**CASE NO: 3306616/21**

# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Bhopinder Singh

**Respondent:** Travellliance Inc

**Heard at:** Watford ET **On:** 9, 10, 11 and 12 January 2023

**Before:** Employment Judge Tuck KC
Ms J Cameron
Mr R Clifton

**Appearances**
For the claimant: Ms Kaur
For the respondent: Mr Mukulu, Counsel

## RESERVED JUDGMENT

1. The claimant was unfairly dismissed.
2. The claimant suffered unlawful deductions from his wages.
3. The claims of direct age discrimination and of suffering detriments and dismissal because of making protected disclosures, fail and are dismissed.
4. The claimant's claims for breach of contract fail and are dismissed.

## REMEDY

5. The claimant suffered unauthorised deductions from wages between March and December 2020 in the gross sum of **£46,200.** Account must be made to HMRC for this sum.
6. The claimant suffered unauthorized deductions from wages by not being paid commission quarterly, between May 2019 and December 2020 in the gross sum of **£180,771.38**
7. Unfair dismissal: the claimant's losses flowing from dismissal are awarded in the sum of **£64,742.85**, which includes a 25% uplift for failing to follow ACAS procedures.
8. Failure to provide written statement of employment **£1076.**

**9. TOTAL AWARD: £292,790.23**

## REASONS

1. By an ET1 presented on 10 May 2021 following a period of early conciliation between 10 March 2021 and 19 April 2021, the claimant presented claims of:
    a. Unfair dismissal
    b. Whistleblowing
    c. Direct age discrimination
    d. Unlawful deductions from wages claims for:
        i. Underpayment of wages
        ii. Commission
        iii. Car allowance / failure to provide a car (alternatively put as a breach of contract claim)
        iv. Pension contributions.

2. At a Preliminary Hearing on 15 and 16 November 2022 EJ Halliday found that the Claimant was an "employee" for the purposes of the Employment Rights Act 1996 and the Equality Act 2010. Judgment was sent to the parties on 21 November 2022 and reasons having been requested, were sent to the parties on 2 January 2023.

3. The tribunal was provided with a five lever arch bundles of documents running to some 2495 pages, a remedy bundle of 197 pages (to which more pages were added in the course of the hearing) and a witness statement bundle containing statements from the claimant, and on his behalf from Mr Micheal Heinz, Ms Misbah Rajah and Mr Anwar Kureembokus, along with a statement by Mrs Paula Halliday, HR Strategic Director for the Respondent. None of the claimant's witnesses attended in person and we accordingly attached such weight as we considered appropriate to those statements. Mr Kureembokus had been due to attend in person but on 10 January 2023 told the claimant he felt unable to do so without a witness order due to his business connection with the Respondent; in any event, his statement did not contain any matters relevant to the substantive issues in this case. As the parties were told at the outset of the hearing, the Tribunal read such pages as we were referred to in the course of the evidence (we note that we were actually referred to remarkably few), and additionally we read the list of what the Respondent stated were the "key documents". We heard oral evidence on oath from the Claimant and Mrs Halliday.

4. On numerous occasions during his evidence the Claimant said that he did not have access to documents which had been within his emails, and he did not consider the Respondent's disclosure to have been adequate. Whilst we recognize that the claimant was a litigant in person acting with only the help of his Aunt (an HR professional), we were surprised that no applications for specific disclosure had been made – especially of data to enable the claimant to calculate commission owed. The Respondent had offered to the claimant

for him to take his laptop to their Luton office, but the claimant told us that he had been informed that the Respondent could not guarantee that it would not lose the data on the machine / network. We were not referred to any correspondence on this matter.

5. It was clear to the tribunal that the disclosure from the Respondent– particularly in relation to the issue of commission owed, was wholly inadequate.

**Issues.**

6. The issues for the ET to determine were set out by EJ Halliday following the Preliminary Hearing, and confirmed to be accurate by both parties at the outset of this hearing. They were in the bundle before us at pages 80 -87.

**Facts.**

7. The respondent is a global company providing airlines with lodgings for their crews, executives, teams and disrupted passengers by securing hotel rooms for their use. Ms Halliday told us that the respondent is part of Fleetcor Technologies Inc; she accepted that Fleetcor acquired Travelliance Inc in October 2019 (not 2020 as she put in her statement). Whilst the claimant's contract was said to be with "Travelliance Europe", the parties agree that the correct legal entity to be respondent to this claim is indeed Travelliance Inc.

8. In answer to the ET, Mr Mukulu told us that the respondent had just three employees in the UK when the Claimant was employed. Mrs Halliday said that currently Fleetcor has over 10,200 employees globally and that she heads up an HR team of 15 who deal with around 2000 employees in the UK and Europe.

9. Following an interview and negotiations with Ted Scislowski of the respondent, the claimant was provided with a contract - which EJ Halliday held to be a contract of employment, which was signed in April 2015 when the claimant was in Minneappolis. It included the following terms:

> "New Position Title: To be determined.
>
> Base salary: Will be £72,000 pounds per year or £35,000 pounds semi-annually. You will be paid semi-monthly on the 7th and 22nd of each month.
>
> Auto Expense: Travelliance Europe will provide you with a leased vehicle for your use during the duration of your employment.
>
> Commission: 5% of commission collected on accounts brought in by you.

…

Benefits: Travelliance will follow your countries rules and regulations regarding company provided benefits.

….

4. Full time employment. While I am employed by Company, I will devote my full time best efforts to Company business ….

…

6. Entire Agreement: modifications. This agreement is my entire agreement with Company and with respect to its subject matter and supersedes any prior written or oral understandings pertaining thereto. My obligations under this Agreement may not be changed in whole or in part except by a written agreement signed by the President of the Company and me and which specifically refers to this Agreement.

…

10. Governing law: The interpretation of this Agreement and the obligations hereunder are governed by the laws of the State."

10. There are manuscript amendments to this contract which are not initialed by the claimant; the finding of EJ Halliday is that the contract was amended after the claimant had signed it and the claimant was not aware of the changes until he received a copy of the contract after his arrangement with the respondent had been terminated. We have accordingly disregarded what had been added in manuscript. This includes a manuscript note about a "team bonus".

11. The copy of this contract was not provided to the Claimant until February 2021. The contract does not comply with the requirements of section 1 of the Employment Rights Act 1996.

12. The claimant told us his job title was initially Business Development Manager, and that he had a great number of contacts with hotels in the Heathrow area and was hired to start up the Respondent's business in the UK. He was initially based from home then worked from an office at the Heathrow Fueling Centre alongside Misbah Rajah and Fredericka Young, other business development managers. He says that while it was a stated intention to be paid via payroll in Ireland, this never happened. The claimant was paid gross on the presentation of invoices; we had no tax returns or any information before us suggesting that any account was made to the Inland Revenue by either party throughout the five years of employment.

13. The claimant says that at some point (perhaps around 2016) he was made Country Manager for UK and Ireland, but that title was removed from him in July 2017, when he reverted only to his Business Development Function. While he was Country Manager he was able to run various financial reports

showing turnover via the respondent's "AIR" computer system, but he could not do this after July 2017.

14. From 2016 the Claimant reported to Yoko Hasegawa. We were told that she has since left the Respondent and that the terms on which she left precluded the Respondent asking her to give evidence in this case, and precluded her from answering the Claimant's request for her to give evidence.

15. The claimant stated that during his employment he raised three grievances.

> "i. 1st grievance was raised on or around Q3 2015 in respect of Janet Harding and Bullying me and my team
>
> ii. 2nd grievance around Q2 2016
>
> iii. 3rd grievance was raised on 23 January 2021 in respect of unlawful termination of my employment"

16. The third of those grievances was in writing – having been sent by the claimant a month after his employment had been summarily terminated.

17. Alongside these grievances the claimant says he made three protected disclosures:

    a. Sept /Oct 15 to Tyler Stewart about there being no banking in the UK / Ireland to take payments or process invoices including salaries and PAYE, and unethical pricing.
    b. In March / April / May 2016, orally to Yoko Hasegawa about lack of banking and unethical practices.
    c. 2019 orally to Yoko Hasegawa about unethical pricing practices.

    Essentially the claimant says that the respondent's business model was to negotiate favourable hotel rates, then an airline would contract with the respondent to provide accommodation for its crew or any passengers who faced disruption. The respondent would book and pay for the hotels, then invoice the airlines and add its 10% commission. The claimant says however that the respondent was taking a commission from both the hotel, and from the airline – which was unethical. There was also an additional 3% audit fee which the respondent charged to airlines, and a 3.5% credit card fee, which we understand arose from the respondent using a credit card to book hotel rooms, and passing this charge onto the airlines.

18. The claimant could not be specific about what "information" he passed on to Mr Stewart or Ms Hasegawa, and was unable to recall the words he used or the gist of them beyond saying there were unethical practices in operation because both airlines and hotels were paying commission.

19. Whilst the claimant might have had a reasonable belief that information about charging practices being unethical was in the public interest in 2015 or even early 2016, we are not satisfied he had such a belief in 2019. Nor are we satisfied that he ever had a reasonable belief that it was in the public interest

to disclose information that no PAYE system was set up. We find that by 2019 his own remuneration had been paid by gross payments for four years, without accounting for tax or paying any national insurance whatsoever, and we also understand that the Claimant was seeking payment of commission based on what he says is double charging by the Respondents. He had not sought to escalate the matter when he found practices were not being changed. Had he thought it was in the public interest, he would not have stood by while this continued over so many years.

20. We are not satisfied that the claimant had a reasonable belief that either not having a UK or Ireland pay system or operating "unethical practices" amounted to a criminal offence, or a breach of a legal obligation. We have seen no evidence that the claimant escalated the matter if he thought it was a breach of legal obligations, rather than simply 'sharp practice', and the claimant did, on his account, continue to negotiate and put in place contracts on the same terms. He certainly seemed to have no concerns about being involved in a criminal enterprise.

21. In any event, even if the claimant had made protected disclosures to Tyler Stewart, we are not satisfied that this led to his being bullied by Ms Harding which he says took place between 2015 and 2018. There was simply insufficient evidence from the Claimant to support such an allegation.

22. Similarly in relation to his position of Country Manager, the claimant says this was removed from him in 2017; we are not able to find this was because of any protected disclosure, having been given no information as to who made the decision or what rationale was given to the claimant at the time. The Claimant provided us with insufficient evidence to make a finding in his favour on this issue.

23. As stated, the claimant's work as a Business Development Manager involved negotiating contracts with airlines so that their accommodation requirements would be booked via the Respondent. The Claimant told us that bookings for rooms for airline crew achieved 98% of the predicted occupancy as rooms were booked in accordance with flight schedules. "Disrupt" business involved airlines needing rooms to accommodate passengers if their flights were disrupted; clearly given the nature of this requirement whilst many more rooms might be needed by an airline, the demand was unpredictable. Whilst he told us that the number of rooms being anticipated was identified, it was not recorded on any of the documentation to which we were taken in the course of this hearing.

24. Many of the 2500 or so pages in the bundle consisted of copies of the contracts the claimant negotiated with airlines and hotels; the copies held by the Claimant were undated and unsigned. His unchallenged evidence was that once he negotiated a contract, it had to be signed by a VP – generally Yoko Hasegawa.

25. The Claimant told us that he negotiated a "disrupt" contract with Virgin airlines, and provided us with a copy of this on the morning of 12 January

2023 (4th day of hearing). This contract was dated January 2016 and made clear that Travelliance would book hotel rooms as required, then on a monthly basis bill Virgin, who were obliged to pay within 30 days. The contract did not set out anticipated numbers of rooms required; it did confirm that the respondent's "AIR" computer system should be used to run reports on all hotel bookings. The claimant told us that he anticipated the contract would result in £10million being paid by Virgin to Travelliance for rooms, per annum. We return when considering the issue of remedy.

26. The claimant's commission was supposed to be paid at a rate of 5% on the commission actually received by the Respondent. We note that no geographical remit on where rooms are booked generating commission, is expressed. The claimant's contract is also silent as to how often commission was to be paid. Both parties agree a term needs to be implied as to frequency of payment to give the contract business efficacy. The respondent's terms of business required it to invoice airlines monthly, and be paid within 30 days of an invoice.

27. The claimant only received four commission payments during the five years of his employment; on each occasion Yoko Hasegawa told the claimant how much he needed to include on his invoice. The first was in November 2016; Ms Hasegawa sent an email to Mr Scislowski on 28 October 2016 entitled "Bhop commission LHR – only end of 2015" (Bhop is how the claimant was referred to). The email thanks Mr Scislowski for the 2015 report, and saying "here's what we owe BHOP if we can process it please. It's really a couple of months of business in 2015 so not too much. 2016 will be a whole lot more. Total sales for 2015 – UK – 33,322.09 Pounds. 5% commission to Bhop – UK Pounds £1666.10".

28. The second payment of commission was made in July 2017 in the sum of £797.53; we have an email from Ms Hasegawa to Mr Scislowski saying "would it be ok to settle partial commission please, I am still waiting on LHR figures. Bhop - £797.53".

29. The third payment was in the sum of £3145; this was paid in October 2018 after Ms Hasegawa had emailed the claimant on 10 September 2018 saying "hi Bhop, please send me an invoice for your Oman hotels 2017 commission. Total collected is 85,507.06 USD….."

30. The final payment made in January 2020 was for £7358.04, this was said to be from Oman, 3919.07 USD, ASL 1510 USD and TAAG Angola 4295.84 USD. We understand the references to be to airlines from which the claimant's contracts had generated business.

31. The Respondent said that commission was payable annually on the basis of payments received. However the sums received by the claimant were in November 2016, July 2017, October 2018 and January 2020; there was no discernable pattern. The claimant said payments were due quarterly, relying on an email Tyler Stewart sent in October 2022 stating that he had employed the Claimant who was entitled to a "quarterly commission bonus". Ms Halliday

told us sales people in Fleetcor are generally paid monthly. We find that there was an implied term in accordance with the indication of Mr Stewart of the respondent, that commission was due to be paid quarterly.

32. Whilst the claimant only received four commission payments during his employment, his unchallenged evidence was that he "frequently requested payments for his commissions on numerous occasions via telephone calls, emails and grievances raised".

33. The contract was also silent as to what happened to commission accruing on contracts negotiated by the Claimant after his termination. We find that the custom and practice of the Respondent is that no commission is payable to employees on monies received after their effective date of termination.

34. The tribunal found it surprising that the claimant, as sales person, did not collate and retain a contemporaneous list of his contracts given his commission entitlement was dependent upon it, and that he had been paid very little commission at all throughout his employment (just under £13,000 in five years). It was however, simply astonishing that the Respondent, which is part of a global organisation which employs over 10,000 people, has been completely unable to calculate what it accepts is the claimant's contractual entitlement to commission.

35. Ms Halliday's evidence was that the Respondent had taken the Claimant's list of contracts he said he had won (remedy page 6-9 which lists around 7 airlines, plus "cargo"), and looked at the Respondent's receipts from those contracts, drawing up pages 34-47, which indicated that over a three year period (2018 – 2021 – so post dating the claimant's EDT) commission of $26,869 was due, but some had been paid. However, the Respondent table showed hotels and does not seem to indicate which airlines used the hotels under which contracts. It also included at least two companies – Arrow Cars and Globetrotter hotels which the claimant said were nothing to do with him.

36. In March 2020 when the UK went into lockdown, the respondent unilaterally paid the claimant for one day per week rather than five. He did not agree to this – in writing or at all. He did complain, and some months between March – December 2020 he was paid for 1.5 days rather than just one. The claimant told us he was working very many hours during this period because there were more "cargo" flights and crew needed to be accommodated, and that as lockdowns were imposed and lifted, there was a huge amount of disruption with passengers not having correct covid documentation etc.

37. On 19 December 2020 the claimant told Yoko Hasegawa that he was suffering a great deal of mental and physical strain because of working long hours, and financial worries not having been paid fully.

38. On 22 December 2020 the claimant was invited to a zoom call; he was not told what this was to be about. Kaitlin Moranto, an HR officer of the Respondent who we understand is based in the USA, told the Claimant on 22 December 2020 that his contract was being terminated because he was a

contractor. When the claimant said he was an employee and the respondent could not do this, he says the video call was terminated.

39. 22 December 2020 was the Claimant's effective date of termination. Ms Halliday told us that the decision to dismiss was taken by Ginger Baker, Fleetcor Senior Vice President North America.

40. The claimant did not receive any letter confirming his termination. In January 2021 he was paid a gross sum of £24900. We have an email from an HR Director of Fleetcor which has manuscript on it as follows:

> "10 weeks – 50 days @300 = 1500
> Holiday – 33 days @ 300 = 9900
> Total to be paid 24900 GBP"

41. On 5 January 2021 the claimant queried what the payment for "five weeks and three days was for". He was told on 7 January it was one week per year of service plus three days holiday. Neither the question nor answer seem to bear any relation to the sum paid or the manuscript indication.

42. On 23 January 2021 the claimant set out in an email a detailed grievance complaining of unfair dismissal, unlawful deductions from wages, bullying and harassment. He made no mention of any alleged protected disclosures. As to commission he said that the Virgin contract would generate £10million per annum giving the claimant an entitlement of £250,000 commission over five years, and listed many other airlines which he had brought in. The claimant said that he would (at that stage) accept £100,000. Whilst there was a response to the claimant's grievance we have not seen any evidence that the commission point was addressed by the respondent.

43. As set out below, dismissal was not because of any protected disclosures in 2015/ 2016/ 2019. There is no evidence to suggest a causative link, and a considerable period of time elapsed between the alleged disclosures and the dismissal. By the time of the dismissal Tyler Stewart had left the organization, and the decision maker in relation to the dismissal was, according to Ms Halliday, Ginger Baker. There is no evidence she knew of any alleged disclosures.

44. Claimant was aged 46 when he was dismissed. He compares himself to Mr Clayton who was retained; he was aged 42 and Viktoriya Soubra who was aged 39. The claimant says that Ingrid Young and Florance Baudoin who were age 65 and 55 respectively and were dismissed, as was he. We are not satisfied that the claimant has shown any link between his age and the decision to dismiss him. In any event, we would not have accepted that the comparators were in materially the same circumstances; the claimant says some were more experienced, some less.

**Law.**

**Unlawful deductions from wages.**

45. **Section 13** of the Employment Rights Act 1996 ("ERA") provides:

> (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.
>
> (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.

46. Section 23 provides:

> **23 Complaints to employment tribunals**
>
> (1) A worker may present a complaint to an employment tribunal—
>
> > (*a*) that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),
> >
> > ...
>
> (2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—
>
> > (*a*) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or
> >
> > (*b*) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.

(3) Where a complaint is brought under this section in respect of—

(*a*) a series of deductions or payments, or

(*b*) a number of payments falling within subsection (1)(*d*) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,

the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

[(3A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2).]

(4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

[(4A) An employment tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.

47. We must consider therefore what sums were properly payable to the claimant, on what dates. We must also consider whether the claim was presented to the claimant within three months (extended by operation of the ACAS EC period) of the deduction – or if a series of deductions, from the last of them. There is no statutory definition of a 'series of deductions' for the purposes of ERA 1996 s 23(3). However, the term has been considered by the EAT in the joined cases of *Bear Scotland Ltd v Fulton; Hertel (UK) Ltd v Woods; Amec Group Ltd v Law [2015] IRLR 15* where Langstaff P stated:

> "Whether there has been a series of deductions or not is a question of fact: “series” is an ordinary word, which has no particular legal meaning. As such in my view it involves two principal matters in the present context, which is that of a series through time. These are first a sufficient similarity of subject-matter, such that each event is factually linked with the next in the same way as it is linked with its predecessor; and second, since such events might either be stand-alone events of

the same general type, or linked together in a series, a sufficient frequency of repetition. This requires both a sufficient factual, and a sufficient temporal, link."

48. In *Group 4 Nightspeed Ltd v Gilbert* [1997] IRLR 398 a claimant who complained that he had been underpaid commission in respect of four different clients was found to have suffered a series of deductions (even though the reasons for non-payment differed).

49. If there has been a series of deductions, the period of two years prior to the presentation of the ET1 can be taken into account (but not longer): s 23(4A).

50. **Section 27** provides for the meaning of "wages" in this part of the ERA

"(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,

…

but excluding any payments within subsection (2).

(2) Those payments are—

(a) any payment by way of an advance under an agreement for a loan or by way of an advance of wages (but without prejudice to the application of section 13 to any deduction made from the worker's wages in respect of any such advance),

(b) any payment in respect of expenses incurred by the worker in carrying out his employment,

(c) any payment by way of a pension, allowance or gratuity in connection with the worker's retirement or as compensation for loss of office,

(d) any payment referable to the worker's redundancy ….

51. While therefore a failure to pay commission can amount to a deduction from wages; *Delaney v Staples* [1991] IRLR 112, CA (considered on other grounds by the House of Lords [1992] IRLR 191,) failure to make pension contributions cannot (*Somerset County Council v Chambers* *UKEAT/0417/12* (25 April 2013, unreported); *University of Sunderland v Drossou* *[2017] IRLR 1087*.

**Breach of Contract**

52. The Employment Tribunal (Extension of Jurisdiction) England and Wales Order 1994 provides that proceedings may be brought before an Employment Tribunal in respect of a claim of an employee for the recovery of damages if the claim arises or is outstanding on the termination of the employee's employment.

**Unfair dismissal.**

53. Section 98 ERA 1996 requires an employer to show a potentially fair reason for dismissal – which includes redundancy and SOSR. If the employer shows a potentially fair reason, the ET must then consider whether the employer acted reasonably, in all the circumstances, in treating that as a sufficient reason for dismissal. Redundancy is defined in section 139 ERA.

**Protected disclosure.**

54. Section 43B ERA 1996 provides that a qualifying disclosure is a disclosure of information which, in the reasonable belief of the worker making it, is in the public interest and tends to show … (b) that a person has failed, is failing or is likely to fail with any legal obligation to which he is subject.

55. The approach to be taken to what is in the public interest was set out in the case of *Chesterton Global Ltd v Normohamed* [2017] IRLR 837.

56. Section 47B ERA provides that workers must not be subjected to detriments on the ground they have made a protected disclosure.

57. The time limit for presenting a complaint to the tribunal of a detriment is three months (extended by ACAS EC) from the date of the act complained of, or within such further period as is reasonable if it was not reasonably practicable to have presented it within that period; section 48 (3) ERA.

58. Section 103A ERA provides that dismissal for making a protected disclosure will be an automatically unfair dismissal.

**Direct Discrimination.**

59. Section 13 of the Equality Act 2010 (EqA) provides that a person must not be treated "less favourably" than another person in comparable circumstances because of their protected characteristic; the claimant here relies on his age.

60. Section 123 EqA provides for the time limits in discrimination claims, and any complaint must be presented within three months of the act complained of (extended by the ACAS EC provisions) unless it was not reasonably practicable to have done so, providing it was presented within such further period as was reasonable.

**Submissions.**

61. Mr Mukulu provided us with submissions consisting of 5 paragraphs over 1.5 pages. They did not address the law or the issues. He also made oral submissions. He made the following express concessions:
    a. The claimant did suffer unauthorised deductions from his wages of 4 days per week in March, April, May, June, July, August and December 2020.
    b. The claimant did suffer unauthorised deductions from his wages of 3.5 days in September, October and November 2020.
    c. The claimant was not paid accrued commissions due to him at the termination of his employment and sums were outstanding.

62. In relation to the "car allowance" Mr Mukulu, having been asked on days one and two of the hearing what his legal points were on the issue, referred to a car allowance rate of £600. When asked by the tribunal expressly if he was therefore not alleging the breach of contract – for provision of a car (NOT for provision of an allowance to which there was no contractual entitlement) had been affirmed, he sought to adopt the argument. He said that although this had not been pleaded, identified in the list of issues or put by him during cross examination it was a matter of law for the ET to consider.

63. As to pension Mr Mukulu said 3% was the rate provided for in auto enrolment schemes, which were what is required by state legislation. When the tribunal pointed out that pension contributions cannot constitute wages under s27 ERA, he contended that as it was not a breach of contract issue the claimant would need to amend his claim. In answer to questions he accepted that the Respondent would suffer no prejudice from such an amendment.

64. As to commission sums owed, Mr Mukulu relied on the witness statement of Ms Halliday which identified, from the claimant's schedule of airlines he achieved contracts, of a total of $26,869 over the three year period of 2018 – 2021 (i.e. including sums received after the claimant's EDT).

65. The respondent agreed the claimant was dismissed, but said it was by reason of redundancy. He accepted no procedure was followed and said the reason for that was that the claimant was a contractor. He said neither age nor protected disclosures could be shown to be causative. He (eventually after

questions) submitted that any detriments alleged from the protected disclosures were out of time.

66. Ms Kaur provided written submission which we took time to read, and addressed all the issues before us. In relation to commission she said that "the respondent's continued failure to take instructions / provide a former employee with simple documents in a digital word is shocking and disturbing. That it cannot generate reports / find records/ find the employee record, is shocking. Whole case has been ill prepared by them".

**CONCLUSIONS ON THE ISSUES.**

**Unfair dismissal.**

67. The respondent has failed to show a potentially fair reason for dismissal. It asserted redundancy / SOSR. It has not evidenced a redundancy situation. The decision maker was not called to give evidence and there was not even a letter of dismissal.

68. The claim for unfair dismissal accordingly succeeds.

69. Even had the respondent shown a potentially fair reason, it did not act reasonably in treating it as sufficient reason to dismiss the claimant. It followed no process whatsoever. The claimant was told to attend a zoom call on 22 December 2020 and dismissed summarily, being told it was "because he a contractor". We note that others carrying out business development roles were retained; whilst no "Polkey" argument was identified or raised, we would in any event have dismissed it as the respondent did not even attempt to seek to show that a fair procedure would have made no difference.

**Protected Disclosures.**

70. Whilst the claimant's evidence lacked any specificity, on balance we accepted that he disclosed 'information' to Mr Stewart and Ms Hasegawa, noting in particular that he was not challenged in cross examination that he had done so. Whilst the claimant might have had a reasonable belief that this was in the public interest in 2015 or even early 2016, we are not satisfied he had such a belief in 2019. As set out in the facts, by this time he had been receiving gross payments for four years, without accounting for tax or paying any national insurance whatsoever, and is seeking payment of commission based on what he says is double charging by the Respondents. Nor are we satisfied that the claimant had a reasonable belief that unethical practices amounted to a criminal offence, or a breach of a legal obligation. We have seen no evidence that the claimant escalated the matter if he thought it was a breach of legal obligations, rather than simply 'sharp practice'.

71. In any event, even if the claimant had made protected disclosures to Tyler Stewart, we are not satisfied that this led to his being bullied by Ms Harding. Furthermore the claimant says this took place between 2015 and 2018; the claim was presented in May 2021 and the matter is out of time. The claimant has not demonstrated that it was not reasonably practicable to have presented a claim within the statutory time period.

72. Similarly in relation to his position of Country Manager, the claimant says this was 2017; we are not able to find this was because of any protected disclosure, but in any event it is out of time.

73. His dismissal was not because of any protected disclosures in 2015/ 2016/ 2019. There is no evidence to suggest a causative link, and a considerable period of time elapsed between the alleged disclosures and the dismissal. By the time of the dismissal Tyler Stewart had left the organization, and the decision maker in relation to the dismissal was, according to Ms Halliday, Ginger Baker. There is no evidence she knew of any alleged disclosures.

**Age Discrimination.**

74. Claimant was aged 46 when he was dismissed. He compares himself to Mr Clayton who was retained; he was aged 42, and Viktoriya Soubra who was aged 39 and was retained. The claimant says that Ingrid Young and Florance Baudoin were age 65 and 55 respectively and were dismissed, as was he. We are not satisfied that the claimant has shown any link between his age and the decision to dismiss him. Nor has he shown facts from which we could draw inferences of any such link so as to reverse the burden of proof. In any event, we would not have accepted that the comparators were in materially the same circumstances; the claimant says some were more experienced, some less.

**Unauthorised deductions from Wages.**

75. The Respondent concedes the unlawful deductions from March to November 2020, which we are satisfied constituted a series of unlawful deductions, when they reduced his pay from to 1 then 1.5 days per week during covid, not putting any written agreement in place.

76. This amounts to a total deduction of £46,200 gross (for which account must be made to HMRC).

77. Car allowance – the contractual term was for “the provision of a lease car” during his engagement; this falls to be considered as a breach of contract claim. It is dismissed as a claim for unauthorised deduction from wages.

78. Pension contribution – pension contributions are not pay within section 27 ERA, and this claim is also dismissed as a claim for unauthorised deductions.

79. Commission. It was agreed that the claimant is entitled to 5% of commission collected on accounts he brought in. As set out above the contract is silent as to when commission is paid and both parties said that a term must be implied by business efficacy in this regard, and for the reasons set out above, we have implied a term that the commission was properly payable quarterly in arrears.

80. The claimant appears not to have collated or stored lists of what accounts he had brought in until he was asked to do so by Yoko Hasegawa at the end of 2020; this is the list he added to and presented in the remedies bundle before us at pages 6 – 9. Mr Mukulu conceded that the Claimant had been entitled to a payment on termination of his employment of accrued commission but does not agree the accuracy of the claimant's document – we return to this issue when dealing with remedy.

81. Over the two years prior to the submission of the ET1 (i.e. May 2019 – May 2021) the claimant suffered a series of deductions from wages when he was not paid his accrued commission each quarter. He ought to have received such payments between May 2019 and his effective date of termination on 22 December 2020. He received partial payment of £7358.04 in January 2020 from contracts with Oman, ASL and TAAG Angola.

**Breach of Contract.**

82. Claimant was entitled to a lease car and was entitled to a pension (in accordance with national duties – not at the rate of 16% which whilst discussed prior to the contract being entered into, was not reflected on the face of the document signed by the claimant in circumstances where it contains an "entire agreement clause"). Those contractual entitlements were breached by the Respondent.

83. If the claimant needed permission to amend his claim to claim pension as breach of contract in the alternative to an unlawful deduction from wages, we grant it. It is a labelling matter which causes no prejudice to the Respondent (as conceded by Mr Mukulu).

84. However, the Claimant continued to work for five years; we have no evidence that he did so under protest, for example by putting on the bottom of his invoices there was an outstanding entitlement to pension or car allowance in lieu of provision. He directed us to no emails nor told us of any phone calls or other verbal exchanges of his complaints. We find he has affirmed the breach of contract in this regard. We considered carefully the Respondent's failure to ensure affirmation was in the list of issues or put to him in cross examination. We did not find that these failures of the Respondents should however essentially override what we find the position to have been. The claimant did not make complaints about the lack of provisions of his benefits – when we asked him to identify the raising of the issue he took us to correspondence prior to employment commencing and after its termination.

85. The claimant asserts that he should receive compensation for lack of heath and travel insurance. We do not find any entitlement to such benefits on the face of the contract and dismiss these claims. Similarly, the claimant claims 20% "team bonus" – which also does not appear on the unamended face of the contract (and nor is it within the list of issues).

## REMEDY

### Approach to calculating commission.

86. The tribunal gave oral judgment in accordance with our findings and conclusions set out above at the end of the third day of hearing. We informed the parties, that unless better evidence was presented to us on the morning of the fourth day as to what sums had been properly payable by way of commission for the period between May 2019 and December 2020 (20 months), we would adopt the following approach. We would use the table produced by the claimant on pages 6 – 9 of the remedy bundle as our starting point, remove the "Virgin" line indicating a spend by them of £50,000 000 over five years, and the line of "all others LHR" which also had a value of £50m over five years as we had no evidence in relation to either of those by way of contracts. We would then divide the turnover by 5 to calculate an annual turnover from the claimant's contracts; take the Respondent's 10%, then calculate the claimant's entitlement of 5% of that, deducting the £7358 he had been paid.

87. On the morning of the fourth day:

    a. Ms Kaur presented to the ET a supplementary written submission, a copy of the Virgin contract as held by the claimant, the claimant's payslips from his new employment, and a schedule setting out what bonuses the claimant had received and when.
    b. Mr Mukulu emailed to the Claimant 86 documents at 0821hrs. He did not have hard copies and the ET did not see these. He handed up two documents. Firstly an annotated version of the Claimant's schedule from pages 6-9 which purported to set out how much commission had been received by the respondent on the contracts identified by the Claimant from May 2019 – December 2020. No totals were printed on the spreadsheets and both GBP and Euro were identified in the currency column, but Mr Mukulu said it indicated a total of US$1,204,224 received, which would give an entitlement to commission of $60,211. While Mukulu explained that was the same exercise that had resulted in Ms Hallidays' witness evidence saying that for a three year period the entitlement was $26,869, he was unable to explain the differences. The second document was said to relate to disrupt passengers and showed commission earned by the

Respondent of €4,505. There was no explanation as to how this related to the same airlines listed on the earlier schedule.

c. Mr Mukulu asked for time to take further instructions. In fact we did not commence the remedy hearing until 12.05pm. Mr Mukulu started cross examination then asked for a further break at 12.40pm which we acceded to and the parties returned again at 12.55pm.
d. The tribunal asked Mr Mukulu whether he had any other applications to make on the morning of the fourth day; we were struck that he did not make any application to adjourn the calculation of remedy, or indicate that better evidence would be available with more time afforded to him.

**Findings of fact in relation to remedy.**

88. The parties agree that the claimant suffered unauthorised deductions from wages between March and December 2020 in the gross sum of £46,200.

89. When the claimant was summarily dismissed on 22 December 2020, he was very shocked and distressed. He quickly began to apply for other jobs in the same industry, both at a higher and lower salary. He was successful in being offered two roles; one was at a higher salary of £105,000 but had a start date which was delayed. He therefore accepted an offer of employment with Hotel Reservations Service Ltd on a base salary of £72,000 plus benefits, and started on 1 May 2021.

90. Mr Mukulu cross examined putting the case that taking four months to find a comparable role amounted to a failure to properly mitigate his loss. We do not accept that, and are entirely satisfied that the claimant acted properly to mitigate his losses by finding another role in four months.

91. We do not understand the claimant to have received state benefits during his four months of unemployment. The claimant has not advanced any claim for ongoing loss, despite telling us that his commission in his new role is less generous than his entitlement with the Respondent.

92. The claimant suffered four months loss of salary and commission because of the unfair dismissal.

93. We have taken 4 months net pay at £3785 pcm (rate taken from page 200 as new employment is on same annual rate) giving a sum of £15,140.

94. We find that the claimant should also be entitled to commission for that four month period, and have taken the monthly rate set out below in the sum of £9,038.57. = £36,154.27.

95. In addition we award loss of statutory rights in the sum of £500.

96. We are entirely satisfied that a 25% uplift on this compensation is appropriate for the Respondent's failure to follow ACAS code of practice. No procedure whatsoever was used and the claimant was callously summarily dismissed via

a zoom call after five years of service. Whether he was understood to be a contractor or an employer, this was a grossly inappropriate way to terminate that relationship.

97. As to the Respondent's failure to provide written particulars of employment, after the EDT but prior to the presentation of the ET1 the respondent provided a contract which had been given to the claimant. It did not however comply with s1 ERA; Mr Mukulu submitted that in these circumstances we were obliged to make an order for compensation under s38 EA 2002. We accordingly award two weeks at the rate applicable for the period of April 2020 to April 2021 that amounts to £1076.

98. Turning finally to the most difficult of the issues, that of commission, we were not satisfied that the Respondent provided us with any cogent evidence to take a different approach to that we outlined at the conclusion of our liability judgment. The claimant had listed his contracts and set out the anticipated usage under each of them. In relation to crew he said that usage was generally around 98% of what was anticipated so we based our calculations on the figures as presented.

99. We had intended to disregard the Virgin contract because there was no evidence from either party about that. However, the Claimant produced the contract he secured, dated January 2016 for a five year period. This contract did not set out how many hotel rooms were anticipated.

100. We asked the Respondent to identify for us how much it had billed Virgin between May 2019 and December 2020. At 2pm on the fourth day Mr Mukulu handed us two schedules; these were "voucher activity summaries" and did not confirm that Virgin had paid all the sums set out therein. Nor did the respondent provide evidence to us that these were 'bad debts' and had not been paid.

101. The first schedule was for USA business indicating that the Respondent had billed Virgin US$242,975.

102. The second schedule for Virgin showed a total spend in UK, Antigua, South Africa, Jamaica, India, USA, Barbados, Nigeria, Saint Kitts and Saint Lucia of US $1,119,555. The claimant pointed out that the sub total figures for each venue – which he said was not the complete list of venues covered by the contract he had negotiated – did not give that total. Mr Mukulu was unable to explain this; so the tribunal calculated the actual total numbers from the sub totals for each country (which seemed to amount to just under US$5m) and worked out what the claimant's commission should be. As we started to deliver oral judgement at 3.50pm on the final day of the hearing Mr Mukulu said that the second schedule had subtotals in local currencies, the implication was that the total figure of US$1.1m was in fact correct. This caused the tribunal to have to reserve its judgment to recalculate commission due.

103. The claimant considered the Virgin data to be incomplete, but he had not sought specific information from the respondent by way of order in advance of this hearing. We had no data to find that there had been utilisation of rooms at other venues and the claimant should receive the commission; we note that he appears not to have received any commission from Virgin at any point in his employment and so were surprised that he had not sought figures from the respondent whilst still employed to claim such an entitlement.

104. The claimant urged us to award £50,000 p.a. commission for all other 'disrupt' business via London Heathrow as set out in his schedule. We quite simply had no evidence to support this claim. Whilst we had every sympathy that the disclosure of the respondents had been inadequate, and what they had given was contradictory and confusing, there had been no requests by him for specific disclosure so as to evidence the claim.

105. Mr Mukulu in submission said it was for the claimant to prove what was properly payable. The respondent is part of Fleetcor, a multinational organisation employing over 10,000 people with a dedicated HR function. It instructed solicitors and counsel of 20 years call. Mr Mukulu's submission was effectively that such a respondent could accept commission was due, but sit on its hands and not disclose documents enabling its calculation and thereby escape liability. We do not consider that to be in accordance with the overriding objectives of the ET. When this point was put to Mr Mukulu he did not have any answer to it.

106. We have therefore accepted the claimant's evidence that on his 'crew' contracts there was 98% occupancy, such that the sums he anticipated earning commission on when he entered into the contracts could properly be relied upon. As to the disrupt business, save for Virgin – where we adopt the figures given by the Respondent, and which we now understand to indicate their receipts in schedule two were accurately said to be $1.1m, we have not found the catchall category of "all" to be proven as properly payable. We accept the claimant's estimates for the other providers with whom he negotiated contracts. The biggest of these in relation to "disrupt" business seemed to be Norwegian; among the documents provided to the claimant but not the ET on the morning of the fourth day of the hearing, we were told that one indicated commission collected worldwide from this airline by the Respondent of $2.1million (the claimant accepted not all worldwide destinations were 'his'). This figure seemed in keeping with those provided to us by the claimant.

107. Therefore – using the claimant's figures from pages 6 – 9, discounting Virgin and "all"; dividing by 5 for one year =

Travelliance 10 % = £10,952,677

Claimant's 5% = £547,633

Per annum = £109,526

Per month: £9,127

X 20 months = £182,543

LESS £7358 = **£175,185.**

108. In addition to this, for Virgin the respondent would have billed them $1,362,530, generating commission for Travelliance of $136,253. For the Claimant this generates an entitlement (5%) of $6812.65. Using an exchange rate of $1 = £0.82, this is £5586.38.

109. We add this to the £175,185, giving a total commission payment of £180,771.38.

110. SUMMARY OF SUMS DUE:

a. Wages March – December : £46,200 gross
b. Commission - £180,771.38
c. Unfair dismissal
    i. Loss of salary £15,140
    ii. Loss of commission £36,154.28
    iii. Loss of statutory rights £500
    iv. £51,794.28
    v. 25% uplift £12,948.56
    vi. TOTAL: £64,742.85
d. Failure to provide written particulars; £1076.

111. TOTAL AWARD: £292,790.23

**Employment Judge Tuck**

Date: 17 January 2023

JUDGMENT SENT TO THE PARTIES ON

Date: 09 February 2023

NG

FOR THE TRIBUNAL