



EMPLOYMENT TRIBUNALS

Claimant: Mr Mark Taylor

Respondent: Redcentric Solutions Limited

Heard at: Leeds Employment Tribunal
Before: Employment Judge Deeley

On: 6 and 13 October 2023 and on 19 October 2023 (in private)

Representation:

Claimant: Mr A MacMillan (Counsel)

Respondent: Miss J Hale (Solicitor)

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1. The Tribunal declares that the claimant has suffered unauthorised deductions from wages. The claimant's complaint in respect of non-payment of commission for February, March and April 2023 succeeds and is upheld. The amount of such unauthorised deductions shall be determined at a separate remedy hearing.
2. The claimant's complaint of wrongful dismissal (notice pay) fails and is dismissed.

REASONS

INTRODUCTION

Tribunal proceedings

1. The hearing of this claim was originally listed for two hours on 6 October 2013 and went part heard, concluding after a further day's hearing on 13 October 2023.

2. During the hearing the Tribunal considered:

2.1 a joint file of documents (including fourteen pages of additional documents which were added to the file with the agreement of the parties and an electronic copy of the email attaching the commission plan of 30 October 2022);

2.2 witness statements and oral evidence from:

2.2.1 the claimant;

2.2.2 the respondent's witnesses:

Name	Role at the relevant time
1) Mr Kieran Brady	Group Sales and Marketing Director and claimant's line manager
2) Mr Daniel Green	Senior Analyst, Sales Compensation
3) Ms Katie Wood (<i>Ms Wood's statement was taken as read</i>)	HR Business Partner

3. I also considered the helpful skeleton arguments and oral submissions made by both representatives.

Adjustments

4. I asked both parties if they wished us to consider any adjustments to these proceedings and they confirmed that no such adjustments were required. We reminded both parties that they could request additional breaks at any time if needed.

Claimant's application to postpone the hearing

5. The claimant applied on the first day of the hearing to postpone the hearing due to the additional fourteen pages of disclosure documents submitted by the respondent. I Tribunal refused this application because:

5.1 the documents were sent to the claimant's solicitor at least a day prior to the hearing;

5.2 there were only 14 pages, including email chains which contained limited amounts of relevant text;

5.3 the claimant's representative was able to seek instructions when the Tribunal adjourned for reading time and was given leave to ask supplemental questions.

CLAIMS AND ISSUES

6. The claimant's complaints consisted of:

6.1 non-payment of commission pay for February, March and April 2023; and

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- 6.2 the balance of his notice pay, which he stated was three months in total (the claimant was paid in lieu of one week's notice).
7. The issues that the Tribunal had to determine are set out below.

7.1 Commission payments

There was no dispute that the respondent operated a commission plan. However, the parties disputed the terms of that plan and its contractual status:

- 7.1.1 What were the terms of the commission plan under which payments may have been payable during February, March and April 2023)?
- 7.1.2 Was that plan contractual (as contended by the claimant) or discretionary (as contended by the respondent)?
- 7.1.3 Was the respondent entitled to withhold payment under the terms of the commission plan?
- 7.1.4 If the claimant should have been paid commission, how much commission should he have been paid?

7.2 Wrongful dismissal (notice pay)

There was no dispute that the claimant was entitled to one month's notice from the respondent during his probationary period and three months' notice thereafter (as set out in clause 18.1 of the claimant's contract of employment).

The parties disputed whether or not the claimant was still in his probationary period when the respondent dismissed him with one week's pay in lieu of notice on 28 April 2023.

The question for the Tribunal is therefore:

- 7.2.1 Did the terms of the claimant's probationary period (set out in clause 5 of his contract of employment) apply as at 28 April 2023?
- 7.2.2 If so, what is the net balance of the notice pay that is payable to the claimant?

FINDINGS OF FACT

Context

8. This case is heavily dependent on evidence based on people's recollection of events that happened some time ago. In assessing the evidence relating to this claim, we have borne in mind the guidance given in the case of *Gestmin SGPS -v- Credit Suisse (UK) Ltd* [2013] EWHC 3560. In that case, the court noted that a century of psychological research has demonstrated that human memories are fallible:

"Above all it is important to avoid the fallacy of supposing that because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

9. I wish to make it clear that simply because one or other witness' version of events are not accepted in relation to a particular issue does not mean that I consider that witness to be dishonest or that they lack integrity.

Background

10. The respondent provides managed IT services to a range of private sector and public sector clients in the UK. The respondent is part of the Redcentric plc group (an AIM listed company) and the group's staff at that time included:

Name	Role at the relevant time
1) Mr Kieran Brady	Group Sales and Marketing Director and claimant's line manager
2) Mr Daniel Green	Senior Analyst, Sales Compensation
3) Ms Katie Wood	HR Business Partner
4) Mr Peter Brotherton	Chief Executive Officer (Redcentric plc)
5) Mr David Senior	Chief Financial Officer (Redcentric plc)

11. Mr Brady started working for the respondent shortly before the claimant. Mr Green had previously worked in a different business within the respondent's group, but had transferred to the respondent's business in 2022.

Claimant's employment

12. The claimant was employed by the respondent in the role of Sales Director, reporting to Mr Brady. The claimant's contract of employment stated that his place of work was 'Home Based'. The claimant lived in Romford and the respondent's head office was in Harrogate.
13. There was some disagreement over the claimant's start date (the claimant stated he started on 23 August 2022 and the respondent stated 24 August 2022, which is the date stated in the contract of employment). The Tribunal accepts that the claimant started his employment on Tuesday 23 August 2022 because the respondent provided an email from HR dated 13 February 2023 (referred to in more detail later in this judgment) stated that the claimant's probationary period was due to end on 23 February 2023.
14. The respondent issued the claimant with an offer letter dated 2 August 2022, which the claimant signed electronically on 8 August 2022 (the "**Offer Letter**"). The Offer Letter stated:

"Further to recent discussions, we have pleasure in offering you the position of Sales Director - Enterprise. Your salary in this role will be £90,000 per annum, this is based on working standard company full time hours.

You will also be eligible to earn commission with an annual on target commission amount of £90,000. Further details of the commission scheme will be shared with you upon commencement of the role.

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Please note that your position is probationary for a period of six months. After this period your performance and suitability for the position will be reviewed and if everything is in order your position will be made permanent.

...

This offer is also conditional on your returning to us a signed copy of the enclosed contract of employment. This contract sets out in detail your terms and conditions of employment. In the event of any conflict between the terms of this letter and the terms of the contract, the terms of the contract will prevail.”

15. The respondent issued the claimant with a contract of employment, which the claimant signed electronically on 8 August 2022 (the “**Contract**”). The relevant terms of the Contract included an entire agreement clause in the initial section which stated:

“This contract sets out the entire agreement between the parties and supersedes the terms and conditions of any previous contracts, oral statements or established customs. Unless expressly indicated to the contrary, no provisions of the employee policies and procedures published on the Company intranet (which you should refer to upon joining the company) form part of your terms and conditions of employment with the Company.”

16. The Contract also included the following terms:

“5. Start Date and Date of Continuous Employment

Your start date of employment is; 24th August 2022 (TBC), you will be subject to a six-month probationary period, during which time you will be expected to demonstrate your suitability for the position. Your performance will be continually monitored and formally reviewed after six months. Upon successful completion of your probationary period your employment will be confirmed as permanent.

...

7. Annual Salary

...

You will be notified separately of any entitlement to bonus or commission. The Company reserves the right at any time to withdraw or amend any bonus or commission scheme, which is force from time to time.

...

9. Absence from Work

During an Employees initial probationary period, other than Statutory Sick Pay (SSP) there is no entitlement to payment of salary during periods of sickness. To obtain payment of SSP you must follow the Company's notification and certification procedure as set out below. Failure to comply with the procedure outlined may result in the Company withholding any payment of SSP owed.

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Following the successful completion of an Employees probationary period, any payment of full or basic salary during a period of absence shall be determined in line with the Company's Absence Policy and paid by the Company in its absolute discretion. Any such payment will be deemed to include SSP. Any payment in excess of SSP made for any one period of sickness absence will not give rise to a contractual right to an enhanced payment during any subsequent period of sickness or incapacity.

...

18. Provisions Relating to The Termination of Employment

18.1 Rights to Notice

The length of notice you are obliged to give to the Company and entitled to receive from the Company to terminate your Contract of Employment during your probationary period is one week's notice from either side, unless the provisions of Clause 18.2 [immediate termination] apply.

Following the successful completion of your probationary period, the length of notice you are obliged to give to the Company and entitled to receive from the Company is 3 months, unless the provisions of Clause 18.2 [immediate termination] apply.

...

18.3 Pay in Lieu

The Company reserves the right at its sole discretion to terminate your employment without notice on payment to you of an amount equal to your basic salary (at the rate payable when the Company makes its selection) for the notice period.

...

22. Deductions

The Company may at any time deduct any sums which you owe to the Company from your pay or from any other payment due to be made to you by the Company. In addition, you will at all times pay to the Company upon demand any sums which you owe to the Company. This provision does not affect the right of the Company to recover any sums or balance of sums owed by you to the Company by taking legal proceedings.

26. Alterations to your Contract of Employment

Given the need for flexibility in today's business environment, the Company reserves the right to make alterations to your Contract of Employment. You will be notified of any changes before the change is due to be implemented. Any such changes will be deemed to be incorporated into your Contract of Employment with the Company.

27. Acceptance of Employment Terms and Conditions

I acknowledge I have received, read, understood, and accepted the Terms and Conditions of Employment relevant to my employment with the Company as stated

in this document. I understand the terms of the Contract may change occasionally and I agree to be bound by such changes as the Company may reasonably make.”

Commission plan

17. The claimant stated that he discussed commission with Mr Brady before accepting the role with the respondent. However, he stated that they had not discussed the specifics of any commission plan. Mr Brady could not recall the contents of those discussions.
18. The respondent did not disclose any commission plan documents that applied during the initial period of the claimant’s employment. However, Mr Green stated that the claimant’s previous commission calculation was based on his team’s performance and was calculated in a similar manner.
19. The Tribunal accepts Mr Green’s evidence that the respondent reviewed all employees’ commission plans and put in place new commission plans with effect from 1 September 2022 in relation to commission payments which were payable two months after the month in which the sales performance (e.g. signing of a new customer deal) took place (referred to as ‘booked’). This means that the first payments made under the new plan were paid in the respondent’s November 2022 payroll.
20. Mr Green stated that line managers, including Mr Brady, were asked to communicate the details of the new commission plans to all staff, including the claimant. Neither Mr Brady nor the claimant could recall any such discussions, although Mr Brady stated that it would have been discussed during team meetings.
21. Mr Brady emailed the claimant’s new commission plan to the claimant (copied to Mr Green) on 30 October 2022 (the “**Commission Plan**”). The claimant states that he does not recall receiving this email and had not read the commission plan terms before these proceedings. The claimant did not return a signed copy of the commission plan. However, the Tribunal accepts Mr Brady and Mr Green’s evidence that this email was sent by Mr Brady and received by the claimant’s work email address at the same time that Mr Green received it.
22. The Tribunal also accepts their evidence that the new commission plans were also discussed during team meetings with all sales staff around this time because the new plans formed a significant part of sales staff’s remuneration.
23. The Commission Plan stated:

“Introduction

This document sets out the allocation of sales commission or On Target Bonus applicable to all contracts and customer orders booked by your sales team during the period 1st September 2022 – 31st March 2023 and supersedes all other commission plans.

Purpose and Scope

The purpose of this commission plan is to:

- Drive business sales performance
- Provide clarity on how Sales Performance will be measured and rewarded Margin Types Commission Bonus is calculated on your Sales Team’s Total Contract Cash Margin (TCCM) within Orders achievement against target (the cumulative target for all members of your team).

Commission rates

The following rates will apply for achievement against the sales team’s performance

Team Target: £7,949,265 TCCM

OTB: £90,000

	YTD Performance			
	<85%	86%-95%	96%-110%	110%+
Commission Rates Paid Against OTB	50.0%	75.0%	100.0%	120.0%

Sales Targets and Key Performance Indicators (KPIs)

In addition to TCCM sales performance a number of Sales Excellence KPIs will be reviewed as part of the 121 process.

In the event that both Sales Performance and KPIs are not being met Redcentric reserves the right to withhold commission payments until one or both are brought into line. The table below shows example

KPIs...

24. We note that the KPIs set out in the plan included “Churn Management”, “Opportunity and Pipeline Management”, Sales Forecasting and “Cross Sell – Power of Five”.

25. The Commission Plan also stated:

“Commission Calculation

Commission will be calculated as a percentage of your On Target Bonus based on your Sales Team’s cumulative performance against their TCCM target, as follows:

Team Total Contract Cash Margin achievement x Commission Rate Percentage = Commission

All orders will be booked into the orderbook based on the date closed, and commission calculations will be carried out sequentially.

The commission rate payable will be subject to YTD performance versus target.

For Strategic product lines, an additional step may be added to the calculation of commission. This will take the form of a multiplier increase, to be determined and advised from time to time by the Group Sales & Marketing Director.

Exceptional Deals:

Where any single deal or individual performance represents >50% of the annual TCCM target Redcentric reserves the right to review the commission payable. In these instances, the commission payable may be at a reduced rate which will be agreed within 30 days of preferred supplier status.

Irrespective of commission rates payable, exceptional deals will still count towards annual TCCM target in full.

Commission Instalments

The commission instalment will be made two months after the month the performance sales team's achievement was booked.

Definitions & General Notes

Total Contract Cash Margin

Total Contract Cash Margin (TCCM) includes all direct costs attributable to a contract. This excludes the

cost of internal resource and contribution to overheads, except in the case of professional services where

internal resource costs will be included as defined by the Divisional Finance Director.

TCCM will be captured in the Order Book and validated by Finance.

...

Conditions

...

Redcentric reserves the right to discontinue or vary the scheme with seven days' written notice.

Redcentric reserves the right to review targets on a quarterly basis should a material change occur.

Where the achieved TCCM on any Order is not in line with Redcentric's expectations, Redcentric reserves the right to investigate the variances and adjust commission accordingly. Adjustment will be made to the commission payment relating to the month the correction is made.

Redcentric reserve the right to recover commission payments made:

- in error;*
- in respect of orders won and subsequently cancelled; or*
- where payment is not received from the client, three months after the due date for payment.*

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In such cases the company reserves the right to deduct the balance from any monies due. Any waiving of the company's right to recover incentive payments must be authorised by any two of CEO, CFO or Group Sales & Marketing Director.

Redcentric reserve the right to withhold commission indefinitely or refuse payment if, at the time the commission is due, the salesperson is:

- *Under a Sales Improvement Plan (SIP)*
- *Under a disciplinary sanction*
- *Serving notice, given either by the Company or the individual*

All payments are at the ultimate discretion of the Company."

Respondent's internal meetings re commission payments

26. The Commission Plan states that the respondent makes commission payments two months after the sales performance to which they relates takes place. For example, payments made in December 2022 would relate to sales performance in October 2022. Mr Green explained that this is because it takes some time to calculate and check commission payments.

27. Mr Green stated that before the commission payments were made each month, he had a meeting with Mr Brotherton and Mr Senior to go through each individual's sales employee's commission. No records were kept of these meetings.

28. I accept Mr Brady's and Mr Green's evidence that in early 2023, energy prices had risen significantly due to the Ukraine conflict. Energy prices form a large proportion of the respondent's costs and the price increases affected the respondent's ability to meet its financial targets set out in its 2022/23 business plan. Mr Brady said that the respondent was not in any financial difficulty as such, but needed to consider cutting costs in order to meet its financial targets. For example, the cost of racking space at co-located sites was factored into the profitability of customer deals for deals agreed from January 2023 onwards, which in turn reduced the commission payable to sales staff from March 2023 onwards.

29. I also accept Mr Brady and Mr Green's evidence that two days before the February 2023 payroll run, there was a query about the commission payment for another colleague (DW). Mr Brotherton reviewed DW's commission payment on a particular deal and took the view that DW's commission payments under the Commission Plan had not been calculated correctly. Mr Brotherton noted that the application of the 'year to date' criteria in the commission plan appeared to be incorrect, which had potentially led to over-payments being made to all sales staff and sales managers.

30. Mr Green stated that:

- 30.1 Mr Brotherton and Mr Senior decided that commission payments should be placed on hold for all sales managerial level staff (including the claimant) whilst they re-calculated commission payments;

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30.2 Mr Green then carried out the calculations and noted that the claimant had in fact been overpaid a total of around £8000 in relation to commission paid up to and including the respondent's January 2023 payroll date.

31. I accept Mr Brady's evidence that other colleagues' commission payments have been varied by the respondent to reflect their individual performance. Mr Brady did not provide any examples of this scenario, however the claimant said that he was aware of three more junior sales staff who did not receive commission (or who received reduced commission) in relation to single deals. These included:

31.1 PT (Account Director);

31.2 DW (Enterprise Account Director); and

31.3 JB (Account Director).

32. However, I accept the claimant's evidence that the respondent did not withhold commission entirely from any of these three staff and that they would have received commission on other deals concluded in any particular month.

Commission payments from September 2022 to January 2023

33. The claimant received commission payments from the respondent in their payroll runs on September, October, November, December 2022 and January 2023.

34. Mr Brady stated that the claimant was paid commission from September 2022 to January 2023 as a "*goodwill gesture*", designed to incentivise the claimant to perform well in his role whilst he was settling into his employment and getting to know the team.

Events during January to April 2023

35. The claimant injured his shoulder on 17 November 2022 during a work trip to York. He did not take sick leave during November. The claimant was later absent on sick leave due to his shoulder injury from 24 January to 27 February 2023 because of symptoms associated with his shoulder fracture. The claimant was also absent on sick leave due to shingles from 13 April 2023 onwards and did not return to work before he was dismissed. The claimant's wife had emailed the respondent on 27 April 2023 and said that the claimant should be well enough to return to work on 2 May 2023.

36. The claimant received statutory sick pay during his sickness absence. The claimant was not paid any commission at all in the respondent's February, March and April 2023 payroll runs. The claimant did not query this whilst he was in employment because he understood that commission payments had been temporarily suspended for all managerial level sales staff at that time.

Respondent's explanation for non-payment of commission to claimant

37. Mr Brady stated that the claimant was not paid any commission during February, March and April 2023 for two key reasons:

37.1 the claimant's sickness absence; and

37.2 the claimant's performance from November 2022 onwards.

38. Mr Brady stated in his oral evidence that:

"...for an enterprise deal, it takes minimum 6 months, sometimes 15-18 months – so Mark arriving in August and then deals that were closing June/July/August when he got paid (commission paid 2 months in arrears) – he had no impact on commission paid initially.

The deals that came in September/October/November – decisions already made by customer, the contracts were already negotiated and signed. Sales impact is at beginning to middle of deal, rather than at the end. Mark's performance had very little impact

If Mark had performed well in December/January/February/March – he would have full involvement in any deals, then would had big impact in deals landing at beginning of this calendar year

...

Mark did not get his payments because he either wasn't at work (he hurt his shoulder at the beginning of November), then he really struggled at work from November onwards. He didn't do much at all from November until when he left the business. He had some formal and informal absences and we tried to support him as best we could. As a last resort, we let him go.

It was after his injury and his repeated commitment to return to work the next week – then he got shingles. There was no end in sight for Mark's return to work.

We were looking for Mark to introduce Scotsmans and ADPs to help us to build a single sales team across our four organisations.

...

Mark's personal contribution to the leadership of his team was not satisfactory and he was absent – therefore we did not pay him commission."

39. Mr Green stated that Mr Brotherton and Mr Senior informed him during a meeting that the claimant would not receive any commission payments for the months of March and April 2023 because the claimant had been absent from work on sick leave.

40. Mr Brady and Mr Green's evidence on the respondent's reasons for not paying the claimant commission during February, March and April 2023 appears to conflict. However, I note that Mr Green said that he did not enquire into the detail of the claimant's absences because his role was to perform the calculations, as instructed by Mr Brotherton and Mr Senior.

41. In addition, when the claimant wrote to the respondent after his dismissal, Ms Kate Wood (respondent's HR) responded on 19 May 2023 stating:

"Commission Payments

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Your letter details payments of commission outstanding. Unfortunately, as you are aware and as is written into our commission scheme details, any payments in the commission scheme are at the ultimate discretion of the Company and can be withheld at any time. Due to your levels of absence we do not feel it appropriate to pay commission when you have not been in the business over this period to influence sales results.”

42. Mr Brady also stated that the claimant’s performance from November 2022 onwards ‘was not satisfactory’. He accepted that the claimant had not been placed on any formal performance improvement plan. Mr Brady stated that he had discussed the claimant’s performance with him in 1:1 meetings, including in January 2023. However, the claimant viewed this meeting as a normal 1:1 discussion and stated that both positive and negative feedback was provided during that meeting.

43. The Commission Plan (quoted in more detail earlier in this Judgment) states that the basis on which the claimant’s commission payments were calculated related to the performance of the claimant’s team, not his individual performance:

“Commission Calculation

Commission will be calculated as a percentage of your On Target Bonus based on your Sales Team’s cumulative performance against their TCCM target, as follows:

Team Total Contract Cash Margin achievement x Commission Rate Percentage = Commission”

44. I also note that the Commission Plan contains certain conditions relating to the individual manager:

“Redcentric reserve the right to withhold commission indefinitely or refuse payment if, at the time the commission is due, the salesperson is:

- *Under a Sales Improvement Plan (SIP)*
- *Under a disciplinary sanction*
- *Serving notice, given either by the Company or the individual.”*

45. Mr Brady accepted that none of these conditions applied to the claimant. He relied on the final sentence of the Commission Plan: *“All payments are at the ultimate discretion of the Company.”*

46. Mr Brady stated during his oral evidence that:

46.1 [the respondent] was *“trying to make sure people, wherever possible, paid as much as possible – but have to take account of certain factors that may/not be documented. You cannot document everything in a plan - that’s why plan refers to management discretion.”*;

46.2 *“The amount paid to an individual can vary based on management’s view of individual’s contribution.”*

47. However, Mr Brady was unable to explain how the claimant would have been aware of any such additional undocumented terms.

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48. Mr Brady was also unable to recall any conversation where he discussed varying the claimant's individual commission payments with him:

"I can't honestly recollect if I did or not – in my opinion Mark was virtually absent from when he hurt his shoulder at the end of November...Mark started off very promisingly and things went well as he got to know the team. Mark then had a personal challenge with his dog, had an accident and then from December until he left he was extremely difficult to get hold of. We let him go as a last resort – there was no sign of Mark coming back to work. We'd gone through December, January, February and March with almost no contribution from Mark."

49. In relation to the claimant's performance, Mr Brady stated:

"...even when he came back, he was not performing because he was still on medication and still had significant personal challenges..."

Also a key part of the strategy was to deliver new ways of working – Mark's primary role was to deliver this – he was working with a consultant who was at his wits' ends trying to get hold of Mark....

I effectively took over running of Mark's team to introduce GROW [the Goal/Reality/Options/What next model] and the sales strategy because he was effectively absent."

50. Mr Brady and the claimant had a 1:1 meeting on 18 January 2023. Mr Brady emailed the claimant after the meeting to summarise their discussion and stated:

"I highlighted that I felt we were getting on fine and that you were doing very well on engaging the team and focussing on deals but that your sales management administration was very poor. Therefore in 50% of the role you were 9/10 (deal engagement & supporting the team on deals) and 50% of the role (sales management administration) you were 3/10 but that you were focussing on the right element of the role and that we will solve the admin piece together."

51. I note that Mr Brady's summary of this meeting does not refer to the 'key deal review meeting' which he states the claimant failed to attend on 13 January 2023 or any other key meetings that the claimant missed.

52. Mr Brady could not recall any other discussions regarding his performance. This may be due to the fact that the claimant was subsequently absent on sick leave from 24 January to 27 February 2023. Mr Brady was also unable to recall or provide evidence of any written communications between him and the claimant regarding performance concerns before the claimant's dismissal.

Probationary period

53. The respondent did not attempt to arrange any formal probationary review meetings with the claimant before February 2023. Mr Brady had held one to one discussions with the claimant (e.g. on 13 January 2023), during which the claimant's performance was discussed (both positive and negative points). However, Mr Brady

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did not inform the claimant that any of those discussions constituted 'probationary review meetings'.

54. Mr Brady stated in his oral evidence that he viewed 6 months as "as an indicative probation period" and that an employee's probation period ends "when the employer says it has ended". Mr Brady noted that his own probation period carried on for longer than six months. The claimant's representative suggested that Mr Brady should have written to the claimant to tell him that his probationary period had been extended. Mr Brady stated "Potentially yes – but what I would have preferred to do is to sit down with Mark and have the conversation".

55. I was taken to various emails by both parties regarding the claimant's probation period by both parties. Ms Jessica Ryder (HR Administrator) emailed Mr Brady on 13 February 2023 stating:

"Mark has been with Redcentric as a Sales Director coming up to 6 months, meaning their probationary period is due to end on 23rd February.

Please can arrangements be made to hold a meeting with the employee, prior to this date, to discuss both their development in the role, any concerns if applicable and the outcome of their probation.

This is a gentle reminder that certain aspects of Mark's employment are dependent on passing their probation and so we ask you prioritize setting up a meeting and completing the attached form alongside.

If you would like any assistance or for HR to sit on such meeting, please let me know and I would be happy to action."

56. Mr Brady responded on 16 February 2023 and stated (with words underlined for emphasis):

"Mark is currently off sick, hopefully returning next week after almost 4 weeks absence. Once he is back I will schedule a probation review.

Please note that I do not want any sales colleagues passing their probation by default, all must have a review and successful probation completion confirmed in writing by myself. Do we need to send out a note to that effect as there will be a number of people coming to the end of their probation period in the coming 2-3 months?"

57. Ms Ryder replied stating:

"In regards to future probations for sales department, we wouldn't pass a probation without prior confirmation from a line manager and we have introduced notifying in advance of a probation end, to ensure managers are given prior notice before the end date."

58. Hannah Gibson (respondent's HR) emailed an invitation to "Mark Taylor's 6 month probation review" to the claimant, Mr Brady and Ms Wood for 24 February 2023. However, this meeting did not take place. The claimant's GP fit note states that the claimant was still signed off from work on that date.

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59. Neither Mr Brady nor the respondent's HR team contacted the claimant to inform him that his probation period was not yet complete nor that it had been extended. Mr Brady attempted to arrange a meeting with the claimant from March 2023 onwards.
60. Mr Brady emailed Ms Ryder on 14 March 2023 and stated that: *"I will likely set up the probation review for late next week or early April when I am back from a week's holiday (last week in March)"*. However, no probation review meeting took place.
61. Mr Brady attempted unsuccessfully to meet with the claimant on three occasions after the claimant returned to work in March 2023 (see table below). However, the claimant was told that these meetings would be a one to one meeting – he was not told that any of these meetings would be a probation review meeting.

Invitation sent	Meeting date scheduled	Stated purpose of meeting	Outcome
Early March 2023	14 March 2023	1:1	Meeting rearranged to in person at claimant's request to take place after Mr Brady's holiday
7 April 2023	11 April 2023 – Team meeting	1:1	Meeting rearranged to in person at claimant's request to 13 April 2023
11 April 2023	13 April 2023 – in person	1:1	Claimant did not attend due to illness (shingles)

Termination letter

62. The claimant was absent was on sick leave due to shingles from 13 April 2023 onwards and did not return to work before he was dismissed. The claimant's wife had emailed the respondent on 27 April 2023 and said that the claimant should be well enough to return to work on 2 May 2023.
63. The respondent wrote to the claimant on 28 April 2023 stating:

"As you will be aware we were due to hold your probation review on 13th April 2023, which you were unable to attend due to absence.

I am now writing to confirm that unfortunately, for a number of reasons, you have failed your probationary period with Redcentric.

The reasons stated are as follows:

- *Failure to attend a number of key business meetings, specifically on 14th March 2023 and 13th January 2023. The importance of attendance at all key meetings has been highlighted to you.*

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- *Failure to make the required improvements to your sales administration activities. This was highlighted to you on 13th January 2023.*
- *Unacceptable levels of absence throughout the probationary period with 37 days absence to date since 24th August 2022.*

I'm afraid that as a result of the above, I am now writing to confirm we are serving you with notice of the termination of employment with effect from today, 28th April 2023.

You are entitled to 1 weeks notice, which will be paid in lieu."

Correspondence after 28 April 2023

64. The claimant wrote to Ms Wood on 3 May 2023, stating:

"The letter first talks about a probation review meeting on 13th April 2023. There was no such meeting. Probation has never been discussed ever, since the day I joined. That meeting was a face to face catch up postponed from Tuesday night. It was clear from conversations between Kieran and I, also you can see from diary entries that it was purely a catch up.

You also mention key business meetings on the 13th of January and 14th March that I failed to attend. I can categorically say that I missed no meetings, and no one has ever made that claim to date, in fact I appear to have been at the meeting on the 13th of January as my sales administration needed improvement. If this was a catch up, then there were also positive things said at that meeting.

Now in terms of absence. My shoulder was badly broken and my neck severely damaged whilst on company business in York. I struggled on for 2 months missing no days or meetings, and at no time did anyone say my time off was excessive, but people cared that I had been injured. My unfortunate Shingles is just that, unfortunate.

With regard to one weeks' notice as I had not passed probation, my contract is clear (Clause 5), that the review was due 2 months ago, therefore I should be due one months' notice.

One thing I am pleased about is that there is no mention of any kind of poor sales results. I am due a large amount commission that I outline below.

I am due commission for the months margin sales outlined: December (£277,411), January (784,185), February (£305,072), March (£676,370), April (£693,167). The records show that this totals £2,736,155 of Margin was signed during this time. The rate to be applied as it was in October and November is 0.016552. Which means £45,288 is due to me.

When I joined the company, I made it clear up front I did not want a guarantee, I was prepared to stand by results. I do expect you to honour this payment."

65. Ms Wood responded in a letter dated 19 May 2023, stating that:

"2) Absence

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I understand you were absent from the business due to issues with your shoulder from 24th January 2023 until 27th February 2023, and then had a further period of absence with shingles from 13th April.

Our business follows the ‘Bradford Factor’ guidance for absence, which relies on a score triggered by the number of days absent multiplied by the instances of absence. Our trigger for addressing absence concerns is a score of 100. As you were absent for a total of 37 days across 2 instances, your score was 1508 which is significantly higher than an acceptable level of absence during your period of employment. A key factor in probation is level of absence, and in this case, as well as your expectation as a senior leader to be present and influential to the team, we were unable to deem this as acceptable.

...

4) Commission Payments

Your letter details payments of commission outstanding. Unfortunately, as you are aware and as is written into our commission scheme details, any payments in the commission scheme are at the ultimate discretion of the Company and can be withheld at any time. Due to your levels of absence we do not feel it appropriate to pay commission when you have not been in the business over this period to influence sales results.”

66. The claimant wrote again on 22 May 2023. The Tribunal was not provided with a copy of that correspondence. Ms Wood responded by letter dated 31 May 2023 stating:

“In response to your query around payments of commission for the months of December 2022 and January 2023, I must highlight that as you are aware, as per our commission scheme / policy, all commission payments are at the ultimate discretion of the business and can be withheld at any time. It is the Company’s decision not to proceed with these payments for this period.”

RELEVANT LAW

67. The Tribunal has considered the legislation and caselaw referred to below, together with any additional legal principles referred to in the parties’ helpful skeleton arguments. This Judgment does not reproduce their submissions in full in the interests of brevity.

Unauthorised deduction from wages

68. The key provisions on unauthorised deductions from wages are set out at section 13 of the Employment Rights Act 1996 (the “**ERA**”). Section 13(3) states (with words underlined for emphasis):

13 Right not to suffer unauthorised deductions

(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

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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.

69. Section 27 of the ERA clarifies that 'wages' include commission payments.

70. I note that on the question of whether wages are 'properly payable', caselaw provides guidance including:

70.1 there must be some form of legal (but not necessarily contractual) entitlement to the sum in question (cf Morritt LJ in *New Century Cleaning Co Ltd v Church* 2000 IRLR 27, CA);

70.2 once an employer has exercised its discretion in favour of granting, for example, a bonus on certain terms, the employer is under a legal obligation to pay it in accordance with those terms (until such terms are altered with notice) (cf *Farrell Matthews and Weir v Hansen* 2005 ICR EAT, *Tradition Securities and Futures SA v Mouradian* 2009 EWCA Civ 60 CA);

70.3 any sum in question must be capable of quantification (cf *Coors Brewers Ltd v Adcock and ors* 2007 ICR 983 CA). However, the fact that quantification is disputed and/or difficult does not exclude a claimant from claiming unauthorised deductions from wages (see *Lucy and ors v British Airways plc* 0033/08).

71. In terms of the exercise of an employer's discretion, I note that common law principles apply including:

71.1 discretion must not be exercised in an irrational or perverse manner (cf *Briganza v BP Shipping Ltd and another* 2015 ICR 449, SC); *Keen v Commerzbank AG* 2006 EWCA Civ 1536, CA);

71.2 an employer must take into account relevant factors only in exercising its discretion.

Wrongful dismissal (notice pay)

72. A claim for wrongful dismissal is a breach of contract claim for notice pay. The Tribunal's contractual jurisdiction is governed by section 3 of the Employment Tribunals Act (ETA) 1996 together with the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 SI 1994/1623.

73. The key issue in this wrongful dismissal claim is one of contractual interpretation of the claimant's probationary and notice clauses, as well as other provisions of his contract of employment. Carr LJ summarised the key legal principles of contractual interpretation in *ABC Electrification Ltd v Network Rail Infrastructure Ltd* [\[2020\] EWCA Civ 1645](#) at paragraphs [17]–[19] (with my underlining for emphasis):

"17. The well-known general principles of contractual construction are to be found in a series of recent cases, including Rainy Sky v Kookmin, Arnold v Britton and Wood v Capita Insurance.

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18. A simple distillation, so far as material for present purposes, can be set out uncontroversially as follows:

i) When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. It does so by focussing on the meaning of the relevant words in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the contract, (iii) the overall purpose of the clause and the contract, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions;

ii) The reliance placed in some cases on commercial common sense and surrounding circumstances should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision;

iii) When it comes to considering the centrally relevant words to be interpreted, the clearer the natural meaning, the more difficult it is to justify departing from it. The less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning;

iv) Commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made;

v) While commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent

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term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party;

vi) When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time the contract was made, and which were known or reasonably available to both parties.

19. Thus, the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. This is not a literalist exercise; the court must consider the contract as a whole and, depending on the nature, formality, and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. The interpretative exercise is a unitary one involving an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences investigated.

APPLICATION OF THE LAW TO THE FACTS

74. I have applied the law to the facts found and set out my conclusions below.

Commission Payments

75. I concluded that the reasons why the respondent failed to pay commission to the claimant in respect of February, March and April 2023 included:

75.1 **February 2023:** over-payments of commission pay for preceding months, according to the respondent's revised method of calculating commission payments; and

75.2 **March and April 2023:** his sickness absence from 24 January to 27 February 2023 and from 13 April 2023 until his dismissal. This is because Ms Wood stated that this was the reason for non-payment of commission in those months in her letter of 19 May 2023. I also accepted Mr Green's evidence that this was Mr Brotherton and Mr Senior both stated that this was the reason why the claimant's commission for March and April 2023 was withheld.

76. Mr Brady also stated that another reason why he believed that the respondent should withhold the claimant's commission was due to his concerns regarding the claimant's performance. However, Mr Brady did not raise those concerns with the claimant in any formal manner and did not place the claimant on any sales improvement plan. In addition, Mr Brady's concerns regarding the claimant's

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performance were not discussed at the meetings between Mr Green, Mr Brotherton and Mr Senior during which decisions were communicated regarding commission payments.

77. In any event, the written terms of the Commission Plan state that the claimant's commission payments would be calculated on a specific formula, based on the claimant's team's performance. They do not contain any express provisions stating that the claimant's commission (or that of any other sales manager) could be reduced due to individual performance, unless that individual has been placed on a sales improvement plan or is subject to a disciplinary sanction. I note that Mr Brady and the claimant agreed that more junior sales' staff's commission payments have been reduced in the past due to their personal contribution to individual deals. However, I note that non-managerial sales staff's commission is linked directly to their personal performance. Mr Brady did not provide any examples of managerial level sales staff whose commission had been reduced because of their personal performance, other than in the limited circumstances set out in the Commission Plan.
78. The provisions of the Commission Plan do not contain any terms regarding reduction and/or non-payment of commission for all or part of any period of sickness absence.
79. I have therefore concluded that commission payment for February, March and April 2023 were 'properly payable' to the claimant within the meaning of s13 of the ERA because:
- 79.1 the claimant had a legal entitlement to participate in a commission plan, as set out in his offer letter and contract of employment. The claimant's offer letter stated:
- "You will also be eligible to earn commission with an annual on target commission amount of £90,000. Further details of the commission scheme will be shared with you upon commencement of the role."*
- Clause 7 of the claimant's contract stated:
- "You will be notified separately of any entitlement to bonus or commission. The Company reserves the right at any time to withdraw or amend any bonus or commission scheme, which is force from time to time."*
- 79.2 once the claimant started working for the respondent, then he was entitled to receive commission payments calculated in accordance with the terms of any commission plan notified to him;
- 79.3 the respondent issued the Commission Plan by email in October 2022 (replacing their previous commission plan for sales managers) and did not seek to vary or amend the terms of the Commission Plan after this time;
- 79.4 the claimant's commission payment under the Commission Plan for each month is capable of quantification (and in fact both parties have sought to quantify the amount due).

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80. Mr Brady stated that the Commission Plan did not contain all applicable terms. He relied on the final sentence of the Commission Plan which stated that all commission payments were subject to the respondent's 'ultimate discretion'. However, even if this were correct, such discretion is not without limits. In particular:

80.1 sickness absence is not a relevant factor identified in the Commission Plan as a reason for the respondent to exercise its discretion to withhold or reduce commission payable under the terms of that plan. The respondent did not provide any examples of when sickness absence had previously been taken into account when reaching decisions on commission payments;

80.2 individual performance for managerial sales staff (other than where they are subject to a Sales Improvement Plan or disciplinary sanctions) is also not a relevant factor identified in the Commission Plan as a reason for the respondent to exercise its discretion to withhold or reduce commission payable under the terms of that plan;

80.3 if either of those matters were reasons as to why the respondent exercised its discretion to withhold commission payments due to the claimant, then such exercise of discretion was irrational or perverse. This is because the respondent took into account irrelevant factors when exercising its discretion.

81. The claimant has therefore suffered an unauthorised deduction from wages in relation to commission payments for February, March and April 2023.

82. There will be a separate remedies hearing to determine the quantum to be awarded in respect of the unauthorised deductions from wages. The parties were unable to agree the correct commission payment figures for each of those months because the claimant had only received the respondent's commission spreadsheets shortly before the hearing of this claim.

Wrongful dismissal (notice pay)

83. The relevant provisions of the claimant's contract are set out in full in my Findings of Fact above. Clause 18 of the contract (the "**Notice Clause**") states (with words underlined for emphasis):

"18. Provisions Relating to The Termination of Employment

18.1 Rights to Notice

The length of notice you are obliged to give to the Company and entitled to receive from the Company to terminate your Contract of Employment during your probationary period is one week's notice from either side, unless the provisions of Clause 18.2 [immediate termination] apply.

Following the successful completion of your probationary period, the length of notice you are obliged to give to the Company and entitled to receive from the Company is 3 months, unless the provisions of Clause 18.2 [immediate termination] apply.

84. The meaning of “probationary period” is defined at clause 5 of the claimant’s contract (the “**Probationary Clause**”) (with words underlined for emphasis):

“5. Start Date and Date of Continuous Employment

Your start date of employment is; 24th August 2022 (TBC), you will be subject to a six-month probationary period, during which time you will be expected to demonstrate your suitability for the position. Your performance will be continually monitored and formally reviewed after six months. Upon successful completion of your probationary period your employment will be confirmed as permanent.”

85. The key question that I have to decide is what the meaning of the words: “*successful completion of your probationary period*”.

86. The claimant’s position is set out at paragraph 12 of his representative’s skeleton argument. In summary, the claimant submits that once six months have elapsed, then his probationary period has been ‘successfully completed’:

“i. The natural meaning of completion of 6 months’ probationary period is for employment to extend beyond the 6 months’ start date;

ii. Clause 6 provides relevant context in identifying common grounds for finding the employment is not suitable which it might be expected would be discovered in the initial 6 months of employment;

iii. The purpose of the clause is to give parties certainty around the extent of their notice obligations by identifying a fixed period of time after which the extent of contractual obligations evolve;

iv. The parties at the time of entering the agreement knew of both an agreed start date of 24 Aug 2022 (repeated at various points in the signed agreement) as well as the fixed term of probation;

v. Commercial common sense points to the value of a defined period of time during which both parties retain flexibility to exit at short notice, and at the end of which they may determine if they intend to put the contractual relationship on a permanent basis.”

87. The claimant’s representative submitted that the claimant’s probation period was a fixed six months period, which expired on completion of six months’ employment. The claimant’s representative referred to an Employment Tribunal case (summarised in the IDS Handbook) in support his submission. Unfortunately, the claimant’s representative was unable to provide a copy of the decision itself because the decision was made in 1995. The claimant’s representative also stated during submissions that he had found another Employment Tribunal case which had reached the opposite decision. I note that, in any event, decisions of other Employment Tribunals are not binding on this Tribunal.

88. The claimant’s representative also relied on the case of in *Anderson and ors v London Fire and Emergency Planning Authority* 2013 IRLR 459, CA. At paragraph 16 of his skeleton argument, the claimant’s representative stated:

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“...the Court of Appeal overturned an EAT decision as to whether a pay term gave an employer the unfettered right to choose between two different rates of pay increase. In that case the Court of Appeal held that the union would not have agreed to such an interpretation when entering the agreement, even if on a literal reading this was a permissible construction of the pay term. By analogy, C would never have agreed to a probationary period that could be extended without notice beyond its contractually fixed term.”

89. I do not accept the claimant’s submission because:

89.1 the vast majority of employment contracts (unlike commercial contracts and collective agreements) are entered into on an employer’s standard terms, save perhaps in respect of the amount of salary and other monetary terms;

89.2 the claimant did not provide any evidence that he: *“would never have agreed to a probationary period that could be extended without notice beyond its contractually fixed term”*. The claimant stated that he discussed commission plan in broad terms with the respondent, but did not provide any evidence regarding his understanding of the probationary period clause at the time that he entered into his contract of employment;

89.3 as noted in the section above on “Relevant Law”:

“...a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight.”

90. The respondent’s position is set out at paragraphs 3-9 of their representative’s skeleton argument (the relevant parts of which have been reproduced below). The respondent submits that ‘successful completion’ required a positive step by the respondent, namely a formal review, and would not occur simply because the claimant remained in employment six months after his employment started:

“3 The claimant asserts that he was entitled to receive three months’ notice. He says that his contract confirms this. It does not. The contract (which the claimant signed on 8th August 2022, states at clause 18.1, page 50 of the bundle, ‘Following successful completion of your probationary period, the length of notice you are obliged to give to the Company and entitled to receive from the Company is 3 months ...’

4 The claimant confirmed in evidence that he had not been told that he had successfully passed his probationary period and nor had his job been confirmed as permanent. The contract states at clause 5, page 47 of the bundle ‘Upon successful completion of your probationary period your employment will be confirmed as permanent’.

...

6 Although the claimant did not accept this proposition in cross examination, the contract at clause 5, page 47 of the bundle specifically provided that the formal review of his six-month probationary period would happen after the period. The

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claimant, despite assertions to the contrary, cannot suggest the passage of time meant that he considered his probationary period to be successful because he knew he was to have a formal meeting, which was postponed because he was absent.

...

9 Contrary to the claimant's pleadings, whilst the contract stipulates a six-month probationary period, it also stipulates that it will be formally reviewed after six months and states that only on successful completion of the probationary period would employment be confirmed as permanent. That requires some statement of success. In addition, the notice period only changes from one week to three months after successful completion of the probationary period..."

91. Taking the key legal principles in turn and applying them to the findings of fact:

91.1 the natural and ordinary meaning of *"successful completion of your probationary period"* under both the Notice Clause and the Probationary Clause is that the claimant must:

91.1.1 remain employed for the probationary period; and

91.1.2 something more must happen for the probationary period to be deemed 'successful'. That 'something more' required was stated in the Probationary Clause to be a 'formal review' after the six month probation period had ended, following which the claimant's employment would be confirmed as permanent. The Probationary Clause stated (with words underlined for emphasis):

"You will be subject to a six-month probationary period, during which time you will be expected to demonstrate your suitability for the position. Your performance will be continually monitored and formally reviewed after six months. Upon successful completion of your probationary period your employment will be confirmed as permanent."

91.2 this interpretation is also supported by similar wording in the Offer Letter which states (with words underlined for emphasis):

"Please note that your position is probationary for a period of six months. After this period your performance and suitability for the position will be reviewed and if everything is in order your position will be made permanent."

91.3 the purpose of the probationary provisions of the claimant's contract was to enable the respondent to assess the claimant's performance and suitability for his role, as part of his overall employment contract;

91.4 it is common practice for contracts of employment to contain probationary periods of varying lengths, with conditions attached to passing the probationary period (including conditions relating to the length of any notice period from an employer). A reasonable reader would have been aware of such practice;

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91.5 I note that I cannot take account of facts that were not known to the parties at the time of entering into the contract (see the principles summarised by Carr LJ in *ABC Electrification* quoted in the section on ‘Relevant Law’ earlier in this Judgment), including the points set out at paragraphs 4 and 6 of the respondent’s skeleton argument;

91.6 I also note that I must disregard subjective evidence of any party’s intentions. For example, the respondent provided copies of emails dated February 2023 between Mr Brady and HR regarding the claimant’s probationary period. These would consist of subjective evidence of the respondent’s intentions.

92. The claimant’s claim for wrongful dismissal therefore fails and is dismissed.

CONCLUSIONS

93. For the reasons set out above:

93.1 The Tribunal declares that the claimant has suffered unauthorised deductions from wages. The claimant’s complaint in respect of non-payment of commission for February, March and April 2023 succeeds and is upheld. The amount of such unauthorised deductions shall be determined at a separate remedy hearing.

93.2 The claimant’s complaint of wrongful dismissal (notice pay) fails and is dismissed.

Employment Judge Deeley
Date: 13th November 2023

JUDGMENT SENT TO THE PARTIES ON

Date: 14th November 2023

.....
.....
FOR EMPLOYMENT TRIBUNALS

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