



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Miss Bianca Shevlin

v

Cambridge Kitchens Ltd

Heard at: Bury St Edmunds

On: 8, 9,10, 11,12 April 2024

Before: Employment Judge K J Palmer

Members: Mrs S Lawrence-Doig and Mr R Allen

Appearances

For the Claimants: Petar Starcevic (Counsel)

For the Respondent: Jonathan Monroe (Litigation Consultant - Peninsula)

RESERVED JUDGMENT

It is the unanimous judgment of this Tribunal as follows:

1. The Claimant's claim for unlawful deduction of wages succeeds. The Claimant is awarded the sum of £11,870.30.
2. The Claimant's claim for unfair dismissal succeeds. There will be a one day Remedy Hearing in person at the Bury St Edmunds Employment Tribunal on 12 August 2024.
3. The Claimant's claims for disability discrimination fail and are dismissed.

REASONS

1. This claim came before this Tribunal pursuant to a significant history of preliminary hearings before a series of judges.

2. The Claimant issued two claims under the case numbers set out above which are now consolidated and are to be heard together in accordance with the Case Management Summary produced by this Tribunal pursuant to a hearing on 11 and 12 December 2023.
3. In a prior Case Management Hearing before EJ H Mason on 21 March 2023, a list of issues to be determined by the Tribunal at this full merits hearing was agreed and set out. It is on the basis of that list of issues that this hearing proceeded.

Problems getting this hearing started.

4. The parties attended on the first day of this hearing but we were unable to commence due to the fact that the bundle had not been properly constituted and there was no cogent bundle before the Tribunal to enable matters to commence.
5. It was therefore necessary to send the parties away and ask the Representatives to prepare a properly indexed and paginated bundle to be before this Tribunal. We are happy to report that they achieved that and as a result we had before us a two volume bundle indexed and paginated extending to some 534 pages.
6. We heard evidence from the Claimant and from the Respondents, from Chris Weyer, the sales manager of the Respondent and from Dylan Wade-Gledhill, owner of the Respondent company.
7. We are most grateful to EJ H Mason for setting out the list of issues to be before this Tribunal.
8. In summary, the Claimant pursues a claim under section 13 of the Employment Rights Act 1996 for unlawful deduction of wages. This is framed in respect of commission payments, the Claimant avers she is due pursuant to the sales bonus/commission structure set out in her contract of employment, a copy of which was before us. In this respect she is claiming the sum of £11,870.30. That sum is agreed by the Respondents as being the sum that would have been payable to her under that commission structure albeit the Respondents argue that in the circumstances those sums were not payable.
9. The Claimant also pursues various claims in disability discrimination as set out in EJ Mason's list of issues. Those claims include claims for discrimination arising from disability under section 15 of the Equality Act, a failure to make reasonable adjustments under section 20 and a claim for victimisation under section 27 of the Equality Act. Both section 15 and section 20 are disapplied if the Respondent successfully deploy knowledge defences. Those defences are subject to slightly different tests under section 15 and section 20.

10. The Claimant also pursues a claim for constructive unfair dismissal based upon her resignation by letter dated 11 October 2021.

Findings of fact

11. The Claimant was employed between 24 June 2013 and 6 December 2021 which was her effective date of termination pursuant to her resignation on 11 October 2021.
12. The Claimant was employed as a design consultant for the Respondents who are a company that designs and installs kitchens and bathrooms for domestic premises.
13. The Claimant was employed under a contract of employment subject to written terms in a document extending to three pages which was before the Tribunal. This document is headed "Statement of main terms of employment". It specifies that the Claimant's employment commenced on 24 June 2013 and the document before us was signed on behalf of the employer on 20 June 2013 and by the Claimant on 22 June 2013.
14. On the third page of that document, as an addendum, was a clause sitting alone, on a page of its own, out with the body of the contract of employment, that was headed "Sales bonus/commission structure". It reads as follows:

"Sales bonus/commission structure
Basic salary per annum £12,500.00
Monthly sales target ex VAT £45,000.00 Bonus = £1000.00 per month
Commission at 6% (6% can be claimed on all materials sold excluding
labour and sub-contractor items).
(These figures are for 2013 and will be subject to a review for 2014)."
15. It is accepted that the Respondent is a family run business which designs and installs bespoke kitchens and bathrooms. The company was incorporated on 5 March 2003 but the business has been running since the 1970s.
16. The events which led to these proceedings started in or about mid 2020 during the height of the covid and continued through to 2021.
17. These findings of fact are not a complete picture of events that took place between those dates but our findings of fact are necessary and relevant only to the issues to be determined.
18. We heard evidence from the Claimant that pursuant to a busy period at work in March 2021 she began to develop a skin rash. She sought advice

from her General Practitioner who advised her to take time off sick. She obtained a sick certificate dated 22 March but she did not present this to the Respondents until later and continued to work until 19 April when she then presented a second certificate she had obtained to Chris Weyer, the Respondent's sales manager and the Claimant's line manager.

19. On cross-examination the Claimant accepted that she had not produced the original sick certificate. Those certificates were before the Tribunal and cited work related stress as the reason for absence. The 22 March certificate ticked the box suggesting altered hours and the latest certificate dated 8 April ticked the 'not fit to work' box.
20. Under cross examination the Claimant accepted that she, in discussions with Chris Weyer, had not used the word "stress" as a reason for her sickness.
21. We heard evidence from Mr Weyer that the first he knew of any hint of unwellness in the Claimant was when he was handed the second sick note on 19 April 2021. We accept his evidence and it is largely borne out by the Claimant's own evidence in cross-examination. There is no doubt that the Claimant was feeling under pressure at work but it was a busy time and the Respondents, in particular Mr Weyer, saw it as that and only that. There were others under the same, or similar, pressures at work.
22. The Tribunal accepts that whilst the Claimant may have indicated she was overworked and under pressure, there was nothing that would have alerted Mr Weyer or anyone else at the Respondent, that she may or may not be suffering from a significant medical issue that amounted to a disability.
23. This, of course, is all in the context of the fact that EJ Tynan found that the Claimant was a disabled person by reason of Lupus at the material time between 22 March 2021 and 20 November 2021. The Claimant was not formally diagnosed with Lupus until November 2021.
24. We conclude that at the time the Claimant went off sick the only evidence before the Respondents of her illness were events that took place on 19 April 2021.
25. It was mentioned that thereafter the Claimant did not, at any stage, return to work but kept in touch with Chris Weyer throughout the course of April and May before launching a grievance on 5 June 2021. This was pursuant to an exchange of emails principally concerning commission that the Claimant felt she was owed arising out of kitchens she had designed/sold, in respect of which the Respondents were not paying the commission she expected to have received.
26. That grievance was sent by the Claimant to Dylan Wade-Gledhill and Chris Weyer under cover of an email dated 5 June and identified the

grievance as a formal letter of grievance concerning unpaid commission. There was, accompanying that email, a letter attached dated 5 June headed up "Grievance letter for unpaid commission". That grievance principally, therefore, was a grievance concerning the unpaid commission which the Claimant expected to receive and had not received during to then, a period of absence.

27. There is a reference to her continuing to be unwell and some indication of the nature of her illness but minimal detail.
28. Pursuant to that grievance the Respondents invited the Claimant to a grievance meeting which took place on 30 June 2021. That grievance was conducted by Chris Weyer. Also in attendance was Francis Hedger.
29. We have the minutes of that grievance meeting in the bundle in front of us.
30. In that meeting the Claimant discussed with Chris Weyer, the list of commission payments she said she was entitled to and there were also discussions about the amount of work the Claimant had been expected to deal with during the period up to the end of March 2021 and the Claimant's view that he had contributed to her being off work ill. There are discussions about the treatment that the Claimant is undergoing and ultimately, pursuant to that meeting, the Respondent, Chris Weyer, wrote to the Claimant on 12 July with a grievance outcome letter. In short, the Claimant's grievance was not upheld and an explanation was given as to why the commission payments had not been paid.
31. There was a short section dealing with the Claimant's assertion that her workload had contributed or indeed caused her to become ill. This focused on the level of work the Claimant had undertaken and the support that Chris Weyer had given to her.
32. The grievance was not upheld.
33. The Claimant appealed to Dylan Wade-Gledhill in a letter attached to an email to him dated 14 July and there was ultimately an appeal hearing on 7 September 2021. Similar discussions concentrated principally upon the commission dispute but also the level of workload the Claimant had been under and the nature of her illness which had caused her to be off sick. In a letter sent on 5 October 2021 the Claimant was informed that her appeal against the grievance outcome had been unsuccessful. That letter was sent by Dylan Wade-Gledhill. The outcome was that the appeal had been unsuccessful and that Dylan Wade-Gledhill declined to pay the commission claimed and did not consider that there was evidence to support the assertion that an excessive workload caused the Claimant to become ill and that she was not given support.

34. It was after that, on 11 October, that the Claimant wrote a letter resigning her employment. That employment had an effective date of termination pursuant to that resignation of 6 December 2021.
35. In that letter the Claimant cited several reasons for her resignation including lack of support during a heavy workload and lack of support when the Claimant became ill, including an assertion of a failure to make reasonable adjustments. There was an assertion of victimisation but not on the basis of the victimisation claim that is currently before this Tribunal.
36. One of the reasons cited amongst five paragraphs justifying the decision to resign, was a paragraph which reads:

“You are breaching my contract by not paying me any of the commission I earned without reasonable justification. Deductions contrary to section 13 of the Employment Rights Act 1996”.
37. That was one of five reasons cited.
38. The Claimant then left the Respondent’s employment and ultimately pursued these proceedings.

The Claimant’s claim for unlawful deduction of wages in respect of unpaid commission payments

39. The Claimant pursues a claim for unpaid commission by way of unlawful deduction of wages. The Tribunal had before it the document which we marked C2 which listed a number of customers with whom the Claimant had dealt and sums by way of commission attributed to those customers which the Claimant felt, under the terms of her contract of employment, she was entitled to by way of commission on the basis of the commission arrangements set out in her contract of employment. That sum totalled £11,870.30. There was no dispute about the calculation between the parties and that is the sum in dispute.
40. The evidence we heard from both Chris Weyer and Dylan Wade-Gledhill puts the Respondent’s position as being the situation where the trigger for the payment of commission had not been effected. They say that there were a series of things which a designer/sales person had to effect in respect of a kitchen sale before commission was payable.
41. The Respondent’s position is that no commission is payable until the job had been formally signed off by the job surveyor, suggesting that there was some element of discretion, even in circumstances where there had been secured, a deposit had been received, the installation had taken place and the final payment had been made. In his evidence Chris Weyer went through each of the customers on the list of commission claims put forward by the Claimant at C2 and found errors and adjustments that had been required to be rectified. This appeared to be the case in all of those

customers in respect of which the Claimant was seeking commission. In his evidence, Dylan Wade-Gledhill referred the Tribunal to a document which appeared to be a list of things that needed to be done prior to commission becoming payable on any given job. That, however, was a loose typed document not attached to anything else and prepared purely for the purposes of this Tribunal.

42. In her evidence the Claimant was clearly unaware that this was a definitive list which needed to be completed to trigger the payment of commission and we accept her evidence that she had not had to do so in respect of customers in the past.
43. There may have been queries which needed to be ironed out on those sales/installations but that would not be unusual and would not be the case in most, if not all, sales and installations. We accept the Claimant's evidence that in the past she had not had to go through and essentially tick off as done, the lengthy list put before us at page 501 in the bundle, prior to triggering the payment of commission.
44. Under cross-examination Chris Weyer confirmed that in respect of each of those cited in the list of commissions claimed at C2, the Claimant had been the effective sales person and each and every one of those customers had entered into the necessary contract, paid the 25% deposit and ultimately the installations had gone ahead with some issues to be ironed out and had ultimately all had completed.
45. Under further cross-examination by EJ Palmer, Chris Weyer admitted that he could not recall a situation where an operative had been denied commission in the past as a result of missed steps, errors and mistakes that needed to be ironed out in respect of a particular customer's installation. He also accepted that the document at page 501 was not a document but was an operative document in these proceedings but merely a list of issues which, the Respondents assert, needed to be completed to trigger commission which had been put together by Dylan Wade-Gledhill, purely for the purposes of this Tribunal. He also accepted, under the same cross-examination, that the commission was not paid to anyone else and that he had, in effect, finished them off when the Claimant was away sick. He asserted, however, that there was a process that needed to be completed. He said that she hadn't corrected the mistakes and he had to do that for her.
46. Under cross-examination he confirmed to EJ Palmer that this had not happened in the past other than when someone had left in the middle of a transaction. He said that in those cases the commission might be split between the leaver and the person coming in to pick up the job half way through.
47. The Claimant gave a comprehensive explanation as to her understanding as to when commission payments were triggered. She said that the

commission was usually paid to the employee after the survey was undertaken and before the installation date. There was one sale, "Peck", which did not proceed to survey and the customer asked for their deposit back, all of which occurred after the Claimant started her sickness absence and that is not included in the Claimant's claim before this Tribunal.

48. Having heard the evidence of Mr Weyer, Mr Wade-Gledhill and the Claimant, we prefer the evidence of the Claimant in this respect. It seems to us that it is clear that the practice was for the commission to be paid on jobs where an individual employee had been the operating cause of the sale and that commission was, in practice, paid irrespective of the necessity to iron out errors and miss steps in the design and preparation for installation process. There was no evidence that there was a previous occasion on which anyone had not been paid commission because they had failed to complete the list which was put before us as being the definitive list required to be completed prior to the payment of commission. We do not accept that that has happened and, in fact, on the Respondent's own evidence they accept that that was the case.
49. We therefore make a finding of fact that the Claimant was indeed the operating and substantive cause of those sales at C2, all of which ultimately went to installation and completed. There is nothing in the written contract of employment at page 112 of the bundle or in any of the evidence before us, which suggests that the Claimant was not entitled to be paid those commissions.
50. The Respondents have not even alleged that anyone else was the effective cause of the sale. The commissions on the jobs listed at C2 had not been paid to anyone else. We make a finding, therefore, that the Claimant was entitled under her contract to be paid those commissions in the sum of £11,870.30.

The Claimant's claim of victimisation

51. This is based on the assertion that the Claimant carried out a protected act, namely, the raising of the grievance on 5 June 2021. The fact that that qualifies as a protected act is not disputed by the Respondents. What is in dispute is that the Claimant suffered a detriment as a result. The detriment claimed is the allegation that she was not allowed to return to work until the conclusion of her grievance and that this detriment was because of the protected act.
52. It is necessary for us to make findings of fact about that.
53. The Claimant's claim arises out of the discussions during a grievance meeting with Chris Weyer on 30 June.

54. She raised the issue of a back to work plan during the course of that meeting. Extracts from notes taken during that meeting were before us. We also heard evidence from both the Claimant and Chris Weyer which was subject to cross-examination.
55. Having carefully considered that evidence we make a finding that the Claimant did raise this issue at the grievance hearing and that Chris Weyer did not refuse the Claimant's suggestion that she came back to work but merely suggested that it would be wise to get the grievance out of the way and that the Claimant should not come back until she was fit to do so. In fact, the Claimant goes on to confirm that she would not want to come back until she was properly in a position to do so. We do not therefore consider, as a matter of fact, that this constituted a refusal on the part of Chris Weyer to have her back. We accept his evidence under cross-examination that he was very keen to get her back because she was a high performing employee but that he was reluctant to commit to a return until he was certain she was able to. We therefore do not consider that the Respondents did not allow the Claimant to return to work. In any event, had we have construed the evidence before us to mean that, we would not have been able to find that it was because of the protected act, the raising of the grievance.

The Law

The Claimant's claim under section 13 of the Employment Rights Act for unlawful deduction of wages.

56. Section 13 of the Employment Rights Act states as follows:
13. Right not to suffer unauthorised deductions
- (1) An employer shall not make a deduction from wages of a worker employed by him unless—
- (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
- (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.
57. For the Claimant to succeed in her claim in this respect she would have to show that the commission payment was due under the terms of her contract. The failure to pay it would constitute a deduction and in the

absence of evidence that she had previously signed in writing, an agreement or consent to make that deduction, she would succeed.

58. The key would be whether she was so entitled under the terms of the contract. We accept that the law put forward by Mr Starcevic on the Claimant's behalf with respect to the payment of commission from "Chitty" is the correct position that it is traditionally implied that an agent must be the effective cause of the transaction to trigger the commission. Naturally, it is the contract of employment which is key in this respect. Here, the operative part of the contract is perfunctory and simply says that commission is due at 6% on all materials sold, excluding labour and sub-contractor items.
59. We are, of course, bound to consider evidence of custom and practice as to how that clause and the commission payment had operated in the past.

Constructive dismissal

60. The Claimant pursues this claim under section 95 of the Employment Rights Act 1996.

95. Circumstances in which an employee is dismissed

- (1) For the purposes of this Part an employee is dismissed by his employer if—
- (a) the contract under which he is employed is terminated by the employer (whether with or without notice),
 - (b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or
 - (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct

61. In this respect the Claimant relies on 95(1)(c).

62. The leading case on constructive dismissal remains, the case of Western Excavating (ECC) Limited v Sharp [1978] ICR221 Court of Appeal. This was a case presided over by Lord Denning and concluded that for an

employer's conduct to give rise to a constructive dismissal it must involve a repudiatory breach of contract. Lord Denning stated:

“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct he is constructively dismissed”.

63. The test is an objective test for the Tribunal to decide. The employer must establish that there was a fundamental breach of contract on the part of the employer, that the employer's breach caused the employee to resign and the employee did not delay too long before resigning, thus firming the contract.
64. In this case the Claimant relies upon the implied term of trust and confidence.
65. She alleges that for the reasons set out in her resignation letter she resigned and that those reasons constitute repudiatory breaches entitling her to do so and that she resigned in good time.
66. We are reminded by Mr Starcevic that with respect to causation it is sufficient if the employer's breach of contract is an effective cause of the decision to resign. It need not be the only or dominant cause of the Claimant's decision. In this respect he refers us to Wright v North Ayrshire DC [2014] ICR77EAT.

Disability discrimination section 15

67. The Claimant pursues a claim under section 15 of the Equality Act which is discrimination arising out of a disability. Section 15 states as follows:

15. Discrimination arising from disability

- (1) A person (A) discriminates against a disabled person (B) if—
 - (a) A treats B unfavourably because of something arising in consequence of B's disability, and
 - (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
- (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

68. Section 15 is disapplied if the employer can show that it did not know and could not reasonably have been expected to know, that B had the disability.
69. A similar provision sits under section 20 of the Equality Act which is also a claim pursued here. However, that has a slightly different test in that the required knowledge is not only that the Claimant is disabled but also that the Claimant is placed at a particular disadvantage by a PCP.
70. Knowledge is a defence raised in both of these claims by the Respondents. Lack of actual or constructive knowledge is a defence and the burden is on the Respondents to prove that lack of knowledge. The Respondent is required to make reasonable enquiries where they should be alerted to do so. We are referred by Mr Starcevic to the case of AECOM Limited v Mr C Mallen [2023] EAT. Here the EAT said an employer cannot turn a blind eye and must make enquiries where alerted. However, this is not an unlimited duty, the duty is only to make such enquiries as are reasonable in the circumstances.

Victimisation

71. Victimisation is governed by section 27 of the Equality Act 2010 and provides:

27. Victimisation

- (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
 - (a) B does a protected act, or
 - (b) A believes that B has done, or may do, a protected act.

72. Here, there is no dispute that the Claimant did a protective act. The Claimant, however, has the burden of proof to show that she suffered a detriment because of that act. The detriment relied upon is not being allowed to return to work until the conclusion of a grievance.

CONCLUSIONS

Section 13 – Unlawful deduction of wages claim.

73. The Claimant claims that she was entitled to be paid commission in the circumstances under the terms of her contract of employment. The

operative clause in her contract of employment is short and perfunctory. It simply says she is entitled to 6% commission on all materials sold excluding labour and sub-contractor items.

74. We heard evidence from the Respondents that commission is only paid at the end of a series of detailed acts culminating in the signing off of a particular installation by a surveyor and pursuant to a completed commission claim form. We do not accept that evidence. Even on their own evidence under cross-examination the Respondents, in the shape of Mr Weyer, accepted that there had never been a circumstance in the past where a failure to comply entirely with the list put before us at 501 (a list compiled purely for the purposes of this Tribunal and not before seen by the Claimant), had ever resulted in an employee not being paid commission in respect of a particular job other than in circumstances where someone had left and the job had had to be picked up by somebody else.
75. Moreover, the Respondents admitted that the commission had not been paid to any other designer/salesman but therefore simply not been paid to anyone. There was no suggestion that the Claimant was not the operating and substantive cause of effecting those sales to those clients and customers, only that there were problems that need to be ironed out before those jobs could complete and the installations take place. That, in this Tribunal's judgment, is not sufficient under the terms of the Claimant's contract, to bring about a situation where she was not entitled to be paid those commission payments. It was her that landed those contracts, she got the contract signed and the deposits paid. Ultimately, it was as a result of her efforts and endeavours that those contracts completed. Nowhere in the documentation before us was there anything that suggested other than she should be the one who would benefit from the commission. There was no evidence sufficient to persuade us that there was a custom and practice that an exhaustive series of triggers had to be completed prior to the commission being paid. We therefore conclude, that on the evidence before us, the Claimant was entitled to be paid those commissions under her contract of employment. They were not paid. That amounts to an unlawful deduction of wages. The Respondents have not argued that there was any justification for that deduction on the basis of prior written consent or agreement. Accordingly, the Claimant's claim succeeds and she is awarded the sum of £11,870.30. That is payable gross and payable immediately.

The Claimant's claims in disability discrimination.

Knowledge

76. The Respondents rely in both aspects of the Claimant's disability discrimination claims on lack of knowledge, both in respect of the test under section 15 and the extended test that attaches to section 20.

77. The first that the Respondents could have known about the Claimant's ill health was when she went off sick on 19 April 2021. She had received a previous sick note in March 2021 but concealed it. The sick notes simply specified work related stress. Nothing else was, at any time, put before the Respondents. The Claimant framed her unhappiness in any discussions with Mr Weyer and/or Mr Wade-Gledhill in terms of the pressure she was under due to an excessive workload.
78. The Claimant never went back to work after 19 April and raised her grievance on 5 June, subsequently remaining away from work until her resignation in October.
79. In all that time she produced no medical evidence of her condition other than those sick notes.
80. She was not diagnosed with Lupus until November of that year. However, it is the case that that would not preclude the Respondent's duty to make appropriate enquires where, in all the circumstances, it was reasonable for them to do so. EJ Tynan made a finding that the Claimant was a disabled person by reason of Lupus during the material period.
81. It is the case that the Tribunal must examine whether it would have been reasonable for the Respondents to have been expected to know that B had the disability at various points throughout her absence. It is not a snapshot at any one time.
82. Issues were raised by the Claimant verbally during her grievance meeting and in the grievance appeal meeting. However, we have examined the transcripts and notes taken of those meetings carefully and whilst there is discussion as to her medical condition, no written or other detailed evidence was ever produced by the Claimant throughout the whole of the period of her absence and discussions concerning the reason for her absence were largely on the basis of her being under pressure due to overwork. We find the cues that were made during those discussions and the fact that such discussions were in the general tenor of workload rather than her illness meant that the Respondents did not know she was a disabled persons nor was the obligation to make further enquiries triggered as in the circumstances it was not reasonable to expect the Respondents to make further enquiries.
83. Therefore in all the circumstances and applying the rationale in the authorities referred to above, we do not think that it is reasonable for the Respondents to have made further enquires as to the Claimant's condition and we conclude that they did not know and therefore could not reasonably have been expected to know that the Claimant was suffering from the disability of Lupus.
84. In those circumstances the Claimant's claims under section 15 and section 20 fail and are dismissed.

The Claimant's claim under section 27 for victimisation.

85. It is accepted by both parties that the act of pursuing a written grievance on 5 June 2021 constitutes a protected act under section 27(1)(a).
86. We have made a findings of fact, however, that we do not consider that as a matter of fact the Respondents subjected the Claimant to the detriment claimed, namely, that she was not allowed to return to work until the conclusion of her grievance. We consider that on the evidence we have seen and heard, there was a discussion about her returning to work and Mr Weyer was more concerned that she should be fit to do so before she did. We accept that he wanted her to return as she was an excellent employee and a good performer. Therefore, as a matter of fact, we cannot find, on the balance of probabilities on the evidence before us, that she was subjected to the detriment claimed.

Unfair dismissal

87. The question before us is whether there was a repudiatory breach of contract on behalf of the Respondents which entitled the Claimant to resign and in respect of which she did resign.
88. From the moment the Claimant went off sick in April 2021 she was agitating and chasing the Respondents for the commissions which she said were due under the terms of her contract. The Respondents consistently refused to pay that commission for the reasons they set out and continued to do so through the grievance process and up to the point where the Claimant resigned.
89. She resigned by way of letter on 11 October 2021. In that letter she cited as one of five reasons for her resignation, the failure to pay her commission due under her contract of employment.
90. We have found that that commission was due under the terms of her contract of employment. We have also found that the failure to pay that commission amounts to an unlawful deduction of wages, a claim in respect of which the Claimant has succeeded.
91. The question for us is whether that failure to pay commission constitutes a repudiatory breach going to the root of the contract on behalf of the employer, entitling the Claimant to resign and, if so, whether she resigned in reliance upon it in sufficient time.
92. Dealing with each of those in turn. Failure to pay commission is a failure under an essential term of the Claimant's contract of employment. That, in the judgment of this Tribunal, constitutes a serious breach of contract and a repudiatory breach going to the root of that contract on the basis of the authority of Western Excavating v Sharp. Thus the Claimant was entitled

to treat that repudiatory breach as terminating her contract in resign and reliance on it.

93. She wrote on 11 October, shortly after the grievance appeal had been unsuccessful, where the principal focus of the grievance and the appeal was the non payment of commission to her. She cited as one of the five reasons for her resignation, the failure to pay commission.
94. We accept that Mr Starcevic is correct in that the repudiatory breach does not have to be the only reason for the resignation, it has to be an effective cause of the decision to resign. In this case it was. It was one of the reasons cited in the letter of resignation. There was no delay sufficient to affirm that breach and one of the effective causes of the Claimant's resignation was that she was not being paid her commission to which she was due. That constituted a repudiatory breach and she resigned in reliance upon it. That failure was a fundamental breach of the Claimant's implied term of trust and confidence and she was therefore entitled to resign in reliance upon it. She did so and she did so within a reasonable time.
95. She was therefore constructively unfairly dismissed and in this respect her claim succeeds. There will be a one day Remedy Hearing to take place in person at the Bury St Edmunds Employment Tribunal on 12 August 2024.

Employment Judge K J Palmer

Date: 1 July 2024

Sent to the parties on: 12 July 2024...

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For the Tribunal Office.