EMPLOYMENT TRIBUNALS

Claimant: Mr P Hemmings

Respondent: Mishcon De Reya LLP

Heard at: **London Central (by CVP)** **On: 11 and 12 December 2024**

Before: **Employment Judge Walker**

Representation
Claimant: Mr Wheaton of Counsel
Respondent: Mr Harris of Counsel

RESERVED JUDGMENT

The Claimant's claim for constructive unfair dismissal succeeds.

The Claimant's claim for an unlawful deduction of wages in relation to course fees is well-founded.

REASONS

The Claim

The Claimant claimed unfair dismissal where the dismissal was alleged to be a constructive dismissal. The Claimant also claimed unpaid sums of money under section 13 of the Employment Rights Act.

The issues

The issues were discussed at the outset of the hearing and are listed below.

Constructive Unfair Dismissal:

1. Did the Respondent breach a term of the Claimant's contract of employment relating to payment of commission contained in the Claimant's Offer Letter dated 20th March 2020 (referred to at paragraph 1 of the Grounds of Complaint) and/or failing to account properly for the commission?

   NOTE: To the extent necessary this may involve determining the meaning of the commission clause in the contract.

2. If so, was that breach a repudiatory breach of contract?

3. The Claimant did resign.

4. Did the Claimant resign in response to any repudiatory breach?

5. Alternatively, did the Respondent act in a way that, without reasonable and proper cause was calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence between the parties, by:

    a. Failing to pay the Claimant commissions owed to him?

    b. Failing to be transparent in respect of the commission owed to him?

    c. Unreasonably subjecting the Claimant to a performance improvement programme?

6. The Claimant did resign.

7. Was that resignation in response to any repudiatory breach?

8. At the time of resignation had the Claimant waived any such breach or affirmed the contract?

9. If there was a constructive dismissal, was the dismissal fair given the provisions of section 98 of the Employment Rights Act 1996.

Deduction of wages (s13 ERA):

10. Did the Respondent make a deduction of wages that were 'properly payable' to the Claimant by:

    a. Failing to pay the Claimant commission owed to him?

    b. Deducting the cost of the London Business School "Mastering Digital Marketing Course" from the Claimant's final payslip?

Withdrawn

12 The following arguments were withdrawn by the parties at the outset of the hearing.

    a. The Claimant's claim that the Respondent had failed to pay the Claimant company sick pay (beyond Statutory Sick Pay) between 14 August 2023 to 14 September 2023.

    b. The Respondent's arguments that the claim of some parts of it were out of time so that the Tribunal did not have jurisdiction.

13 In the event that the Claimant were to succeed in whole or part, the question of remedy would arise. On that point the Respondent would argue that any award should be reduced by reason of contributory fault. We did not consider remedy at this hearing.

The Evidence

14 I heard evidence from the Claimant and from Mr Hancock, a non-lawyer partner of the Respondent.

15 I also had a bundle of documents and shortly before the hearing I was provided with two additional documents being two policies from the Respondent – a Performance Improvement Policy and a Sickness Absence Policy.

The Facts

1 The Claimant commenced work on 4 May 2020. His job title was Commercial Director according to his ET1. He was hired to work within the Respondent's cyber business.

2 The offer letter sent to the Claimant referred specifically to a commission arrangement which was described as follows:

> *"In addition to your annual salary or set out in the Contract of Employment and subject to conformity with the firm's usual billing practices, you will be entitled to further payments as follows, reviewable on an annual basis:*
>
> *3 per cent on all fees originated by you. We will only be required to pay this commission on the basis that the fees are billed and paid by the clients introduced by you to the Firm and where the fees directly relate to a matter you were directly responsible for originating unless otherwise agreed. This will be paid quarterly."*

3 The Claimant also had a contract of employment which included a number of clauses which are often incorporated into such documents including a clause relating to confidential information.

4 The Claimant commenced work during the COVID era. This made normal business somewhat difficult. Thereafter both parties acknowledged that the cyber business was not as successful as hoped.

5 The Respondent operates an appraisal system through an HR programme called ELM. The last appraisal on that system for the Claimant was in 2021. The Claimant and Mr Hancock who was his immediate line manager and responsible for the cyber business spoke very regularly and frequently discussed the problems in achieving sales and promoting the cyber business. The Claimant had access to various programmes including one called HubSpot, which is a client relationship management system and which facilitated him monitoring the progress of efforts to attract potential clients to the business. The Claimant kept notes of his own about his work.

6 By the time of the events that the parties are addressing, the Respondent's business fell into two parts. One part was a contractual arrangement under which the client had the ability to have an ongoing annual retainer to support them and the second part was a reactive crisis business in which, when a client had some kind of cyber problem, the Respondent would assist them with that particular issue as and when they were contacted. The Claimant says that he had no visibility on the reactive crisis business because that went straight to the delivery team but might have been initiated by him or through the third parties who are the channel partners.

<u>Budget for 2023/24 financial year</u>

7 By an email dated 25 November 2022 Mr Hancock asked the Claimant for achievable figures for certain quarters based on what could be attributable to his origination/activity so he did not end up double counting. There followed an exchange of

emails and Mr Hemmings gave Mr Hancock a range of figures. Mr Hancock then extracted figures which he checked with Mr Hemmings. It was stressed by him to Mr Hemmings that those figures should be accurate and achievable. There was clearly an emphasis on accurate and achievable figures in this financial year's budget process. In February 2023, Mr Hancock was preparing budgets and forecasts for the business. The firm's email to Mr Hancock is very clear in stating that the BD budgeting process was to work differently to previous years. He was told that the firm was producing numbers which they must then work within.

Learning Agreement

8 Mr Hemmings understood that there were difficulties with the marketing of the cyber business. Getting sufficient support from the Respondents digital marketing team had not been very successful and so he proposed that he attended an online course for digital marketing himself. In May 2023 he enquired whether he could proceed with this due to a deadline to register. That same day the Respondents approved the course.

9 The course approval was subject to the terms set out in a letter sent to the Claimant headed "LEARNING AGREEMENT FOR PROFESSIONAL TRAINING". In signing that Agreement, the Claimant was required to agree to the repayment provisions which were attached. The repayment provisions included a requirement that the Claimant would repay the fees if one of the "triggering events" took place. These were set out as follows:

> *(a) you resign;*
>
> *(b) you are dismissed for gross misconduct in accordance with the Firm's disciplinary procedure;*
>
> *(c) your employment is terminated for any other reason (with the exception of redundancy);*
>
> *(d) you decide not to pursue or continue the course for any reason (including failure of exam/assessment).*

10 There were terms of repayment which set out how what percentage of fees would need to be repaid and what the timeline was.

Performance Improvement Plan Process

11 I understand that the Respondent's financial year runs April to April. At the end of quarter one of the Respondent's financial year, the expected figures had not been achieved. Mr Hancock discussed the position with HR, and they put in place arrangements to commence a performance review under their Performance Improvement Policy.

12 The Performance Improvement Policy states:

> *"Where concerns arise about the standard of your performance, these will normally be raised initially by your development partner/manager in the course of your ELM meetings or daily work, which, depending on the issues raised, may be addressed by setting a list of objectives that you are required to meet within a given timescale.*
>
> *In the event that these objectives are not met or those partners or managers for whom you work are not satisfied that your performance is improving sufficiently quickly or to an appropriate standard, your development partner/manager will advise you that you will be required to attend a formal meeting in line with this procedure to discuss your performance."*

13 There are three formal meetings detailed. The reference to the first formal meeting said:

> *"You will be invited in writing to this meeting …. and will be given details of the issues or concerns that will be addressed. You will be entitled to be accompanied at that meeting by a colleague or a trade union representative (if relevant) should you so desire. During the meeting you will be given an opportunity to raise any issues or information that you may have in relation to your performance or that you would like us to take into account, and to put forward views about what could help you improve or how you might achieve the standards required.*
>
> *If it is found that the concerns about your performance require formal action, your development partner/manager, in consultation with other people for whom you work (including the People Advisory team where appropriate), will draw up a Performance Improvement Plan (PIP) after the meeting and will provide a copy of it to you. The plan will set out any performance objectives and timescales within which you will be required to meet those objectives. "*

14 A PIP would amount to a first performance notice. The employee would be told that failure to achieve the required improvements in the timescale would result in the next stage of the procedure being implemented.

15 There was then a process for a second formal meeting at which the performance levels would be reviewed against the PIP and if the objectives had not been sufficiently met, the PIP would be updated as appropriate and that would serve as a final performance notice. It would be made clear that failure to achieve that level of performance might result in dismissal.

16 The third stage provided that monitoring, and assessment would be carried out throughout the duration of the second PIP and if there had not been sufficient improvement it could lead to dismissal.

<u>First Invitation to a Formal Meeting</u>

17 There was a normal one to one meeting between Mr Hemmings and Mr Hancock on 17 July 2023 at which Mr Hancock raised the prospect that there was to be a performance process. On Thursday 20 July, a formal letter was sent to Mr Hemmings inviting him to a meeting on Monday 24 July. That invitation letter was sent by Harriet Kirkaldy, Head of People Advisory, and headed "Performance Management Meeting" and said:

> *Further to your recent discussion with Joe Hancock on 17 July 2023, I am writing to invite you to a performance management review meeting. The purpose of the meeting will be to discuss concerns we have with your current performance.*
>
> *……*
>
> *At the meeting we would like to discuss our concerns regarding your performance that have previously been brought to your attention.*
>
> *The areas to discuss include attaining the specific sales targets that have been agreed for the current financial year in terms of overall revenues and number of contracts that are expected to be originated directly by you in year."*

18 The meeting took place and was attended by the Claimant, his manager, Mr Hancock and Ms Hartley, an HR representative. There are two records of the meeting. One was prepared by Ms Hartley for the Respondent and is clearly a summary. It is far from a complete record. The other is a transcript of a recording made by the Claimant (without disclosing that he was recording) which indicates that he was alone in the meeting

room at first. Then Ms Hartley arrived and then a few moments later Mr Hancock joined, them. Ms Hartley made a very brief explanation of her role and said she would take notes. I assume Ms Hartley made some rough notes in manuscript or on her computer at the time and her minute of the meeting is compiled from those notes because it is prepared in a manner which would be difficult to achieve when trying to make contemporaneous notes. Mr Hemmings was given an opportunity to read out some notes he had prepared. Mr Hemmings was extremely distressed by the invitation and his pre-prepared statement included a reference to the extent of his workload and the lack of support, and that he thought the PIP could only be viewed he believed, *"for removing him, and not for improvement"*. He made it clear that he felt the process was unfair and unreasonable.

19 Mr Hemming explained that he had four key points that he wanted to raise. He talked about retainers and argued that some of the retainers predicted for quarter one had not materialised yet, but suggested these were small sums and that there were other sales he was responsible for which were relatively large sums. He then referred to the concept of originations and said he did not understand it. As part of this explanation, Mr Hemmings raised for the first time the fact that he had not received the 3% origination commission which he was due under his offer letter. He raised that in the context of pointing out that it was unclear which sales opportunities he had managed and where they had gone. He thought he wasn't recognised for all his originations which were substantial. He pointed out that he had not had a job description. He accepted that sales were down but strongly contested at that he had been at fault in not bringing them in. His speech culminated in a request for a settlement package.

20 The Respondent's notes ended when they moved into a without prejudice discussion, but the Claimant had continued his recording, and his eventual transcript sets out word for word (where it was audible) what was said continuing into the without prejudice meeting and on. The parties agreed that I could see the without prejudice sections of the transcript and some without prejudice correspondence. It appears the Claimant had waived his right over the privilege and the Respondent did not challenge this. The without prejudice discussions did not result in a settlement

21 There are some specific comments which are important, where the Claimant as part of his pre-prepared speech specifically raised the commission payment and said:

> *"I'm really confused over your interpretation of origination. I've not challenged it because in my head it's really black and white, but I don't have it defined in my contract. There is no explanation of it but it does state an origination bonus of 3%, which I've never pursued because actually in my head the job is the job."*

The Claimant also said:

> *"I'm really unclear on where certainly sales origination to sales opportunities and accounts that I've managed in developed at that point. Where have they gone today then? And incremental sales, the origination of incremental sales. We received sales from accounts that I found and developed. SCC, Little Fish recently. These requests are directed straight to the delivery team. I'm not informed of these. I find out after the event. As the sales and account lead this, this can't be right."*

22 The Claimant requested a definition of origination, an explanation as to why his bonus wasn't paid and where it went, and clarity on origination and its process. On this point he wanted to know about origination for incremental business. The Claimant wanted his job description. He wanted a clear set of objectives for his role in line with his job description. He wanted partner attendance at key business development meetings.

23 The Claimant made it clear on several occasions that he regarded the process as one which would lead to his departure. He referred to his confusion over how he could continue to sell to clients knowing he was leaving. He needed to understand how to handle

existing meetings. The Claimant pointed out that this included matters such as a client called SCC. He had worked on a partnership programme under which other entities would promote the Claimants work either as part of a larger service they provided or for other reasons. One of these, SCC, had planned a national campaign which was about to go live in a week.

24 The Claimant explained that he felt this was unfair and said how he was proud of the job but clearly needed to look for another job which was not a quick exercise. He was concerned about his family and living costs and he explained he would like a without prejudice meeting to discuss a sensible settlement figure which allowed both parties to move forward.

25 Thereafter the transcript shows that the Claimant referred to the commission and indicated that it was not important to him as a monetary sum but rather he was concerned he was not getting credit for the client work he had brought in. In relation to the commission he said:

> *"I'll be honest Joe I don't care about the money."*

26 There followed a discussion about the technicalities of the Respondents operation, the competition and the issues with developing the cyber business and also a discussion about the pressure the Claimant was under and the London Business School course he was doing. Although the Claimant had passed every module so far and only had about 5 weeks to go, it was taking a day or a day and a half of his time each week. In the course of that conversation Mr Hancock made number of comments indicating the Claimant could stop going. They included Mr Hancock saying:

> *"Well stop going. I mean you asked for it and so we paid for it. OK, you don't have to do it. No one's ever made you do it. You can stop."*

Also Mr Hancock said:

> "*You can absolutely stop. You should not …on your holiday. I'm sorry. I'm sorry. But honestly there's no obligation from us for you to go on that course".*

He also said:

> *"And look, one thing I say is if the course is causing problems, please stop doing the course."*

Even Ms Hartley's summary notes show that they both encouraged Mr Hemmings to stop attending the course if it was causing him stress.

27 There is no express statement in the transcript that Ms Hartley left the room after they had discussed what might make up a without prejudice settlement, however she ceased participating in the discussion. Mr Hemmings and Mr Hancock had a continuing discussion about the situation.

28 On two occasions during the meeting Mr Hancock made comments which indicated some problems with the Claimant. My attention was drawn to the transcript where Mr Hancock said:

> *"But we've had conversations around, you came in on a certain package, so you were going to originate or say generate the [inaudible], whatever, gain a million pounds worth of business."*

29 After that, Mr Hancock went on to explain because of COVID they were happy to accept that it's a very hard market and then expectations were lowered and now

expectations are very low and in terms of the new business that we need to generate it isn't there. He also he carried on:

> *"and I get there's some other reasons you've put across, and again, I understood the frustration with marketing and those kind of things, but that ultimately is the sales target."*

30 The second comment made by Mr Hancock was when he said:

> *"So just stop you for a minute, Paul. One is, ultimately it is for you to recommend to us what can be done not for us to necessarily, because you are the commercial, right? And I do often feel we have these conversations and you look to me to find the answers. No, that's how it feels from my perspective, right? And so in terms of more genun spend or expertise, seems I can't change the firm's marketing machine or marketing programme. I've tried to do it in the ways that I can and within the constraints that I've got. But I'm still –".*

31 However, particularly during the later discussion between Mr Hemmings and Mr Hancock, Mr Hancock confirmed Mr Hemmings' belief that there was nothing he could do to improve the market situation for the cyber business at the Respondent. There are a number of comments to this effect. Mr Hancock in his evidence explained this by saying that he had been trying to reassure a very distressed individual, but he did have concerns about the Claimant's performance. There are emails in the bundle which indicate that Mr Hancock did have some issues with Mr Hemmings' performance. However, the comments that Mr Hemmings made to Mr Hemmings are overwhelmingly to the effect that he was not at fault.

32 These include Mr Hancock saying:

> *32.1 "Look the issue is, let's have a chat about it because my impression is... [inaudible] I don't think this is that in any way lack of effort. I don't think this is you right? I mean this is absolutely a market problem and genuinely cybersecurity sales right now is not the market to be in. If I'm being really honest, it is …OK".*
>
> *32.2 "Every person I speak to is in cybersecurity sales at the moment it's moving out of cybersecurity sales, so if you want to make a move into a different sector, you want to go and do something else, I will absolutely support that. OK? And that's not you being let go. That is genuinely, you are in a situation where, as the commercial director, there's a mountain to climb and the mountain is getting even bigger and it's not you growing the mountain, right?"*
>
> 32.3 *"It's stupid, honestly. [Inaudible.] I genuinely do not think there's anything else you can do. Right? I think that this is wrong services, wrong market in the wrong way, right? That kind of alignment."*
>
> *32.4 "I don't want to put words in your mouth, but I think one of the things that you've kind of articulated is that effectively, structurally, we're set up wrong for this."*
>
> *32.5 "I'm not entirely sure it was a winnable fight, is what I'm saying. Right? You see what I'm getting at? It's kind of like... because that is... and I reflect on that because I know I have my own... we should be able to build a cyber security business because people need cybersecurity and people spend money on it. And I just started to come to terms, I think even a tiny bit recently, with the fact that yeah, but that doesn't mean people buy it from us from here."*

33 In summary, those comments show that although Mr Hancock suggested there was a sales target (which we know had been missed) and he wanted Mr Hemmings to provide answers, Mr Hancock repeatedly acknowledged there was nothing Mr Hemming

could actually do to improve performance. There were practical difficulties with the business offering and there were strong competitors, coupled with the fact that people generally were reluctant to spend money and world events had also made things difficult.

34 In consequence, the Claimant was left with three key points. First, he understood that he was being told to stop the digital marketing course. Mr Hancock acknowledging this during his evidence, but it did not occur to him to consider the terms on which the training had been offered. As a result, Mr Hemming believed he had instructions to stop the course and believed that having been given such an instruction it would be paid for by the Respondent

35 Secondly, Mr Hemmings understood that Mr Hancock agreed that there was nothing at all he could do to improve his performance.

36 Thirdly, Mr Hemmings understood that the Respondent was going to look into a settlement package along the lines they discussed to give him the opportunity to find another role elsewhere.

Commission Investigation

37 As I have noted, during the meeting, Mr Hemmings raised the issue of the commission. He had not received any payment of commission since he commenced work. He had not chased the commission and indeed in the course of the meeting, he made it clear that the money was not the driving force behind his request. Rather it appears that his belief was that he was not being given credit for the work that he had brought into the Respondent and that if he had commission allocated, it would be clear to people what his contribution amounted to. After this meeting, steps taken by the Respondent to ascertain the commission due to the Claimant.

38 On 26 July, Ms Hartley emailed Kane Brewer of the Respondent to ask if anything had been paid to the Claimant since he joined in May 2020 and if not, how they could go about looking up into it and she cited the clause in the Claimant's offer letter. Mr Brewer replied and confirmed that he was now calculating commissions. He confirmed that Mr Hemmings was not on the list of any people on such a deal. He also acknowledged it appeared nothing had been paid to Mr Hemmings. Mr Brewer asked for the full contract and said he would start looking at into the figures.

39 Meanwhile on the 2 August, the Respondent had an internal exchange of information about the possibility that Mr Hemmings had removed some data and sent it to personal accounts. The Respondent does not seek to take any action in response to this and it does appear that some of the data was not particularly confidential but two or three were considered sensitive. I have noted that there was a confidentiality clause in Mr Hemmings' contract. It seems he took documents relating to the business forecast and e-mail them to his home e-mail or his wife. No-one suggested Mr Hemmings has used those documents to benefit himself. It appears he sent them home in relation to his addressing the performance issues and his commission. However, the Respondent says this caused it to investigate and impacted on the way in which they treated the provision to mr Hemmings of information about his commission.

40 On 7 August in the afternoon, Mr Hemmings and Mr Hancock would normally have had a catch up meeting but Mr Hemmings did not attend as he was visiting his lawyer. The Respondent has not included any documentation in the bundle specifically convening that meeting. It did include a meeting invite for 8 August at 1.30 to 1. 55 pm, which was sent to Mr Hemmings and indicated that it would be attended by Ms Hartley and Mr Hancock, but this meeting is described as a catch up. There is no reference in it to the possibility of the Respondent showing the Mr Hemmings their commission calculation.

41 By 8 August, Mr Brewer had produced some calculations for the commission allocation. His initial figures produced on 4 August had included a number of matters where Mr Hemmings was down for 50%. That had been copied to Mr Hancock who asked for some more information. They then had an exchange of emails resulting in Mr Hancock sending another list of key matters and a further calculation increasing the amount due to Mr Hemmings. Mr Brewer replied on 8 August at 11:01 a.m. to Mr Hancock saying that he had combined the matters to be considered for the commission calculation. He noted that it showed 100% origination allocation to Mr Hemmings but asked if Mr Hancock wanted to show one client as 50% only. Based on 100%, the commission sum was £4,512.

42 Mr Hemmings was not able to attend the proposed 8 August meeting. That same day, 8 August 2023, he was admitted to hospital with chest pains. His wife attempted to inform the company that, following a doctor's appointment, Mr Hemmings had been admitted to Salisbury hospital, but her emails were bounced by the email system as undeliverable for some unknown reason.

43 Meanwhile also on 8 August, Mr Hemmings' direct access barrister wrote a without prejudice letter to the Respondent indicating that his client had a claim in relation to the commissions and he also had a potential constructive dismissal claim. His letter expressly said:

> *"My client can provide evidence of origination of business to MDR approximately as follows:*
> *2020 to 2021 – £24k*
> *2021 to 2022- £250k*
> *2022 to 2023- £230k*
> *2023 May to date £54K relating to prospective client BRE (which has been awaiting MDR to complete compliance firms for two weeks)."*

44 I calculate that at the rate of 3 per cent commission for direct originations which were billed and paid, these sums mean that Mr Hemmings was claiming £720, for 2020/21, £7,500 for 2021/22 and £6,900 for 2022/23, totalling £15,120. He would not have been due any sums for BRE until it was billed and paid. On the question of commission, the letter referred to "one off" RIR and to intermediary clients via partner engagements. He said that it would appear that there had been a substantial underpayment of commissions due to his client and that they had been diverted or hidden by the Respondent. In the event, despite the assertion that Mr Hemmings could produce evidence of those originations in the years set out above, he has not done so.

45 Unfortunately Mr Hemmings was unwell and too ill to work after being admitted to hospital on 8 August. He was on sick leave until 15 September. Meanwhile the Respondent continued to work on the commission problem.

46 On 10 August Mr Brewer gave an instruction to payroll for payment of £3,972.03 to be made to Mr Hemmings, being commission due to Mr Hemmings, as calculated between Mr Hancock and himself. This was paid in the August payroll at the end of the month. There are two relevant points. First this happened two days after the catch up meeting proposed on 8 August and secondly, it was a lower sum than the sum of £4,512 Mr Brewer had previously calculated. I can only assume Mr Hancock instructed Mr Brewer to reduce the sum. It seems likely, given the amount by which it was reduced, that the reduction was for the 50 per cent attribution for one client origination mentioned by Mr Brewer in his email of 8 August, client A. I understand that payroll made that payment of £3,972.03 to Mr Hemmings in the August payroll but at this stage there was nothing sent to him to explain the calculation.

47 Ms Hartley continued in her HR role to try to check in with the Claimant, but by an email dated 11 August 2023, she also reminded him that he was able to self-certify for up to five days and then would need a hospital "sick note" as she referred to it.

48 On 11 August 2023 the Respondent replied to Mr Wheaton's correspondence confirming that they didn't dispute his client was owed commission and they did not understand why it had not been paid but confirming they would pay what he was entitled to. That response explained that Mr Hemmings had been invited to two meetings to discuss the commission, which he did not attend. I understand that was a reference to the 7 and 8 August meetings which did not take place, neither of which were identified at the time as discussions about the commission entitlement. The Respondent explained they were happy to meet with Mr Hemmings to share the basis for the calculation and detail a small number of matters originated by him which were eligible for commission. They thought the commission calculation in Mr Wheaton's letter appeared to be based on confidential documents that they believed Mr Hemmings had wrongfully obtained and which contained details of overall fees rather than his individual originations. They then addressed other parts of the letter.

49 A fit note was submitted for Mr Hemmings stating he was not fit to work by reason of stress related chest pains.

50 There followed an exchange between Mr Wheaton and the Respondent in which the Respondent confirmed that when your client is well enough to return to work, they would reschedule the first performance meeting and proceed with the performance improvement process in accordance with usual policy.

51 As part of that process the Respondent confirmed that Mr Hemmings would be provided with the notes of the first performance meeting, should he wish to see them.

Return to work

52 Mr Hemmings returned to work on Friday 15 September. Mr Hancock emailed him suggesting a catch up later today or early next week. It is not clear that happened. The email then gave Mr Hemmings a short update on things that had been going on in his absence.

53 Meanwhile Ms Hartley emailed Mr Hemmings referring to his consent to a reference to Occupational Health and said she would be sending it through shortly and Occupational Health will be in contact and directly arrange a telephone appointment in due course. She then said:

> *"As you state, we want to resolve any issues as quickly as possible and discuss the performance review process. We note your preference to resolve this within the next 7 days and proposed to hold a meeting next Friday 22 September."*

Ms Hartley also said with regard to your commission payments they had attempted to meet with on two occasions prior to his illness to discuss it. They attempted to meet on 7 August and then again on the Tuesday morning when he was on his way to the doctor. They wanted to do that in person not via e-mail. She explained this on the basis that confidential emails containing financial information and client names had been forwarded out of business by Mr Hemmings previously. She said now that he returned to work, she would send him a separate e-mail with the commission breakdown to his work e-mail address, but it was strictly not be forwarded outside the business. She also sent a copy of her minutes.

54 By an e-mail sent on Monday 18 September, Mr Hemmings asked for a Teams call to go through sales that were received into the company in the last three years. He said:

> *"As previously advised, I am completely blind in what is coming into the company that has been originated by myself.*

Therefore the breakdown of what you paid me only goes so far in helping me understand the whole picture."

55 It was clear that despite slightly vague language, Mr Hemmings was not trying to obtain information about sales for the whole of the Respondent but rather specifically sales which might be impactful on his commission entitlement.

56 On 19 September Ms Hartley emailed Mr Hemmings providing the commission breakdown for the sum paid to him in the August payroll and reminding him of his confidentiality obligations. The breakdown she supplied showed client A had only paid half the bill. Had the full payment of client A's bill, been shown, the payment would have been less than the 3 per cent due to Mr Hemmings. In relation to the request Mr Hemmings had made for sales received into the company in the last three years, despite the fact that the meaning was clear (albeit infelicitously expressed), she asked for him to be more precise and asked whether these were purely cyber specific sales. Ms Hartley did not send Mr Hemmings the sales information.

Renewed Invitation to Formal Performance Review meeting

57 By an e-mail sent on Wednesday 20 September 2023 the Respondent invited Mr Hemmings to further performance management meeting. I was quite properly not informed of the detail of the settlement negotiations, but I know they were not successful.

58 The new invitation letter referenced the previous meeting on 24 July and the fact that at Mr Hemmings' request, conversations were paused. It noted that he had been on a period of sickness absence. Now that he had been certified fit to work, they would be resuming it in accordance with the Firm's Performance Improvement Policy which was enclosed again for ease of use. They proposed to treat the meeting as a fresh first meeting under the policy. The purpose of the meeting was explained as follows:

"The purpose of the meeting will be to discuss the concerns be previously raised with your current performance and decide what, if any, action may be necessary to help you improve your performance. The areas to discuss include the failure to attain the specific sales targets that have been agreed for the current financial year and expectations around the number of contracts that are expected to originate. This will also feed into a discussion about the expectation and standards required of you in your role as Commercial Director."

59 The letter continued stating:

"If it is found that the issues with your performance require further action, this may include implementing a Performance Improvement Plan (PIP) which will set out the improvements required and warn you that a failure to improve mainly to a further PIP and could ultimately lead to your dismissal."

60 The meeting was set up via Microsoft Teams for Friday 22 September 2023. Subsequently that meeting was postponed, to be rescheduled. This appears to be largely in response to Mr Hemmings emailing the Respondent on 21 September referring to the Respondent's minutes of the previous PIP meeting, which I noted were largely a summary. Mr Hemmings did not think the Respondent's notes were accurate. He had various comments on the minutes and absolutely refuted the suggestion in them that the lack of sales was based on his not being capable of doing anymore and that he accepted responsibility for the outcome. As we know, Mr Hemmings had a recording of the meeting, but he did not tell the Respondent at this stage.

61 Mr Hemmings said:

"I am disappointed that these words have been attributed to me and twisted. I advised that I was happy in my job and felt I had done a very good job in a difficult and troubled market, bringing in credible sales opportunities into the company.

He went on to state he considered the performance review process was fundamentally flawed as it was clear from the previous meeting that there was nothing else that Mr Hancock thought he or anyone else could do to improve sales.

62 Mr Hemmings also raised four concerns being:

62.1 that he had not been sent his job description and evidence of when it was sent to him,

62.2 he had not received a return to work meeting to discuss his health and well-being,

62.3 he had not received any meeting for an occupational health appointment despite being in hospital for work related stress,

62.4. he had been contacted by a client of MDR who advised him that they had been informed that he had already left the company.

63 In preparation for the new formal performance meeting, Mr Hancock sent Ms Hartley, copying Mr Kirkaldy, an email saying please find the data requested below in red. He then summarised the issues that led to here. That email set out a number of frustrations with Mr Hemmings' performance but the tenor of his conversation with Mr Hemmings at the first performance review meeting utterly belied all of this. In the event, Mr Hemmings resigned before the meeting could be rescheduled.

Resignation

64 Mr Hemmings' resignation letter sent on Monday 25 September 2023 made it clear that he regarded himself as constructively dismissed. He gave three months' notice but made it clear that he was working under protest. He was put on gardening leave after a while and remained on garden leave until 4 December when his employment was terminated, and he was paid in lieu of the remainder of his notice.

65 In his letter of 25 September Mr Hemmings explained the reasons for his resignation as follows:

1 The non-payment of wages for the last three years. That was more in the form of a heading and related to the next point – being the commission.

2 The failure to pay any commission up until 23 August 2023. Since discussing it with the Respondent on 24 July, Mr Hemmings had been paid a sum which had not been broken down and there was a marked or reluctance to provide adequate information so that Mr Hemmings could see what commission he was legitimately entitled to.

3 Mr Hemmings said he had lost trust and confidence in the company due to the way he had been treated and put on a Performance Review process for lack of sales when he had made sales and then being told the level of sales were nothing to do with his performance. He said the process was a farce and the lack of transparency regarding that conversation was unacceptable and unfair and was continuing to cause a huge amount of stress. He not been provided with a job description or even a rubric that they could measure his performance against.

4 Mr Hemmings said he had been shown a complete lack of respect honesty and professionalism, and the company had failed to provide him with a fair process and adequate notes in respect of the meeting. He had been left waiting for nearly 6 weeks for a copy of the notes. Then they were fundamentally flawed and didn't reflect the real conversation.

5 The company had ignored or dismissed his concerns and formal requests about the issues and processes within the Respondent to allow him to do his job in line with his contract thus not providing him with a safe and healthy working environment.

6 Mr Hemmings referred to the fact is that the firm showing very little consideration about his health, and he had been left chasing for an adequate return to work meeting and for an occupational health referral.

The last day of work would be 24 December.

Occupational Health report

66 The Respondent set up an occupational health meeting on 26 September and the report was dated the dame day. The appointment was a telephone appointment as far as I can tell from the covering letter from the letter. The report makes no mention of having reviewed any medical notes. It does note that Mr Hemmings was suffering from chest pain and was assessed by his GP and the local acute assessment unit. He had been prescribed medication. Feelings of stress at work are considered a likely contributory factor.

67 There was no explanation of the particular diagnosis. The report merely repeated what Mr Hemmings had said about workload and demands and the outcome of a recent performance conversation. The advice from Occupational Health was that management should arrange to meet Mr Hemmings to discuss his concerns with a view to trying to achieve a mutually agreeable resolution

Investigation

68 Thereafter Ms J Lawson, who I understand is a partner of the Respondent, was instructed to investigate and consider the points that the Claimant had made in his resignation letter. Her conclusion was that there was no basis on which the Respondent had been in breach of contract.

69 The investigation started with a meeting on 2 November 2023 between the partner, Ms J Lawson, and Mr Hemmings which was also attended by Mr Wheaton, at which they had a detailed discussion about the Claimant's reasons for resignation. They followed through the structure of his resignation letter.

70 There was also a meeting between Ms Lawson and Mr Hancock in which they discussed Mr Hemmings' assertion that Mr Hancock had said the level of sales were nothing to do with his performance. Mr Hancock denied ever saying this. He admitted that he had tried to offer support to Mr Hemmings when he had been upset in the meeting and then had to leave the room to compose himself. He said that he had tried to do so by saying he knows that it is a tough market at the moment. This subject was discussed twice. In the second discussion Mr Hancock said he had tried to console Mr Hemmings by saying that market forces were at play and recognised that it is a tough market and everyone was struggling. However, notwithstanding all of this, PH should have been hitting the sales target, and this did not detract from his performance. Mr Hancock and Ms Lawson did not have the benefit of the transcript of the recording which shows this assertion by Mr Hancock was not accurate.

Additional Commission

71 The Respondent paid the Claimant some additional commission in his final payment amounting to £2,070.43. The Claimant and his representative have suggested this throws doubt on the first payment being accurate. I am satisfied that the second payment relates to commission which accrued due as a result of clients being billed and paying bills for work originated by the Claimant after the first commission payment as well as the balance of the 50 per cent payment for the bill for client A. The Claimant said in his witness statement that he was not given a breakdown of this payment, although there was some discussion at a meeting on 30 November, and he was told the amount of the commission payment by a letter sent in December. There are two versions of this letter, one dated 4 December and another dated 18 December. I cannot see that Mr Hemmings was ever given a breakdown of this payment. He would not have known the breakdown until he got disclosure in this case, in which event he would have seen an internal email about it.

Deduction of Course Fee

72 By an e-mail dated 19 October 2023 Harriet Kirkaldy wrote to the Claimant attaching a copy of the Learning Agreement and stating that as there had been a triggering event within six months of the completion of the course, 100% of the total fee less VAT had to be repaid. She asked if he would like this split over the November and December payroll. The Claimant replied the same day stating that he had been told by Ms Hartley and Mr Hancock to stop doing the course which by then had four weeks to run. If the business had told him the firm would not be paying if he stopped the course, he would have suggested a further discussion, but he thought they were clear.

73 On 27 October Ms Kirkaldy wrote back. She replied to the Claimant's comments about the course fee. She agreed that Ms Hartley and Mr Hancock were trying to reduce his workload to support him and suggested he stop the course, but she said the clawback was not related to whether he had completed the course, rather the fact that he was leaving the firm as per the terms of the Learning Agreement. In fact in their ET3 the Respondent refers somewhat vaguely to a wider range of triggering events.

End of Claimant's employment

74 Mr Hemmings was put on garden leave on 4 October 2023. By a letter dated 4 December 2023 the Respondent notified Mr Hemmings that he would be released on 4 December, and he would have payment of the remainder of his notice.

75 By an e-mail dated 30 November 2023, the Respondent sent an e-mail internally to Joanna Walsh, and Harriet Kirkaldy with a large Schedule of all cyber matters opened from April 2020 to date and the fees billed and recovered, ("the Client Schedule"). This was shown to Mr Hemmings and his representative at a meeting with them that day. It is quite a large schedule with various columns. It is in the bundle. One page appears in the bundle as several separate pages, as it is too large to print out on A4 and be legible. Pages from the bundle need to be spread out in order to read across the columns. Mr Hemmings raised some questions during the meeting and by an email dated 1 December, Harriet Kirkaldy replied to those questions with an explanation. For example, one of the named clients on the Client Schedule was questioned by the Claimant. There was no amount attributed to that client. The response was that this had been a relation of Mr Hemmings who was facing a personal crisis and as a gesture of goodwill the advice was provided on a pro bono basis so no work in progress was recorded, and no bills were raised on the matter.

76 On 2 January 2024 Mr Hemmings commenced a new role which he said had arisen in late December. There are no documents in the bundle about his efforts to try to mitigate his loss.

77 The effect of Mr Hemmings' resignation was that the performance process did not continue. As noted above, the report prepared as a result of the investigation concluded that the Respondent was not in breach of contract.

Final Payments

78 The Respondent paid Mr Hemmings in lieu of his notice up to 24 December 2023. It also paid Mr Hemmings a further £2070.43 as an additional commission payment. The Respondent deducted £1998 as the course fees which it claimed it was entitled to deduct under the Learning Agreement.

Submissions

79 I had written submissions from both parties. I also had some oral submissions. Before making submissions, the Respondent's Counsel asked whether the Claimant was relying on the case law relating to last straw as some of this case law had been cited in the Claimant's Counsel's written submissions. We were told by the Claimant's Counsel that he was not arguing this was a last straw case. However, he was arguing that there were a cumulative series of acts which formed the breach.

Respondent's submissions

80 The Respondent made a submission on the meaning of the express term in the letter of offer regarding the payment of origination. This was accepted by the Claimant's representative and is recorded by me in the Conclusions.

81 The Respondent argued that there was no reference in the offer letter to the provision of any information regarding commission to be provided to the Claimant. When I asked about whether there was an implied term in order to give business efficacy to the agreement, the Respondent argued that this had not been raised. As a result, the Respondent's case at this stage focused on the non-payment of commission rather than the complaint about the provision of information.

82 The Respondent argued that the outstanding commission had been paid in August. The Respondent accepted it had been a breach of the term subject to waiver/ affirmation. However, by August 2023, the Respondent regarded itself as no longer in breach of the terms as the commission had been paid. The Claimant had not identified any outstanding commission he thought was due to him from full Schedule representing all the clients and bills during the Claimant's employment.

83 In terms of the record keeping the Respondent did have a system in place to identify matters of origination when a file was opened. This relied on human input. All cyber matters were reviewed by the Respondent which led to the payment of the monies to the Claimant. The Tribunal should regard the process which the Respondent took in reviewing the commission calculation as evidence of a genuine effort to get the commission calculation right. The fact that the Respondent paid a further sum by way of commission later is not evidence of any error in the first calculation but again showed the Respondent was acting correctly.

84 In order for breach to be repudiatory it must be a breach that goes to the root of the contract. The Claimant accepted that the commission term was not a significant part of his overall remuneration. He had not challenged it for the three years prior to the 24 July meeting.

85 The Claimant did not resign in response to the non-payment of commission. Rather the Claimant raised the commission during the 24 July meeting because he felt he was not being properly allocated originations.

86 The case of WE Cox Toner (International) Limited v Crook [1981] ICR 823 sets out the law in relation to the question of affirmation. The Respondent argued that the Claimant had affirmed the contract because he had continued to work for three years without receiving commission payments and without any challenge. This was consistent with the continued existence of his contractual obligations.

87 In relation to the question of the implied term of trust and confidence the Respondent argued there are two aspects to the test. First actions must be serious enough to be calculated or likely to destroy or seriously damage mutual trust and confidence. Second that action must be without reasonable proper cause.

88 In relation to non-payment of commission the Respondent's submissions mirrored their previous submissions. In relation to the failing to account to the Claimant for commission, the Respondent argued that it took immediate steps to investigate and determine what commission was owed to the Claimant. Thereafter, when the investigations were complete, the Respondent endeavoured to talk to the Claimant on 7 August 2023, but he did not attend as he was meeting with his lawyer. Then the meeting was rescheduled to the following day, 8 August 2023, but the Claimant was absent due to sickness. He did not return to work until 15 September. The Respondent did not withhold information from the Claimant but intended to discuss the underlying figures with the Claimant and tried to do so on two occasions. It was only on 18 September when the Claimant had returned from sickness absence that he requested all sales. This request went far beyond previous requests to explain the commission and on the face that was a request for all sales for the entire firm. On 19 September the Respondent sent the Claimant a breakdown of the commission he had been paid and the basis of the calculation. This provided the information initially requested by the Claimant in letters of 8 and 18 August 2023 through his lawyer.

89 The effort to seek clarification about the additional request for information was not a refusal. The Claimant resigned before providing that clarification. The Respondent did not withhold or refuse to provide the Claimant with further information. The request made by the Claimant for all sales over three years could not have been complied with and would have been disproportionate and irrelevant. In the circumstances seeking clarification for Claimant's request was proper and reasonable and not calculated or likely to destroy trust and confidence.

90 In relation to the subjecting the Claimant to the PIP, the Respondent submitted that the Claimant was never subjected to a PIP. The Claimant was asked to attend a stage one meeting which was to decide whether to implement a PIP or not. It would give the Claimant a chance to make any points he wished to make. No decision had been made as to the outcome of the meeting.

91 Following the Claimant's absence he was again invited to another meeting which was a stage 1 meeting The Respondent did not move to stage 2 or suggest that another stage 1 meeting was unnecessary before implementing a PIP. The Respondent argued that it was clear from the transcript of 24 July meeting that while Mr Hancock was sympathetic to the challenges of the Claimant's role, he was not saying that his performance was irrelevant to the failure to meet sales forecasts. The Respondent referred to two quotes from the transcript.

92 The Respondent argued as it had before, that the contract was affirmed by the Claimant.

93 On the question of the deduction of wages, the Respondent addressed the claim for unpaid commission and said that there was no evidence there was any outstanding commission, and it was for the Claimant to prove that there was. The Respondent referred to the fact that the Claimant had got the Client Schedule which showed all sales in the

cyber team as a result of the disclosure process. It appeared in the bundle. The Claimant had not at any point, including during his evidence, identified any client or matter for which he said he was entitled to further commission.

94 As for the London Business School fees, the Respondent argued that the Learning Agreement provided for repayment of the fees on the occurrence of certain triggering events. The Claimant's employment contract also entitled the Respondent to deduct monies owing from the Claimant's salary. The Respondent understood that the Claimant alleges that Mr Hancock instructed him to stop the course, and he relies on those statements. The Respondent argued this was not a waiver of the agreement. The Respondent therefore says it was entitled to make deductions of course fees in line with the contract and the Learning Agreement.

Claimant's Submissions

95 The Claimant's Counsel referred the Tribunal to a large number of cases on the question of constructive dismissal. I do not intend to refer to them all and several related to last straw principles which was not in issue in this case.

96 Some of the cases listed in the Claimant's written submission include Western Excavation v Sharp, Malik v Bank of Credit and Commerce International, Lewis v Motorworld Garages, Meikle v Nottinghamshire County Council [2005] ICR1, Garner v Grange Furnishing Limited [1977] IRLR 206, Woods v WM Car Services Peterborough Limited [1981] IRLR 347, WE Cox Toner International Limited v Crook, BCCI v Ali (3) [1999] IRLR 508, GAB Robbins UK Limited v Gillian Triggs [2007] UK EAT and Lombard North Central PLC v Butterworth [1987] QB 527. There were others.

97 The Claimant argued that there were a number of incidents which on their own, and cumulatively, amounted to a repudiatory breach and breach of the implied contractual term of mutual trust and confidence, specifically the Respondent's conduct between mid-July 2023 and 25 September 2023.

98 The Claimant argued that there was an implied duty to pay wages and that this was a core obligation under an employment contract. Non-payment of wages was well established as a repudiatory breach. It was accepted that no commission was paid for three years from when the Claimant joined until he raised it at the meeting on 24 July. This was sufficiently serious to justify termination.

99 The Claimant argued that although nearly £4000 was paid in the August payroll, it was clear this was not the complete payment. The Claimant argued that the fact that approximately £2000 was paid a few months later towards the end of the Claimant's employment demonstrated that the earlier figure was unlikely to be the correct figure for the previous three years. The Claimant therefore submitted that it was more likely than not that commission was outstanding at the time the Claimant resigned on 25 September 2023.

100 Although the sum due to the Claimant was only 3% of the total bill, it pointed was a substantial sum of money and could not be said to be so minor as not to amount to fundamental breach.

101 In relation to the digital marketing course, the Claimant said that he'd been told to stop attending the course and despite his refusal the course fees were deducted in any event. The Claimant acknowledged the fact there was a recoupment clause in the contract of employment and the Learning Agreement, but the Claimant's position was that he was instructed by line management to cease attending the course and that because he was a constructively dismissed the Respondent should be unable to rely on the recoupment clause.

102 In relation to performance management, the Claimant accepted that the Respondent can, in legitimate circumstances, operate a performance management system. However, there were numerous comments made by Mr Hancock in the July meeting which were such that Mr Hancock had made it clear that there was no performance issue with the Claimant, or the way he applied himself to work but a general market situation.

103 The Claimant argued that he felt undermined by the continuation of the performance process which clearly contradicted the comments made by Mr Hancock. The Claimant rejected Mr Hancock's evidence that he was clumsily trying to console the Claimant. Further the Claimant's position was that he had been generating bills, and these were not being attributed to him. The Respondent had no system of capturing sales for the purpose of the commission payments. Although the Respondent disputed the fact that they did not have an accurate means of attributing sales to the Claimant, there was still a discrepancy in the figures and the Claimant could not be satisfied over the Respondent's figures. The Respondent had still failed to account properly to the Claimant for the commissions payable to him.

The Law

105 Section 95 of the Employment Rights Act 1996 provides so far as is relevant:

> (*1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) . . ., only if)— ----------*
> *(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.*

106 The approach to constructive dismissal is set out by Lord Denning in Western Excavating (ECC) Ltd v Sharp [1978] 1 All ER 713, [1978] QB 761, [1978] 2 WLR 344, CA in which he defined constructive dismissal as follows:

> *"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."*

107 The guidance given for deciding if there has been a breach of the implied term of trust and confidence is set out in Malik v. Bank of Credit; Mahmud v. Bank of Credit[1998] AC 20; [1997] 3 All ER 1; [1997] IRLR 462; [1997] 3 WLR 95; [1997] ICR 606 where Lord Steyn said that an employer shall not:

> *". . . without reasonable and proper cause, conduct itself in a manner calculated (or) likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."*

108 In Lewis v Motorworld Garages Limited [1986] ICR 157, Glidewell LJ said:

> *"The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, although each incident may not do so. In particular in such a case the last action of the employer which leads the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term."*

109 In a constructive dismissal claim the Respondent is still required to establish the reason for dismissal. In Berriman -v- Delabole Slate Ltd. [1985] ICR 546 Browne-Wilkinson LJ held that the reason for dismissal is the reason for which the employer breached the contract of employment.

110 Meikle v Nottinghamshire County Council [2004] EWCA Civ 859 it was held that in determining whether an employee had accepted the employer's repudiation of the employment contract, the fact that the employee objected not only to the repudiatory conduct but also to other actions of the employer, not amounting to a breach of contract, did not vitiate acceptance of the repudiation. It is enough that the employee resigned in response — at least in part — to the employer's fundamental breach of contract.

111 This was further elucidated in Abbeycars (West Horndon) Ltd UKEAT/0472/07/DA when it was pointed out on an obiter basis that the as follows:

> "*the crucial question is whether the repudiatory breach played a part in the dismissal. There must be a causal connection between the repudiation and the resignation; if they are unconnected acts then the employee is not accepting the repudiatory breach.*
> *It follows that once a repudiatory breach is established, if the employee leaves then even if it he may have done so for a whole host of reasons, he can claim that he has been constructively dismissed if the repudiatory breach is one of the factors relied upon."*

112 In Leaney v Loughborough University 2023 EAT 155 the question of affirmation of contract such that the breach was waived was considered and authorities such as Western Excavating. Bashir and Cox Toner as well as Chindove v William Morrison Supermarkets plc EAT 0201/13 were considered. HHJ Auerbach said:

> *"the tribunal cited the dictum of Lord Denning MR in **Western Excavating** at [15]...*
> > *"Moreover he must make up his mind soon after the conduct of which he complains: for if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."*
> *However, as later authorities such as **Bashir** and **Cox Toner** explain and clarify, it is not the passage of time, as such, prior to resignation that gives rise to affirmation, but conduct or other circumstances occurring in that period from which affirmation maybe inferred.*

113 In the case of Courtauld's Northern Spinning Ltd v Sibson and anor [1988] ICR 451, it was held that in order to give the contract of employment business efficacy a term had to be implied in the contract, as being a term which the parties, acting reasonably would probably have agreed if they had considered the matter.

114 Section 13 of the Employment Rights Act 1996 provides the right not to suffer unauthorised deductions as follows:

(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 workers contract, or the worker has previously signified in writing his agreement or consent to the making of the deduction.

Conclusions

115 I will set out the issues in turn and my conclusions on them.

1. Did the Respondent breach a term of the Claimant's contract of employment relating to payment of commission contained in the Claimant's Offer Letter dated 20th March 2020 (referred to at paragraph 1 of the Grounds of Complaint) and/or failing to account properly for the commission?

2. To the extent necessary this may involve determining the meaning of the commission clause in the contract.

116 There are two aspects to these issues. First, whether there had been a breach in relation to the payment of commission. In addition to that there was a question of whether there was a breach in failing to account properly for the commission.

117 I discussed at the time with the parties what that meant and considered that it meant a failure to provide adequate information to enable the Claimant to understand the commission calculations and be able to check it. The need for it was that if appropriate, he could challenge the calculation.

Meaning of Commission clause

118 As part of the discussions about the list of issues, it had seemed that there might be a dispute over the meaning of the commission provision in the letter of offer. I therefore noted the possibility that this may involve determining it. In the event it seemed that the Claimant did not dispute the meaning of that wording proposed by the Respondent and therefore I have largely reiterated it.

119 The meaning of the contract explained by the Respondent in their submissions is as follows.

(a) The rate of Commission would be 3%.

(b) Commission would only be paid on fees that had been billed and paid by the relevant client.

(c) The Commission would only be paid on fees paid by clients who were introduced by the Claimant.

(d) Commission would only be paid on fees paid by clients introduced to the Firm (not just new to the department or team).

(e) Commission would be payable on fees which related to a matter that the Claimant was directly responsible for originating.

(f) The Commission would be paid quarterly.

Non-Payment of Commission

120 There was no dispute that commission had not been paid for about 3 years of the Claimants employment. Non-payment of money due under a contract of employment is generally regarded as a serious matter. Depending on the amount of money involved and the pay earned by the individual, non-payment of monies due can frequently amount to a fundamental breach. At the extreme, the failure to pay a few pence to a highly paid employee is not a fundamental breach, but the loss of small sums can be devastating to a low paid employee. It is a question of degree.

121 As the Respondent did not pay commission quarterly as it arose until it was raised by Mr Hemmings in July 2023, there was a breach of contract over that period of time. We do not have enough information to know precisely what commission arose and when it was payable. Certainly, no commission would have arisen immediately as it inevitably

took time to obtain clients, do the work, bill it and have the client pay. When it did arise and was not paid quarterly as required, that was a sufficiently large sum that it would have been a breach of the Claimant's contract.

122 Thereafter the Respondent tried to work out the commission and pay it and again paid further commission which it calculated as having accrued due after the first commission payment and that was paid promptly, before Mr Hemmings employment ended.

123 Mr Hemmings' argument is that he still has not been paid the full commission to which he is entitled. However, he has not told me what that outstanding commission sum is, or which clients he originated who have not been accounted for in the payments made to him.

124 I should note that at the outset of the hearing, having not had a full opportunity to review the documentation completely, it appeared there was a lack of information available to Mr Hemmings to assess the unpaid commission. I told the parties that one option would be for me to try to assess liability to the extent possible in general terms and then order further disclosure before a further hearing at which the residual matters could be addressed. In response to this I was directed by the Respondent to the Client Schedule which appears in the bundle split into several pages. I am satisfied this is a complete list of all sales through the cyber team for the full period of Mr Hemmings' employment. While I appreciate this was only shown to Mr Hemmings at a late stage during his employment, it was clearly supplied as part of the disclosure process and appears in the bundle. Therefore, Mr Hemmings has had time to review it again. I gave each party the opportunity to ask supplemental questions and, had there been specific bills which Mr Hemmings regarded as his own originations, I would have expected him to point them out. He did not do so.

125 The submissions made by Counsel for Mr Hemmings were that the commission is still not properly accounted for. There is however a problem with this submission. I have not been given any figures or specific clients or bills for which commission has not been paid. Mr Hemmings knows which clients he worked on and thus should be able to say which ones he introduced directly. However, he has not identified specific clients whose bills are missing from his commission payments.

126 Mr Hemmings has identified two scenarios where he says the business is not adequately recorded. I have considered both of those scenarios. First Mr Hemmings was concerned about repeat business, but I am told the Client Schedule contains all the bills, and on its face, it appears that it includes repeat business. I say this because some clients appear to have been billed and paid more than once. In common with many law firms, a client is given a specific number and then every matter opened by them is given a further number starting at 1 and continuing for each new matter opened. Thus, a client I will call "LF" has 69583 as its client number and it appears on the list to have at least two matters. That number and both .1 and .2 appear. Likewise, another client which I will call "SCC" has more than one matter. There is no sign on the face of the Schedule that repeat business is missing.

127 The second scenario is that the Claimant spent some time building relationships with what he refers to as "channel partners". Those are other companies ("channel partners") who would act as intermediaries and refer their clients/contacts on to the Respondent. It appears that the Respondent has no system by which it could identify someone who had come to them via a referral from a channel partner and thus there is a possibility that some business was originated in this way. The Claimant would seek to be given commission for that. The Claimant cannot identify those clients and neither can the Respondent.

128 The Claimant did not seek disclosure of any referral payments made by the Respondent and indeed we do not know if any referral sums were paid. The Claimant does not suggest that all these parties would have triggered a referral payment. In fact, we do not know if any of them was subject to referral payment. As the Claimant initiated the relationships with those channel partners, I would have expected him to know which of them, if any, had a referral arrangement entitling them to the payment of monies, but I have been given no evidence about that. It is possible that in times of a crisis some of the Respondent's clients had simply been told to contact the Respondent and did so leading the Respondent to assume that they were a direct approach.

129 The Claimant's Counsel suggests that this in itself is a breach of contract because the Respondent has failed to keep adequate records. I do not agree with this proposition. At the time when the decision was made for the Claimant to seek channel partners, he would have had the opportunity to raise the question of commission and how that could be identified. He did not do so. That would be entirely consistent with his approach towards the whole question of commission which is that it was not his main focus. Importantly, I do not accept the suggestion that the Respondent is in breach for failing to set up an adequate recording system. That was not the case that was pleaded. Nothing indicated that a reference to a lack of transparency referred to a failure to "make" sufficient records or to "make sufficient enquiries" in order to understand whether clients had been referred through a third party channel partner. We discussed the meaning of transparency at the outset and that was not suggested.

130 Unfortunately, while it is possible that the referral mode of attracting business was not managed in a way which might have identified the Claimant's role in setting up the third party channel partner, the Respondent has paid all the money that it, or the Claimant, can identify as his origination. I cannot reach the conclusion there was a failure to pay without clear evidence about what money has not been paid.

131 For the above reasons I can only determine that the long outstanding commission was paid in the August payroll, (barring only 50 per cent for client A). Having paid the major part of the overdue commission, it is my conclusion that there was no later breach due to non-payment of commission as that was calculated and paid promptly.

Failure to account properly for the Commission

132 The next point is whether the Respondent breached the terms of the Claimant's contract employment by failing to account properly for the commission. The Respondent's argument is that the Claimant had no express contractual right to any documentation as a part of the commission clause in his contract. In response to a question about it being an implied term, I was told that an implied term was not pleaded. I do not see why it needed to be.

133 The Claimant in his ET1 summarised his claims as including unfair constructive dismissal for the failure by the Respondent to pay him the above unpaid commissions and to properly account to the Claimant for them. The Claimant had in the body of the grounds of claim stated that there was no transparent system of recording to enable him to know what orders the Respondent had received and to enable him to allocate his origination. He had also pleaded that there was no explanation in the August 2023 payroll for the sum paid to the Claimant then. The Respondent did not explain its position on that in the ET3. The Respondent did not argue about my explanation when we discussed the list of issues at the outset, and I explained that I took the list of issues to include an argument that they Respondent was in breach of contract for failing to provide adequate information to enable the Claimant to understand his commission payment and be able to challenge the calculation if needs be.

134 The Respondent is right to say there was no express written term which provides the Respondent is obliged to provide any specific financial data to the Claimant in connection with the commission entitlement. There is thus a question as to whether this would be an implied term. Applying the test of business efficacy identified in the Courtauld's case, I asked myself whether the parties, acting reasonably, would probably have agreed if they had considered the matter that the Claimant needed some information in order to understand whether he had been paid the 3% commission on sales he originated. I have no doubt that acting reasonably at the time the offer letter was prepared, had that matter been raised, the parties would have undoubtedly been in agreement that the Claimant should have sufficient documentation to know the breakdown of any commission payment and which client bills had been included that as well enough information to verify the commission calculation. On that basis, I conclude that there was an implied term that the Claimant should be supplied with sufficient information to understand, and if appropriate, challenge his commission entitlement. I do not think the fact that this was not set out in some detail in the ET1 is a problem.

135 Although the Respondent did not provide submissions on the question of a direct breach of contract in failing to give the Claimant enough information for him, to understand the commission breakdown and challenge it, if appropriate, I did have submissions from the Respondent on that question in relation to the question of breach of trust and confidence claim. In that regard, it was suggested that the Claimant had sufficient information as he had access to a variety of tools in order to identify his progress with potential clients, in particular HubSpot. It was also pointed out that he said he kept notes. However, the Claimant only received a simple breakdown to enable him to understand the commission paid on 19 September. He was given limited access to the full client list on 30 November 2023. When the Claimant was given information, it was limited in that it showed client A had paid half the bill, it seems client A had paid the full bill, but Mr Hancock thought the Claimant should only get 50 per cent of that origination. Subsequently he did get the remainder.

136 The Respondent also argues that it endeavoured to provide the information. It says it tried to meet with the Claimant on 7, and then 8 August to discuss the commission, but he was unavailable at first and then became unwell. This lacks credibility. Other than the Respondent's subsequent letter to the Claimant's lawyer, there is nothing from which the Claimant could have known that was the purpose of the meetings. The meeting invitation for lunchtime on 8 August simply refers to a catch up with no indication that the Respondent intended to provide the commission data at that time. It appears the meeting on 7 August was at the usual catch up time in the afternoon. It is not even clear what commission calculations could have been discussed with Mr Hemmings on either 7 or 8 August because Mr Hancock was still in communication with Mr Brewer to work out the commission on the morning of Tuesday 8 August.

137 Mr Hancock provided the breakdown of the commission which had been paid to Ms Hartley in an e-mail dated 15 September. Ms Hartley then replied to him on Monday 18 September asking him to clarify whether she understood it correctly. It was only on 19 September that she provided the breakdown of the commission that had been paid to Mr Hemmings.

138 The Respondent also says they were reluctant to supply financial data to the Claimant as he had sent some confidential information out of the business to his personal e-mail and/or his wife's e-mail. They were, however, comfortable to provide the information to a work e-mail address accompanied by a confidentiality reminder subsequently. They could have provided the information in that format to the Claimant's work email during August when instructions were given to payroll so that the Claimant could understand the monies received at the earliest opportunity.

139 Since I have concluded that there is an implied term that the Claimant should have been given sufficient information to enable him to understand any commission payment

made to him and to assess it for accuracy, the failure to provide the commission breakdown by the time when the commission payment was made at the end of August 2023 through to 19 September and the failure to provide any other information about the client bills until the end of November is a breach of contract

3. If so, was that breach a repudiatory breach of contract?

140 This issue requires me to go back to consider each of the two matters that I have found to be breaches of contract to determine whether these breaches were so serous as to amount to a repudiatory breach.

141 I considered the non-payment of commission in two time periods. I only found one period to be breach of contract in relation to the failure to pay commission.

Start of employment to 24 July 2023

142 I have noted that it is unlikely there was very much commission in the early stages of the Claimant's employment as he had not yet had an opportunity to develop the client relationships but after a period of time there would undoubtedly have been some commission due and that should have been paid quarterly. At times that would have been a repudiatory breach.

Failure to account for the commission

143 As regards the breach of contract in failing to provide the Claimant with sufficient documentation to understand they breakdown of the commission he had been paid and sufficient information for his to check his entitlement for a period of time, I do not think this on its own was a repudiatory breach.

Cumulative effect of the situation

144 Looking at the cumulative position, there was a situation where the Claimant had not been paid commission for three years. While he may have not being troubled about that, he began to be troubled about the failure to attribute his origin donations to him because of the risk to him of his activity being undervalued leading to a risk to his job security to that end the Claimant began to be concerned about the level of commission and therefore the delay in the Respondent accounting for the commission calculation exacerbated the position.

145 The Claimant did resign.

4. Did the Claimant resign in response to any repudiatory breach?

Resignation in response to repudiatory breach

146 It is possible for there to be a repudiatory breach but unless the Claimant resigns in response to it, there is no constructive dismissal. As I have found, the Respondent's failure to put the Claimant on to a system which would have a calculated and paid commission due to him every three months was a breach of contract. It is also clear the Claimant did not complain and indeed the comments made by the Claimant to Mr Hancock and Ms Hartley in the meeting on 24 July indicate that he did not regard it as a serious matter. His concern related more to the attribution of origination in order to prove his achievements rather than the money. He specifically said that it was not about the money.

147 In those circumstances if there was a repudiatory breach due to the non-payment up to 24 July, it is my view that the Claimant made it clear in that meeting that he did not care about that.

148 I realise the Claimant later complained about the commission, and he thought more was due to him but I do not consider that non-payment for that time period was the reason for his resignation.

149 In relation to the question of the later commission I have made it clear that I do not consider the Respondent was in breach of contract for second phase of the commission entitlement.

150 In relation to the failure to provide adequate documentation to account for the commission, I have said that was a breach of contract but not a repudiatory breach.

151 In relation to the cumulative position, I have also said that exacerbated the position, but it is not a fundamental breach of contract.

152 The question is whether the Claimant resigned in response to any of those breaches and my conclusion is that although he was extremely concerned at this stage, and they fed into the ultimate problem, he did not resign because of those matters.

Waiver/Affirmation

5. At the time of resignation had the Claimant waived any such breach or affirmed the contract?

153 The question of waiver is significant. To the extent that there was any repudiatory breach, I have concluded that was the non-payment of commission in the period up to 24 July 2023. The Respondent argues the Claimant continued working for three years without receiving any commission which is inconsistent with any intention to treat that breach of contract as a fundamental breach. I would agree. Importantly at the meeting on 24 July the Claimant made a significant comment. It is my view that the comment made by the Claimant to the effect that it was not about the money confirmed his attitude towards that breach. It was confirmation of the waiver of the breach due to non-payment of commission at that time. He expressed the view that it was not important to him in terms of money. It was recognition that he sought. It was thereafter not open to resign in response that breach.

Alternative claim for breach of mutual trust and confidence

6. Alternatively, did the Respondent act in a way that, without reasonable and proper cause was calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence between the parties, by:

    a. Failing to pay the Claimant commissions owed to him?

154 Again I have taken the two separate phases of commission payment. Looking at the first phase up to 24 July 2023, for the same reasons as are set out above, I do not think that the Respondent acted in a way that was calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence between the parties. I do not need to reiterate the explanation in full. There was a significant delay in the first period up to 24 July, but that behaviour was not calculated to destroy the relationship. It might have been likely to do so, but when it was brought to the Respondent's attention the Claimant had carried on working for three years. He then made it clear that it was not about the money. In doing so, the Claimant clearly indicated that this delay had not in fact damaged the relationship of trust and confidence and he waived any breach. Thereafter the Respondent acted correctly, save for the 50 percent attributable to client A, which was later paid. There is no evidence of any missing commission.

155 I have taken account of the fact that the Claimant considered that there were further commissions due and was very surprised by the low level of payment made to him. I have noted that the Respondent's business fell into two parts. The Claimant says that he

had no visibility on the reactive crisis business because that went straight to the delivery team but might have been initiated by him or through the third parties who are the channel partners and therefore some fees due to him have not been paid. However, there are no records about this. Since the Claimant has not been able to identify commissions which were due to him and not paid, despite the records which were eventually provided to him, all I can say is that there was an environment in which the Claimant was concerned, but there was no breach of the duty of trust and confidence by the Respondent in failing to pay any commission.

b. Failing to be transparent in respect of the commission owed to him?

156 As I have noted previously, we discussed the meaning of this wording in the list of issues, and I told the parties that I regarded it as meaning a failure to provide the Claimant with a breakdown and sufficient information so that he could understand what had been paid to him. The importance of this was that he would then be able to check the accuracy of the payments made to him.

157 I have noted the Respondent's argument that the Claimant had access to certain records. The Claimant kept notebooks. He also accepted that he had access to a client relationship management system called Hubspot, which had a great deal of information on it about the transactions being worked through in the pipeline and successful transactions. From those records, he should have known which clients he originated, apart from the referred clients who came through channel partners. However, he did not know what bills had been sent out, or paid, or what work had been undertaken as this was all passed over to the delivery team.

158 There clearly was an issue over the disclosure of information and the breakdown of the commission payment. When the Claimant resigned on 25 September 2023, there had been a long delay in providing him with a breakdown of the commission that the Respondent admitted was due. The facts I have described show that the Respondent's assertion that Mr Hancock and Ms Hartley were endeavouring to provide this information at a meeting with the Claimant on 7 and 8 August is not credible. The commission calculation was still being worked on, during the morning of 8 August, after the first meeting would have taken place. It is not even clear that it was ready by the time of the second meeting on 8 August. That was due to be at lunchtime that day. At 11.01 that morning, Mr Brewer had calculated a figure of £4,512, if 100 per cent commission was allocated to the Claimant but in fact instructions were given to payroll to pay a lower sum on 10 August so there was clearly a further dialogue of some sort.

159 On balance, the evidence shows that the commission calculation was not finished on 8 August 2023 at the time of the second meeting proposed between Ms Hartley, Mr Hancock and Mr Hemmings. It was only ready on 10 August when Mr Brewer sent the instructions to payroll. In fact, Mr Hancock's witness statement does not refer to those dates and merely says they were willing to provide the information at a meeting.

160 Thereafter the Claimant was absent through illness for several weeks and returned to work on 15 September. At that time Ms Hartley did not understand the commission calculation and there was a further email exchange between her and Mr Hancock to enable her to confirm what it meant. The breakdown of commission monies paid was provided to the Claimant by Ms Hartley on 19 September 2023. That breakdown was misleading as it indicated that client A had only paid half the bill whereas the earlier exchange between Mr Hancock and Mr Brewer shows that Mr Hancock was asked if he wanted to allocate half the origination to another member of staff. Given Mr Brewer's earlier calculation, that seems to have been a way to reduce the payment to Mr Hemmings.

161 The Client Schedule was provided on 30 November 2023, over a month after the Claimant had resigned, at a meeting, to be read there only.

162 In summary, I do not accept that submission from the Respondent that they were in fact trying to arrange for the Claimant to have the information he required on 7 and 8 August, nor do I accept their submission that it could not be said that they had refused or failed to provide that information. I have also explained that the suggestion that the Respondent did not know what information to provide in September when the Claimant requested full list of clients was disingenuous. Clearly his requirement was to try to understand his own commission and he had no interest at all in the entire firm client base.

c. Unreasonably subjecting the Claimant to a performance improvement programme?

163 The Claimant complains that he was unreasonably subjected to a performance improvement programme. The Respondent argues that this is not correct on the basis largely of a technicality based on the wording in the performance improvement policy. The Respondent's argument is that policy provides for a first stage meeting at which the parties consider whether to draw up a Performance Improvement Plan. The Respondent takes the view that until the Claimant was given a formal Performance Improvement Plan, he was not subjected to the Performance Improvement Programme. I reject that submission. It is a technical argument and ignores the reality of the situation which is that the Claimant was in fact instructed to attend the first formal meeting, which was the first stage of a 3 stage performance process under the Performance Improvement Policy.

164 While the policy indicates that the employee would be able to raise any issues or information in relation to their performance before any decision was taken about whether to draw up a Performance Improvement Plan, the decision as to whether to issue a PIP was solely in the Respondent's control. Mr Hemmings knew that he had missed sales targets. This led him to be very concerned. In the meeting, when he and Mr Hancock discussed the problems facing the Respondent's cyber business, Mr Hancock told the Claimant that there was nothing more he could have done. It is immaterial that was done to reassure a distressed individual. By making that comment and the others like it, Mr Hancock confirmed the Claimant's concerns, namely that nothing could be improved. Mr Hancock said the issue was a structural problem. The clear consequence was that any targets Mr Hemmings would be set would continue to be problematic and would probably not be met, leading ultimately to his dismissal.

165 I have read Mr Hancock's explanation to the HR team about the problems in his e-mail dated 22 September which was prepared in readiness for the second meeting which the Respondent was trying to arrange. If that email is a genuine explanation of his views, Mr Hancock had some other concerns. However, the evidence shows that the Claimant was told by Mr Hancock on 24 July that there was nothing he could have done differently, and Mr Hancock could see the entire cyber business shutting down in time.

166 That conversation reinforced the Claimant's fear about the purpose of the meeting and left him with the belief that the meeting had been called with the sole purpose of forcing his exit. After his illness and absence from work, the Claimant then was quickly called to the second meeting at which the process was to be restarted despite his having told being told that there was nothing he could do.

167 The Tribunal must consider whether the Respondent has without reasonable and proper cause acted in a manner which is calculated or likely to destroy or seriously damage trust and confidence. Taking this in stages, the first question I asked myself is whether the Respondent has acted in a manner which was <u>calculated</u> to destroy or seriously damaged trust and confidence. I do not consider the Respondent calculated their behaviour in that way.

168 I then considered whether the Respondent had acted in a manner which was likely to destroy or seriously damaged trust and confidence. On this question, the calling a meeting (which is the first stage in a process which if it is carried through could lead to dismissal) and then telling the employee that there is in fact nothing they could do, had obvious potential to damage trust and confidence on the part of the employee. Having told the employee that there was nothing that he could do, calling another meeting to restart the process put the employee in the situation where he genuinely believed this was not being done with any intention or expectation he could improve. Looked at objectively, any employee in that situation would assume the Respondent was determined to pursue of course which would lead to his dismissal. Given the comments Mr Hancock had made to him, Mr Hemmings was doomed to failure. That was certainly likely to destroy or seriously damage trust and confidence.

169 I then have to consider whether the Respondent had reasonable and proper cause to act in that manner. I accept the Respondent had a performance improvement process and that is generally designed to assist employees to get better in their job and meet the standard required. It is not an inevitability that there will be a continuing problem. It is not a disciplinary process. In normal circumstances the Respondent would have reasonable cause for using the performance improvement process as a way of working with an employee. However, revisiting that process having acknowledged that there was nothing the employee could do to improve due to factors beyond his control is not a reasonable and proper use of the process.

170 I bear in mind that the Tribunal should not look at these incidents individually and separately but should also look at the cumulative picture and I now turn to that.

171 Looking at the situation cumulatively, there was a breach of the duty of trust and confidence. First the Claimant faced confusion over his commission payments. He had no way of knowing that the Respondent was working on assessing it. I have explained why I find the Respondent's explanation that they were calling meetings on 7 and 8 August with a view to trying to discuss the commission calculation not credible, given the e-mail chain which shows that the calculation was not settled at that stage. Moreover, the Claimant had no information that that was the purpose of those meetings. I understand the Claimant was then absent through illness and the Respondent may have had some concerns about the security of their information, but the fact is that when the Claimant returned to work on 15 September, he had been paid a sum which was much lower than he expected with no information on about how it was calculated.

172 Given the information available to him, his employer was being evasive about his commission. The Claimant got the commission breakdown at 4.22 pm on 19 September, but no other information to enable him to know if other client bills had been paid on which he should have had origination. The very next morning, before 9 am the Respondent sent the Claimant a new performance meeting invitation letter. He was called back to restart the performance process when he knew from the comments of his line manager that there was nothing he could do to improve his performance. The cumulative conduct was undoubtedly likely to lead to a breakdown in the trust and confidence between the parties.

7. Did the Claimant resign? - Yes
8. Was that resignation in response to any repudiatory breach?

173 The Claimant's resignation was a response to the repudiatory breach. The Claimant resigned a few days after he had received the letter calling him to a fresh meeting to restart the performance improvement process. It is clear from the timing that he did not want to go through that meeting. The cumulative situation was clearly a breakdown of

trust and confidence, and the Claimant's resignation letter referred to that key series of events.

174 Although the Claimant gave a number of reasons for his resignation, the first two on the list were the failure to explain the commission calculation and the performance review process. The Claimant describes how the renewed performance meeting was called for lack of sales when he had made sales and was told that the level of sales were nothing to do with his performance. His wording describing the process as a complete farce and his emphasis on the fact that he had not got a job description or anything from which he could measure his performance further draws in this process as a critical factor in his resignation.

175 I appreciate that the Claimant threw other details into the resignation letter, but case law makes it clear that even if a Claimant resigns for a variety of reasons some of which are not a breach, provided there is a breach amongst the reasons, that is sufficient.

10 At the time of resignation had the Claimant waived any such breach or affirmed the contract?

176 There are no facts from which it could be suggested that the Claimant affirmed the contract in relation to the delay in the provision of information about the commission, or the performance management process.

177 Having established that there was a constructive dismissal, I have to consider whether that dismissal was a fair dismissal or not. That requires me to apply section 98 of the Employment Rights Act. Neither party made submissions on section 98. I understand it was accepted that if the conclusion was that there was a constructive dismissal, it was not argued that this was a fair dismissal.

178 If there is a dismissal, it is for the employer to show the reason for the dismissal and that it is a reason falling within section 98(2). That section sets out potentially fair reasons. The employer did not argue there was a potentially fair reason. In circumstances where the employer does not show the reason for the dismissal (or if more than one the principal reason) and that it is for a reason falling within subsection 2 or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held, the dismissal must be unfair. That is the situation here. Therefore, the dismissal of Mr Hemmings was an unfair dismissal

Deduction of wages (s13 ERA)

1. In respect of any alleged deduction of wages

2. Did the Respondent make a deduction of wages that were 'properly payable' to the Claimant by:

    a. Failing to pay the Claimant commission owed to him?

179 In relation to the claim for deduction of wages in relation to commission, I have insufficient evidence to find for the Claimant. Initially it appeared the Claimant was claiming he did not have enough information from which to calculate the commission which he claimed was due to him. In practice it is clear from the Client Schedule in the bundle that he did in fact get all the possible information in time to do so before this hearing. It was not suggested on the part of the Claimant that he needed more time to calculate commission. It was simply suggested that the records were inadequate. I have dealt with that assertion earlier in the judgement. I consider the Claimant had enough information to calculate the commission he considers to be due to him and has not done so and without clear evidence about specific bills paid by clients originated by him for which he has not been paid commission, there is no basis for me to make such a finding.

180 Counsel for the Claimant made some references to a 50 per cent commission arguing there was no scope within the commission agreement for the Respondent to pay only 50 per cent. I am aware that Claimant was initially only paid 50% of the 3 per cent for client A, as there were an email references about splitting origination with another individual who had contributed to that client. The explanatory email sent to Mr Hemmings by Ms Hartley, which was based on the information sent to her by Mr Hancock, shows that client A only paid half the bill and thus looks as if the amount included was the full 3 per cent due, which is misleading. However, in the final commission calculation, prepared by Mathew Tilly on 27 November, my analysis is that the full bill for this client was included as paid. Mr Tilley calculated the total due throughout the Claimant's employment, and deducted the amount paid in August reaching a balance due of £2,070.43, which was then paid, so the full 3 per cent has been paid.

Deducting the cost of the London Business School "Mastering Digital Marketing Course" from the Claimant's final payslip?

181 The terms under which the Claimant was due to repay the cost of the digital marketing course entitled the Respondent to deduct the money from the Claimant's wages included where the Claimant resigned within a certain time period, was dismissed or where he decided not to continue the course. The email from Harriet Kirkaldy explaining the deduction relied on the Claimant "leaving the firm". Harriet Kirkaldy did not give evidence so I can only assume by that she meant that the Claimant was resigning. In circumstances where the Claimant resigned due to constructive dismissal, this cannot fall within the wording of the agreement. A resignation which is in fact an acceptance of a fundamental breach of contract is not a resignation as such but regarded in law as a dismissal. As I have found that the Claimant was constructively dismissed, and that his resignation was a response to a fundamental breach, that provision cannot apply.

182 I have also looked at the other provisions which are potentially relevant. To the extent that the Respondent relies on the employment being terminated for any other reason (with the exception of redundancy), the termination in question is an unfair dismissal. It would be against basic doctrine of law that a man may not take advantage of his own wrongdoing, for the employer to be able to rely on its own breach in order to insist on repayment of the course fee. Effectively there was a condition precedent for the Claimant to be entitled to the benefit of the full course fee being paid for him. That condition precedent was that he was not dismissed before a certain time. There are various ways in which this sort of situation had been treated in the past all of which amount to the same principle. Whether you say that the Respondent is estopped from relying on the constructive dismissal or you say that the wording of the contract cannot be read as applying to any dismissal including an unfair dismissal, the outcome must be the same. The clause should be read as meaning the triggering event would be that the employment is "fairly" terminated for any other reason (with the exception of redundancy). That is not the case here.

183 The third triggering event is where the Claimant decided not to continue the course. I know that Ms Kirkaldy specifically states in her email of 27 October *"the clawback is not related to whether you completed the course".* It is not the basis on which the Respondent applied the deduction. However, the Respondent's Counsel argued that there was no waiver and the ET3 was similarly opaque. As the Respondent may argue it had the right to deduct under this provision, I have considered it.

184 In this case the Claimant stopped the course because he regarded himself as having received an instruction from the Respondent. Neither Ms Hartley or Mr Hancock who are present at the time made any reference to the Learning Agreement or suggested to the Claimant that he could stop but that he would find himself liable for the cost of the course. There is no doubt in my mind that the Claimant would not have stopped the course had he thought he would pick up the cost.

185 As the Claimant was given an instruction to stop the course, the Respondent would have been under a duty, being the general duty of good faith, to notify the Claimant if by doing so he would be liable for the cost of the course. The terminology used by the Respondent gave the Claimant every reason to believe that he was being told to stop it and that he would not have any adverse consequence.

186 The Respondent has argued that this was not a waiver of the terms of the Learning Agreement, but I do not accept that. The Respondent's management told the Claimant in clear terms that he should not continue given the stress he was under. That followed from Mr Hancock saying the course has been paid for. Those words were enough for Mr Hemmings to consider the course had been paid for and he could stop it without adverse consequences.

187 While neither Ms Hartley nor Mr Hancock may have been aware of the terms of the Learning Agreement, they had authority on behalf of the Respondent to give an instruction. They did not stop to check the terms on which the course fee had been paid. They were clear that the Claimant should stop in the light of the stress it was causing. It's my view that they did waive the right of the Respondent to recover the course fee on that basis.

188 In summary I find that the Claimant was constructively dismissed, and that dismissal was an unfair dismissal. I also find that the Respondent is liable to the Claimant for the unlawful deduction of the course fee in the sum of £1,998.

189 Remedy remains to be considered at a future date

Employment Judge Walker

29 December 2024
Date

JUDGMENT & REASONS SENT TO THE PARTIES ON

3 January 2025

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FOR THE TRIBUNAL OFFICE