c. Other payments: does PDL owe Mr Peartree a commission and/or bonus payment for March 2022?

Findings of fact

18. PDL was incorporated on 26 March 2014. Mr Prinse was appointed PDL's director and Company Secretary on 26 March 2014. PDL operates a business of Chartered Surveyors. PDL operates under a trading name which was Prinsegate Chartered Surveyors. At the relevant time, PDL employed 20 surveyors.

19. Mr Peartree had a written contract of employment with PDL. A copy of the contract was produced, and it is accepted that it constituted the written terms and conditions that apply to his employment. The following terms are relevant:

7) DUTIES DURING EMPLOYMENT

a. You will be required to undertake such duties and responsibilities as may be determined by the Company from time to time, according to the needs of its business, as reasonably required. These include but are not limited to those set out in the job description attached to this Contract. The Company reserves the right to vary your duties and responsibilities, and update any job description, at any time and may require you to undertake additional or other duties as are necessary to meet the needs of its business;

…

c. The Company requires the highest standards from you in your performance at work and your general conduct and in particular you must at all times:

…

iii) comply with all reasonable instructions, limitations, policies, procedures, rules and regulations which the Company may notify to you from time to time, including those of any association or professional body to which the Company or you may belong to.

…

13) DEBTS AND OVERPAYMENTS

a. If during your employment you oh the Company money as a result of any loan, advance on or overpayment of wages, holidays or expenses, damage to Company property or that of others, default on your part or for any other reason whatsoever, the Company shall be entitled as a result of your agreement to the terms of this Contract to deduct the amount of your indebtedness to it from any monies which it may be due to make to you. Such deductions may include but are not limited to:

…

x) Any shortfall suffered by the Company as a result of your carelessness or negligence.

…

15) BONUS

The Company may in any year introduce a bonus and/or commission scheme, details of which will be provided to you at the appropriate time. Any bonus or commission paid to you by the Company under such a scheme shall be absolutely discretionary and may be removed or varied at any time upon giving you 1 month's notice. The payment of a bonus/commission in one year does not entitle you to any bonus/commission in any subsequent year and the introduction of a bonus/commission scheme in one year, does not oblige the Company to operate any bonus/commission scheme in any subsequent year. Should you be allocated a bonus/commission, it will normally be paid by the end of the month following that in which the amount of the bonus/commission is notified to you. No bonus/commission of any nature is payable if, on or before the date the bonus/commission is due to be paid, you are not employed by the company, or if you have given notice to or received notice from the Company to terminate your employment, for whatever reason, or you have been placed on garden leave, or where you have received a formal disciplinary or performance warning during the bonus/commission year.

…

27) REPAYMENT OF TRAINING COSTS

a. From time to time the Company may pay for you to attend training courses. In consideration of this, you agree that if your employment terminates after the Company has incurred liability for the cost of you doing so, you will be liable to repay some or all of the fees, expenses and other

costs ("the costs") associated with such training courses.

b. You shall repay the Company as follows:

i) if you cease employment before you attend the training course but the Company has already incurred liability for the costs, 100% of the costs or such proportion of the costs that the Company cannot recover from the course provider shall be repaid;

ii) If you voluntarily withdraw from or terminate the Course early without the Company's prior written consent, 100% of the costs or such proportion of the costs that cannot be recovered from the course provider shall be repaid;

iii) if you are dismissed or otherwise compulsorily discharged from the Course, unless the dismissal or discharge arises out of the discontinuance generally of the Course, 100% of the costs or such proportion of the costs that cannot be recovered from the course provider shall be repaid;

iv) if you cease employment, for whatever reason, during the training course, 100% of the costs or such proportion of the costs that cannot be recovered from the course provider shall be repaid;

v) if you cease employment, for whatever reason, within 12 months of completing the training course, you will repay 1/12th of the costs incurred for each month in that 12 month period not worked.

Thereafter, no repayment shall be required.

c. You agree to the Company deducting the sums under this clause from your final salary or any other outstanding payments due to you. In the event that there are sufficient sums available to clear the costs due, you agree to repay the costs due within seven days of the Company's request. Failing which the Company reserves the right to take appropriate action to recover the debt and you will be responsible for any interest, charges, fees, or other associated costs incurred as a result of that action.

30) NOTICE

…

b) The Company shall be entitled to terminate this Contract, without any notice period or pay in lieu of notice, if you are found guilty of any gross misconduct.

c) Notice by the Company:

i) During your probationary period is one week;

ii) After your probationary period is one week for each complete year of service up to a maximum of 12 weeks in total. This is the statutory minimum.

d) Notice to the Company:

i) During your probationary period is one week;

ii) After the successful completion of your probationary period and up to two years' service this increases to one month and after two years' service to two months.

19. Before joining PDL, Mr Peartree had worked in his family property business for 10 years. He joined PDL on 1 March 2021 as a Graduate Building Surveyor. Mr Peartree's role involved conducting Level 3 building surveys of properties on the instructions of private clients. Calls would often be booked in with clients after a survey had been completed. A Level 3 building survey is the most comprehensive type available for residential properties as opposed to a Level 1 survey which would only note the general condition and outline of defects.

20. On 28 March 2022, Mr Peartree was given two surveys to undertake at late notice. In his witness statement he recalls that the second survey was given to him on 25 March 2022. In his opinion, both surveys would be challenging, and he believed that it was realistically impossible that he would be able to finish them during his working hours. He goes on to say that he was happy to go over his working hours as and when the business required even though he was not entitled to overtime. He strongly believed that he had to set his own limits. The first property was a flat in a Conservation Area where he had been required to park nearly 25 minutes away. The second property was a five-bedroomed house where the client had sent a 10-point query list. His journey to the first property had been delayed and he was nearly 1 hour behind before he even started, and he felt stressed regarding the day and the week ahead. When he arrived, he noticed that PDL had booked in two phone calls in the afternoon. This meant that there was no chance of his being home in time to handle the phone calls to the standard that he wished.

21. Mr Peartree was worried that he was being asked to take on too much work which could compromise the quality of what he was required to do and at 11:52 hours on 28 March 2022 he sent an email to PDL [113]. He said, amongst other things:

> *Apologies in advance for this lengthy email. The key point is I will not be attending my second survey today (242 L**** Road …).*
>
> *I have been planning on giving my thoughts to some of the recent changes that Nicholas has implemented. That email is still to come but the key points today that he has nearly halved our travel allowance (effectively a pay cut of between £100-£100 per month to each surveyor, justifying it with an incorrect application of the 10,000 per mile tax relief, when I raise this he implicitly threatened to cut it further), while also dramatically increasing workloads of all surveyors and encouraging us to significantly reduce our standards to achieve 'optimisation', while also maintaining that we will be held liable for mistakes. That's not to mention a number broken pledges regarding socials, training and variety of work that have not come to pass.*
>
> *My workload today is, and I don't mean to be rude, simply unacceptable. Two surveys, the first in a place where I've had to park nearly 25 minutes away and the building in terrible condition, the second on a five-bedroom mansion where the client has sent a 10-point queries list, and two phone calls on top, each liable to take 30-45 minutes including prep time.*
>
> *I think it's best to leave it there for now. I trust you will rearrange this second survey for a later date/with someone else.*

Thanks in advance. Apologies for any offense the above may have been caused.

22. PDL responded to this email at 12:09 hours on 28 March 2022 to the effect that they would not be able to rearrange the second survey because it had already been booked in and confirmed with the vendors who had re-arranged meetings and clients who were expecting their survey to take place at 13:30 hours on the same day [114].

23. Mr Prinse then sent an email to Mr Peartree saying, amongst other things:

Andrew,

We do not cancel surveys last minute unless it is truly beyond our control.

In this case, it is merely a question of efficiency, which all site surveyors have been improving on as they become more familiar with the software and experienced in workflow. The plan is working very well.

…

There are 8.5 working hours in a day. 2 surveys per day is totally reasonable. I've been doing it for nearly a decade (before the assistance of software) and with no complaints on quality standards ever received.

I therefore resent the comment about reducing standards. This is not the case. Our standards will actually improve; however, we will be focusing more on the actual problems with the property and less on the non-issues. This is the purpose of a building survey.

As for the mileage rate, I did not implicitly threaten to cut this, but I did explain that companies can pay (if at all) whatever rate they want and what we offer is still relatively generous, given the £4.39 estimated profit made by you or each litre.

As for being held liable for mistakes, everyone will need to be accountable for their work. I would not have it any other way.

I hope you will not be dropping the ball today.

24. There was disputed evidence about whether the instruction to conduct the second survey was reasonable. Mr Peartree thought it was unreasonable. Mr Prinse thought it was not unreasonable. Under cross examination, Mr Peartree explained that he did not believe that it was a reasonable instruction and explained that on the previous working day, which was 25 March 2022, he said that he had worked late until the afternoon, and he understood that he only had one survey for the following Monday (i.e. 28 March 2022). It was only later on Friday that he received notice of the second survey, and he said, "okay that sometimes happens". He then said that he had a difficult journey to get to the property and when he arrived, he saw that a client had booked in two phone calls in the middle of the day. He said that he set himself high standards when it came to dealing with these calls. He also said that Mr Prinse wanted surveyors to take calls whilst driving in between appointments with the client reading back sections of the survey report to them. In Mr Peartree's opinion, this was unacceptable because it was indicative of lowering standards. He was not happy with that. This triggered his decision to write to PDL to tell them that he had been given too many surveys for the day. He intended to do three of the four tasks assigned to him. The fourth task would have to be done by someone else.

25. PDL's position is different. In paragraph 4 of his witness statement, Mr Prinse says that on 25 March 2022 Mr Peartree was booked to inspect the property at L***r

Road between 1 and 3 PM. He says that Mr Peartree accepted the instruction in advance. In his opinion the workload was reasonable within the allotted time. In paragraph 15, he says that his workload was no different to that of any Graduate Building Surveyor. He goes on to say that the profession requires much of its surveyors, but Mr Peartree was not given any more work than he could reasonably manage. No complaints about workload had been received from any other member of staff.

26. In paragraph 7 of his witness statement, Mr Peartree refers to the Rules of Conduct prepared by the Royal Institution of Chartered Surveyors ("RICS") [94-95]. Mr Peartree believes that PDL excessively prioritized quantity over quality, falling short of Rule 3 of the RICS Code. He suggests that on 14 March 2022, an email was circulated by Mr Prinse regarding phone calls with clients suggesting that to save time, a brief post survey call could be had with the client during travel hands-free. The report did not need to be in front of the surveyor as the client could simply read it out. I agree with Mr Peartree that this is evidence of requiring more work to be done during the day in circumstances that were far from ideal. An employer should not be requiring an employee to engage in a telephone discussion about the technicalities in detail of a survey whilst they are driving. I accept that the suggestion is that this could be done hands-free, but it is generally accepted that even hands-free conversations, particularly if they are more than brief and cursory, can be dangerous and compromise road safety. Mr Peartree also refers to an email that Mr Prinse circulated amongst the team PDL on 20 March 2022 under the subject heading "Optimisation" [108-110]. The email was written in response to a conference call with the financial consultant who had done a review of the business. I note the following:

> *<u>Forecast</u>*
>
> *To summarise, our consultant was immensely impressed at our growth, but the rising costs are troublesome. He wants to slash the latter.*
>
> *I countered by saying that, although we will be trimming back on non—HR costs, we ought to be keeping everyone who is working at high capacity. This is a fair warning.*
>
> *We will be keeping a watchful eye on everyone's productivity as we shift into overdrive with the huge influx of work. Rise to the challenge and prove your worth.*
>
> *The added benefits include more bonuses and commission plus additional potential rewards (e.g. EMI) by taking on as much as you can handle.*
>
> *More money for the company equals more money for you.*
>
> *<u>Inspection & Reporting workflow</u>*
>
> *Last Thursday, I finished two building surveys (a terraced house and a flat) within 5 hours including travel. That's an average of 2.5 hours each.*
>
> *This also included some unrelated calls I had to take in emails I had to read/send (say 30 mins).*
>
> *The reports were finalised and uploaded by the time I got home (by leaving the phone open on OneDrive/GoReport, as the apps receive the uploads whilst you're travelling).*
>
> *I would therefore be able to do three 4 small/medium properties with immediate*

report turnaround. No visit to the office necessary for "write up".

I see my calendar getting booked up with jobs because some site surveyors suffer from limitation thinking: they cannot do as much as I and other efficient surveyors do. They are wrong and a big change will need to take place for them.

Quality Standards

Clients only want to know what's wrong with the property. They don't really care about anything else. In fact, most will only pay attention to the summary and skim read the rest.

Focus on the big 3: substance, damp, and rot.

Sure, you still need to cover everything else, do not waste your time extensively writing about non-issues or even non-serious issues. You can't be told off for not elaborating on the element's good condition, as "the report focuses on matters that the Surveyor judges to be urgent or significant" (1.8 General Terms). So, blast through areas which are fine.

Post-survey Calls

Travelling is "dead time". Thankfully, being in the 21st-century, we have hands-free calls be directly on the phone or via Bluetooth). Provided you maintain safety as top priority, post-survey calls can be on-Route to site and going back home.

…

New Rota

*The new plan is to add **doubles** (2 small/medium building surveys in a day).*

*We will also arrive on site **9 AM** (key collection as early as 8:45 AM) and many will want to do **post-survey** calls around travel (one on the way at 8:30 AM and the other on the return home at 5:30 PM) this leaves time for lunch in between. Higher earnings, earlier finishing time.*

…

The full-time site survey rota, which would be pro-rata for part-timers, will there for look something like this for a building surveyor:

Monday: double
Tuesday: single
Wednesday: double
Thursday: double
Friday: single

*The new target for each site to surveyor needs to be **7-8 reports per week.** You can still have time for emails and other surveying work.*

I will be rolling up my sleeves and following the same schedule where needed.

Final Thoughts

Recently, a surveying firm called MCL went under. I met with one of the former directors on Thursday. He explained the reasons. As I suspected, their failings were due to a lack of optimisation: high costs, mediocre revenue. There is no

way I would ever let that happen to us.

In order to realise this, we will need to follow a highly-optimised rota as set out above. Otherwise, we will lose out on so much revenue and incur too many extra (HR costs).

We also need to take into consideration economic downturn, which inevitably happens. We need to be prepared for those events (winter is coming). Remember when this company fully took care of everyone during the pandemic whilst expanding? That's how well this company is managed, but the site surveyors will need to continue to be good team players as well. We all support one another.

So, work hard for the company to pay out that extra bonus/commission (plus the potential future pay rise, Summer prize and/or share option) and we will have an amazing year.

…

27. I am not satisfied with the evidence that the requirement to perform an additional survey on 28 March 2022 was unreasonable. I can understand that Mr Prinse wanted the business to be more productive. The proposal to change the rota had only very recently been implemented and it is difficult to see whether it was unreasonable particularly as I have not seen any evidence to suggest that other surveyors were complaining or having to work excessive hours to meet the requirements of the updated rota. Mr Prinse's own evidence that he would be able to complete two surveys per day, taking 2.5 hours to do so, went unchallenged. I also take into account the fact that Mr Peartree had 10 years' prior relevant experience as a surveyor before becoming a Graduate Building Surveyor is relevant to determining the time he could be expected to take to perform a survey. The only aspect that I think is unreasonable is the requirement to conduct hands-free telephone calls with clients in between assignments whilst driving. However, that does not form the subject matter of Mr Peartree's complaint concerning unreasonableness. He was concerned about the number of surveys he was asked to perform on 28 March 2022.

28. On 29 March 2022, Mr Peartree was booked in to do another survey at a property in Rainham. He undertook the survey as normal. During the survey, he received a WhatsApp message from Mr Prinse on his personal and work phones asking what time he was free to chat. On completing the survey, he went to reply to the message on his personal phone, but he saw that Mr Prinse had deleted the message. He did not think it was necessary to check his work phone because he concluded that Mr Prinse had changed his mind about wanting to speak to him and took no further action.

29. In paragraph 14 of his witness statement, Mr Peartree says that on 30 March he received a voicemail message on his phone at 9:37 AM from Mr Prinse which said:

a sure fire way to piss me off is to ignore a message I've sent you, so why don't you get back to me with a time you are free to chat… So we can discuss what happened a couple of days ago.

30. Mr Peartree was not cross examined on the existence of this voicemail and the contents thereof. I have no reason to disbelieve him. I find that Mr Prinse left the voicemail in the terms reproduced above. The tone of the voicemail borders on being aggressive and the choice of language could have been better.

31. Mr Peartree goes on to say that he realised that Mr Prinse had only deleted the message on his personal phone and not on his work phone. Consequently, at 9:55

AM he sent an email to Mr Prinse apologising for the confusion this had caused and for the disruption his actions had caused on Monday, stating that his preference was for communication on this matter to be in writing and that he intended to carry on with his duties as normal in the meantime [116]. Mr Prinse replied at 10:08 hours saying, amongst other things:

> *You will not be dictating how we communicate. If I asked for a phone call, you will make it. Now, I want you in the office for us to have a meeting at the next available time.*

The tone of that response is firm, bordering on aggressive.

32. On 31 March 2022, Mr Peartree did not receive his March salary, or his payslip and he contacted two of his colleagues to check if they had been paid and they confirmed that they had.

33. Mr Prinse responded to Mr Peartree's email on the same day at 09:23 hours [121]. He said that the payslip should have been uploaded and invited Mr Peartree to let him know when it had and to confirm that he was happy with it.

34. Mr Peartree reviewed the payslip and noted that his commission (approximately £300-£400) and his bonus (£100) which he had earned had been removed [92]. He believed that PDL were contractually obliged to give him one month's notice if they were going to change or remove commission and bonus entitlement.

35. On 1 April 2022 Ms Redpath sent an email to Mr Peartree with details of his financial metrics for March 2022 [118]. She said:

> *Metrics as follows:*
>
> *You had £10,726.45 paid jobs working 5 days a week.*

36. On reflecting on what had happened, Mr Peartree says that he considered his position and concluded that it was no longer tenable, and he submitted his resignation letter on 1 April 2022. A copy of his resignation letter was produced to the Tribunal during the hearing. Mr Peartree states as follows:

> *Please accept this letter as formal notification of my resignation as a Graduate Building Surveyor with Prinsegate Chartered Surveyors. In accordance with my notice period, my final day will be April 30th. It should be noted that, as agreed in writing, I will be on sabbatical from Tuesday 19th April onwards. Having taken legal advice, I understand a sabbatical does not alter the one calendar month notice period required as per my employment contract.*
>
> *I would like to thank you for the opportunity to have worked in the position since March 2021. I have learned a great deal during here and have enjoyed collaborating with my colleagues. I will take a lot of what I have learned with me in my career and will look back at my time here is a valuable period in my professional life.*
>
> *I wish yourself, your staff and Prinsegate Chartered Surveyors all the best in the future.*

37. The tone of this letter is friendly. Indeed, it is quite warm and gives no hint of any discontent on the part of Mr Peartree. For example, nothing is said about being given too much work thereby compromising professional standards. Nothing is said about the failure to pay a commission or a bonus. Indeed, it appears that at this juncture,

Mr Peartree valued his time at PDL indicating that he had learnt a lot during his employment which he characterised as a "valuable period in his professional life".

38. In paragraph 19 of his witness statement, Mr Peartree says that when he wrote the letter, he had not taken legal advice and had acted in good faith. This contradicts what he says in the letter where he quite clearly says "having taken legal advice". He says that the letter could be construed as affirming PDL's breach of contract. In response, he says that he genuinely believed that PDL would pay him as per his contractual entitlement. Even if they had paid him, he would still have resigned and he saw no reason not to submit his letter of resignation as soon as possible. He says that he is not a legal expert and was not aware that a waiver argument could be made. Had he been aware, he would not have submitted the letter. He says that ordinary people should not be required to be aware of obscure matters of law.

39. Mr Peartree was cross-examined about this letter. He was asked why he had not given any reason for his resignation to which he replied that he thought it was unnecessary and he wanted to leave quietly without making a fuss. At this juncture, Mr Peartree was an employee who had given one month's notice of termination of employment to PDL. He would continue to be employed until 30 April 2022. I asked Mr Peartree if he had found alternative employment and he told me that he had. He said that he had started his new job in July 2022, and he had been offered the position sometime in April. He was unable to be more precise. He could not provide a date of the offer. He told me that he had been interviewed for the position and asked when that was, he replied that it would have been in late March or early April. He is now employed by the Watts Group as a Graduate Building Surveyor.

40. Having considered the resignation letter, Mr Peartree's explanation for it in his witness statement and the evidence that he gave under cross examination, I find that he has been disingenuous. In his own words in the letter, he admitted that he had taken legal advice. This contradicts what he says in his witness statement. He knew at the time that he wrote the letter that he had problems with PDL both with the workload and non-payment of his commission and bonus and the failure to provide a payslip He could have referred to these issues in that letter. I would have expected him to have discussed this with whoever gave him legal advice. I believe that at that point, Mr Peartree had been interviewed for his new position. I am unable to make a finding of fact as to when he accepted the offer. What I can say is that he was thinking of working elsewhere and had taken steps to achieve that.

41. However, notwithstanding what I have said above, this was not the end of the story. On 4 April 2022, Mr Peartree sent an email to Mr Prinse at 09:11 hours [122]. He said:

> *Thank you for sending over the payslip on Friday afternoon. Unfortunately, funds which were due 31st March have yet to be received in my bank account. For obvious reasons I would be grateful if this could be investigated and actioned urgently.*
>
> *Separate to the above, I noted on the payslip that my commissions earned in March (totalling between £300-£400) has been deducted. Can you kindly explain the basis of this deduction to my salary was undertaken.*
>
> *I understand I made Prinsegate over £10,000 revenue in March. I further understand this entitles me to an extra bonus of £100. Can you kindly confirm when this will be paid.*
>
> *…*

42. Mr Prinse replied by email at 09:48 hours [123]. He said:

Andrew,

It was a mistake for Jemma to mention how much revenue a surveyor might generate, because it gives them the impression that they are "making" a lot of money for the company. They are not. We have huge overheads and small margins, particularly given how competitive the industry is.

You are not entitled to any commission or bonuses. They are entirely discretionary.

When you refuse to attend an appointment at the last minute because you can't be arsed, this results in a loss of revenue. Who will pay for that?

We then have to carry out extra work in rectifying the problem you have caused. This results in an additional cost.

Moreover, we have to waste time dealing with your moaning and we should all be focusing on working. Another cost to us.

Next time you have the audacity to confront us why you didn't win a company award, consider that pissing your team off plays a huge factor in this.

Instead of hiding behind your lawyer and trying to be clever with your emails, perhaps you should be more professional by getting the job done and being grateful for the career development we provide you with.

43. The tone of this email is petulant and aggressive. It is also condescending in the way in which it denigrates Mr Peartree seeking legal advice. He was entitled to do that given that he had not been paid. The tone is patronising in the way it refers to the career development that had been provided. It suggests that Mr Prinse did not tolerate being challenged in circumstances where it was reasonable for him to be challenged.

44. Mr Peartree responded later the same day at 16:27 hours [124]. He said, amongst other things:

At the time of writing this e-mail I have still not received my salary for March. It is not my intention nor desire to have an elongated argument which only wastes everybody's time. My only wish to be allowed to go quietly about my work being given the space and time to do so at the high standard I set for of myself, and to be paid as per the terms of the employment contract. It is in the interests of fairness, finality, and reconciliation that I write the below.

In your prior e-email you advise that bonuses are entirely discretionary. This is not strictly correct. Clause 15 of my employment contract states [this is then set out]. I was not given any notice of these deductions thus you were a contractual obligation and withholding them as breach of said contract. I am therefore due, on top of my un-received basic salary, £300-£400 in commission and another £100 on top of that for achieving the £10,000 revenue target.

It appears to me that these deductions were carried out as a retaliatory measure regarding my correspondence to the admin department on Monday 28th March, where upon being given an excessive workload I advised (in admittedly forceful terms) that the four significant tasks

assigned to me that day I would only be undertaking three of them. In addition to this, on Tuesday there was an innocent misunderstanding regarding deleted WhatsApp messages, and on Wednesday my request that we communicate in writing was not well received.

Having received the payslip on Friday, from your last e-mail I am of the understanding you are intentionally, and wrongfully, withholding payment of the amount outlined on the payslip. Presumably, this is an attempt to exert pressure on me whereby I accept your statements and waive any claim to the full amount owed. I am not prepared to do that. Consequently, if you consider the maximum liability owed to me to be £2083.33, then that amount should be paid to me without further delay, leaving me to claim the outstanding amount through the correct methods.

For obvious reasons, I am deeply concerned I will not receive my due pay for March. I further believe your e-mail this morning provides justification for me to be concerned that you will also attempt to withhold my March expenses, as well as my wages and expenses of April. To allay these fears, over the last few days I have spoken with a number of former Prinsegate employees. I will not give any name or names, and I appreciate there are two sides to every argument, however my research has led me to understand you have a history of undertaking exactly the actions of which I am concerned about.

As stated above it is my view deductions have been made to my salary as a retaliatory measure, and that my salary has further being wrongly withheld. This is a breach of the employment contract, and an unlawful deduction as per the Employment Rights Act 1996. Obviously, I take this matter very seriously and would be grateful if you would confirm the following [Mr Peartree then sets out the sums that he believed to be entitled to be paid].

I truly hope I'm being overly paranoid, and we will look back at this e-mail in a month or so and laugh at how over-the-top it is. However, all things considered, I feel I have no choice but to protect myself. Therefore if the above is not agreeable and/or not actioned I will consider this a repudiatory breach of the employment contract, allowing me to immediately terminate our working relationship.

45. This email unequivocally states Mr Peartree's position regarding non-payment of his salary and his belief that he was entitled to be paid a commission and a bonus. It also clearly states that he will treat this as a repudiatory breach of contract and terminate his employment with immediate effect if he is not paid the sums of money that he believes that he is due.

46. Mr Prinse replied to Mr Peartree on 4 April 2022 at 16:43 hours [126]. He said:

Andrew,

You will learn in life that you attract more flies with honey than with vinegar: making a friendly phone call as opposed to sending adversarial emails would have yielded a better result for you. I'll give you one last chance to do that by today.

47. The tone of this email is patronising. Mr Peartree had legitimate concerns about why he hadn't been paid. He was entitled to raise these concerns with Mr Prinse in

the way that he did. The response is demeaning, and it is also threatening in that if Mr Peartree does not do as Mr Prinse requires (i.e. "making a friendly phone call") then he will not enjoy "a better result".

48. On 5 April 2022 Mr Prinse emailed Mr Peartree with his substantive response to the points raised in Mr Peartree's email of 4 April 2022 percent at 16:27 hours. He marked his response in red on the original email [124]. His response was as follows:

> *[In respect of the claim for commission and/or bonus] Rejected. You were notified of deductions at our last meeting, but for the avoidance of doubt, you may also take this as notice that any commission/bonuses you believe you are "entitled" to will be deducted. Refer to part 13 of your contract for clarity on this.*
>
> *[In respect of the claim that deductions were made in retaliation for not undertaking the survey on 28 March]. We reserve the right to produce evidence of the work I and other surveyors are capable of completing each day and contrast that with your output. We further reserve the right to tally up all of the appointments we had to reject as a result of your refusal to complete a full day's worth of work and apply derived losses against your pay.*
>
> *[In respect of the allegation that the deductions were being made to exert pressure on Mr Peartree to waive any claim for the full amount owed] Rejected. Given your invitation to open up this matter, we have reviewed your account and have uncovered outstanding costs, which we now need to be taken into consideration.*
>
> *[In respect of the allegation that Mr Peartree's March expenses would be withheld]. Where leavers have acted negligently or incurred costs in other ways, deductions apply. Otherwise, all leavers have been paid in full.*
>
> *[In respect of the quantification of the claims]. Again, we will have to review your account upon your leaving in order to establish the final additional costs you have incurred to the company.*
>
> *[In respect of the penultimate paragraph reserving rights]. Should you cause any further upheaval, you will be held liable and we will be the ones suing you for damages, the cost of which will be recovered from you.*

49. In paragraph 27 of his witness statement, Mr Peartree interpreted this email to mean that Mr Prinse was "telling me to shut up, keep working, and he wasn't going to pay me". Mr Peartree, therefore, decided that he had no option but to terminate his employment with immediate effect and he emailed Mr Prinse at 12:18 hours on 5 April 2022 to notify him [128]. He cited repudiatory breaches of contract as the reason. He said:

> *In your e-mail you raised several new points. To keep it brief:*
>
> - *I stand by my request for correspondence to be in writing. All things considered, I find claims a chat between us would have been "friendly" to be dubious.*
> - *You refer to a "meeting". Our one and only meeting (which was also the last time I saw or spoke to you) was Thursday 10th February. I have attached a summary of that meeting which you agreed to. This meeting took place over six weeks before the inciting incident, there was no notification of future salary deductions made. I am rather concerned you would, apparently, come up with a fictitious meeting to try and justify your position.*

- *Clause 13 of the contract refers to debts and overpayments, it makes no reference to bonus' or commissions and is not relevant here.*
- *You refer to "outstanding costs" which you have "uncovered". I look forward to being provided full details, whereby I shall review them.*
- *I appreciate your position at carrying out 7-8 RICS Level Three Building Surveys a week, plus phone calls, checking, and e-mails, is "not excessive at all". If it comes to it, I will produce my evidence to a judge/tribunal and they can decide. My primary concern, among several others, is our obligations regarding client care not being met.*
- *I find claims of a "tally of appointments you "had to reject" because of me to be dubious, and I noted your confirmation that multiple former Prinsegate employees have left with wages, holiday pay, expenses, etc. outstanding.*

50. Mr Prinse responded on 5 April 2022 at 12:59 hours [130]. He said, amongst other things:

> *Andrew,*
>
> *There are no breaches to your contract.*
>
> *You have incurred costs by virtue of failing to attend an appointment last minute. The cost associated with this was deducted from the bonuses and commission from last month, which are discretionary in any event. Your base wages remain unaffected.*
>
> *I requested your acceptance of the payslip for payment to be made and you have failed to do so.*
>
> *Your early termination is not accepted and you will be liable for all damages associated with cancelled appointments, which we will instruct our legal team to recover from you plus costs.*

51. On 6 April 2022, Mr Peartree went to PDL's offices and met with Ms George who was the HR manager at PDL at the relevant time. In paragraph 12 of her witness statement, Ms George states that Mr Prinse attended the meeting with Mr Peartree and mention things to Mr Peartree such as "in an old job being threatened to be killed and kept "advising" Mr Peartree to walk away and accept the deductions. She was not cross examined on this and I have no reason to doubt what she says. This is evidence of threatening behaviour and Mr Prinse pressurizing Mr Peartree to accept the deductions and be paid less than what he believed he was entitled to.

52. On 6 April 2022, Ms George emailed Mr Peartree with PDL' s official response regarding his email of 4 April 2022 [135]. Her responses were marked in red in the email. I note the following:

> *… I am emailing to formally confirm the position of the Company.*
>
> *Whilst I appreciate your comments regarding Clause 15-the commissions that were due to you have been off-set against money that is owed to the Company-I will be detailing this below. This should have been notified to you before any termination date was given/agreed but as I mentioned I have been out of the office due to the work schedule.*
>
> It is noteworthy that Ms George believed that Mr Peartree was entitled to

payment of the commission because she used the words "the commissions that were due to you". She then refers to these being set off against amounts that she believed Mr Peartree owed to PDL. She had been instructed to formally confirm the position of PDL. That is clearly stated at the beginning of the email.

There were changes made to what we required for workload of all surveyors as of Sunday, 20 March 2021.

The position of the Company was compromised due to your late advice that you would not be attending the appointment on Monday 28th March and subsequently cost the Company £1300 + VAT. Whilst I appreciate your comments regarding workload and have viewed the email dated 28th March sent to Admin, your behaviour on Monday 28th March was a breach of Clause 7 of your employment contract. You state in this email that you were planning to give your thoughts about the changes to the workload button said of this taking place, you just cancelled an appointment giving us no time to rectify this properly and thus having to rectify at the cost of the company. Clause 7 a does state that the Company reserves the right to determine the roles and responsibilities in line what the business requirements. I have checked on numbers from the previous 2 weeks and other surveyors have been able to undertake the amount as requested in the email on Sunday 20th March. For the avoidance of doubt, I have checked this across the Company.

As per my paragraph 2 above-there are costs which should/would have been deducted at the point of termination.

As per all contractual terms-deductions have been applied in line with this. I have reviewed this and am satisfied this has been done lawfully however this matter is confidential and not relevant.

Further to our meeting today at 12.30 -I will send a revised email regarding expenses and holidays. I have revisited HR Partner and your holiday dates are as follows 13th Jan-17th Jan-please confirm you just took the Friday 14th as annual leave? If so is just how our partner logs it and I will recalculate days of accrued holiday once this is confirmed.

I would be happy if we can discuss this further as our meeting today as you have given notice without completing your required notice period as per your contract.

[In relation to references] No threats have been made here and I categorically disagree with these comments. All references provided will be fair and accurate and dealt with our policies and procedures.

The following is in black in the email setting out PDL's position of outstanding costs it alleged Mr Peartree owed to PDL:

- *Training- RICS structured training, RICS subscription, RICS "APC Prep day"-£897.00 which was paid to you in Deb 2022.*
- *Clause 13 x)Any shortfall suffered by the Company as a result of your carelessness or negligence-£1300 + VAT. Due to the late notice changes in cancellation Prinsegate were required to offer a goodwill gesture due to a formal complaint that was raised.*

These two points alone amount to more money than your basic salary.

53. Ms George has provided a witness statement. In paragraph 4 she states that after Mr Peartree called the office to say that he was unable to attend the second survey on 28 March 2022, the administration department dealt with the matter and called the property owner to explain that there had been an issue and they were working to resolve the matter. She goes on to say that the property owner was very cross about that and Mr Prinse was advised of this, and he said that he would attend to the survey later in the day. She goes on to confirm that Mr Prinse carried out the survey [96-103]. Under cross examination Ms George said that it was her first day working at PDL and she had raised the point that the survey had not been carried out. She witnessed the conversations with the property owner. The survey was rearranged and carried out by Mr Prinse. In her opinion, it could not be said that the client or PDL had suffered a loss. I agree with her. Whilst the survey was not conducted by Mr Peartree it was conducted by Mr Prinse later the same day. Whilst I accept that the client was very angry that Mr Peartree had not conducted the survey, I accept Ms George's evidence that the matter had been resolved because another surveyor had done the work.

54. Ms George was asked to deal with Mr Peartree's wages, his unpaid holiday, expenses and commissions. In paragraph 6 of her witness statement she says that these "had all been withheld in the payroll of March 2022". She goes on to say in paragraph 8:

> *I cannot remember the exact date or times of my emails, but I was asked to email Mr Peartree regarding the deductions, and I explained that on final payment of salary we would identify any overpayments, owed payments (such as training) and then if there was anything else. This "anything else" was referring to Mr Prinse stating that Mr Peartree had lost the company money. I tried to explain to Mr Prinse that if we had incurred an actual loss, we should evidence this is if the matter ever went to a tribunal for non-payment of wages, we would be asked for this. The only clause in the contract which I was reluctantly able to use was clause 13 x-a generic catchall clause which stated that on an employee's final payment the company will be entitled to deduct amounts if the employee had incurred a loss to the employer through "carelessness or negligence". I believed Mr Prinse's application of this clause stretched credibility.*

55. In paragraph 9 she goes on to say that she explained her feelings to Mr Prinse and that it was likely to get ACAS to which he is said to have replied "let it, I don't care, I'm not paying".

56. I do not believe that PDL suffered a loss as a result of Mr Peartree refusing to do the survey on 28 March 2022. I do not accept that there has been any finding or concession of negligence in relation to any work performed by Mr Peartree for the following reasons. Ms George was not cross-examined on what she said in paragraphs 8 & 9 of her witness statement, and I have no reason to disbelieve what she is saying. In paragraph 16, she goes on to say that in mid-May there was another complaint that came to Mr Prinse's attention where it was apparently caused by Mr Peartree's negligence and she was asked to add this to the deductions. Ms George goes on to say that she asked Ms Redpath who said there was no claim and that another surveyor called George Ford had replied to the complaint. I have no reason to doubt this.

57. In paragraph 29 of his witness statement, Mr Peartree says that during his whole time at PDL every survey he submitted was on time and he had not received any complaints or claims that he knew of about his work. He said that all feedback been

positive. I have no reason to doubt this. Furthermore, when Mr Prinse was giving his oral evidence, I asked him whether there had been any negligence claims against PDL where liability had been established or conceded in respect of Mr Peartree's work. He replied that there were none. He said there was an ongoing dispute with a client, but legal proceedings had not been instituted and liability had not been conceded.

58. I now turn to the question of commission/bonus. Under cross examination, Mr Prinse said that bonuses would be awarded if staff met their targets. He explained that PDL would have to agree if a bonus was payable or not and that was normally carried out over the next month and then calculations would be made as to who met the targets. He said that he did not remember agreeing to a bonus payment in March for Mr Peartree. He explained that the accountant would normally produce a draft payslip which would then be sent to the company for agreement. He explained that because Mr Peartree had refused to conduct the second survey on 28 March he had lost confidence in him which made him believe that he would be disruptive will make a claim and as a result, he wanted to check that he was on track with his usual work and then send draft payslip for him to approve. When it was put to him that he wanted to be paid as much salary and that he would hold over any discussion about his commission/bonus this had been rejected. Mr Prinse replied that at the time the payroll was being run "we had not uncovered any of those additional costs which arose when you abandon an appointment 28th March". I do not accept that that is a reasonable basis for withholding payment given that PDL had not suffered any loss (see above).

59. A new bonus scheme for surveyors was instituted on 23 February 2022 which was communicated by email [111]. This indicated that from March, individual bonuses would run separately from the commission scheme. It indicated that the bonus would be target based and allocated against the value of paid work carried out as follows:

£10,000 revenue-£100 bonus
£15,000 revenue-£150 bonus
£20,000 revenue-£500 bonus
£25,000 revenue-£1000 bonus

This would be prorated for those surveyors who were working part-time.

60. Under cross examination, Mr Prinse accepted that Mr Peartree had met the target for the £100 bonus, and he said to Mr Peartree that was "up until you abandoned the survey 28 March, we had not taken £100 into account that you would have fallen below the target. We don't pay bonuses to staff who abandon surveys at the drop of a hat. If people don't work stop if they abandon work and cause disruption and incur cost, we have to factor them in."

61. When Mr Peartree received his payslip for February 2022 it recorded that he was paid a commission of £312.25. The word "commission" is used as a label for the payment. Under cross examination, despite this label, Mr Prinse suggested that Mr Peartree was not entitled to payment of the commission as this was a separate scheme that did not apply to him. When he was asked to explain why the payment of £312.25 was expressed as a commission, his explanation was "that is how the accountant words things". By this he meant that the accountant, who was responsible for running the payroll and producing the payslips, had decided to use the word commission to be applied to this payment when what he really meant was the payment was a bonus. He suggested that this was a bonus and not a commission. He also said that a commission/bonus was paid entirely at the discretion of PDL. I find this explanation unsatisfactory. The value of the payment suggests that it was calculated by reference to a percentage and bears all the

hallmarks of a commission. This should be contrasted with how bonuses were paid which uses a different formula based on revenue and a fixed amount payable by reference to incremental increases in revenue. Furthermore, I also give weight to what Ms George said in her email to Mr Peartree on 6 April 2022, which she wrote confirming PDL's position that the commission that **would have been due** would be set off against sums payable by Mr Peartree. She was acknowledging his entitlement to a commission.

Applicable law

62. The general prohibition on deductions is set out in Employment Rights Act 1996, section 13(1) ("ERA), which states that: 'An employer shall not make a deduction from wages of a worker employed by him.' However, it goes on to make it clear that this prohibition does not include deductions authorised by statute or contract, or where the worker has previously agreed in writing to the making of the deduction (section.13(1)(a) and (b)).

63. ERA, section 27(1) defines 'wages' as 'any sums payable to the worker in connection with his employment'. This includes 'any fee, bonus, commission, holiday pay or other emolument referable to the employment.

64. It had previously been held that non-contractual discretionary payments fell within the ERA. Section 27(1) definition of wages if there was a reasonable expectation that they would be paid. However, following the Court of Appeal's decision in **New Century Cleaning Co Ltd v Church 2000 IRLR 27, CA**, this no longer appears to be so. In that case, the majority of the Court of Appeal held that the section 27(1) definition of wages required some legal, although not necessarily contractual, entitlement to the payment in question.

65. A deduction is defined in the following terms: '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… as a deduction made by the employer from the worker's wages on that occasion' (ERA, section13(3)). Thus, any shortfall in payment of the amount of wages properly payable is to be treated as a deduction.

66. Bonuses can form an important part of an employee's remuneration and are often used as a means of incentivising performance and loyalty. The main legal issue is one of entitlement, whether, first of all, there is an enforceable right to a bonus payment at all and, if so, whether there is a right to a particular amount. Whether an employee has an enforceable right to a bonus depends, in the main, on the legal status of the disputed bonus. Cases often turn on whether, on a proper construction of the employment contract, the employee has a contractual right to the bonus, or whether the bonus payment is at the discretion of the employer, although the legal intricacies can often result in a substantial grey area rather than clear demarcation. Bonus payments that are expressed to be discretionary may, on closer analysis, turn out to be contractual, and case law has established that even genuinely discretionary bonus payments are subject to the operation of implied contractual terms.

67. Where a bonus scheme is contractual, it will generally be incorporated into the terms of the employee's contract, either expressly or by implication, and the scheme will usually set out the conditions of eligibility for a bonus and the amount to be paid, or the manner of calculating the amount. Such schemes have the advantage of transparency, an employee knows what he or she has to do as an individual, and what the employer has to do at a corporate level, in order for a bonus to be paid. A dispute over such a scheme is likely to focus on factual issues concerning whether the conditions for entitlement to a bonus have been met, and so should be less likely to lead to protracted litigation.

68. If the bonus is expressed to be 'contractual' and based on a specific formula linked to, for example, performance targets, the employer will have to pay if those targets are met.

69. If an employee's earnings are dependent, in whole or in part, on commission from sales, the parties will normally have reached an express agreement as to the basis on which commission is calculated and the date on which it is payable. The unilateral decision to withdraw a commission scheme may well constitute a breach of express terms and/or the implied terms that the employer will not act capriciously in relation to pay or breach the implied term as to trust and confidence.

70. Where the employer commits a fundamental breach of contract — typically a change in one of the main terms and conditions of employment, such as a reduction in pay, or behaves in a way which amounts to a repudiation of the contract, the employee may react in a number of ways. The employee could choose to accept the breach and resign from employment. Following such an acceptance of the breach, the employee could sue his or her employer for breach of contract.

71. If an employee resigns without giving his or her contractual notice, he or she will be resigning in breach of contract unless they can establish a repudiatory breach of contract on the part of the employee warranting the resignation.

72. The general rule is that statutory annual leave cannot be replaced by a payment in lieu. This is set out in regulations 13 (9) & 13 A (6) of the Working Time Regulations 1998 ("WTR"). The main exception to this rule arises where the worker is owed outstanding holiday on termination of his or her contract. This is set out in regulations 14 (1) & (2) WTR. Payment in lieu is permitted where the worker's employment is terminated during the leave year and on the termination date, the proportion of statutory annual leave he or she has taken is less than the proportion of the leave year that has expired. The period of leave in respect of which payment in lieu is calculated under the statutory formula is determined by reference to the 'termination date'. This is 'the date on which the termination [of a worker's employment] takes effect' — Reg 14(1). This is not defined any further in the Regulations, but at common law it is simply the date on which the contract comes to an end. If the termination is with notice, the termination date coincides with the expiry of the notice period. If no notice is served, the appropriate date will be the date the worker ceases to work (in the case of resignation by the worker) or the date the worker is summarily dismissed (in the case of dismissal by the employer).

Discussion and conclusions

Holiday pay: did PDL fail to pay Mr Peartree for annual leave that he had accrued but not taken when his employment ended?

73. PDL did not pay Mr Peartree for the annual leave that he had accrued but had not taken when his employment ended. He originally resigned giving one month's notice which meant that the reference point to determining the amount of holiday pay due for untaken holiday was 30 April 2022. However, whilst he was still working his notice, he resigned with immediate effect on 4 April 2022. The termination date of accrued holiday pay is 4 April 2022. The contract of employment does not provide for recoupment of holiday pay on the grounds relied upon by PDL. There is no evidence of carelessness or negligence on the part of Mr Peartree. Therefore, his claim for payment of accrued but untaken holiday pay is well founded. It is accepted by the parties that he is due £395.24 and that is the sum which I award.

Arrears of pay: did PDL make unauthorised deductions from Mr Peartree's wages and, if so, how much was deducted?

74. PDL made unauthorised deductions from Mr Peartree's wages for his March salary and one week of his April salary. Whilst there are contractual provisions that allow for deductions in certain circumstances, the provision relied upon is clause 13 x) of the contract of employment which permits a deduction in circumstances where the employee has been careless or negligent. There is no evidence of carelessness or negligence for the reasons given above. Mr Peartree subsequently terminated his contract of employment with immediate effect. He was justified in doing so because he feared that he would not be paid his March salary or receive his commission or bonus which amounted to a fundamental breach of contract. In other words he treated himself as being dismissed by PDL. Under such circumstances, he would have been entitled to one week's notice from PDL as per his contract of employment. The claim is well founded, and I make the following award: £1897 being his net salary for March and up to 5 April plus 1 week's net pay of £474.25.

Other payments: does PDL owe Mr Peartree a commission and/or bonus payment for March 2022?

75. Whilst the contract of employment expressed the payment of the commission/bonus was at the discretion of PDL, Mr Peartree had a legitimate expectation that he would be paid a commission. He had previously been paid a commission in his February 2022 payslip. Furthermore, Ms George officially confirmed on behalf of PDL in her email of 6 April 2022 that a commission was due to be paid to Mr Peartree but would be set off against sums that were due to PDL. The claim is well founded. The sum claimed is between £300 and £400. It has not been specified in any greater detail and I think it would be fair to make an award of £350

76. Mr Peartree also claims a bonus of £100. I accept that he is entitled to a bonus. The question which must be answered is whether he achieved £10,000 revenue in March 2022 to justify the payment. According to the metrics provided by Ms Redpath to Mr Peartree 1 April 2022, the revenue that he had earned for PDL in March 2022 met the minimum threshold for the payment of a £100 bonus. The claim is well founded, and I award Mr Peartree £100.

77. The parties agree that PDL owes Mr Peartree £355 for expenses. I make an award for that amount.

78. PDL relies upon clause 27 (b) (v) of Mr Peartree's contract of employment to set off outstanding training expenses against any sums that are due to Mr Peartree on termination of employment. In paragraph 14(d) of the Response these are quantified as £621.99. This is for the RICS structured training, subscription and "prep day" (£897 x7/12 months not worked) as set out in PDL's email of 20 April 2022. In his email to Ms George dated 7 April 2022 [138, 140] he accepted that he was liable to pay 1/12 of the costs incurred for each month in that 12-month period not working. He stated that the training costs related to the RICS structured training which started in December 2021 totaling £663. The RICS APC training day cost £234. Consequently, he calculated that he was liable to pay 10/12 of the APC Day cost (£195) and 7/12 of the RICS structured training (£386.75). This totaled £581.75. He agreed to this being deducted from his final remuneration. I agree with this figure which must be set off against the sums due to Mr Peartree.

79. In conclusion the total compensation payable to Mr Peartree is **£2,989.74**

Employment Judge Green

Date 19 December 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

19/12/2022

FOR EMPLOYMENT TRIBUNALS