



THE EMPLOYMENT TRIBUNAL

SITTING: at London South (by CVP)

BEFORE: Employment Judge Tueje

BETWEEN:

SIMON NICHOLAS MARLOW

Claimant

-and-

THAKEHAM HOMES LIMITED

Respondent

ON: 3rd and 4th July 2023

Appearances:

For the Claimant: Mr Davies (Counsel)

For the Respondent: Mr Cook (Counsel)

JUDGMENT WITH REASONS

Judgement

1. The claim for unfair dismissal under section 95(1)(c) of the Employment Rights Act 1996 is not well-founded and is dismissed.
2. The claim for wrongful dismissal is not well-founded and is dismissed.
3. The claim for unauthorised deductions from pay contrary to Part II Employment Rights Act 1996 is well-founded. The respondent made an unauthorised deduction from Mr Marlow's pay, namely the commission due to be paid to him in December 2021, in respect of the site known as Petersfield, 169 The Causeway. The respondent is ordered to pay to Mr Marlow the gross sum of £2,585 that was deducted from his pay.
4. There has been no breach of the ACAS Code of Practice 1: Disciplinary and Grievance Procedures (2015). Accordingly, no ACAS uplift is awarded under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992.
5. The respondent, having provided Mr Marlow with a new contract of employment on 1st July 2018 pursuant to Part I of the Employment Rights

Act 1996, no award is made under section 38 of the Employment Act 2002.

Reasons

Introduction

1. Mr Marlow was employed by the respondent from 4th March 2013 to 17th December 2021, initially as a Senior Land Manager, but was promoted to Associate Land Director in September 2021.
2. Mr Marlow claims during a meeting in June 2020 Mr Stebbings told him the respondent had introduced a new commission structure with immediate effect. In November 2021 Mr Marlow submitted a claim for commission relating to the site known as Petersfield, 169 The Causeway. The claim was based on the commission structure discussed in June 2020. The respondent refused his claim on the grounds that no such commission scheme existed. Mr Marlow resigned when the respondent maintained its refusal to pay the commission as claimed. He argues the respondent's refusal amounts to a fundamental breach of an express oral term of his contract, namely the commission structure discussed in June 2020. Therefore, he claims he was constructively dismissed.
3. The respondent contests the claim. It argues the June 2020 discussion was merely regarding the hypothetical terms of a new commission structure the respondent planned to introduce in the future. It claims no new scheme was introduced at that time. A new structure was subsequently introduced in 2021. The respondent denies Mr Marlow was told in June 2020 that a new commission structure had been introduced with immediate effect. The respondent also maintains it was entitled to refuse Mr Marlow's claim for commission as the claim was made under the hypothetical scheme discussed in June. Therefore, Mr Marlow's subsequent resignation was not a constructive dismissal, as the refusal was not a breach of his contract.

The hearing

4. The final hearing was on 3rd and 4th July 2023.
5. Before hearing any evidence, the parties' legal representatives asked me to consider pages 90, 106, 107, 109, 112, 118, 124, 131, and 137 of the hearing bundle, and pages 26, 29 and 53 of the supplementary bundle, which I did.
6. I heard the parties' evidence on 3rd July. I heard evidence from Mr Marlow, whose witness statement is dated 10th November 2022. His former colleague Mr Ross Blumire, also gave evidence in support of the claim. Mr Blumire's witness statement is dated 11th November 2022.
7. There were three witnesses on behalf of the respondent, whose statements were all dated 1st November 2022. They were:
 - 7.1 Mr John Stebbings, the respondent's Group Development Director, and Mr Marlow's line manager;
 - 7.3 Mr Robert Boughton, the respondent's CEO; and

- 7.4 Ms Liane Richardson, the respondent's Human Resources Director.
8. Except for Mr Marlow who gave sworn evidence, all other witnesses gave evidence under affirmation. All adopted their written statements and were cross examined.
9. In addition to the above evidence, the following documents were sent to the Tribunal:
- 9.1 A 164-page agreed hearing bundle;
- 9.2 A 53-page supplementary bundle prepared on behalf of the respondent; and
- 9.3 A skeleton argument dated 3rd July 2023 from Mr Davies, e-mailed to the Tribunal on 4th July 2023.
10. Unless otherwise stated, page references relate to the agreed hearing bundle.
11. I heard summing up from Mr Cook and Mr Davies on 4th July 2023. I considered all the written and oral evidence, documents in the agreed and supplementary bundles that were referred to in that evidence, Mr Davies' skeleton argument, and both parties' closing submissions. My judgment was announced orally on 4th July 2023.
12. At the hearing on 4th July, and by a letter dated 13th July 2023, Mr Marlow's legal representatives requested written reasons.

Issues for the Tribunal

Unfair (Constructive) Dismissal

13. It being common ground that Mr Marlow's contract of employment provided for contractual commission to be paid, the issues are:
- 13.1 What were the terms of the commission structure that applied to the Petersfield site.
- 13.2 Was the respondent's refusal to pay the £12,000 commission claimed for Petersfield a breach of the terms of the commission structure that applied to that site.
- 13.3 If so, was the breach a fundamental breach of contract.
- 13.4 If so, was that fundamental breach a factor that caused Mr Marlow to resign.

Wrongful Dismissal

14. If the Tribunal finds Mr Marlow was constructively dismissed:
- 14.1 What notice was he entitled to.
- 14.2 Did the respondent pay any notice pay he was entitled to.

Unlawful Deduction from Wages

15. What were the amount of wages properly payable to Mr Marlow as commission for the Petersfield site.
16. Was Mr Marlow paid the amount of wages referred to at paragraph 15 above.

ACAS Code of Practice 1: Disciplinary and Grievance Procedures (2015)

17. Did Mr Marlow raise a grievance.
18. If so, did the respondent fail to deal with the grievance in accordance with the above ACAS Code of Practice.
19. If the respondent failed to comply with the ACAS Code of Practice, was that failure unreasonable.
20. If the respondent unreasonably failed to comply with the ACAS Code of Practice, is it just and equitable to award an uplift, and if so, by what percentage.

Written Statement of Terms

21. Whether the respondent breached its duty to provide Mr Marlow with a written statement of the main terms of his employment in accordance with section 1 of the Employment Rights Act 1996.
22. If so, whether the respondent was in breach of its duty at the date these proceedings were brought.

Findings of Fact

23. The following findings of fact were reached on a balance of probabilities, having considered the witnesses' evidence, including documents referred to in that evidence, and taking into account my assessment of the evidence.
24. Only findings of fact relevant to the issues, and those necessary to determine the issues, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. I have not referred to every document that I read and/or was taken to in the findings below, but that does not mean it was not considered if it was referred to in the evidence and was relevant to an issue.

Background

25. Mr Marlow began working in residential property in 1986, so has almost 40 years' experience. In 2002 he set up an estate agency with a business partner. They were forced to close the business with substantial debts after he was let down by his partner. Rather than declaring bankruptcy, Mr Marlow chose to repay the business's creditors, which caused him considerable financial stress.

26. The respondent is a property development company established in 2003 with around 220 employees. The shareholders are Paul Rooney, his son, Julian Rooney, and Robert Boughton.
27. Mr Marlow had a personal relationship with Paul Rooney and Mr Boughton. He previously worked for Paul Rooney. He had also previously managed Mr Boughton when they both worked for a different company. Mr Boughton paid for Mr Marlow to attend his wedding in Italy, where Mr Marlow was one of a relatively small number of guests. They had also been on driving holidays together.
28. Mr Stebbings and Ms Richardson say that because of their friendship, Mr Marlow had more direct access to Mr Boughton than other employees. When asked about this during cross examination, surprisingly, Mr Marlow said he had the same access to Mr Boughton as all other employees.

Documentation

29. Mr Marlow's contract of employment was signed on 1st March 2013 (at pages 39 to 46). He was appointed as a Senior Land Manager, which entailed acquiring residential land for development. Some sites would have allocated or draft allocated status, meaning the local authority had identified these sites for development. Other sites would be unallocated plots, so were more speculative.
30. Mr Marlow's starting salary was £40,000 gross per annum, plus a £10,000 guaranteed bonus for the first 12 months. He was also to receive an annual car allowance of £5,000 plus mileage.
31. He started working for the respondent on 4th March 2013, but his 2013 written employment contract did not give a start date, nor does it state his place of work.
32. Over time, Mr Marlow received further correspondence regarding his employment. For instance, a letter dated 24th June 2013 confirming he had successfully completed his probationary period. He also received a letter dated 25th November 2013, clarifying certain points regarding commission payments.
33. The respondent's grievance policy is dated July 2014 (pages 137 to 140): it is a three-stage process starting with an informal grievance, progressing to a formal grievance hearing, and finally an option to appeal. To trigger the informal grievance process a complaint must be made in writing and headed "*formal grievance*". The respondent would try to resolve such grievances informally. But if the matter could not be resolved informally, the complainant could progress it to a full grievance hearing.
34. Ms Richardson says Mr Marlow was aware of the respondent's grievance procedure. She says during some of their conversations where he had been dissatisfied about an issue, she asked him whether he wanted to invoke the grievance procedure. He had always said no.
35. Mr Marlow was notified about his commission ("2015 commission structure"),

by a letter dated 12th February 2015, at pages 49 to 51 of the bundle. It stated commission would be paid annually at the end of January for commission earned during the previous calendar year, providing he was still an employee on 31st January. It also stated the 2015 commission structure would not be part of the terms and conditions of his employment.

36. The relevant elements of the 2015 commission structure applying to land Mr Marlow acquired, were as follows:
 - 36.1 An acreage bonus paid at £500 per acre for the first 5 acres, then £50 for each additional acre, but capped at £6,000 per site.
 - 36.2 A discount bonus paid at £50 per percentage where a discount of between 15% to 20% was secured, rising to £500 per percentage for discounts above 20%, but capped at £6,000 per site.
37. In conclusion, the 12th February 2015 letter states the respondent will endeavour to maintain the 2015 commission structure, but acknowledged it may be reviewed, amended or adjusted.
38. By a written tenancy agreement commencing 1st September 2015, Mr Marlow was granted a two-year fixed-term tenancy of Muddle Cottage, 48 Guildford Road, RH12 3JU, at the peppercorn rent of £1.00 per calendar month. His landlords were Mr Paul and Mrs Clare Rooney.
39. The tenancy agreement was subject to special conditions, including that Mr Marlow would be required to vacate the property if he left the respondent company for any reason during the term of the tenancy.
40. When the two-year fixed term expired, it was renewed for a further 12 months at 50% of the market rent. The renewal tenancy contained the same special condition requiring Mr Marlow to vacate the property if he left respondent company.
41. The reason Mr and Mrs Rooney provided Mr Marlow with Muddle Cottage on such favourable terms was because of Mr Marlow's financial difficulties arising from the collapse of his estate agency business. At paragraph 20.1 of his witness statement, Mr Marlow says regarding:

The provision of rent free accommodation; this was a private arrangement between myself and Paul Rooney.
42. Initially he maintained that position during cross examination. But when pressed on the point, and after being referred to the special conditions of the tenancy, eventually he reluctantly accepted it was not strictly a private arrangement, and that there was some connection between his employment and the provision of this accommodation.
43. I found Mr Marlow's view on this lacked objectivity: even in making this concession, he stressed that Julian and Paul Rooney were involved. He pointedly underplayed the respondent's involvement and the connection with his employment, despite the special conditions of the tenancy.
44. Over the years, Mr Marlow received various letters regarding his

employment, including salary increases and bonuses, on 14th December 2016, 3rd February 2017, and 6th December 2017. He also received letters dated 7th September 2016, 4th January 2017, 10th March 2017, 18th March 2017, 22nd November 2017, and 4th December 2017 setting out action points agreed during one-to-one meetings with his line manager. Some of these letters included adaptations to the 2015 commission structure, for particular developments, such as the letters dated 7th September 2016 (see page 53), 4th January 2017 (page 56) and 18th July 2017 (pages 63 to 64).

45. In around 2017 the respondent agreed to Mr Marlow's request for commission to be paid monthly rather than annually. I understand that arrangement continued for the remainder of his employment.
46. Mr Marlow received an updated written employment contract dated 1st July 2018 (pages 68 to 76), setting out all the main terms of his employment, including his start date, job title, remuneration, place and hours of work, annual leave, and notice period. Although he did not return a signed copy of the contract, at the time he didn't object to the updated terms, and worked under the new terms. The contract also dealt with discretionary but not contractual commission.
47. Finally, regarding background documentation, Mr Marlow also received a letter dated 11th December 2019 regarding a salary increase.

The June 2020 Discussion

48. The dispute in this case centres around a conversation between Mr Marlow and Mr Stebbings in June 2020. Specifically, whether as Mr Marlow claims, during that conversation, Mr Stebbings told him the 2015 commission structure was being replaced by a new commission structure with immediate effect. Or whether, as Mr Stebbings contends, he was merely consulting Mr Marlow about hypothetical terms of a new scheme.
49. They both agree the structure discussed would apply only to allocated and draft allocated sites, which sites would attract a bonus payment of £175 per plot.
50. Mr Marlow's recollection is the per plot bonus would only replace the discount bonus, while the acreage bonus in the 2015 commission structure would be preserved under the new scheme. Whereas Mr Stebbings says he discussed a scheme that would scrap the acreage and discount bonuses, both being replaced with the payment per plot bonus.
51. No one else was present during the conversation.
52. To support his contention that the June 2020 discussion introduced a new binding commission structure that included a £175 per plot bonus, Mr Marlow relies on an e-mail he sent on 8th December 2020 to Mr Boughton about his mileage expenses (pages 90 to 91). He wrote:

Also at the point that it was decided we will incorporate schemes with a draft allocation status and it was agreed that discounts of 15% to 20% were highly unlikely to come by, a payment would be made on a per plot basis at £175.00

per plot to compensate the loss of any commission that could be earned on the discount negotiated. That was over a year ago and nothing was ever put in writing as it should have been.

53. He also relies on an e-mail he sent on 26th August 2021, before submitting a claim for commission for an unallocated site known as Kemps Farm, Hurstpierpoint, West Sussex. He wanted to claim £8,720 commission, consisting of an acreage bonus of £2,750, plus a claim for £175 per plot capped at £6,000.
54. As Kemps Farm was an unallocated site, under the 2015 commission structure it would only attract an acreage bonus of £2,750, and no per plot bonus was payable under that structure. But to recognise his achievement in securing this particular deal in very difficult circumstances, Mr Marlow requested his claim be treated as an exception to the existing commission structure. In so doing, he wrote: *“Given the commission structure I have been given by John for draft allocations and allocations last year of £175 per plot ...”*
55. The respondent agreed to pay the acreage bonus plus commission of £150 per plot on this site. Mr Marlow accepts that, as an unallocated site, the £150 per plot paid by the respondent was not paid under the scheme discussed in June 2020. He accepts it was not paid under any other commission structure, but instead was an exception.
56. Subsequently, when Mr Marlow submitted the Kemps Farm commission claim on 1st September 2021, he wrote: *“I have claimed on an allocated basis which is £175/plot offered by you in 2020 to cover the losses of this element above the % threshold.”*
57. In his e-mails of 21st August and 1st September 2021, Mr Marlow refers to a commission structure that included a £175 per plot bonus. He points out, the respondent didn’t question, correct or challenge his reference to that bonus. Instead, it paid his commission including the per plot bonus, albeit at a lower rate than claimed. He relies on this as evidence that a commission structure was introduced in June 2020 which included a per plot bonus.
58. I accept these e-mails show Mr Marlow believed a new commission structure was introduced in June 2020. But I consider Mr Stebbings did not appreciate the degree to which Mr Marlow had relied on what they had discussed as being a new binding commission structure. Mr Stebbings considered Mr Marlow was using the June 2020 discussion as leverage in trying to negotiate his Kemps Farm commission claim. For instance, at paragraph 15 of his witness statement, Mr Stebbings says: *“... I believe Simon knew that he was pushing his luck ...”*. That is why Mr Stebbings did not correct Mr Marlow’s misapprehension.
59. Therefore, I find Mr Marlow misinterpreted the June 2020 discussion of the hypothetical terms of a new commission structure that was merely in the planning stage. Instead, he misinterpreted this as the introduction of a new and binding commission structure.
60. In rejecting Mr Marlow’s evidence regarding the June 2020 discussion, I have

taken into account that his view on other matters has lacked objectivity. For instance, his initial insistence that his Muddle Cottage tenancy was unconnected to his employment, followed by a reluctant, and to some extent only partial acceptance of a connection. Also, him claiming that despite their friendship, other employees had equal access to Mr Boughton. I found this somewhat unrealistic: they were friends for years, who socialised and holidayed together, which wouldn't have been the case for most other employees. In these respects, I found Mr Marlow interpreted these events through a lense that suited him, rather than interpreting them objectively.

61. I conclude his interpretation of the June 2020 discussion was not objective either. Instead, Mr Marlow was influenced by the greater commission he could potentially achieve under the hypothetical terms discussed on sites such as Petersfield.
62. I have taken Mr Blumire's evidence into account. He wasn't present when Mr Marlow and Mr Stebbings met in June 2020. However, he gave evidence in support of the claim, saying Mr Stebbings had a similar conversation with him some months later. Paragraph 7 of his witness statement reads:

Without prompt in October 2020, I was advised by John Stebbings in a meeting, and believe Mr Marlow was advised, that Thakeham's intention was to review my salary package and part of this would be a fixed payment for allocated and draft allocated sites. My existing package which was incentivised in the basis of the discount that was applicable to a purchase price would not be appropriate on allocated or draft allocated sites. We were told the figure would be £175 per dwelling by John Stebbings in a meeting.
63. During cross examination, Mr Cook challenged Mr Blumire regarding the equivocal nature of his witness statement. Mr Blumire's oral evidence was more definitive. He said during a meeting with Mr Stebbings in 2020, he was told that a new commission structure was introduced. He also said that although Mr Stebbings told him the new structure would be put in writing later, he believed that was merely to confirm the scheme, which he understood was introduced with immediate effect.
64. Mr Blumire's witness statement is dated 11th November 2022, so was prepared slightly closer to the meeting he describes compared to his oral evidence on 3rd July. Although his oral evidence did not contradict his witness statement, to the extent it was more definitive, his oral evidence was different compared to his witness statement. Therefore, I attach less weight to his evidence.
65. I prefer Mr Stebbings' evidence. I found his oral evidence was consistent with his witness statement: he says in June 2020 he merely consulted Mr Marlow on the hypothetical terms of a new commission structure the respondent planned to introduce at a future date. He says he told Mr Marlow that when the new commission structure was approved by Mr Boughton, Mr Marlow would be notified in writing when it was being introduced.
66. In fact, according to Mr Marlow, during a later meeting on 5th November, Mr Stebbings said the terms discussed in June 2020 were invalid because they

were not in writing. I find that comment is consistent with Mr Stebbings' evidence. Although an agreement can be reached orally, this comment demonstrates Mr Stebbings approached the June discussion as exchanging views about a non-binding scheme, which at that stage was being planned but not implemented.

67. Mr Stebbings' evidence that any new scheme would be set out in writing, is also supported by the documents referred to at paragraphs 30, 35 to 36.2, 44, and 46 to 47 above. These show the respondent normally dealt with Mr Marlow's employment arrangements, including remuneration, in writing.
68. The financial impact of employees' remuneration means setting out such arrangements in writing would be good business practice.
69. For a company with over 200 employees, oral agreements with some or all employees about certain aspects of their remuneration would be impractical. It would be impossible to keep track of what arrangements had been agreed with whom. Furthermore, as conversations can be misinterpreted, agreeing contract terms verbally could cause disagreements about what precisely had been discussed, as turned out to be the case here.
70. For all these reasons, I find Mr Stebbings would not seek to, and did not, introduce a new commission structure orally by means of the June 2020 discussion.
71. It follows that I consider there were two and not three commission structures: firstly the 2015 commission structure; and secondly, the 2021 commission structure, which I will now deal with.

The 2021 Commission Structure

72. During a meeting on 9th September 2021, Mr Boughton told Mr Marlow a new commission structure was being introduced. That discussion was confirmed in a letter to Mr Marlow dated 24th September 2021 (pages 112 to 113). The letter explained the structure discussed on 9th September 2021 ("2021 commission structure") applied only to allocated and draft allocated sites, providing for a £150 per plot bonus, which replaced both the acreage and discount bonuses, and was capped at £10,000 per site.
73. The letter continued:

Below I have set out your new commission structure from 1st September 2021 and this will apply to all new sites but exclude the below list of sites that will be managed under your previous commission structure.
74. The list consisted of sites Mr Marlow chose to be excluded from the 2021 commission structure; that list included the Petersfield 169 Causeway ("Petersfield") site.
75. As the respondent maintains the 2021 commission structure was the second commission scheme, it says the letter's reference to "*your previous commission structure*", meant the 2015 commission structure. But Mr Marlow erroneously believed the 2021 commission structure was the third

commission structure: the first being the 2015 commission structure, and the second being the scheme he thought was introduced in June 2020. Therefore, he thought the “*previous commission structure*” referred to in the letter was the scheme discussed in June 2020.

76. Finally, as regards the 24th September 2021 letter, it also notified Mr Marlow he was being promoted to Associate Land Director, and his basic salary would increase from £59,100 to £75,000 per annum. The 2021 commission structure and Mr Marlow’s promotion took effect retrospectively from 1st September 2021.

The Grievance

77. Mr Marlow objected to the 2021 commission structure. He set out his concerns in a detailed e-mail sent to Mr Stebbings on 6th October 2021 (pages 118 to 120), in particular, that his earnings would reduce. In his witness statement, Mr Marlow describes this e-mail as a grievance. But the e-mail didn’t expressly state it was intended to invoke the respondent’s grievance procedure, nor was it headed formal grievance or use the word grievance anywhere in the e-mail. In his oral evidence, Mr Marlow clarified that the 6th October e-mail was intended to be an informal grievance.
78. As a result of the e-mail, Mr Marlow met with Mr Stebbings and Mr Boughton on 21st October to discuss Mr Marlow’s concerns. Mr Stebbings and Mr Boughton tried to reassure Mr Marlow that his earnings would be reviewed quarterly to assess the impact of these changes. Additionally, Mr Boughton gave Mr Marlow a personal guarantee that he would earn at least £140,000 that year, to ensure his earnings didn’t reduce compared to the previous year’s earnings. Mr Boughton said he would confirm the guaranteed minimum earnings in writing.
79. An e-mail from Mr Stebbings to Mr Marlow sent on 25th October confirmed most of what had been discussed on 21st October 2021. However, it didn’t expressly deal with Mr Boughton’s guarantee on minimum earnings. Mr Marlow thanked Mr Stebbings for the e-mail, and signed off by hoping he enjoyed his upcoming break. Considering the cordial nature of his reply, Mr Stebbings and Mr Boughton believed Mr Marlow was satisfied with the outcome.
80. Mr Marlow did not receive Mr Boughton’s written income guarantee before he gave notice, or before he left the company. Mr Boughton said he intended to confirm this in writing, but due to other work commitments, and he believes he also took annual leave during this period, he didn’t get an opportunity to do so before Mr Marlow gave notice.
81. Nonetheless, as stated at paragraph 67 above, I consider most of the respondent’s dealings regarding remuneration were notified or confirmed in writing. It was a matter of weeks between the meeting on 21st October and Mr Marlow giving notice on 17th November, with Mr Boughton likely to have been on annual leave during part of that period. This explains why, in this particular instance, their discussion about Mr Marlow’s income guarantee, was not confirmed in writing.

82. The respondent didn't consider Mr Marlow's 6th October 2021 e-mail to be a grievance. That is because it was not headed formal grievance as required under the grievance procedure, nor did the e-mail itself say a grievance was being raised. In my judgment, the respondent was entitled to treat the e-mail as a general complaint that did not invoke its grievance procedure. However, even if the grievance procedure had been invoked, the respondent's handling of the complaint raised was broadly consistent with the way an informal grievance would be dealt with. It arranged the meeting on 21st October, and Mr Stebbings confirmed most of what was discussed in his e-mail sent a few days later.
83. If, as Mr Marlow says, he was invoking the grievance procedure, and he was dissatisfied with the outcome, he could have progressed the matter to a formal grievance. I note he didn't do so. Instead, he responded cordially to Mr Stebbings' e-mail, without any hint of dissatisfaction with the contents.
84. Mr Marlow's 6th October e-mail dealt with the 2021 commission structure. It did not deal with the Petersfield commission claim, which had not yet been submitted.

The Petersfield Commission Claim

85. On 2nd November 2021, Mr Marlow submitted his claim for commission in respect of Petersfield (pages 126 to 128) based on the scheme discussed in June 2020. He did so, believing that because he had chosen to exclude Petersfield from the 2021 commission structure, his claim should be made on the commission scheme he believed was introduced in June 2020.
86. Mr Marlow's Petersfield commission claim consisted of the following:
 - 56 plots @ £175 per plot = £9,800;
 - Acreage claimed at £2,585.00.
87. These amounted to £12,385, but he submitted a claim capped at £12,000.
88. It's apparent from the commission claims submitted in respect of Kemps Farm and Petersfield that both parties accepted submitting claims for commission by e-mail was convenient and acceptable. I was not referred to any written term stating that if a claim was submitted that requested the wrong amount of commission, that error would invalidate the entire claim, such that no commission would be payable at all.
89. Therefore, providing a timely claim was submitted by e-mail under the 2015 commission structure, and the respondent could ascertain what commission was properly payable in respect of that claim, I find the respondent was contractually bound to pay the commission due.
90. From the respondent's perspective, Mr Marlow was not entitled to the commission claimed as it was based on the June 2020 discussion rather than an agreed commission structure. Mr Marlow and Mr Stebbings met on 5th November 2021 to discuss the Petersfield commission claim. According to Mr Marlow, during that meeting, Mr Stebbings said the commission structure discussed in June 2020 was not valid because it was not in writing.

It seems it was as a result of their meeting on 5th November, Mr Stebbings realised Mr Marlow had treated their June 2020 discussion as introducing a new commission structure. He later explains this in an e-mail to Mr Boughton sent on 8th November 2021 which reads:

Getting to the bottom of this and the reasoning behind his position is that over a year ago he and I had talked about creating an incentive for draft allocated and allocated sites at which point I had indicated to him that we were looking at a figure per plot using £175/plot but needed to understand the quantum of sites etc ... I believe I was clear that this was an indication of what we were looking at and that whatever was proposed would need signing off by you and Julian. Then as we have done put in writing to both of them.

91. Mr Boughton made clear to Mr Stebbings that Mr Marlow's claim for £12,000 commission in respect of Petersfield, should not be authorised in the amount claimed. The respondent therefore rejected Mr Marlow's claim for commission claim on the grounds that it was not claimed in accordance with any scheme that existed. Mr Stebbings asked Mr Marlow to submit a new claim under the 2015 commission scheme, but Mr Marlow didn't do so. Presumably if he had submitted that claim, the respondent would have paid it.
92. I agree with the respondent that Mr Marlow (see paragraph 13 page 31):
"... did not submit an amended commission claim, but instead remained adamant that he was entitled to the £12,000 as per his calculations."
93. For Mr Marlow it was all or nothing: either the respondent paid the amount claimed, nothing less would be acceptable.
94. Mr Marlow and Mr Stebbings spoke by telephone on 17th November 2021: Mr Stebbings suggested Mr Marlow meet him and Mr Boughton to discuss the Petersfield commission claim. Mr Marlow (correctly) believed the respondent would not pay the £12,000 commission claimed. He therefore told Mr Stebbings, meeting would be pointless, and explaining he was left with no alternative but to resign. Mr Stebbings asked him to reconsider overnight, and discuss this with his partner.
95. However, in an e-mail sent on 17th November 2021 to Mr Boughton (page 131), copied to Mr Stebbings and Ms Richardson, Mr Marlow wrote:
Dear Rob,
Please accept this email as my resignation.
I am prepared to assist with any handover during my notice period.
Regards
96. Mr Boughton responded by e-mail the next day confirming he accepted Mr Marlow's resignation. This was followed by a letter from Ms Richardson dated 19th November 2021 clarifying Mr Marlow's last day would be 17th December 2021.

97. Although Mr Marlow's e-mail doesn't give any reasons for resigning, I find his reason for resigning was the respondent's refusal to pay the Petersfield commission in the amount claimed. At the very least, I find the refusal to pay that commission was a factor that caused him to resign.
98. My reasons are:
- 98.1 Mr Marlow and Mr Stebbings confirm the Petersfield commission claim was discussed during their 17th November 2021 telephone conversation.
- 98.2 Mr Marlow learnt during that conversation that the respondent's refusal to pay the commission claimed would be maintained. He therefore told Mr Stebbings that he would resign.
- 98.3 Mr Marlow sent his resignation e-mail the same day, and shortly after his telephone call with Mr Stebbings.
99. Mr Marlow was not paid any commission for the Petersfield site. Mr Cook justified this by relying on the 2015 commission structure, in particular he referred me to the provisions summarised at paragraph 35 above, which states commission would only be paid to Mr Marlow if he was an employee when the bonus was paid on 31st January. Mr Davies argued the parties had established a custom and practice whereby commission was no longer paid annually, as the 2015 commission structure envisaged. Instead, it had been paid monthly since around 2017.
100. The 2015 commission scheme stated its written terms may be amended or adjusted. They provided commission would be paid annually, however it had been paid monthly since 2017. Therefore, as regards the 2015 commission structure, I find the written terms had been varied so that commission was payable monthly.
101. The Tribunal received the claim form and Grounds of Claim on 3rd May 2022. The response form and Grounds of Resistance were accepted by the Tribunal on 11th July 2022.

The Law

102. Unfair (Constructive) Dismissal
- 102.1 By section 95(1)(c) of the Employment Rights Act 1996 an employee who resigns will be regarded as being constructively dismissed if the conditions at paragraphs 102.2 to 102.5 below are satisfied.
- 102.2 An employee is entitled to resign where an employer's conduct amounts to a fundamental breach of the contract of employment.
- 102.3 The term of the contract must be clear and certain, with the parties intending to be legally bound by it.
- 102.4 The employer's breach must be a factor causing the employee's resignation.

- 102.5 In these circumstances, a resignation amounts to a dismissal whether it is with or without notice.
103. Wrongful Dismissal
- 103.1 Where an employee is dismissed, they are entitled to the notice period set out in their contract of employment, providing the contractual period is not less than the notice period at section 86 of the Employment Rights Act 1996.
- 103.2 If there is no contractual provision or it is less than the notice period at section 86 of the 1996 Act, the employee is entitled to the notice period in that section.
- 103.3 An employee is entitled to the contractual or statutory notice period irrespective of whether they are actually or constructively dismissed.
104. Unauthorised Deduction from Wages Claim Contrary to Section 13 of the Employment Rights Act 1996
- 104.1 The amount of wages properly payable to an employee is based on the terms of the employee's contract.
- 104.2 The terms of the contract of employment may be express, implied term or a combination of both.
- 104.3 A contractual term may only be implied in limited circumstances, for instance, if the term is implied by the parties' custom and practice.
- 104.4 By the date an employee is due to be paid, if they have received less than the amount properly payable to them, the deficiency in pay amounts to an unlawful deduction of wages.
105. ACAS Code of Practice 1: Disciplinary and Grievance Procedures (2015)
- 105.1 By section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, where an employer has unreasonably failed to comply with the ACAS Code of Practice relating to certain specified claims brought by an employee, the employment tribunal may award the employee an uplift of no more than 25%.
- 105.2 The specified claims referred to at paragraph 105.1 above include claims regarding the unauthorised deduction of wages, unfair dismissal, including constructive dismissals, and breach of contract claims, including wrongful dismissal.
106. Statement of Terms
- 106.1 By section 1 of the Employment Rights Act 1996, on or before the start of their employment, an employee is entitled to a written statement of the main terms of employment including the date on which employment began and their place of work.

- 106.2 Where an employee has succeeded at an employment tribunal in certain specified claims brought against their employer, section 38 of the Employment Act 2002 applies.
- 106.3 The specified claims referred to at paragraph 106.2 above include a claim under Part II of the Employment Rights Act 1996 for an unauthorised deduction from wages.
- 106.4 By section 38 of the 2002 Act, if the employer is in breach of section 1 of the Employment Rights Act 1996 on the date the employment tribunal proceedings begin, the Tribunal must award the employee either two or four weeks' pay unless there are exceptional circumstances which would make such an award unjust or inequitable.

Conclusions

Unfair (Constructive) Dismissal

107. I find that the 2015 commission structure applied to the Petersfield site for the following reasons:
- 107.1 Mr Marlow submitted his Petersfield commission claim on 2nd November 2021. By that date, the 2021 commission structure was in place.
- 107.2 However, by an express agreement between the parties, confirmed in the respondent's letter dated 24th September 2021, Petersfield was excluded from the 2021 commission structure. Instead, commission for Petersfield came under the previous commission structure.
- 107.3 As I have found that no new commission structure was introduced in June 2020, the previous commission structure that would apply to Petersfield was the 2015 commission structure.
- 107.4 Under the 2015 commission structure commission the commission due on Petersfield was an acreage bonus amounting to £2585.00.
108. Therefore, the respondent was entitled to refuse to pay the £12,000 commission claimed for Petersfield.
109. However, the respondent was contractually bound to pay commission on Petersfield in the amount of £2,585.00 for the following reasons:
- 109.1 The respondent was able to (and did) identify the correct amount of commission payable from the Petersfield commission claim that was submitted. This amount was clearly broken down.
- 109.2 Although the commission claim submitted claimed the wrong amount of commission, there was no express provision that such an error would invalidate the entire claim.

- 109.3 In 2017 the respondent agreed to pay Mr Marlow's commission monthly, rather than to pay it annually on 31st January.
- 109.4 This was a variation to the 2015 commission structure, the written terms of which expressly provided for amendment or adjustment.
- 109.5 Having submitted the commission claim in November 2021, the commission claim should have been paid in December 2021, when Mr Marlow received his final salary.
110. To this extent, the respondent's failure to pay Mr Marlow the £2,585.00 commission amounted to a breach of contract. However, I do not consider this amounted to a fundamental breach of contract because Mr Marlow's commission claim was seriously flawed in that it claimed more than four times the amount of commission due. While I don't consider that error invalidated the entire claim, it was because of Mr Marlow's serious error that the respondent rejected his claim.
111. I am not suggesting Mr Marlow's commission claim was dishonest. In my judgment he honestly, but mistakenly, believed he was entitled to claim commission under the scheme discussed in June 2020.
112. If I am wrong, and the respondent's refusal to pay £2,585.00 commission was a fundamental breach, I do not consider that breach was a factor in Mr Marlow resigning.
113. I find that Mr Marlow resigned because the respondent refused to pay the amount of commission claimed, namely £12,000. My reasons are:
- 113.1 Mr Stebbings invited Mr Marlow to submit a new commission claim under the 2015 commission structure. It would have been apparent to Mr Marlow that if he had re-submitted his claim for the correct amount, it would have been paid. He chose not to re-submit his claim.
- 113.2 That Mr Marlow considered meeting with Mr Stebbings and Mr Boughton to discuss his Petersfield commission claim was pointless, also indicates his unwillingness to compromise on the amount he claimed.
114. For both these reasons, I find that for Mr Marlow, unless the respondent paid the £12,000 he claimed, his only option was to resign.
115. Therefore, in the absence of a fundamental breach of contract, or alternatively, because any fundamental breach was not a factor that caused Mr Marlow to resign, I find that he was not constructively dismissed.

Wrongful Dismissal

116. As I have found Mr Marlow was not constructively dismissed, the issue of wrongful dismissal and notice pay do not arise.

Unlawful Deduction from Wages

117. As stated at paragraph 108 above, I find that the commission properly payable for the Petersfield site was £2,585.00.
118. Mr Marlow was not paid any commission for the Petersfield site.
119. Therefore, I find the £2,585.00 commission that the respondent failed to pay Mr Marlow amounts to an unlawful deduction from his wages.

ACAS Code of Practice 1: Disciplinary and Grievance Procedures (2015)

120. I consider Mr Marlow's 6th October 2021 e-mail was a general compliant, and not a grievance, noting it did not comply with the respondent's grievance procedure, which Mr Marlow was aware of.
121. If I am wrong and the 6th October 2021 e-mail was an informal grievance, the respondent followed its grievance procedure by trying to resolve the matter informally. Mr Marlow gave no indication he wanted to take the matter further. The matter was dealt with adequately, so there was no breach, alternatively, there was no unreasonable failure to comply with the ACAS Code.
122. Mr Marlow's e-mail was a complaint about the 2021 commission structure. It was not a complaint about the Petersfield commission claim. Therefore, even though I have found there was an unlawful deduction of wages in respect of the Petersfield commission, awarding an uplift is not justified. That is primarily because no grievance was brought, alternatively, any grievance was dealt with adequately.
123. In any event, the complaint or grievance was not in relation to the Petersfield commission claim. The respondent's failure to pay the £2,585.00 commission was a consequence of Mr Marlow's erroneous commission claim.
124. Accordingly, in all the circumstances, it would not be just and equitable to award an uplift, even if there had been an unreasonable failure to comply with the ACAS Code.

Written Statement of Terms

125. I find that by omitting Mr Marlow's start date and place of work in the contract of employment dated 19th February 2013, the respondent failed to comply with subsections 1(3)(b) and 1(4)(h) respectively of section 1 of the Employment Rights Act 1996.
126. I find that Mr Marlow's contract of employment dated 1st July 2018 provided all the main terms required by section 1 of the 1996 Act.
127. As all the main terms of employment were provided to Mr Marlow before these proceedings were brought, notwithstanding the February 2013 breach of section 1 of the 1996, no award is payable under section 38 of the Employment Act 2002.

CASE NUMBER 2301465/2022

Employment Judge Tueje
Date: 28 July 2023