EMPLOYMENT TRIBUNALS

Claimant: Mr L King

Respondent: ResQ Limited

Heard at: Hull **On:** 27 March 2023

Before: Employment Judge Miller

Representation
Claimant: In person
Respondent: Mr A Mugliston – counsel

RESERVED JUDGMENT

1. The claimant's claim that the respondent made unauthorised deductions from his wages is successful and allowed. The respondent must pay the claimant the gross sum of **£9792.01**.

2. The claimant's claim for breach of contract is successful and is allowed. The respondent must pay the claimant compensation of **£789.04.**

REASONS

1. The claimant was employed by the respondent from 21 February 2022 until 3 August 2022. He made a claim to the employment tribunal for unauthorised deductions from wages and/or breach of contract on 5 October 2022 following a period of early conciliation from 2 October 2022 until 4 October 2022.

2. This claim concerns the alleged non-payment of commission to the claimant in the region of £3000 and overtime of £750 during a period of suspension; and commission earned in June 2022 amounting to £9222.01.

3. The claimant also claims for financial and emotional distress in the sum of £2000.

4. The respondent says that the claimant had committed commission fraud so that they were entitled to withhold commission for the relevant period and the claimant was not entitled to anything beyond his basic pay during his period of suspension. The amount of the withheld commission of £9222.01 is not disputed.

5. The claimant was employed as a sales advisor. The respondent contracts to provide call centre services for third parties and at the relevant time this was Vodafone. The claimant worked in the retention team. His job was to speak to customers who were thinking about leaving Vodafone or requesting an upgrade with a view to offering them assistance and if possible retaining them with Vodafone and selling upgraded or additional products.

6. The claimant was paid a basic wage of £9.50 per hour but was able to earn commission and overtime. I did not hear or see any evidence about details of the commission scheme but as far as is relevant the claimant was paid commission each month in respect of upgrades on the mobile phone contracts that he sold to callers or for new services that he sold. The claimant's evidence was that he normally did 30 – 40 hours overtime per week. The claimant clearly did work very long hours. However, this on the basis of the evidence I heard, was at the upper end of what he *normally worked*. In June 2022, he said he worked 320 hours (see below) and earned about 3 times commission as much that month as his other best months. Doing the best I can, therefore, and on the basis of all the evidence I think the claimant generally worked an average of something in the region of 25 hours overtime per week.

7. The claimant started working for the respondent on 21 February 2022. Throughout his employment until June 2022, the claimant earned in the region of between £2000 and £2500 per month in commission on top of his salary and overtime. Commission and wages were paid by the respondent on or about 20th of the following month in which they were earned. The claimant was informed how much commission he had earned a few days before payment was due. In June 2022 the claimant had earned £9222.01 commission (gross). He checked online on 18 July 2022 and that was the figure he saw on the respondent's system and, I find, the earned commission of which he had been notified.

8. On 18 July 2022 the claimant was called into a meeting room at work and was told he was being suspended on suspicion of gross misconduct. He was suspended by Mr Robert Thompson in the presence of Mr Robert Ward on the grounds that the claimant had breached Vodafone rules by doing something referred to as "churn and return".

9. Mr Steven Thompson, head of people director for the respondent, describes churn and return as follows:

   "This happens where a Vodafone customer rings in because they want to upgrade a product they already have. This could be broadband or a mobile phone contract. An upgrade obviously generates more income from Vodafone but does not qualify the sales agent for a commission. What does occasionally happen unfortunately is that a sale agent, rather than raising

the existing contract, will cancel it and then put in place a new contract (including the upgrade) which makes it look like a new sale. This will generate a commission for the sales agent but is obviously fraudulent.

What the agent must not do therefore is replace an existing line with an additional connection. It is the job of the agent to retain customers not to replace their contracts with another. Essentially, if an agent churns, they make extra income through commission when they are not entitled to it. They have not onboarded a new customer but sold products to existing one.

Churning can also cause issues for our customers, who may become liable for an early termination fee of their existing line and may lose their previous phone number.

Churning is considered poor service and the respondent and has a dishonesty element. It is also an issue for Ofcom, who are our independent regulator. If Ofcom considered we were churning the consequences could be significant".

10. I note that Mr Ham in oral evidence said that the practice of churn and return was in breach of the contract with Vodafone only, and not any regulatory requirement.

11. The definition of churn and return is set out in a contract between the respondent and Vodafone. The claimant was not a party to the contract as it was a commercial arrangement between the two businesses, but he did receive an extract from it entitled "TSAR commission notes" which outlines aspects of the commission scheme. I am not clear how it is directly relevant, but the respondent's witnesses were at pains to point out, and I accept their evidence, that the commission for sales agents was paid by Vodafone albeit that the money was paid to the respondent to pay to the sales agents.

12. Directly relevant parts of the TSAR commission notes are as follows. Paragraph 1.7 is entitled 'Commission Fraud' and says:

"any manipulation of performance may be treated as commission fraud and disciplinary action taken against the employee. Commission fraud will be seen as an act of gross misconduct and, if allegations are proven, this could result in summary dismissal. Commission fraud includes, but is not limited to:…

…

Cancelling an existing line and creating a new connection rather than completing an upgrade (churn and return)".

13. Although this section was suggested to be an interpretation section in this agreement it does then go on to say "whilst an investigation is ongoing any commission payments will be withheld pending the outcome, in the event of no further action being taken the payments held will be paid by the next payroll".

14. At paragraph 3.8 in the same document it says:

"Any employee under investigation for suspected commission fraud will have the commission payments, including bonus, withheld.

If the employee is then dismissed, all commission will be withheld in the instance of any commission fraud case or where any formal action has been taken against the employee.

If the employee is found innocent and allowed to return to work, with no formal action against them, the commission will be paid on the next commission payroll."

15. It is also relevant to refer to the following parts of the TSAR commission notes:

"3.6 Suspension

Where an employee is suspended from the business for any reason, their participation in the scheme will be suspended

Where an employee has been suspended and returns to work, basic salary will be paid. Any Commission owed for this time will be reviewed on a case by case basis. In any instance there is any Commission Payment owed this will be calculated and agreed by the Governance Team & Review board

All Commission will be withheld in the instance of any Commission Fraud case or where any formal action has been taken against the employee

It is the Team Leaders / Sales Manger's responsibility to ensure correct outcomes and dates are communicated to the Governance Manger to ensure the correct bonus can be calculated".

16. It is not proportionate to set out all the provisions of the TSAR Commission Notes, but I find that they make provision for payment of commission in the absence of employees in some circumstances and provide for non-payment in others. Circumstances where a payment in lieu of commission is made include internal voluntary secondments to non-commission based roles; internal assignments to non-commission based roles; during periods of maternity, paternity and shared parental leave; during periods of agreed holiday and training. A payment in lieu of commission is not payable during periods of sickness absence (subject to individual manager discretion).

17. The claimant did not dispute that these rules applied to him and he agreed that he was familiar with the TSAR commission notes and well versed in their content.

18. The meeting on 18 July 2022 was said to be an investigation meeting. No evidence was put to the claimant at that meeting. Mr R Thompson told the claimant that there had been at least one call that had been listened to where the claimant did instigate conversation about a new line deal. This is said to be an instance of churn and return. The claimant did not respond to that specific allegation but had said previously in the meeting that he believed he had followed the rules and had made it clear to customers when taking out a new line that it was a new contract.

19. In this context “new line” means new mobile telephone contract. The claimant was suspended on full pay pending further investigation although full pay meant basic pay only. The claimant did not receive any payments based on commission he might have earned during the period of his suspension or any overtime he might have worked.

20. The claimant was told that Vodafone were withholding any commission pending the outcome of the investigation.

21. The respondent, as a corporate entity, did not give any consideration to anything less than suspension at this point and they said the reason for the suspension was business risk that the claimant might, they thought, continue to commit commission fraud. It is unclear who made the decision to suspend the claimant. It appears from the later interview between Mr Donoghue, the appeal manager and Mr R Thompson (which is the closest thing the respondent provided to any evidence from Mr R Thompson who did not give evidence to the Tribunal), that Mr R Thompson did not think that suspension was necessary but he was instructed to suspend the claimant, I conclude from emails in the bundle, by a Mr Sam Such, Call Centre Manager.

22. Vodafone had decided to investigate the claimant’s calls because of his unusually high commission that month. The average commission payable to workers on the campaign was more in line with what the claimant had been earning previously, namely in the region of £2000-£2500 per month. In this month the claimant had earned in excess of £9000 commission. The claimant said he worked virtually every day that month – a total of 320 hours – and was working 12 hour days. This, he said, accounted for his high commission.

23. The investigation comprised Mr R Thompson reviewing Vodafone’s summaries of what they say was said in the telephone calls that they say amount to churn and return, together with listening to the calls himself and summarising their content.

24. Mr R Thompson’s summary of the calls is more detailed than that of Vodafone. The calls identified by Mr R Thompson do not directly correspond with the calls identified by Vodafone. There only appear to be two calls that correspond with the same “SBL” numbers. This is consistent with the record of interview in the appeal between Mr R Thompson and Mr Donoghue. Mr R Thompson said in that interview that he went through some of the claimant’s calls and there were two that were grey areas. Mr Thompson thought one of the calls amounted to churn and the other was a grey area. These were calls on 19 June 2022 at 12.05 and on 22 June 2022 at 8.52. Only one of these had also been identified by Vodafone as potentially suspect, namely the one on 19 June 2022.

25. I note that a potentially problematic call identified by Vodafone on 28 June was explicitly rejected as problematic by Mr R Thompson, apparently on the basis that “It was a customer led discussion to take a new con and cancel her existing line”.

26. Mr Ham was appointed as disciplinary officer. He had a conversation with Mr R Thompson and Mr Ward before the disciplinary hearing but there is no note of that conversation. Mr Ham did not listen to any of the call recordings. He also gave no evidence in his statement about the content of the conversations with Mr R Thompson or Mr Ward. Again the only evidence I have is the note of Mr R Thompson's interview with Mr Donoghue as part of the appeal process to which I will turn later.

27. Mr Ham is an operations manager with the respondent and has been working for them for just over 10 years. He currently works on the Vodafone campaign and has done so for some time.

28. Mr Ham met with the claimant on 2 August 2022 in a disciplinary hearing and discussed the allegations. The claimant had been provided with the call logs from Vodafone and Mr R Thompson. The record of the disciplinary meeting is difficult to follow and Mr Ham did not give any detailed evidence about the conduct of the hearing in his witness statement. Mr Ham identified in his witness statement two calls out of the list of six calls that Mr R Thompson had listened to and that Mr Ham said amounted to instances of churn. These were the two calls identified by Mr R Thompson on 19 and 22 June.

29. Mr Ham did not appear to explicitly put to the claimant in the disciplinary hearing the allegation that he had been acting fraudulently, and the claimant denied that he had acted incorrectly. The claimant said in the hearing that he had obtained approval for one of the transactions from a Team Leader – Ms Terri-Anne Hardmeat – who gave evidence at the tribunal. The claimant said that Ms Hardmeat was unsure about the transaction in question, so had obtained approval from a more senior person in Operations.

30. Mr Ham did not speak to Ms Hardmeat at any point about whether she had given permission for the alleged conduct. At the tribunal hearing, Ms Hardmeat said that she had, on occasions, offered the claimant guidance and, if she was unsure about the answer she would seek advice herself. She could not, however, remember specific examples and in oral evidence she said that she could not remember if she had spoken to the claimant about a call on 19 June 2022 or not.

31. Again, it is unclear from the notes of the disciplinary meeting which of the calls the claimant is suggesting he obtained permission for.

32. Mr Ham decided at the conclusion of the meeting that the claimant was to be given a final written warning. Again, it is extremely unclear from the record of what he said at that meeting what the claimant was actually found to be guilty of. Mr Ham also said "…online for a lot of commission, won't get that commission, that is Vodafone's sanction". The claimant asked at the end what's happening to last month's commission and Mr Ham said he did not know.

33. Mr Ham sent the claimant a disciplinary outcome letter dated 3 August 2022. It said

"I am writing to confirm our decision to issue a Final Written Warning, due to:

Gross Misconduct – that you knowingly cancelled a customer's existing line and sold them a new line so they could benefit from a deal ('churn and return')".

34. It does not say which of the recorded calls this referred to but sets out brief details of both the calls (it was agreed that the calls referred to were the ones on 19 June 2022 and 22 June 2022, although it does not say so in the letter).

35. I set out in full the relevant parts of the letter:

"At the hearing we discussed the above [referring to the upheld allegation]. When asked you explained the first call mentioned in detail. You confirmed you received a call from a customer asking to cancel their contract, you advised you were unable to do this as they were still in contract. They asked you about a cheaper price and you pitched to them stating that if they were to take out an additional line, they would get a cheaper price. The customer asked if they are able to transfer their number over, you responded by sending them a 'keep your number' form, which changes their number on their new line to their current number and recycles the new number. I advised that this not something we should be doing and going forward, the answer should be that they're unable to do that.

We then discussed the second call, where you advised, you had spoken to your Team Leader who had received Operations approval to make the sale.

In the meeting, I advised you that you wouldn't be receiving your commission due to this, as Vodafone see this as fraudulent behaviour. Any issues regarding this, you will need to speak to your Team Leader and Operations Manager.

You confirmed you understand the importance of the above allegation and the impact of failing to follow the process.

Having listened to your explanations, we discussed the areas of concern to us including the impact your conduct could have on the business. We reiterated the offer of support that the company could provide to you".

36. It appears from this letter that in fact Ms Ham only upheld one allegation of churning. This is because the warning related to a customer in the singular, and Mr Ham appears to have accepted the claimant's explanation that he obtained approval or advice from Operations for the second call. He does not make a finding either way about the claimant's assertions about seeking approval and did not speak to Ms Hardmeat. The the only reasonable conclusion, therefore, would be that Mr Ham had accepted the claimant's account of the second call. Again, I observe that it is not clear whether this means the second call chronologically, or not.

37. In his witness statement, Mr Ham addressed both calls in more detail. In respect of the call on 19 June, Mr Ham said:

"What the claimant did was sell the customer two additional "Sim Only" deals at £10 per month on 18 month contracts. This only made sense if the customer could cancel their primary, existing contract and transfer their existing number to one of the new lines, but the could not. We cannot port numbers from a primary number to an additional number. However, the claimant took the customer down that road as if that could happen, including sending them a keep my number form when they asked. He even explained how they would move their number when he knew they could not actually do that. The claimant then benefitted in commission".

38. Mr Ham said that in his opinion the claimant had attempted to manipulate the system.

39. There are aspects of what Mr Ham said that do not bear close scrutiny.

40. Firstly, it is not correct, according to Mr Ham's oral evidence, that it is in fact *impossible* to transfer numbers from a main contract to an additional one, but that agents *should* not do it. It is, I understand, possible to do it on the Vodafone website.

41. Secondly, the description of the order of events is not consistent with the only available evidence about the call – namely Mr R Thompsons's description of it. That description says:

"Customer wished to upgrade- agent talked the customer through sim only upgrade options. The customer can upgrade later in the month to sim only at no extra charge - the customer said they will call back to cancel on 22nd and then 2 x new connections are offered to the customer as additional line offers. The customer asks how they can retain their number and Lewis talks the customer through how to move their number onto the 2 x additional connections - churn. Keep my number form also sent to the customer".

42. I find that the only evidence available to Mr Ham at the time was that the order of the conversation was as follows:

    a. The customer said they would cancel their contract later in the month

    b. Then the customer was offered 2 additional lines

    c. Then the customer asked how they could move their number to the additional lines (although that cannot have meant to both of them); and

    d. Then the claimant explained how to move the number and sent the form.

43. I also prefer the claimant's evidence at the hearing that the request was initiated by the customer and the claimant answered their question about keeping their number. This is consistent with the account the claimant gave at the disciplinary hearing. I note that this order of events mirrors that recorded by Mr R Thompson for the call on 28 June for which no further

action was taken and in respect of which the transaction is recorded as being “customer led”.

44. I also prefer the claimant’s evidence that he genuinely believed at the time that the discount applicable to the additional lines was applied in a lump sum at the start of the SIM contract so that the discount would continue past the end of the primary account. Mr Ham said in his witness statement that the additional offers the claimant sold were cheaper generally than their original plans which is consistent with the claimant’s belief about how the additional line plans worked.

45. I do not know if the claimant’s belief is correct as I was shown no documentary evidence about the offer in question and no convincing evidence that the claimant had been told differently to what he believed. The respondent’s evidence was that the discount would stop once the primary contract ended, thereby causing additional costs to the customer. This does not, as part of the outcome letter, seem to have formed part of the original reasoning for sanctioning the claimant and is not mentioned in Mr Ham’s witness statement. It is also inconsistent with Mr Ham’s evidence that the additional offers sold to customers by the claimant were generally cheaper than their current plans.

46. There is no basis, on this available evidence, from which Mr Ham could reasonably conclude that the claimant had attempted to manipulate the system for his benefit. The evidence appears to be that the discussions about keeping the number were customer led and there is nothing to suggest that the claimant has processed the new transaction as a new deal, rather than an upgrade, for his benefit. The customer was not purchasing an upgrade, but was cancelling their primary contract. It is clear that Mr R Thompson was of the view that this call amounts to “churn”. There is, however no evidence to support or explain his conclusions. Particularly as it is also recorded, explicitly, in one of the call summaries that “the customer requested the information [about keeping the number] and was not given prior to the customer agreeing to the additional lines”.

47. Turning now to the call on 22 June 2022. Although it appears from the disciplinary outcome letter that Mr Ham accepted the claimant’s assertion that he had consent for this call (assuming that the second call refers to the second chronological call), in his witness statement he said:

> “This was similar misconduct. The customer wanted to negotiate an upgrade but the sales agent, the claimant, had to explain that the customer cannot get cheaper until out of plan. Customer then mentions they will cancel closer to date. At that point, the claimant suggests the additional line offers for a cheap price, £10 per month for 40gb. He then goes on to mislead the customer into believing that they can take the second line, transfer their number to that second line, and cancel the first, which as I say above, they simply cannot do. The claimant benefitted in commission. Again, for me the categoric evidence of misconduct was that he sent the customer a “keep my number” form when it’s impossible”.

48. Again the only evidence of this call was the summary produced by Mr R Thompson which said:

"The customer called to look at sim only upgrade options, the customer is still within commitment. Suitable sim only upgrade offers given and agent advises the customer that they cannot get a cheaper price until they are out of commitment.

The customer advises they will call back closer to their commitment date to cancel. Lewis then advises the customer around additional line offers on their account at a cheap price. Customer agrees to take out sim only plan new connection £10 for 40GB. Their (sic) is no discussion that the customer will be paying for 2 connections until the existing line is cancelled and whilst Lewis advises this as a "second line offer" this is not a detailed enough explanation for the customer. There is no discussion around how the customer can keep their number, thoughts are the customer thinks that this is an upgrade as they comment that their sim is fine and they don't need a new one sent out. The customer is also sent the transfer my number link"

49. This allegation is even less clear cut than the previous one. I accept the claimant's evidence that he did read out the terms and conditions at the end of the call and that this would have referred to the additional lines being in addition to the customer's existing mobile phone contract.

50. Mr Ham said in his statement that the claimant misled the customer into believing that they could take the second line, transfer their number on to that second line and cancel the first line. He also said that the claimant was knowingly manipulating the situation to gain financially.

51. The evidence from Mr R Thompson suggests poor practice – that it was not clear that the customer knew they were getting an additional line, rather than an upgrade – but it also records that there is no discussion about the customer keeping their number. The claimant's evidence was that this customer did not have English as their first language so she was asking questions that the claimant answered.

52. As with the previous example, however, it is clear on the limited available evidence, and I find, that the order of the conversation was that the customer understood that their contract would be continuing until later in the month and then the claimant offered additional lines. I also observe, as with the previous example, that it is not, apparently, impossible to transfer numbers as discussed but that it is prohibited under the contract between Vodafone and the respondent for the respondent's sales agents to initiate the transfer.

53. As with the previous call, there is no evidence that I have seen from which Mr Ham could have reasonably concluded that the claimant had set out to deliberately mislead the customer or had manipulated the situation to gain financially.

54. The claimant was not paid his commission. Nobody was able to say on behalf of the respondent who made the decision not to pay the claimant the commission although it was notified to the claimant by Mr Ham. It appears to have been treated as the decision of Vodaphone, although the claimant does not have a relationship directly with Vodaphone. The respondent said, and I accept, that they did not receive the commission that would have been

payable to the claimant from Vodafone. They did, however, still receive their payment for the sales the claimant had made in June 2022. No-one was able to explain how much commission the two calls on 19 and 22 June would have generated for the claimant.

55. The claimant appealed against the final written warning and resigned on the same day he received the outcome letter, being 3 August 2022. The grounds for his appeal were that:

> "1 call is a churn but this had TL and ops approval to do this so this call isn't my fault it was a churn as I asked advice from my senior ups and they advised this can be done so I have done it per advice I was given
>
> You cannot take action against a agent due to following advice from a senior up
>
> The last call this wasn't churned at all the customer asked questions and I answered them, yes this call may of been ambiguous but this wasn't churned as
>
> A) I followed correct guidelines I followed FCA and ofcom rules I read T and Cs out they agreed to contract summary , they was aware there would be a new number , they new is was a new line , they new there would be a new SIM card
>
> B) this call is not about churning this is about ambiguous"

56. It appears in this email that the claimant agrees that one of the calls was a churn. The claimant's explanation at the Tribunal was that he agreed that on the evidence he had been presented with the call did look like a churn but that on further analysis (as reflected in my findings above) it was, as a matter of fact, not. However, the claimant's evidence – in the disciplinary hearing and subsequently – about which call he says he had obtained permission for was unclear.

57. The appeal was allocated to a manager from a different branch of the Respondent – Mr James Donoghue, Call Centre Manager at Seaham – and the claimant was invited to attend an appeal hearing on 15 August 2022, which he did. In the appeal, the claimant said "I was suspended on churn and return for gross misconduct but with the evidence that's available there's no evidence there for churn to return there's 6 calls voda weren't happy with and one is churn but that's got ops approval and that was in the notes".

58. In the meeting, Mr Donoghue asked the claimant what he understood by churn and return and the claimant said "tell customer to cancel and take something else out", which appears to be consistent with Mr Steve Thompson's explanation in his witness statement. Mr Donoghue did not correct the claimant in the appeal meeting.

59. Later in the meeting, the claimant appears to say that agents will admit they do churn and return and he had done it a few times. The claimant said that Mr Ham had, in the disciplinary hearing, effectively disregarded the call for

which the claimant said he had approval, and that is consistent with my findings above.

60. There was a discussion about what outcome the claimant wanted – it appears that the claimant would consider returning to work for the respondent, and he agreed in oral evidence that he would have been prepared to, but was, he said, not permitted to by the respondent.

61. Mr Donoghue said he would listen to the calls and get back to the claimant in a week.

62. On 22 August Mr Donoghue spoke to Mr R Thompson (the investigating manager) who told him that he had ben told to suspend the claimant by Mr Such, but that he did not want to suspend him. He also said that he was struggling to identify anything in the calls that would justify suspending the claimant, and that he had no real evidence on which to suspend him. He then said, that having listened to the calls, one was an example of churn and the other was a grey area.

63. Mr R Thompson also said that he did not make any recommendations about the calls or come to any decisions – he assumed there would be a disciplinary hearing.

64. On 26 August Mr Donoghue interviewed Mr Ham. The only relevant finding I make from that interview is that there were no documentary notes of any training given to the claimant about churn and return. There is no discussion about how Mr Ham reached the decision he did about the substance of the allegations.

65. There is no evidence to suggest that Mr Donoghue did in fact listen to any of the call recordings. I note, also, that they were not made available to the tribunal. On 5 September 2022, Mr Donoghue sent an internal email which said

    “The outcome for Lewis, given that all he wanted was his commission and did not want his job back, will be that he will not receive the commission. Mike Oliver has confirmed that this was a client instruction under a rule of that if there is one single example of "churn and return" they will forfeit all their commission.

    If it was a case of the sanction being disproportionate, then I would have agreed and reduced it down accordingly”.

66. On 7 September 2022, Mr Donoghue sent the formal appeal outcome to the claimant not upholding the appeal on the basis that Mr Ham’s decision was appropriate.

67. The only remaining matter of evidence relates to a video recording the claimant made of a conversation he had with Ms Hardmeat on 5 November 2022. The recording was taken covertly without Ms Hardmeat’s knowledge. The claimant says that in this recording Ms Hardmeat agrees that she had approved the disputed call.

68. The recording is too unclear to hear the conversation between the claimant and Ms Hardmeat. Ms Hardmeat said in oral evidence, and I accept, that she spoke to the claimant a few times after he stopped working for the respondent and she cannot remember the content of the conversation on 5 November beyond what she could hear on the recording. The claimant did not refer to the recording in his witness statement and his summary of what he says is on the recording cannot be relied on as it is not possible to meaningfully compare it with the recording. The recording is, therefore, of no evidential value and I disregard it.

Law and conclusions

69. The claim is brought either as unauthorised deductions from wages or breach of contract. I address unauthorised deductions first:

70. S 13 Employment Rights Act 196 says, as far as is relevant:

> (1) An employer shall not make a deduction from wages of a worker employed by him unless—
>
> (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
>
> (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.
>
> (2) In this section “relevant provision”, in relation to a worker's contract, means a provision of the contract comprised—
>
> (a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or
>
> (b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.
>
> (3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

71. Section 27(1)(a) of the Employment Rights Act 196 says

> (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,

72. Section 24 of the Employment Rights Act 1996 says (as far as is relevant):

> (1) Where a tribunal finds a complaint under section 23 well-founded, it shall make a declaration to that effect and shall order the employer—
>
> (a) in the case of a complaint under section 23(1)(a), to pay to the worker the amount of any deduction made in contravention of section 13,
>
> …
>
> (2) Where a tribunal makes a declaration under subsection (1), it may order the employer to pay to the worker (in addition to any amount ordered to be paid under that subsection) such amount as the tribunal considers appropriate in all the circumstances to compensate the worker for any financial loss sustained by him which is attributable to the matter complained of.

73. The power to award additional compensation in section 24(2) is limited to identifiable financial losses. It does not include non-pecuniary losses (such as personal injury, emotional distress or injury to feelings).

74. The tribunal has jurisdiction to determine the amount of wages properly payable on any occasion and that determination should be made by reference to normal contractual principles (where the payment is said to be payable under a contract). In respect of payments such as commission which are not explicitly set out as part of a contract of employment, there must be a legally identifiable right to payment of a particular sum.

75. In *Farrell Matthews & Weir v Hansen* [2005] ICR 509, the EAT held, in respect of discretionary payments, that:

> *"Once, however, an employer tells an employee that he is going to receive bonus payments on certain terms, he is, or ought to be obliged to pay that bonus in accordance with those terms until the terms are altered and notice of the alteration is given: Chequepoint (UK) Ltd v Radwan (unreported) 15 September 2000; Court of Appeal (Civil Division) Transcript No 1743 of 2000".*

76. In this case it was not disputed that on 18 July 2022 the claimant was notified of his entitlement to payment of £9222.01 by way of bonus. Although the respondent said that the claimant had no right, under his contract of employment, to payment of any commission, they did not assert that, subject to the terms of the scheme, no legal entitlement to bonus had arisen.

77. Mr Mugliston's submissions were focussed on whether the commission was properly payable and he referred to the terms of the scheme set out in the TSAR Commission Notes.

78. In respect of the commission for June 2022, my judgment is that the terms of the TSAR Commission Notes did apply to the claimant. It is unclear whether the status of the TSAR Commission Notes was one of a contract or contractual term between the claimant and respondent. There is no

reference at all to the payment of any commission, bonus or anything similar in the claimant's contract of employment. In fact, it does not even specify a salary or rate of pay. It simply says, at paragraph 5.2 that "An itemised pay statement of the employee's earnings and deductions will be provided electronically at the time of payment".

79. It may be that the rate of payment is set out somewhere else, but I was not shown it and the evidence I have was that the claimant was entitled to £1600 per month basic pay plus £9.50 per hour for overtime.

80. In my judgment, in determining whether commission was properly payable, once the claimant had been notified of the amount of commission he was otherwise entitled to, I must apply the terms of the scheme to determine whether the respondent was entitled to withhold the commission.

81. The question for me is whether, objectively in light of all the evidence I have, the respondent was *actually* entitled to withhold the commission under the terms of the scheme or not.

82. The relevant provisions of the scheme are those in paragraphs 1.7 which defines Churn and return, the alleged category of commission fraud on which the respondent relied, and 3.8 (under investigation). The provisions of paragraph 3.6 are also material. In my judgment, regardless of whether the TSAR Commission Notes has achieved contractual status or not, the only reasonable way in which to interpret the terms is applying normal principles of contract construction.

83. Paragraph 1.7 says:

> "any manipulation of performance may be treated as commission fraud and disciplinary action taken against the employee. Commission fraud will be seen as an act of gross misconduct and, if allegations are proven, this could result in summary dismissal. Commission fraud includes, but is not limited to:…
>
> …
>
> Cancelling an existing line and creating a new connection rather than completing an upgrade (churn and return)".

84. It is not elucidating to set out the other examples in 1.7. I heard no evidence about them and the language of them is so sector specific as to be meaningless without further context.

85. I consider the clause based on the normal meaning of the words in the clause. The relevant parts are "any manipulation of performance may be treated as commission fraud" and "Cancelling an existing line and creating a new connection rather than completing an upgrade".

86. In my judgment, Churn and Return requires, in accordance with the definition, a decision by a sales advisor to firstly cancel a line and secondly create a new connection. That is obvious from the words.

87. The next requirement is that this must be done as an alternative to upgrading an existing line (contract). This necessarily requires that the existing contract would, but for the intervening act of the sales advisor to cancel the contract, remain in place.

88. Thirdly, by virtue of the reference to 'manipulation of performance', there must be an intention on the part of the sales advisor to do this for the purpose of making their performance look better than it did.

89. It should be clear from my findings of fact above that there is no evidence from which to conclude that all the requirements of return and churn have been met.

90. Firstly, in both instances relied on by the respondent, the claimant did not cancel a line. He did create second connections, but in both cases, on the evidence available in the call summaries, the customer retained their contracts at the point the new contracts were created.

91. Secondly, in both cases, there was no evidence to suggest that the customers had decided to upgrade their existing contracts in the course of the call. The evidence shows that the customers had decided to cancel their existing contracts before the new line was offered or let the contract run its course and revisit their contract then.

92. Finally, I have seen no evidence of manipulation. In both cases, the evidence demonstrated that the claimant was responding honestly to queries from customers. This cannot, on any reasonable basis, be said to amount to manipulation.

93. For these reasons, objectively, there was no evidence before the tribunal and, as far as I have heard, no evidence before Mr Ham, from which I or he respectively could conclude that that claimant was guilty of churn and return in respect of the calls on 19 and 22 June 2022.

94. At paragraph 3.8 in the same document it says:

> "Any employee under investigation for suspected commission fraud will have the commission payments, including bonus, withheld.
>
> If the employee is then dismissed, all commission will be withheld in the instance of any commission fraud case or where any formal action has been taken against the employee.
>
> If the employee is found innocent and allowed to return to work, with no formal action against them, the commission will be paid on the next commission payroll."

95. The first sentence in this clause is clear and it is also undisputed that the claimant was investigated for commission fraud. It was right, therefore, that the claimant's commission was withheld *initially* from payment on 20 July 2022.

96. The next sentence is ambiguous. It is very difficult to read it, in isolation, in any grammatically meaningful way. It seems to say that commission will be

withheld if the following two conditions are met: firstly that the claimant has been dismissed and secondly that either there has been commission fraud or that formal action has been taken against the employee.

97. Formal action is not defined, but the respondent proceeded on the basis that this included any formal disciplinary action. However, if read as suggested, this does not make sense because dismissal is, generally, formal disciplinary action and it is not easily possible to conceive of any additional formal action of a similar nature (such as a written warning) that could accompany a dismissal

98. Formal action could in this case, include other legal action – such as civil or criminal proceedings, but there is nothing anywhere else in the document to even hint at that possibility.

99. The interpretation contended for by the respondent is that it means if any formal action, whether dismissal or otherwise, is taken against the employee for commissions fraud then commission will be withheld. The difficulty is, that it does not actually say that. The confusion is further compounded by the use of the word “withheld” in ways that would tend to suggest two different meanings.

100. This is because the next sentence then makes provisions for the repayment of withheld commission on certain conditions. Those conditions are that:

    a. The employee is found innocent (of commission fraud, given the context of the clause)

    b. The employee is allowed to return to work; and

    c. No formal action is taken against them.

101. The intention behind this clause is, in my view, to say that if the claimant is found not to have committed commission fraud, their commission will no longer be withheld under this clause. The difficult question is why the clause would also specify that the employee be permitted to return to work and that no formal action is taken against them? In this case, however, the claimant was permitted to return to work, so I do not need to consider that part of the clause.

102. However, rather than clarifying, the reference to formal action again, serves to confuse the issue. In the event that the claimant was found innocent of commission fraud, it is very difficult to conceive of any circumstances where formal action of any kind could reasonably be taken in respect of the alleged fraud.

103. In seeking to interpret this clause, I must resolve any ambiguity against the party seeking to rely on it (in this case the respondent) and I should try to interpret the clause in a way that makes sense, rather than in a way that is meaningless.

104. In my view, it is also reasonable to take account of the fact that the claimant took no part in agreeing these terms – they were imposed on him; and

further that they were extracted from a commercial agreement between two corporate entities so that I can assume that the clause is intended to mean what it says, having been considered by experienced business people.

105. On balance, however, I conclude that it is just a very badly drafted clause. The only sensible meaning that I can give it is as follows:

    a. An employee under investigation for commission fraud will have any outstanding commission withheld pending completion of the investigation.

    b. On conclusion of the investigation, the commission will be retained (and not paid) unless the employee is found not to have committed commission fraud.

106. As far as I can tell, all other aspects of the drafting are extraneous.

107. Finally, in respect of this clause, it was agreed by Mr Mugliston that it is implicit that the investigation, consideration and determination of the allegations must be undertaken reasonably and in good faith. Those were not the exact words to which he agreed, but in my view it is not a contentious proposition that, before the outstanding commission could be withheld under 3.8 the respondent must have a reasonable belief that the claimant was guilty of the alleged conduct with which he was charged.

108. In my judgment, normal principles of fair and reasonable decision making must apply. All relevant evidence should be considered, irrelevant factors must be disregarded and the claimant must have an opportunity to see or hear and comment on all evidence relied on by the employer. Without this, the respondent would be able to withhold commission amounting to substantial amounts on a whim with the claimant having no recourse at all, if the only test was whether the respondent had made a finding of commission fraud, regardless of how genuine or reasonable that was.

109. Although the respondent was entitled, therefore, to withhold commission during the investigation, the next question is whether the respondent had the power under the TSAR Commission Notes to retain the commission on the basis of Mr R Thompson's investigation and Mr Ham's decision. This includes consideration of whether the investigation was undertaken reasonably and in good faith.

110. In my view, and as I have found, there was insufficient evidence before Mr Ham to properly decide that there had been commission fraud. Further, the process by which he reached the flawed decision was itself flawed. Mr Ham did not listen to the recordings and the claimant was not able to either. He therefore failed to take into account relevant evidence and the claimant was not given an opportunity to make representations about all the evidence. Mr Ham also failed to obtain or consider any evidence from Ms Hardmeat as to whether consent had been given for any of the transactions.

111. Consequently, had Mr Ham reached the only conclusion available to him on the evidence he had, he would not have had any legitimate grounds for taking any further formal action – whether under the respondent's

disciplinary policy or externally. Consequently, there would have been no proper basis in the TSR Commission Notes – and particularly under clause 3.8 – to withhold the claimant's commission.

112. For these reasons, the claimant was, on the payday following his disciplinary hearing which would have been 20 August 2022, entitled to be paid the gross sum of £9222.01 by way of commission for June 2022 and he was not paid this sum. This was the sum properly payable as the terms of the TSAR Commission Notes under which commission could be retained (namely that the respondent had reached a fair and reasonable conclusion that the claimant had committed commission fraud having undertaken a fair and reasonable investigation) were not met.

113. It was not suggested that there was any other basis on which the respondent could withhold commission or that the claimant had consented to it. The respondent has therefore made an unauthorised deduction from the claimant's wages on 20 August 2022 and the respondent must pay the claimant the sum of £9,222.01.

114. The other two sums are for payment during the claimant's suspension based on the average of what he would have earned had he not been suspended.

115. The claimant's contract of employment is silent on payment during suspension. The respondent's disciplinary policy simply says that "Exceptionally, suspension with pay will be considered where there are reasonable grounds to believe that evidence has or may be tampered with, destroyed or witnesses are pressurised or intimidated". It then lists further circumstances where suspension will be considered and this includes "If there is a potential risk to company property, employees or customers".

116. The reason given by the respondent was their perceived risk of ongoing commission fraud and in my judgment this is covered in a risk to company property (namely their good will with Vodafone or actual money).

117. In my judgment, the respondent had reasonable grounds on which to suspend the claimant on the basis of the initial evidence it received from Vodafone. There is nothing in the disciplinary policy or the claimant's contract that says what pay is for these purposes.

118. In respect of the ongoing entitlement to commission during the period of the claimant's suspension, I refer to paragraph 3.6 of the TSAR Commission Notes. This says, as far as is relevant:

> "Where an employee is suspended from the business for any reason, their participation in the scheme will be suspended.
>
> Where an employee has been suspended and returns to work, basic salary will be paid. Any Commission owed for this time will be reviewed on a case by case basis. In any instance there is any Commission Payment owed this will be calculated and agreed by the Governance Team & Review board

All Commission will be withheld in the instance of any Commission Fraud case or where any formal action has been taken against the employee"

119. This clause must apply to suspension for any reason, including Commission Fraud. The last sentence refers to the matters covered above in respect of clause 3.8.

120. The remainder of the clause provides that during suspension, the claimant is not entitled to earn commission. The second two sentences are not immediately clear. Payment of basic salary during suspension is already covered in the respondent's disciplinary policy. This agreement is part of an arrangement between Vodafone and the Respondent. It must be, therefore, that reference to basic pay must intend to reflect the policy that the respondent already had.

121. The third sentence can only, in my view, refer to commission owed in respect of the actual period of suspension. Outside clause 3.8, there do not appear to be any provisions for withholding commission *actually* earned. The reference to commission being owed and reviewed must therefore, refer to a payment in lieu of commission earned, at the discretion of the "Governance Team and Review Board", in circumstances where an employee returns to work after being suspended. I refer to the additional clauses mentioned in my findings about payment in lieu of commission in circumstances where an employee is unable to earn commission including parental type leave, approved holiday, reassignment and training. In my judgment, this reflects a reasonable approach to ensure that employees do not miss out on commission because they are required, by circumstances or the respondent, to do something else.

122. It appears obvious that the reason for the requirement for a decision on a case by case basis is to establish whether it would be reasonable to compensate the employee for lost commission during their suspension in all the circumstance of any case.

123. There has been no referral to the Governance Team and Review Board that I am aware to make a decision in this case.

124. While a decision may have resulted in payment of a sum in lieu of commission earned, any such sum would be at the discretion of the Governance Team and Review Board. In this case, the reason that the respondent was not permitted to withhold commission, was because of the failings in the investigation and determination of the alleged fraud and the inadequacy of the evidence obtained and presented to Mr Ham.

125. I cannot say that the claimant was not guilty of commission fraud (only that there was no available evidence to show that he was) and nor can I say that the claimant was not culpable in some other way which, in all the circumstances, might have justified the withholding of some or all of a payment in lieu of commission.

126. This means that there is no quantifiable sum which ought to have been paid to the claimant that was not paid. In order to successfully claim unauthorised deduction from wages, the claimant must show an identifiable

sum that was due. He has not done and it is not possible for me to calculate such a sum, so in respect of the non-payment of pay in lieu of commission throughout the period of the claimant's suspension, the respondent has not made an unauthorised deduction from the claimant's wages.

127. Finally, in respect of unauthorised deductions from wages, the claimant said that he would have worked overtime hours for the period of his suspension. This is unrelated to the commission scheme. There is no definition of pay for the purposes of the suspension provisions. I have already set out everything that the disciplinary policy says about pay during suspension. In my judgment in the absence of anything else, pay must mean normal pay. This includes overtime pay usually or regularly earned. It does not *necessarily* include commission for the reasons explained above.

128. I have found that the claimant worked, on average, 25 hours overtime per week. He was suspended for 2 weeks and 3 days from 18 July 2022 to 3 August 2022. This gives a total of 2.4 weeks which is 60 hours. At £9.50 per hour this equates to £570. In my judgment, this was what was properly payable to the claimant during his period of suspension (in addition to his basic pay), on the basis that that is what he would have earned in overtime had he not been suspended and on my interpretation of the respondent's disciplinary policy.

129. The claimant was only paid basic pay during his period of suspension and there has therefore been an unauthorised deduction from the claimant's wages, payable on 20 August 2022, of £570 gross.

130. The respondent must therefore pay the claimant the sum of £570.

131. The claimant's claims were brought, in the alternative, as breach of contract claims. The tribunal has the power to consider claims for breach of contract that are outstanding on the termination of the claimant's employment under article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.

132. I do not address the claims for commission earned in June 2022 or overtime payments as they are addressed above in respect of unauthorised deductions form wages and it is not proportionate to do so.

133. The remaining question is whether the respondent was in breach of contract for failing to consider whether the claimant should be paid any pay in lieu of commission for the period of his suspension under clause 36 as discussed above.

134. In my judgment, the terms of the commission scheme as set out in the TSAR Commission Notes must amount to a contract. The basic elements of a contract – offer, acceptance, consideration and intention to create a legal relationship – are present. The claimant was told about the commission terms, he agreed to accept them – there is no dispute about that. Both parties considered that the terms applied to the Vodafone retention Campaign on which the claimant worked. The claimant's consideration was doing the work for Vodafone under the contract, and the respondent's was

paying, or agreeing to pay commission subject to the terms of the TSAR Commission Notes.

135. It is obvious, in my view, that the parties intended the terms of the agreement to be legally binding in respect of the payment of commission.

136. It is not necessarily the case that this was part of the claimant's contract of employment, but it is not necessary to consider that. The only question is whether the respondent was in breach of clause 3.6 by failing to consider in the claimant's particular case whether he was entitled to any commission for the period of his suspension.

137. The particular relevant terms are

> "Any Commission owed for this time will be reviewed on a case by case basis. In any instance there is any Commission Payment owed this will be calculated and agreed by the Governance Team & Review board
>
> All Commission will be withheld in the instance of any Commission Fraud case or where any formal action has been taken against the employee.
>
> It is the Team Leaders / Sales Manger's responsibility to ensure correct outcomes and dates are communicated to the Governance Manger to ensure the correct bonus can be calculated"

138. No commission was calculated by anyone as the respondent had concluded that the claimant was guilty of commission fraud and had been subject to a final written warning.

139. The question is, then, whether case by case consideration was excluded under the contract merely because of the fact of the finding of commission fraud and the taking of formal action, rather than any consideration of the reasonableness or genuineness of any such action. .

140. In my judgment, this cannot be right for the same reasons as set out above. The reference to an instance of commission fraud must mean that commission fraud has been reasonably found to have occurred following a reasonable investigation conducted fairly and in good faith. Similarly, formal action must mean only formal action taken reasonably and following a reasonable investigation conducted fairly and in good faith.

141. As I have already found, this did not happen and at the time that the claimant returned to work there was no reasonable basis on which the respondent could have found the claimant guilty of commission fraud or given him a final written warning.

142. The respondent ought, therefore, to have considered whether the payment of commission was appropriate in those circumstances. They did not do so and the claimant's claim of breach of contract is therefore successful.

143. The principles for calculating compensation are that the claimant should be, as far as possible, put in the position he would have been in had the breach not occurred. I cannot say what the decision of the respondent would have been so, the best I can say is that there is a 50% chance that the claimant

would have been awarded pay in lieu of commission based on his average commission.

144. The claimant's estimate of his likely commission for the month is £3000 which accords with his likely average. This equates to £98.63 per day. The claimant was suspended for 16 days so the commission he is likely to have earned was £1578.08. 50% of this (to reflect the chance that he might not have been awarded any commission by the Governance Team and Review Board) is £789.04 and I therefore order that the respondent must pay the claimant £789.04 as compensation for breach of contract.

1805488/2022

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Employment Judge **Miller**

6 April 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

17 April 2023

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FOR EMPLOYMENT TRIBUNALS