EMPLOYMENT TRIBUNALS

Claimant: **Mr M Chapman**

Respondents: **(1) Goji Administration Services Limited**
(2) Euroclear SA/NV

Heard at: **East London Hearing Centre**

On: **27, 28, 29, 30 April and 1 May 2026**

Before: **Employment Judge S Park**

Representation

For the Claimant: Ms G Churchouse (counsel)

For the Respondent: Mr R Dennis (counsel)

RESERVED JUDGMENT

The Judgment of the Tribunal is that the claimant's claims for unlawful deduction of wages are not well-founded. The claimant's claims are unsuccessful and are dismissed.

REASONS

Claims and issues

1. The claimant had been employed by the first respondent from 1 March 2021 until his dismissal on 7 November 2022. The claimant brought three claims against the respondents for unlawful deduction of wages in respect of commission that he says was payable to him after the termination of employment in connection with work he had undertaken during his employment. The deal that the claimant says commission was payable in connection with was referred to by the parties as the "*Euroclear Deal*". I refer to it in the same way in this Judgment.

2. The claimant brought his first claim in September 2023 and a further two claims in respect of additional payments he says were subsequently due.

3. The only claims the claimant brought in the Employment Tribunal were for unlawful deduction of wages under the Employment Rights Act 1996. The claimant's employment with the first respondent had terminated so it was open to him to bring a claim for breach of contract. The claimant did not do so. The consequence of this is that the issues to be determined are solely framed by reference to a claim for unlawful deduction from wages.

4. The claimant also brought a claim against the second respondent. The claimant says that there was a relevant transfer under the Transfer of Undertakings Regulations 2006 at some point after his employment terminated. The claimant said he was assigned to the organized grouping of resources or employees that transferred and the sole or principal reason he was dismissed in November 2022 was this transfer. As a consequence, he says liability for his claim transferred to the second respondent.

5. The claimant did not have two years continuous service when his employment terminated so he was unable to bring a claim for unfair dismissal. The question of whether there was a transfer and the reason for the claimant's dismissal only needs to be determined in respect of which respondent is liable for his claim.

6. At the outset of the hearing the parties provided a list of issues. This was described in the bundle as agreed. This version was not the same as had been agreed at earlier preliminary hearings. It included a few amendments that had been made by the respondents. The respondents said that these were clarifications. The claimant objected, saying that some of the amendments changed the respondents' case, introducing a new argument about an implied term.

7. Having heard submissions from both parties I decided to allow the amendments to the list of issues. The particular amendments added further details of the arguments the respondent sought to advance but did not change the underlying questions I needed to determine. The details of the changes were primarily matters to be addressed in submissions or via supplementary questions, which I permitted.

8. The claimant in response sought to amend the way his claim was put in response to the amendment to the list of issues. The respondent did not object.

9. The final list of issues is appended to this Judgment.

Procedure, documents and evidence heard

10. Both parties were represented throughout proceedings and by counsel at this hearing.

11. A bundle of documents of over 2000 pages had been prepared and a supplementary bundle containing witness statements, the updated list of issues, cast list, chronology, pre-reading list and opening notes by both parties.

12. The claimant had prepared a witness statement. The respondents called two witnesses, David Genn and Alex Crocombe. Mr Genn had also provided a supplementary witness statement. Supplementary questions were asked of the claimant before cross-examination. All witnesses were cross-examined.

13. At the close of the evidence both parties provided written and oral submissions. Judgment was reserved as there was insufficient time for deliberation and giving judgment.

Findings of Fact

14. The findings of fact I have made which are set out below are based on the issues identified in the appended list of issues. I carefully considered all the evidence provided, both documentary and witness evidence. The findings of fact I have made are limited to those that I have considered necessary to make in order to determine the claims for unauthorised deduction of wages and the associated issues about potential liability of the first or second respondent. A lack of reference to any particular document or something that was said by a witness does not mean it was not considered

15. The first respondent is a start-up business. It is wholly owned by its parent company, Goji Holdings Limited ("GHL").

16. The claimant was offered a role with the first respondent as Business Development Manager in November 2020. The purpose of the role was to bring in new business, so it was a sales type role.

17. The claimant was recruited via an external recruiter. The claimant was interviewed by David Genn, the first respondent's Chief Executive Officer, and Alex Crocombe, the first respondent's co-founder and Chief Financial Officer.

18. Mr Genn emailed the claimant on 9 November 2020. Within this he set out the offer of employment. This included the following package:

    18.1. details of the base salary;

    18.2. equity options;

    18.3. pension contribution, life insurance and health insurance;

    18.4. unlimited holiday allowance; and

    18.5. uncapped commission structure.

19. Mr Genn set out details of the commission and bonus for the first year of employment. The key elements of this were as follows:

    19.1. 8% of first year revenue;

    19.2. 4% of second year revenue; and

    19.3. revenue targets and bonus for year 1.

20. Finally, there was a notes section. This explained how commission would be split between team members if they worked together on a deal. It also stated: *"Year 2 onwards: review target and % revenue share will be adjusted based on learnings from year one."*

21. The tone of the email is relatively informal. The proposal is set out in bullet points and although some elements are clearly specified, such as the percentages for calculating commission, there are also some aspects that are set out in quite general terms with a level of ambiguity. It is unclear from the email whether the first respondent were offering the possibility of a bonus that was in addition to commission or whether Mr Genn was using the terms bonus and commission interchangeably.

22. Mr Genn sent the claimant a formal offer letter on 11 November 2020. This included the same base salary and details about share options. It stated: *"details of your commission structure have been provided separately".* There was no reference to a separate bonus in this letter.

23. The claimant was also provided with his contract of employment on 11 November 2020, although he was not due to start work until the 1 March 2021. The key terms relating to remuneration were as follows:

> *"6. Pay:*
>
> *Your salary is £70,000 per year payable on or around the last business day of each month, by BACS, in arrears.*
>
> *The Company will review your pay annually and advise you in writing of any pay change. There is no automatic entitlement to an annual increase in your pay."*
>
> *"8. Bonus and commission:*
>
> *The Company may, on occasion, pay you a discretionary bonus, the payment of which will not create any contractual entitlement for future bonus payments.*
>
> *Your commission structure is detailed separately and can be amended by the Company from time to time as required."*

24. The claimant started to work for the first respondent in March 2021. During that year it is accepted that he was paid in accordance with the commission structure as set out in the original 9 November 2020 email.

25. On 7 January 2022 Mr Genn emailed the claimant and his colleague, Premal Vadgama. Attached to the email was a new commission structure for 2022. Within the covering email Mr Genn described this as the *"sales bonus structure for 2022".*

26. The document itself was headed *“Sales Commission 2022*”. The document sets out the details as follows:

    26.1. an upfront bonus of £15,000 per sale;

    26.2. ongoing bonus of 8% for the first year and 4 % of second year revenue if revenue was greater than the upfront bonus;

    26.3. the payment terms, which was through payroll at the end of the financial quarter;

    26.4. alternative arrangements for sales where the claimant (or his colleague) provided support.

27. At the end of this document, under the title *“Other terms”* it stated: *“If you are to leave Goji for any reason, no further bonus payments will be made during or after your notice period.”*

28. On 14 January 2022 the first respondent issued all employees, including the claimant, with a revised contract of employment. The claimant accepted and signed this contract. This contract opens by stating that it *“supersedes and replaces any previous contract in place and its provisions apply from the date given above.”*

29. The provisions on remuneration in this contract were as follows:

    > *“6. Pay*
    >
    > *The Company will pay you a salary of £70,000 per year, increasing to £73,500 per year from 1 January 2022. Your salary is payable on or around the last business day of each month, by BACS, in arrears.*
    >
    > *The Company will review your pay annually and advise you in writing of any pay change. There is no automatic entitlement to an annual increase in your pay.*
    >
    > *The Company may, on occasion, pay you a discretionary bonus, the payment of which will not create any contractual entitlement for future bonus payments.”*

    This version of the contract was silent on any entitlement to commission.

30. The provisions on notice allowed the first respondent to pay in lieu of notice. It also included the following:

    > *“For the avoidance of doubt, the payment in lieu shall not include any element in relation to any bonus or commission payments that might otherwise have been due during the period for which the payment in lieu is made, any payment in respect of benefits which you would have been entitled to receive during the period for which the payment in lieu is made*

and any payment in respect of any holiday entitlement that would have accrued during the period for which the payment in lieu is made."

31. Around the same time other issues arose about the commission split between the claimant and his colleague. A mediation was arranged by Mr Crocombe.

32. The claimant's notes of this meeting indicates a number of areas of dissatisfaction, including overall levels of remuneration. One issue that is recorded as being raised is commission on capital raised by employees. Slack messages between Mr Genn and Mr Crocombe from around this time record them discussing the claimant's query, indicating it had been raised with board members, who were uncomfortable with the idea of paying commission on equity raised by employees.

33. The claimant responded to Mr Genn's email with the January commission structure querying the arrangements for splitting commission in some circumstances. The claimant said in his evidence that he subsequently accepted the commission structure in a Zoom call on 21 January 2022, having discussed it on a number of occasions. The implication of the claimant's evidence was that the terms of the commission structure were open to negotiation between the parties. I did not accept this was the case. The terms remained the same as had been sent on 7 January 2022. The claimant may have sought input or raised concerns about aspects of the scheme. Ultimately the terms of the commission structure were determined by the first respondent and came into effect irrespective of whether agreed by the claimant.

<u>Project Gotham</u>

34. The first respondent is a financial technology business. They provide technological platforms and services to investment business. The claimant's role as Business Development involved reaching deals with those businesses.

35. The structure of the deals generally involved an up-front sum, referred to as a '*build fe*e' and then fees for the ongoing provision of services. Under the January 2022 commission scheme the claimant would get a fixed minimum sum when the build fee was payable and then a percentage of the ongoing fees.

36. Initially the deals reached were relatively small. The claimant provided an example of one where the build fee was £25,000 and the ongoing fees for the first year would be £75,000.

37. During early 2022 the first respondent began to have discussions with the second respondent. The second respondent is a large financial institution. This was a very significant potential deal with a much higher value than other deals the claimant had worked on before. The structure of the deal also was going to be different. The second respondent were looking at acquiring the first respondent's services but alongside this they were also looking to invest in the first respondent and GHL. The negotiations with the second respondent were referred to as Project Gotham.

38. The claimant had a key role in developing the relationship with the second respondent during 2022. He had been introduced to individuals within the second respondent in 2021 and had meetings with them in early 2022.

39. It was within this context that the claimant raised the issue of how commission would be paid on deals that involved investment alongside sales of products and services.

40. During June 2022 the claimant had further discussions on this issue with Mr Genn, which began to focus on how commission in respect of Project Gotham could be structured. This was clearly of great importance to the claimant. It was also being discussed by Mr Genn and Mr Crocombe. This is recorded in a note from June 2022, which shows them discussing different possibilities. By this point the possibility of the second respondent paying for services by way of equity investment rather than an upfront fee was already being discussed.

41. On 30 June 2022 a letter of intent was signed between the GHL and the second respondent. This shows that they were intending to: *"explore a potential strategic partnership, including obtaining a strategic and/or controlling equity stake in Goji"*.

42. In July 2022 the claimant had a discussion with Mr Genn about his career development. The claimant's basic salary was increased to £85,000. The notes of meeting show that the issue of how the claimant would be compensated in respect of Project Gotham was discussed. The notes include the following:

> *"1. If any component of the fees is 'replaced' by equity, e.g. an upfront fee is reduced, then you will be compensated as if it were the full commercial fee.*
>
> *2. As discussed previously there will not be direct compensation for the equity component of the deal. This has been discussed with the board and is in line with market standard. As for all staff, your EMI options will increase in value if Gotham invests."*

43. On 2 September 2022 the GHL and the second respondent signed non-binding heads of terms. Following this there was further communication between the claimant and Mr Genn and Mr Crocombe about the structure of the claimant's commission in respect of this deal. In an email the from the claimant dated 14 September 2022 he summarised some of the issues, including *"the main point we need to resolve is the equivalent commercial value of the deal (complex as we've one the whole multi-year deal in one go, but it will be paid in equity)*.

44. Mr Crocombe responded to the claimant on 20 September 2022. He confirmed that they wanted the claimant to get fair commission and that he would be compensated *"for revenue that is replaced with debt and equity".* Mr Crocombe informed the claimant that Mr Genn would send him something in writing. In this email Mr Crocombe also stated as follows:

> *"To be clear, basing commission off all revenue and debt raised is not a viable option: our board now (and Gotham going forward) have reserved*

the right to approve or reject any material payments to staff and they have already rejected commission payments on fundraising.

I completely understand you want as much clarity as possible. We have always committed to pay you commission on this deal whether revenue or equity. As you've said this is complex. Understanding how early the conversations are up to on the commercial, it feels too early to lock in an exact structure today, but things are moving forward at pace. I hope you appreciate this point and our intentions."

45. He followed up to clarify that it should have read: *"To be clear, basing commission off all equity and debt raised is not a viable option."*

46. On 21 September 2022 Mr Genn emailed the claimant with a memo with the commission structure. The covering email states: *"There are no changes in it other than to clarify that the first-year commission date starts from when the first recurring revenue invoice is issued."*

47. The memo attached was headed *"Sales commission memo 18 September 2022".* The first part set out the main commission structure, which mirrored the January 2022 commission structure, save that there was the additional clarity about when first year revenue started. There was then a second part that was new titled *"Exception"*. The first exception was titled *"Relationship management*" and provided for an enhanced rate where the salesperson continued to manage the account. The second exception was *"Sales with a strategic investment component".* This stated:

"1. Commission will not be paid on equity investments made by clients.

2. If a client makes an equity investment into Goji (minority or majority ownership), a commission will be paid on the revenue earned from this client according to the standard structure above.

3. If any part of the revenue e.g. upfront build fees etc is paid out of the equity investment, then the commission will be paid as if these fees had been paid normally, i.e. via an invoice."

4. The amount of commission, payment schedule and other considerations will be worked out once the commercial negotiations with the client have been completed to ensure there is clarity for all parties involved."

48. The claimant responded to this email raising concerns about this, saying it was not specific enough. There followed further emails between him and Mr Genn. Mr Genn's position was that there was still too much uncertainty on the deal. The claimant considered the value of the deal was known based on what had been agreed to date, which was disputed by Mr Genn. The claimant continued to push on this and Mr Genn's position was consistent it was not possible to give certainty.

49. On 24 October 2022 Mr Genn wrote to the claimant again about Project Gotham and proposals in terms of commission on the deal. A new structure was set out. The key parts of this email were as follows:

    49.1. Mr Genn set out principles that would be applied. For revenue, the usual model would apply. He also stated: *"We are assuming there is no upfront fee invoiced to Gotham, but if there is, the commission will be calculated in the same way as below."*

    49.2. In respect of upfront fees Mr Genn stated *"A proportion of the capital injection amount will be allocated to the FundSettlte Alts build ("Build Fee").* The claimant would *"receive 8% of 25% of the Build Fee in year one."*

    49.3. Mr Genn stated in respect of commission *"This will need to be approved by the board as the total monetary amounts are greater than can be signed off by the executive directors."*

50. The claimant responded objecting to this. He expressed concern about whether it was a *"negotiation or not"* and that it would lead to significantly lower amounts than under previous arrangements. He also put forward his position that the sum considered as a build fee at the time was £7.6million.

51. In support of his position the claimant provided by way of evidence financial models that were presented at a meeting in Brussels on 26 October 2022. The claimant has not provided a complete account of this meeting or explanation of what this document shows in his evidence. Within this document there are references to build fees for Project Gotham. The claimant relies on these but in his evidence does not provide further explanation, other than to explain how some early calculations were undertaken to work out the costs involved for the first respondent to do the work that the second respondent would require.

52. The claimant and Mr Genn corresponded further on the issue over the next few days. In an email on 24 October 2022 Mr Genn made the following comments:

    52.1. *"The picture on funding is evolving"*

    52.2. *I do not believe the £7.6m is in as a one-off fee or as an estimate of the build costs as we've not segmented costs in that way."*

53. In an email dated 27 October 2022 Mr Genn again stated that figures could not be finalised at that point because negotiations were ongoing with the second respondent about the total capital injection being made. He reiterated that *"the principle of the commission is to take a proportion of the equity injection and treat it in the way we would have if it were paid as upfront build fees".* The claimant's position was that there could be certainty because he said that *"the cost of building the platform has been negotiated and is factored into the investment."*

54. Based on the emails at the time I accept that it was the claimant's understanding that the financial models at the time showed an estimated build fee of £7.6million. However, Mr Genn's emails also make it clear that understanding was not shared.

From his perspective negotiations on the deal were ongoing so there was not that level of certainty.

55. The claimant and Mr Genn were due to meet to discuss the commission structure at the end of October. This did not happen as Mr Genn cancelled the meeting.

56. In late October and early November 2022, the claimant continued to chase Mr Genn for an update about the commission scheme. On 3 November 2022 Mr Genn said he would let him know when they were in a position to do so.

57. The claimant attended a meeting with Mr Genn on 9 November 2022. At that meeting Mr Genn terminated the claimant's employment with immediate effect and pay in lieu of notice. This was confirmed by a letter of the same date from April Nardulli, the first respondent's General Counsel. The reason given by Mr Genn, and set out in the letter, was the breakdown of the working relationship. The letter specifically refers to the tone of the claimant's correspondence with Mr Genn.

58. Within the letter the first respondent set out their position on commission. They refer to the provision in the January 2022 contract that states payment in lieu will not include bonus or commission that would otherwise be payable. The first respondent also states their position that the claimant had no entitlement to commission for the Euroclear Deal. In the letter the first respondent states that there are no contractual terms in this respect as there was a negotiation ongoing which had broken down.

59. The claimant was paid in lieu of his notice at the end of November 2022. The claimant was also paid a sum in respect of commission on a different deal he had worked on. The respondent described this as having been paid on an ex-gratia basis.

<u>Post-termination events</u>

60. The GHL and second respondents had signed non-binding heads of terms on 2 September 2022. Negotiations were ongoing at the time that the claimant's employment terminated. An investment agreement and a convertible loan agreement was signed on 14 December 2022.

61. Under these agreements the second respondent would acquire a controlling stake in GHL, who wholly owned the first respondent. While this was agreed in December it was subject to regulatory approval. This was obtained at the end of June 2023, and the acquisition was completed on 14 July 2023. At the same time a commercial agreement was entered into between the two companies.

62. The second respondent paid various sums to GHL under these agreements and subsequent agreements. The claimant says that he is entitled to commission payments on these sums in accordance with the September 2022 commission scheme.

63. The sums that were paid by the second to GHL are as follows:

63.1. £3.5million under the convertible loan agreement from December 2022.

63.2. £12,799,947.56 under the investment agreement from December 2022.

63.3. £1,325,000 under the commercial agreement from July 2023.

63.4. £10million under the convertible loan note dated 31 May 2024.

64. In various agreements under which these sums are paid, the purposes of the payments is described in different ways. What is notable, is that they all include multiple purposes. The December convertible loan agreement is *"fund the developments of the FundSettle App and the company's other working capital requirements"* and the sum under the investment agreement of that date was for *"the working capital requirements of the Company (including the development of FundSettle Alts"*. The position is the same across each agreement with the money being for more than one purpose.

65. The nature of these sums is disputed by the parties. The claimant says that these sums were all up front fees or build fees paid by the second respondent for IT products and services. The respondents position is that the structure of the deal between GHL and the second respondent changed after the claimant's employment terminated for regulatory reasons so ultimately no upfront build fees were paid, either directly or by way of a fee/equity swap.

66. In September 2022 it had been anticipated that the deal would include a commercial agreement under which the first respondent would provide certain IT services to the second respondent. This included the development of a platform called the FundSettle Alts. The heads of term signed on 2 September 2022 included an obligation on both respondents to negotiate this commercial agreement. The respondent says that subsequently for regulatory reasons it was not possible for GHL and the second respondent to enter into the anticipated commercial agreement. The first respondent's witnesses explained how a different structure was put in place, which was described as being a fee-share arrangement. The first respondents' position is that as a consequence of this none of the sums that were paid to GHL by the second respondent can be classified as being a build fee.

67. I accepted that the structure of the deal between GHL, the first and second respondent changed between the claimant's departure and the commercial agreement being reached in July 2024. There are no upfront build fees that are identifiable within the agreement, or a clear arrangement whereby there is a fee/equity swap. Nonetheless as part of the deal the first respondent was still going to develop IT software and provide services to the second respondent. Although the agreements do not identify any specific sums as being build fees, either being paid upfront or by way of fee/equity swap, the first respondent received money from the second respondent in return for providing these services to the second respondent. Therefore, some of the sums paid by the second respondent could be classified as being a build fee. However, I do not accept the claimant's assertion that the entirety of the sums are disguised build fees. There was a significant commercial deal between the respondents (and GHL) which involved the second respondent investing in GHL and the first respondent. Each

agreement makes it clear that the sums being paid are for multiple reasons, including providing working capital. This is consistent with a large company, such as the second respondent, investing in a much smaller start-up business.

68. In summary, the first respondent did undertake work for the second respondent during 2023 and 2024. This was work of a type where under a straightforward commercial agreement that the first respondent usually entered into there would be a build fee payable. Some of the money paid by the second respondent under the various agreements was consideration for that work to be done, so could be described as a build fee. The actual sums were global figures encompassing payment for the work being done and wider investment. However, the structure of the deal was different to what was anticipated. As a result, there is no clearly identifiable sum which is the build fee or fee/equity swap.

69. As a result of the deal between GHL and the second respondent there was a share sale and the second respondent acquired a controlling share in GHL, who wholly owned the first respondent. The agreements provided certain rights for the second respondent in terms of the management of GHL and the first respondent. This included having observers at board meetings and subsequently representatives on the board. There were arrangements for secondments of individuals from the second respondent to the first respondent and to have input over certain decisions made by GHL and the first respondent.

The Law

70. The claimant brought claims for unlawful deduction of wages. The right not to suffer unauthorised deductions from wages is set out in section 13 Employment Rights Act 1996 which says:

"(1) An employer shall not make a deduction from wages of a worker employed by him unless –

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

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

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised –

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

[….]"

71. The definition of wages is broad. Section 27 Employment Rights Act 1996 states that wages includes: *"any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise."*.

72. To pursue a claim for unlawful deduction of wages there must be an occasion where a specific sum is properly payable. There must be a legal right to the sum claimed. This requires the Tribunal to ascertain whether the claimant has a legal entitlement is to the sum claimed. This may be a contractual entitlement or some other type of legal entitlement, such as an under statute. If the sum claimed is a contractual entitlement the usual principles of contractual interpretation apply.

73. Both parties provided detailed opening notes and written submissions including summaries and analysis of the law, including relevant case law. These submissions have all been considered carefully. I do not replicate fully here all the arguments put forward by both parties.

74. By way of summary, the key principles in terms of constructing contracts of employment that are relevant to this case are as follows:

    74.1. Terms of an employment contract may be expressly agreed, either orally or in writing.

    74.2. *"When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] AC 1101 , para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions." **Arnold v Britton and ors 2015 AC 1619, SC**.*

    74.3. When the express terms are wholly in writing, then usually the communications outside the written agreement is merely background. This is subject to the parol evidence rule, which may arise if the written agreement does not reflect an earlier oral agreement or the intentions of the parties at the time the contract was entered into.

74.4. When written terms are ambiguous then context may be relevant to the construction of those written terms. The contra proferentem rule may also apply, so any ambiguity is resolved in favour of the party who did not draft the term.

74.5. The general rule is that a term may only be implied if there is no express term.

75. For a claim for unlawful deduction of wages, it is only possible to bring a claim about a sum that is properly payable. The sum must be capable of quantification. The quantification can be disputed or difficult, but it must be quantifiable. (**Coors Brewers Ltd v Adcock and ors 2007 ICR 983 CA** and **Lucy and ors v British Airways plc 0033/08)**

76. Where an employer has discretion, then a sum only becomes properly payable once that discretion is exercised. If an employer has any discretion under the contract it must not be exercised in an irrational or perverse manner and should take relevant factors into account (***Braganza v BP Shipping Ltd and another 2015 ICR 449, SC****).*

77. A contract may contain a provision that limits an employee's right to commission that would otherwise be payable after the termination of employment. Such terms may be onerous but are binding if the language is clear. Such clauses should be interpreted in accordance with business common sense. (**Peninsula Business Services Ltd v Sweeney 2004 IRLR 49, EAT** and **Brand v Compro Computer Services Ltd 2005 IRLR 196, CA**)

Discussion and conclusions

78. The claimant case is that there were sums that he was entitled to be paid by way of commission after the termination of his employment in connection with the Euroclear deal. For the claimant's claims to succeed the following is necessary:

78.1. The claimant must have a contractual right to be paid the commission in connection with the Euroclear deal.

78.2. The sums he is claiming must be quantifiable and properly payable on a specific occasion, because this is a claim for unauthorised deduction from wages as opposed to a breach of contract claim.

78.3. The terms of the contract must entitle for him to receive those sums after his employment has terminated.

<u>The claimant's entitlement to commission under his contract</u>

79. The terms of contracts of employment need not be contained in a single document. It is not uncommon for the terms to be found in multiple documents. Due to the ongoing nature of the employment relationship the terms of the

employment contract between an individual and employer may change over time. My first task is to determine what were the relevant terms of the claimant's contract of employment with the first respondent.

80. In the claimant's case there are six documents which are all contractual in nature. These are:

    80.1. The email of 9 November 2020 from Mr Genn to the claimant containing the original offer of employment.

    80.2. The formal offer letter dated 11 November 2020.

    80.3. The first contract of employment dated 11 November 2020.

    80.4. The commission structure sent by email dated 7 January 2022.

    80.5. The updated contract of employment issued on 14 January 2022.

    80.6. The commission structure sent to the claimant by email dated 21 September 2022.

81. What is common with all these documents is that there is a lack of clarity on some key points.

82. The first contract of employment refers to a separate commission structure but does not expressly state that the claimant is entitled to be paid commission in addition to his basic salary. There is a reference to a discretionary non-contractual bonus. In this respect the contract itself does not reflect the original offer, as set out in the email of 9 November 2020, which was accepted by the claimant. That email expressly included an uncapped commission structure within the terms that were offered.

83. I have concluded that to understand the contractual position on commission it is necessary to read the offer email and the contract of employment together. The email makes it clear that the claimant's remuneration structure includes a basic salary and commission. The claimant was employed in a sales role. I take note that this type of remuneration structure is common for sales roles. When read in this context, the parties intended that the claimant should have a contractual right to be paid commission in addition to his basic salary. That was the offer originally put to the claimant which he accepted. The result of this is that clause 8 of the contract should be read as stating that the claimant has an entitlement to partake in a commission scheme and be paid commission in addition to his basic pay.

84. The right to be paid commission does not in itself entail a right to be paid a particular amount or be paid in a particular way. There needs to be some separate way of calculating commission. The nature of commission is that it will be variable and dependent on the claimant achieving certain things during the course of his work. This is reflected in the offer letter and contract, which refers to a commission structure.

85. The offer email from 9 November 2020 contained that commission structure. The actual commission structure contained within the original offer email is clear. It provides for set percentages of revenue and there is no leeway for commission to be calculated in a different way for the first year.

86. The contract also states that the commission structure *“can be amended by the Company from time to time as required.”*. This is consistent with the offer email, which indicates that aspects of the commission structure would be reviewed from Year 2 onwards.

87. The consequences of this are as follows:

    87.1. Under the original contract of employment, the claimant had a contractual right to participate in a commission scheme.

    87.2. The actual commission structure was set out in a separate document.

    87.3. The first respondent reserved the right to amend the commission structure. To this extend, the first respondent had discretion.

    87.4. Once the commission structure was in place it became binding and the claimant was entitled to be paid under that scheme until the respondent exercised its right to amend the scheme.

88. The claimant was issued with a second contract of employment in January 2022. This contract was completely silent on commission. It did not even refer to a separate commission structure. It only refers to a completely discretionary bonus.

89. The second contract states that it replaces the earlier contract. If that were the case the claimant would no longer have any entitlement to commission under his contract. That was clearly not the case. The claimant had been provided with an updated commission structure a few days before. There is no indication that the parties intended for claimant’s underlying right to participate in a commission scheme to be removed. This would be a fundamental change to the claimant’s rights in respect of remuneration. I have concluded this was an oversight, and in the absence of a new term on commission the original terms in respect of commission remained. The claimant continued to have a right to commission, with the commission structure determined by the first respondent. The first respondent retained the right to amend the commission structure, but once a commission structure was in place it was contractual until it was amended.

90. The January 2022 commission structure replaced the original one when it was provided on 7 January 2022. It came into effect then. This was then replaced with the September 2022 commission scheme, when that was provided on 21 September 2022. Because the first respondent had the right to amend the commission structure from time to time these schemes came into effect when the respondent provided them to the claimant. The claimant did not need to agree to their contents, because the first respondent had discretion on the contents of the commission structure.

<u>Right to commission post termination of employment</u>

91. If the claimant's contract of employment included clear express terms that prevented him receiving any further payments in respect of commission after the termination of his employment then his claim will fail. The sums the claimant is claiming did not become potentially payable until after the termination of the claimant's employment.

92. The January 2022 documents (contract and commission structure) both include provisions that seek to limit entitlement to commission and/or bonus payments after the termination of employment. Both provisions are poorly drafted with some inconsistency.

93. The clause in the contract of employment places limits on the calculation of the payment in lieu of notice. Pay in lieu of notice is restricted to basic salary and does not include any additional payments that may otherwise have been payable during the notice period, including any bonus or commission that would have been payable. The wording about the calculation of pay in lieu of notice is clear.

94. Reading this clause, it is clearly about how any payment in lieu of notice will be calculated. It is contained in the provision about notice and termination of employment, not the provisions on remuneration. That is the scope of this provision. It does not expressly state that there is no further right to commission that may become payable at a later date under a commission scheme where there is an ongoing entitlement over a period of time.

95. It may be that whoever drafted this clause did so on the assumption that it was obvious that entitlement to commission automatically ceased on the termination of employment. The subjective belief of either party is not relevant when seeking to understand the correct meaning of any term. There is nothing within the clause itself which imposes this restriction. On reading the term it is just about the calculation of pay in lieu of notice, and there are no further restrictions.

96. Clauses that restrict entitlement to commission should be read restrictively, but also in accordance with business common sense. Read literally, the wording only applies to the calculation of pay in lieu of notice and not to entitlement to commission after the expiry of the notice period. This leads to a slightly absurd situation whereby an employee does not receive commission that is otherwise payable in the period immediately after the termination of employment but could have an ongoing right to commission payments that crystallised at a later date. The wording though is sufficiently clear to give that meaning, irrespective of the outcome. Therefore, the contract itself does not give the first respondent the right to withhold commission that becomes payable after the expiry of the notice period.

97. In this case there is also the separate January 2022 commission structure. This is important because, as noted above, the January 2022 contract does not in itself provide any right to commission. The terms of the commission structure are contained in the separate commission structure documents. This document also contains a provision seeking to limit entitlement to commission post termination of employment. It states *If you are to leave Goji for any reason, no further bonus payments will be made during or after your notice period."*

98. There is some ambiguity in this provision because it refers to bonus payments, not commission payments. This was a consistent theme throughout the various contractual documents and commission scheme documents. The terms bonus and commission are both used and at no point is there a clarification of the difference. The first respondent said they were used interchangeably. The claimant disputed this.

99. Reading the January 2022 commission structure document as a whole I have concluded that commission and bonus are used interchangeably, so the limitation on payments post termination of employment applies to commission that would otherwise become payable at a later date. The document is titled "*Sales Commission 2022*" but throughout the document itself the various different payments that may become payable are all referred to as types of bonus. This includes an upfront bonus and ongoing bonus, with the details under these sub-headings sometimes including '*commission'* and sometimes saying *'bonus*'*.* The document is poorly drafted in this respect, but it is not ambiguous. The only types of payments that the claimant is entitled to under the document are commission type payments calculated by reference to sales. Therefore, the limitation on payments post termination of employment applies to all payments that would otherwise become payable under the January 2022 commission structure.

100. The claimant has disputed when this limitation on payments post-termination applied. During this case the claimant has argued that it should be interpreted as only limiting his entitlement to further payments if he chose to leave, i.e. not if the first respondent terminated his employment. This is not what the provision states. It says: *"if you are to leave Goji for any reason".* Leaving for any reason encompasses either resignation or dismissal by the employer.

101. On that basis, under the January 2022 commission document the claimant had no right to any further commission payments that would be payable under that commission structure once his employment terminated.

102. This agreement was replaced by the September 2022 commission structure, that is dated 18 September 2022 and sent to the claimant on 21 September 2022. I set out below my conclusions on the terms of that document.

<u>The terms of the September 2022 commission structure</u>

103. In accordance with my findings above, the claimant continued to have a right to participate in a commission scheme. The respondent had discretion about the contents of the scheme so could amend it from time to time. Once a commission structure was communicated by the respondent it became binding, so the claimant was entitled to be paid commission in accordance with the terms of that scheme.

104. The claimant has advanced an argument in this case that the September 2022 is a collateral contract so separate to the claimant's main contract of employment. I did not accept this was the case. My analysis of how the claimant became entitled to commission is set out above. Critically, the respondent retained

discretion about the contents of any commission structure. Therefore, there was no need for it to be agreed by the claimant for it to come into force.

105. The September 2022 commission document was the relevant commission structure in place from the date it was presented to the claimant. An updated structure was presented by Mr Genn to the claimant on 24 October 2022. Within the email Mr Genn said that it was still subject to board approval. Therefore, it was provisional and did not replace the September 2022 commission document.

106. In the covering email dated 21 September 2022 Mr Genn had said there were no differences in the schemes other than clarifying when the first-year commission date started. This is not completely accurate. There were a number of differences between the January and September 2022 commission documents.

107. The key difference is that there was a section headed *“Exceptions”*. There were two areas of exceptions. The key one related to: *“Sales with a strategic investment component.*”. The Euroclear deal fell within this exception.

108. To be entitled to the commission the claimant is claiming this part of the September 2022 commission structure must provide an entitlement to commission that is quantifiable and payable on a specific occasion. The unauthorised deduction occurs when that quantifiable sum ought to have been paid.

109. The claimant says that the September 2022 commission scheme entitled him to commission on the revenue element of the Euroclear deal because it provides for the same formula to be applied on the part of the equity investment that represented revenue. By applying the same formula, the claimant says that the sums are quantifiable. The claimant said that the only uncertainty was due to it not being possible to quantify the amounts payable until after the deal was concluded.

110. The first respondent’s position was that this scheme required the respondent to exercise its discretion before any sums could be quantified and determine when they would be payable. The first respondent did not undertake this step; therefore, no commission became properly payable at any point. If this was the case there would be no unauthorised deduction.

111. Reading clauses 3 and 4 of the part of the September 2022 commission structure document that deals with *“Sales with a strategic investment component”* there are two parts which indicate uncertainty and introduce the possibility of discretion needing to be exercised before any commission is quantifiable. Clause 3 states that commission will be paid *“as if these fees had been paid normally”*. Clause 4 refers to when the commission will be worked out, along with the *“payment schedule and other considerations”.*

112. The key part of clause 3 is *“as if”.* As put forward by the parties, there are two possible interpretations to this. The first, as advocated for by the claimant, is the commission calculation is identical and the only uncertainty is due to any deal not being finalised, so sums not being known. The respondent’s advocate for a less

certain position, where *"as if"* indicates a broad equivalence but additional intermediary decisions being required before any commission can be quantified.

113. I concluded that the relevant provisions that would have applied to commission on the Euroclear deal still required discretion to be exercised by the respondent. The wording *"as if"* indicates that there will be a broad equivalence in approach, but not identical. It is a general reassurance that the commission would be similar to what it would have been if it was a standard deal, but there is no methodology set out to clarify how this aim will be met. For commission to be paid there are intermediary steps required, such working out this methodology. This process in itself will involve some level of discretion being exercised.

114. Further, the fourth paragraph also makes it clear that the actual approach to calculating commission cannot be undertaken until the deal itself is nearing completion and that there may be other factors to be taken into account. This means that the payment schedule may also differ, in which case there is no identifiable occasion when the commission was due. The respondent may have exercised discretion with this aspect of the scheme.

115. In reaching this conclusion I have also taken into account the background context. The deal itself was significantly bigger and a different structure to any deal that the claimant or first respondent had done before. The parties knew that the usual approach to commission would not work and a different method of calculating commission would be needed, particularly when the second respondent was both investing in the business and acquiring their services. The purpose of the relevant provisions in the September commission structure was to provide a broad framework for what would happen to provide reassurance to the claimant.

116. What actually happened is the structure of the deal between the second respondent and GHL changed significantly between September 2022 and when the commercial agreement was reached in July 2023. There was no equity/fee swap, as had previously been anticipated. The final agreements between the parties provided for global sums being paid for multiple purposes. This further reinforces the need for discretion to be exercised by the first respondent before any commission could be calculated, to decide what sum should be viewed as being equivalent to upfront fees or other revenue.

117. I have concluded that there is insufficient certainty in the September 2022 commission structure to lead to any quantifiable commission being properly payable to the claimant in respect of the Euroclear deal on any occasion. Therefore, there has been no unauthorised deductions.

118. In addition to this, there is also the question of whether the respondent would have been entitled to withhold any commission post termination of employment, in the event there was a sum that would otherwise have been payable to the claimant.

119. The September commission document does not include an express provision restricting payment after the termination of employment. The January 2022 commission structure did include an express term restricting entitlement post-termination of employment. I have already concluded this restriction related to

commission payments, given that in that document the bonus and commission are used interchangeably. The claimant says the September commission structure replaced the January commission structure and the omission must have been deliberate.

120. I did not accept that the omission was deliberate. The covering email from Mr Genn on 21 September 2022 stated that there was only one change. This was not entirely accurate, but this provides the context to the September memo, i.e. that it is an update not a completely new document. The end of the January 2022 includes a whole section titled *"Other terms",* of which one is the restriction on payments post termination of employment. This entire section is missing from the September document.

121. Given the way that I have concluded the commission structure worked contractually, i.e. a contractual entitlement but the scheme can be amended by the first respondent, I have concluded that these general terms carried across. The September 2022 document amended aspects of the substance of the scheme, but not the general provisions encompassed in *"other terms"*.

122. A change to entitlement post-termination of employment would be significant. It would extend significant rights to the claimant and place significant extra burdens on the first respondent. I do not accept such a change would have been made by mere omission without flagging it up to the claimant and also setting out some indication of how it would happen in practice.

<u>Conclusions</u>

123. The claimant's claim for unlawful deduction of wages does not succeed for the following two reasons:

    123.1. There was insufficient certainty within the September 2022 commission structure for commission under the Euroclear deal to be quantifiable. The use of *"as if"* indicates that additional steps will need to be taken to work out what this would mean in practice which would involve the respondent exercising its discretion. That discretion extended to when any commission would be paid.

    123.2. Due to the change in the structure of the deal during the course of 2023 the need for discretion to be exercised by the first respondent became more pronounced. Even if some of the sums paid included upfront build fees, a method would need to be decided on to ascertain what those sums were.

    123.3. In any event, the provision of the January 2022 commission structure restricting entitlement to commission post-termination of employment carried over to the September 2022 commission structure. That document did not wholly replace the earlier document, it updated it.

124. As the claimant's claims do not succeed I do not need to determine whether there was a transfer and whether the second respondent could be liable. For completeness I note that I accept that the deal between GHL and the second

respondent was a share sale. This would not usually be a relevant transfer under TUPE. It is possible on occasion for there to also be a relevant transfer when there is a share sale. I did not accept that the aspects of the increasing involvement of the second respondent with the first respondent business identified by the claimant suggested a transfer in this case. They were merely consistent with a business taking steps to protect their investment in a smaller business. There was no indication that the second respondent was stepping into the shoes of the first respondent as an employer.

Approved by:
Employment Judge S Park
Dated: 10 August 2026

Public access to employment tribunal decisions