Case Number: 1302163/2022

EMPLOYMENT TRIBUNALS

Claimant: Mr J Biddulph

Respondent: Eastern Countries Leather (In Partnerships)

Heard at: Birmingham by CVP on 20 – 22 September 2023

Before: Employment Judge Hindmarch

Appearances
For the claimant: In person
For the respondent: Mr Griffiths – Counsel

RESERVED JUDGMENT

1. The complaint of unauthorised deduction from wages is not well founded and is dismissed.

2. The complaint of breach of contract in relation to notice pay is not well founded and is dismissed.

3. The complaint of breach of contract in relation to expenses is not well founded and is dismissed.

4. The complaint in respect of holiday pay is well founded and the sum of £471.13 is awarded.

5. The Respondent's counter claim is well founded, and the Claimant must pay the Respondent the sum of £7766.47.

REASONS

1. This case came before me for a 3-day hearing by Cloud Video Platform on 20 – 22 September 2023. The Claimant was a litigant in person and the Respondent was represented by Counsel, Mr Griffiths. I had what was described as a 'combined bundle' comprising the Claimant's bundle running to 68 pages and the Respondent's bundle running to 360 pages. I also had a

Respondent's supplementary bundle running to 26 pages. I shall refer to page numbers in this Judgment as follows: Claimant's bundle (CB – number), Respondent's bundle (RB - number), and Respondent's supplementary bundle (RSB - number).

2. On the first day of the hearing, I heard evidence from the Claimant and from Malcom Burnett for the Respondent. Mr Burnett is a self-employed sales manager working for the Respondent. On the second day I heard evidence from a further 3 witnesses for the Respondent – Hugh Byrne (known as Paddy) General Manager, Jacinta Dean, Partner and Finance Manager, and Natalie Frapwell, E-Commerce Manager. On the morning of day 3 I heard submissions and reserved my Judgment with the agreement of the parties.

3. The Respondent is a partnership, the partners being Jacinta Dean and Susan Ward. The Respondent is in the business of manufacturing and selling chamois leather, sheepskin rugs, coats, gloves, slippers, purses, handbags, and other such goods. It owns a UK based tannery which it uses to manufacture some of these products. It sells to trade customers and also uses web-based trading platforms such as eBay and Amazon.

4. By an ET1 filed on 2 May 2022, and following a period of ACAS Early Conciliation from 19 – 28 April 2022, the Claimant brought complaints of a failure to pay notice pay and holiday pay, for breach of contract in respect of an alleged failure to pay expenses, and for unlawful deductions from wages in relation to commission payments. By an ET3 filed on 9 June 2022, the Respondent indicated its intention to defend these claims and brought a counterclaim for monies it said was owed to it by the Claimant. More detail regarding the counterclaim was given in a set of Further and Better Particulars of Counterclaim (RSB, pages 1 - 5). The Respondent was seeking:

    a. The outstanding balance of a loan.
    b. The cost of a replacement MacBook.
    c. Recovery of income tax and National Insurance on a bonus payment.

5. Where there was a dispute in evidence I was assisted by contemporaneous email exchanges which I found most persuasive in my deliberations.

6. The Claimant commenced employment with the Respondent in the role of Website Manager on 1 September 2018. On 22 August 2018, following his interview for the position, Mr Byrne emailed the Claimant stating the offer was 'a starting salary of £30,000.00 per annum, plus commission to be agreed, (RB, page 91).

7. The Respondent issued the Claimant with a written contract of employment signed by the Claimant on 9 October 2018, (RB, pages 94 – 109). clause 7 dealt with 'Renumeration' and provided:

a. “7.1 Your annual salary is £30,000.
b. 7.3 You will be entitled to commission payments, the terms of which are to be agreed between you and the Partnership following the updating of the Partnership’s websites. The Partnership and you shall agree the necessary improvements and/or updates to each of the websites. The websites shall be deemed to have been updated once such agreed improvements have been tested and each of the websites have gone live.
c. 7.4 The Partnership may alter the terms of any commission scheme, including any targets, or withdraw them altogether at any time on reasonable written notice to you.
d. 7.6 We shall be entitled to deduct from your salary or other payments due to you owing money which you may owe to the Partnership at any time.”

8. Clause 8 dealt with ‘Express’ and provided:

    a. “8.1 The Partnership will reimburse your reasonably incurred expenses wholly, properly and necessarily incurred by you in the course of your employment.”

9. Clause 2 dealt with ‘Term and Termination’ and provided that the notice to be given by either party was ‘not less than one month’s notice in writing.’

10. Clause 21 was headed ‘obligations on leaving the Partnership’ and provided that any property belonging to the Partnership ‘including lap-top computers’ must be returned ‘in good condition’ on the termination of employment.

11. The contract provided that the Claimant’s line manager was Mr Burnett. It is not in dispute that during his employment, up until he handed in his notice, the Claimant’s performance was good. During the notice period the Respondent says the Claimant essentially took steps which were damaging to its business. To the extent I need to make findings on these matters, I shall do so later in this Judgment.

12. The Claimant spent the first few months of his employment creating a new website for the Respondent. The Respondent already had a website in place prior to the commencement of the Claimant’s employment, for the use of its existing trade customers, however the ordering system was out of date and cumbersome. The Claimant created a new website, added more of the Respondent’s stock to this, and created an on-line ordering system. The Claimant also began developing the Respondent’s presence on sites such as Amazon, eBay and Etsy.

13. It is clear that in 2019 the Claimant and Mr Burnett discussed the commission that might be paid to the Claimant, and which was set out in clause 7.3 of the

contract of employment. Mr Burnett's evidence was that he and the Claimant had a number of discussions about commission and about an 'opening 5%' but that he was not a decision-maker, and the final decision would be that of Mr Byrne. Mr Burnett said he asked the Claimant for sales figures that he could share with Mr Byrne on this topic. On 7 October 2019 the Claimant emailed a spreadsheet to Mr Burnett setting out various products, prices, and profit margins. On 8 October 2019 Mr Burnett replied saying "Add new column headed JB (the Claimant) – this'll be your 5%", (CB, page 45). This is contemporaneous evidence that commission in the figure of 5% had been discussed prior to this date. Mr Burnett's evidence was that the Claimant was keen to have the commission agreed and in place but that it was only Mr Byrne, in the role of General Manager, who could agree the commission terms.

14. On 5 November 2019 the Claimant emailed Mr Burnett and asked, "Regarding my commission do you need me to email you online sales to date?" On the same day Mr Burnett replied, "Please update me from the very start week with regard to commission – these figures must not include VAT", (CB, page 45).

15. The Claimant had raised with Mr Burnett the possibility of the Respondent loaning him some money for house renovations. Mr Burnett spoke with Mr Byrne about this and then asked the Claimant to liaise directly with Mr Byrne.

16. On 7 November 2019 the Claimant emailed Mr Byrne, who has experience and business interests in construction, "Would it be possible to speak with you for 15 minutes about my house renovation?" The email exchange suggests they agreed to speak on 8 November 2019, (RB, page 118). In that conversation Mr Byrne agreed to provide a loan to the Claimant.

17. On 5 December 2019 Mr Byrne emailed the Claimant, "When will you need the funds for your house extension." The Claimant replied asking, "Is within 2 weeks possible? … with labour he has estimated £10,000." Mr Byrne replied agreeing to provide this sum (RB, page 119).

18. On 20 December 2019 the Claimant emailed Mr Byrne "Here are details for my bank for the £10,000 loan." In evidence the Claimant sought to argue this £10,000 was in fact commission owed to him, however the contemporaneous documents make it clear it was a loan with the Claimant himself calling it such in his email dated 20 December. It is not in dispute that the money paid to the Claimant was paid by the Respondent business. No repayment terms were agreed, no loan agreement was prepared, and the loan was said to be interest free. Mr Byrne's evidence was that he saw the loan as a mid-long term arrangement which might take 3 – 5 years to be repaid. It is also not in dispute that the parties had intended to put in place a commission scheme for the Claimant and that any payments of commission once agreed might have been used as repayments for the loan. On 18 December 2019 Mr Burnett had emailed the Claimant to say, "Would you like me to confirm to HB (Mr Byrne)

that you would like to proceed with the loan and use the commission when in place as an offset?", (CB, page 51).

19. In March 2020 the COVID Pandemic caused the country to be placed in lockdown. This caused an up-tick in on-line shopping and a surge in business for the Respondent. During 2020 no agreement was reached in relation to commission for the Claimant and there was no documentary evidence of it being discussed.

20. In early 2021, no commission scheme yet being in place, the Claimant raised the issue with Mr Burnett. Mr Burnett in turn raised this with Mr Byrne who asked Mrs Dean to work out a potential commission structure. Mrs Dean began looking into this but concluded it would be too difficult to implement. The Respondent can trace all orders from on-line sales through Amazon, eBay, Etsy and the like however it also has a trade website where orders are placed by trade customers, many of which pre-dated the Claimant's employment. Some orders are placed by trade customers themselves, some through Mr Burnett and some via the Respondent's Scottish agent. Other customers are recruited through the Respondent's presence at trade shows. Mrs Dean concluded it would take far too much time to work through the various sales/orders received in order to isolate sales that could be said to be won by way of the Claimant's efforts. She concluded it would be impossible to implement a workable commission scheme and she informed Mr Byrne of this.

21. As no commission scheme had yet been agreed, Mr Burnett asked Mr Byrne if the Respondent could pay £5000 to the Claimant for the work he had done in 2020.

22. On 13 January 2021 Mr Burnett emailed the Claimant and stated, "Didn't hear from HB (Mr Byrne) yesterday to discuss your loan – no doubt I will today", (RB pages 124 – 125). It must be the case that this reference to a 'loan' is a misnomer – it was a reference to essentially a bonus to be paid to the Claimant and as detailed at paragraph 21 above.

23. On 1 February 2021 Mr Burnett emailed Mr Byrne, subject 'Online and Joe.' His email began, "Following our conversation regarding Joe and commission I've prepared the figures to the end of January 2021." He went on to set out various sales figures. He continued "The commission hinted to Joe was 5%. On the understanding that it could increase or decrease as the online business developed which be accepted," He went on to praise the work the Claimant had done since joining the Respondent, (CB, pages 52 – 53).

24. On 5 February 2021 Mr Burnett emailed Mr Byrne headed 'Joe Biddulph' and stated, regarding a conversation with the Claimant, "I mentioned the loan and that you were prepared to transfer the sum of £5k – there's no question he was very pleased and said this would help him massively." Mr Byrne replied to say

the BACs payment had been processed (RB, page 127). It is not in dispute that the Respondent paid this sum of £5000 to the Claimant in February 2021, the dispute is the nature of the payment. The Claimant in evidence argued this was a commission payment. He argued why would the Respondent pay him a further £5000 if he owed them £10,000 in relation to the earlier loan. Essentially, he argued both payments were commission. I accept there was some confusion regarding the Respondent's description of the £5000 as a loan however it is clearly a bonus payment for the work done by the Claimant for the previous year. I accept that Mr Burnett had asked Mr Byrne for a payment to reflect this work. On or around the same time the Respondent increased the Claimant's basic salary from £30,000 to £35,000. No deductions were made to the £5000 and the Respondent's counterclaim included a sum of £1705 described as 'recovery of income tax and National Insurance on bonus payment of £5000.'

25. On 18 February 2021 the Claimant and Mr Byrne exchanged emails to arrange a face-to-face meeting. They agreed to meet on 23 February (RB, page 128). The Respondents evidence was that at this meeting Mr Byrne explained the difficulties in calculating commission and a pay rise was agreed instead. The Claimant disputes this.

26. On 22 April 2021 Mr Burnett emailed Mr Byrne referencing a meeting he (Mr Burnett) had had with the Claimant and stating, "FYI: HE passed comment which I thought you'd appreciate knowing… he is very happy you increased his salary in preference to commission", (RB, page 130). The Claimant was not copied into this email. He accepts he received a pay rise but does not accept he agreed to this (and the £5000 lump sum) as a substitute to commission. I accept the Claimant was not copied in however the email appears to be a contemporaneous report from his line manager to Mr Byrne about his acceptance of this substitution and his happiness at the arrangement.

27. In December 2021 the Claimant approached Mr Burnett about a further pay rise.

28. On 8 December 2021 the Claimant emailed Mr Burnett saying, "I am looking forward to hearing Paddy's decision on the salary increase." He set out sales figures for 2021 to date and went on, "A 5% commission on this year's figures would be £17,500", (RB, page 134). The Claimant argued that by being asked to produce sales figures at the end of 2021, it was clear commission was still an issue to be decided.

29. On 6 January 2022 Mr Burnett emailed the Claimant referencing a meeting between Mr Burnett and Mr Byrne that had taken place on 5 January 2022. Mr Burnett stated, "This conversation inevitably led to the subject of your salary. I know you were of the opinion it could go one of two ways and unfortunately, I have to inform you that it will not be possible to give you a pay rise this year. For your information, there have been no pay increases for staff in the factory

either. Last year you did have a very big increase from £30,000 to £35,000." The email went on to reference increased costs of importing goods and order cancellation as a result of freight delivery disruption.

30. The Respondent had issued the Claimant with a MacBook for the purpose of his role. There was a problem with this device in February 2022 and the Claimant took it to Apple to see if it could be fixed. The store produced a report dated 24 February 2022 stating 'Cosmetic Condition – No signs of tampering or misuse, internally the machine is in good condition with no signs of accidental damage. Proposed resolution – Hardware repair needed.' The quotation for the cost of repair was £549, (CB, page 55). Instead of repairing the device the Respondent agreed to supply the Claimant with a new MacBook and did so in March 2022.

31. In or around March 2022 the Claimant applied for a new job with JML Group. On 18 March 2022 the founder and CEO JA emailed the Claimant thanking him for his CV and job application, (CB, page 56).

32. On 28 March 2022 the Claimant emailed Mr Burnett attaching his resignation and stating his last day of employment would be 25 April 2022. He stated, "I would like to thank you for all of the opportunities presented to me within the period of my employment. I have enjoyed my time working at (the Respondent)", (CB, page 57). He made no mention of outstanding commission.

33. On 30 March 2022 the Claimant emailed a long list of his duties to Mr Burnett and Mr Byrne (CB, page 58).

34. On 1 April 2022 Mr Burnett emailed the Claimant, "I've had a catch-up with Paddy… he is up to date on your email resignation and naturally disappointed that you are going but understands how important your career progression is and wishes you success and happiness in your new employment. He has asked that the outstanding loan will need to be repaid prior to… 25 April 2022 (the final date of employment)", (CB, page 59). On 8 April 2022 Mr Byrne emailed the Claimant asking for repayment proposals, (CB, page 59). Mr Byrne chased the Claimant by email of 14 April 2022 (CB, page 66).

35. On 14 April 2022 the Claimant emailed Mr Byrne stating, "I dispute what you are saying regarding owing £10,000. Further to disputing I believe I am owed 5% commission on all partnership websites sales I have built, and new online sales channels introduced – arriving from our contractual agreement and the 5% commission which was agreed during my employment", (CB, page 60).

36. On 19 April 2022 Mrs Dean emailed the Claimant and Mrs Frapwell headed 'Acorn Leather' and stating "Another financial year has passed on Acorn Leather and it isn't making enough profit to continue… Please could you do what needs doing to close down any ordering windows with Acorn in time for

the end of June." On the same day the Claimant replied, "All updated. No more orders should come through as Acorn Leather", (CB, page 61).

37. On 25 April 2022, Mrs Frapwell emailed the Claimant saying there had been no online orders over the weekend and there appeared to be no products listed on Amazon and eBay. The Claimant replied that Mrs Dean had instructed him to close down 'any ordering windows under Acorn Leather.' Mrs Frapwell replied, "Unfortunately, I think this may have been naivety in Jacinta's understanding of how the sales channels work rather than a request of all sales on Amazon and eBay that are through Acorn Leather", (CB, page 62).

38. In the Respondent's bundle at RB, pages 164 – 165, was the same email exchange save that Mrs Frapwell had changed the work 'naively' for 'unfamiliarity. Mrs Dean's evidence was that her intention, in sending the email of 19 April 2022, was to have the Claimant or Mrs Frapwell close down the Acorn Leather website only and not all trading platforms which used the word 'Acorn.' The Claimant's evidence was that he did what he was asked by the owner of the Respondent and closed down Acorn Leather but left other trading websites live. He informed Mrs Dean that he had actioned her request. Given the issues in this case, I do not believe I need to find factual findings on this particular set of events, save to say on the contemporaneous email evidence it does appear that there was miscommunication and confusion.

39. On 25 April 2022 the Claimant met with Mr Burnett and returned to him both MacBooks he had in his possession. Mrs Frapwell was not present. On 26 April 2022 Mr Burnett emailed the Claimant to confirm he had dropped off the new MacBook to Mrs Frapwell but that the MacBook had been wiped and asking why that was (RB, pages 155 – 156). The Claimant's evidence was that he had this new MacBook around 4 weeks when he returned it. There was no software belonging to the Respondent on it as he conducted all of his duties on Cloud based platforms. He simply logged out of his Apple ID before returning it. I make no findings about this as I believe it to be unnecessary given the issues between the parties in this claim.

40. On 28 April 2022 Mr Burnett again emailed the Claimant stating that he was replying to the email the Claimant had sent to Mr Byrne on 14 April 2022 and saying, "Could I please ask what contractual agreement you are referring to… A commission arrangement was discussed at length but in the end the decision was to increase your salary by £5k from £30k to £35k which was a 16.66% increase…for your information my email to Hugh Byrne dated 22nd April 2021 does include a conversation that I'd had with you where you expressed your preference to the salary increase over commission (see attached)", (RB, page 157). The Claimant did not reply.

41. On 28 April 2022 the Claimant emailed Mrs Dean, "I haven't received my wages for the last month of my employment… please can you provide me with reasoning why I have not been paid?", (CB, page 64).

42. On 5 May 2022 Mrs Dean replied, "I can confirm that your salary to 25.4.222 has been withheld. As you are aware there is a dispute regarding a £10,000 loan made to you. Please check your contract of employment at point 7.6", (CB, page 65).

43. On 5 May 2022 Mr Byrne emailed the Claimant asking for proposals regarding the repayment of the loan by 13 May 2022 failing which, "I will engage solicitors to act on my behalf", (CB, page 66). The Respondent's counterclaim included the sum of £7766.47 described as the 'outstanding balance of the £10,000 loan', so the Respondent had withheld the sum of £2233.53 from the Claimant's April salary, accrued holiday pay and expenses due.

44. On 13 June 2022 the Respondent obtained a report from Gatenby Services regarding the MacBooks. It confirmed the first MacBook that had been replaced 'did not power on' and that it 'had previously been opened, indicated by scratch marks around the bottom panel screws.' As regards the replacement MacBook which was now in use by Mrs Frapwell it stated, 'The device was reported as wiped by previous employee (the Claimant), on inspection that did appear to be the case. The device was factory reset… No files or user accounts were left on the device. Running a file recovery scan showed that no files from before the device was reset, were recoverable', (RB, page 166). The Respondent's counterclaim included a sum of £853.08 for a replacement MacBook. This was withdrawn in submissions such that I do not need to make findings about it.

45. The Claimant's last day of employment with the Respondent was 25 April 2021. The Respondent believes he was working for the new company he joined, JML Group, during his notice period with the Respondent. As detailed at paragraph (x) above the Claimant was in discussions with JML Group in March 2022. Post termination the Respondent's solicitors entered into correspondence with JML Group and obtained information that caused it to believe the Claimant had been working for them prior to leaving the Respondent. This information was an email the Claimant sent to JML Group on 14 April 2022, thanking them for their time the previous day (13 April 2022) and sending them some logos he had designed for their website (RB, page 229). On 25 April 2022 JML Group sent the Claimant a Dropbox and stated they looked forward to him starting with them on 25 April 2022 (RB, page 227). The Respondent's position is therefore that on 13, 14 and 25 April 2022 the Claimant was working for the JML Group.

Submissions

46. I had oral submissions from both parties. Mr Griffiths for the Respondent argued, on the question of issue estoppel, that it was not necessary for me to make findings of fact as to the Claimant's conduct towards the end of his

employment (the Respondent having led some evidence that the Claimant had acted in ways which may have damaged its business), save that some of these matters may go to the Claimant's credibility.

47. Mr Griffiths took some time addressing me on the mathematical calculations for which I am grateful. He explained 9 days of accrued but untaken holiday were owed to the Claimant on termination of employment. 3 days were not paid by the Respondent due to it saying the Claimant was working for JML Group. The Claimants gross monthly pay at this time was £2916.66 and net was £2115.03. The Claimant served notice on 28 March 2022 and left his employment on 25 April 2022. There is no dispute he received his usual pay for the month of March, so our concern was April. April has 30 days and the Claimant worked for 25 of those. He was paid (albeit deductions were made in full due to the outstanding monies the Respondent says he owed, and it says it was contractually entitled to deduct) gross £2430.55 and net £1762.52.

48. Taking the Claimant's usual monthly salary of £2430.55 gross, a day's holiday pay would be £134.61 (monthly salary x 12 ÷ 52 ÷ 5). 6 days holiday pay had been paid in the final salary payment, albeit the monies were deducted from the outstanding loan.

49. The Respondent's position was that the Claimant owed it £10,000 by way of loan so that its counterclaim (having deducted the April salary and expenses) was £7766.47 The Respondent was no longer pursing the claim in respect of the damaged laptop. It was however pursuing £1705 for tax and national insurance deductions that should have been made by it on the £5000 payment made in or around February 2021.

50. Mr Griffiths accepted the Respondent had the burden of proof in relation to the counterclaim. He argued the contemporaneous documentation supported the Respondents position that the £10,000 paid to the Claimant was a loan and that under clause 7.6 of the contract of employment the Respondent was contractually entitled to made deductions from wages.

51. The Respondents position on commission was that clause 7.3 of the contract of employment did not set out a set sum; it was to be agreed and no agreement was ever reached. The Tribunal could only view a loss of commission as an unlawful deduction from wages under the Employment Rights Act 1996 if commission was declared and quantifiable. Mr Griffiths referred me to Farrell Matthews and Weir v Hansen (2005) IRLR 160, Thom v Hobart Real Estate Partners Ltd (2023) EAT 37, Coors Brewery Ltd v Adcock (2007) EWCA Civ 19 and Jandu v Crane Legal Ltd UK EAT / 0198/13.

52. In the Claimants submission he was entitled to 9.5 days accrued holiday which he calculated at £1278.84 gross. He referred me to the Grounds of Resistance where the Respondent referred to 9.5 days. He disputed that he had worked

for JML Group during his notice period such that the Respondent could deduct 3 days from his accrued holiday. He said he was owed mileage expenses of £12.42.

53. The Claimant's case was that 5% commission had been agreed on all sales channels that he introduced and that the £10,000 payment he received in 2019 was to be offset against commission.

The Law

54. I have already set out the contractual terms relied on. Sections 13 – 27 Employment Rights Act 1996 deal with protection of wages. S13 provides, "(I) An employer shall not make a deduction from wages of a worker employed by him unless –

    a. (b) the worker has previously signified in writing his agreement or consent to the making of the deduction."

55. Section 27 sets out the meaning of wages and states this 'means any sums payable to the worker in connection with his employment including –

    (a) any fee, bonus, commission, holiday pay…'

56. Section 27 (2) sets out payments which are excluded from the definition of wages which includes at (b) any payment in respect of expenses. Hence the Claimant has pursued his claim for expenses as a claim for breach of contract, under the Employment Tribunals Act 1996. The counterclaim is brought under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.

57. Farrell Matthews Weir v Hansen at paragraph 40 deals with the definition of wages. There must be a legal obligation upon the employer to pay any commission, and a legal entitlement on the part of the employee to receive this. 'Once 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.'

58. In Thom v Hobart Real Estate the EAT dealt with an appeal against an Employment Tribunal Judge's finding that 'the parties did not reach agreement' in relation to a performance fee and 'any claim in respect of such a sum would be a claim for an unqualified and unidentified sum.' The EAT agreed that whilst the Respondent in that case had referred to a 10% profit share, at best the percentage had been declared but not of what. The multiplier the Respondent intended to apply had been set out, but not the multiplicand. The reference to a 'profit share'…did not explain how the 'profit'' would be calculated.'

59. In Coors Brewery v Adcock the Court of Appeal considered the jurisdiction of the Employment Tribunal. This was a loss of chance case where the Tribunal said, 'The…claims were in truth, claims for damages by way of compensation for the loss of chance…that task was out with the jurisdiction which… the 1996 Act conferred on the Tribunal.'

Conclusions

60. Turning firstly to be issue of commission, it is clear when the parties entered into the contract there was an intention that the Claimant would receive commission payments and that is reflected at clause 7.3 of the written contract of employment. It is also clear that a figure of 5% was discussed between the Claimant and Mr Burnett. The difficulty is however that nothing was ever in fact agreed and no commission payments were made. There was no agreement reached as to the amount of commission or how it should be calculated or on what basis. I accept the Respondent's evidence that it proved too difficult to set in place a scheme and that instead it agreed to pay a higher salary. I accept this as it is reflected in the contemporaneous email from Mr Burnett to Mr Byrne on 22 April 2021 referencing a £5000 lump sum 'as a substitute to commission' and an increase in salary 'in preference to commission.' It is the case that the Claimant emailed Mr Burnett on 8 December 2021 referencing commission, but it is clear he was using the 5% of sales figure as a yardstick to argue for a pay increase, rather than revisiting the issue of commission which had been overtaken by the increase in basic salary earlier that year. It therefore follows the claim for commission payments as an unlawful deduction from wages must fail. There was no agreement to commission and there was no declared and quantifiable sum from which a deduction could be made.

61. The £5000 lump sum that was paid to the Claimant in February 2021, was clearly a bonus but did not have the necessary deductions for tax and national insurance made. This was a mistake on the part of the Respondent who should have made the payment via payroll. Given my finding that this sum was paid to the Claimant as a bonus for his work in 2020, and was received by him from the Respondent's account, I find he was entitled to consider the Respondent to have made the appropriate deductions and the Respondent's intent was that it should be a net sum. The Respondent's counterclaim for tax and national insurance on this sum therefore fails.

62. I find the £10,000 paid by the Respondent to the Claimant in 2019 was a loan. The Claimant referred to it as such in his email to Mr Byrne of 20 December 2019. I accept it was not subject to any agreed repayment terms and that the parties anticipated that if a commission scheme was agreed it could be offset against the loan, but no such scheme was agreed and, at the time of the Claimant's resignation and termination of employment, no repayments had been made and the total sum of £10,000 was outstanding. The employment contract had the right at clause 7.6 to make deductions from salary. The Respondent deducted the final salary payment in totality from the £10,000 and

its counterclaim is for the balance of £7766.47. Ms Deans evidence was that the deductions made were the April salary of £1278.84 and accrued holiday of £942.27 and that expenses owed were also deducted. The Respondent was entitled under the contract to deduct these sums.

63. The claims for notice pay and expenses must therefore fail. The Respondent has given the Claimant credit for these sums against the £10,000 loan owed.

64. The counterclaim in respect of the MacBook was withdrawn in submissions.

65. The Claimant said he was entitled to 9.5 days holiday which is acknowledged at paragraph 23 of the Grounds of Resistance 'in the 2022 holiday year the Claimant accrued untaken holiday of 9.5 days.' The Respondent had paid 6 days accrued holiday in the final salary payment arguing that it did not pay 3 days as it believed the Claimant was working for another company during his notice period. I do not accept the Respondent's contention here. The Claimant explained he had met with his new employer during the notice period but that he had not worked for it and had continued to discharge his duties for the Respondent during his normal working hours. I accept his evidence and I therefore award him 3.5 days' pay. The sum awarded is a gross sum of £471.13 (daily gross rate of £134.61 x 3.5).

Employment Judgment Hindmarch

3 November 2023