



EMPLOYMENT TRIBUNALS

Claimant: Mr M Stenner

Respondent: Bristol Hotspring Limited

Heard at: Bristol **On:** 8 and 9 July 2020

Before: Employment Judge Midgley

Representation

Claimant: Miss Vickery, Lay representative

Respondent: Miss G Boorer, Counsel

RESERVED JUDGMENT

1. The respondent made unlawful deductions from the claimant's wages and is ordered to pay the following sums to the claimant:
 - 1.1. non-payment of the National Minimum Wage **£1,950.01**
 - 1.2. under payment of Commission **£313.00**
 - 1.3. under payment of bonus **£718.00**
 - 1.4. non-payment pension contributions **£490.85**.
 - 1.5. unpaid annual leave **£3,554.18**
2. The respondent unreasonably failed to comply with the ACAS Code of Conduct in relation to disciplinaries and it is just an equitable to increase the above awards by 20%. The total to be paid in respect of the awards in paragraph 1 above is **£8,431.25**
3. The respondent failed to provide the claimant with written particulars of employment and is ordered to pay the claimant 4 weeks' gross pay **£2,093.60**.
4. The claim of wrongful dismissal is not well founded and is dismissed.
5. The respondent acted unreasonably in asserting that the claimant was not an employee and pursuant to Rules 76 and 79 is ordered to pay the claimant the sum of **£4,364.25**.

REASONS

The Claim

1. By a claim form presented on 21 November 2018 the claimant, who was born on 1 September 1978, brought claims of wrongful dismissal, unlawful deduction of wages (in respect of unpaid bonuses and unpaid pension contributions), failure to provide a statement of terms and conditions of employment, and breach of the National Minimum Wage Regulations. He also made a claim as a worker for breaches of the Working Time Regulations (regarding breaks) and for holiday pay. The claims were initially brought against three respondents, Bristol Hotspring Ltd, Plymouth Hotspring Limited, and Hotspring South West Limited.
2. The respondents defended all the claims. In a response submitted on 10 January 2019, the respondents averred that the claimant was engaged in business on his own account, and that he had contracted with the first respondent through a private limited company, Merry Hot Tubs Limited, to provide services to the first respondent as sales consultant. The respondents therefore denied that the claimant was an employee or a worker and asserted that he did not have the necessary standing to bring the claims he had pursued.
3. On 22 May 2019 at a telephone case management hearing Employment Judge Housego directed that the question of employment status should be determined at a preliminary hearing. However, he ordered that the respondents should pay a deposit of £1000 on the grounds that the respondents had little reasonable prospect of success of establishing that the claimant was “neither an employee not a worker.”
4. On 19 June 2019, the respondents conceded that the claimant was a worker but continued to aver that the claimant was not an employee at any time. However, they did not pay the deposit.
5. Accordingly, that issue was determined by Employment Judge Livesey at a preliminary hearing on 30 July 2019, at which he found that the claimant was an employee of the first respondent. He therefore dismissed the claims against the Second and Third respondents. He held that the Deposit Order was ambiguous and that it could not be construed to require the respondents to pay a deposit to argue that the claimant was not an employee given that it had conceded that he was a worker. Nevertheless, he noted that the basis on which the order was made was clear and understood by the respondents. That was recorded in the attendance note of Mr Brown of Counsel, who represented the respondents at the hearing.
6. The claims were then identified as follows:
 - 6.1. Unpaid annual leave - a claim for 18 days leave
 - 6.2. Breach of contract - a claim for one week’s notice pay
 - 6.3. Unlawful deduction from wages:-

- 6.3.1. A claim for underpayment of the National Minimum Wage in the sum of £5250.28
- 6.3.2. A claim from paying commission and/or bonus in the sum of £2689
- 6.3.3. a claim for unpaid pension contributions in the sum of £746.18
- 6.4. In addition, the claimant sought:
 - 6.4.1. an increase to any award pursuant to section 207A TULRCA 1992 for the respondent's failure to follow the ACAS Code of Practice;
 - 6.4.2. compensation for failing to provide him with written particulars of employment contrary to section 38 Employment Act 2002.
7. The case was listed for a final hearing on 21 October 2019. The parties appeared to have reached an agreement to settle the claim on that day, but it subsequently materialised that the respondent had failed to adhere to the terms of the agreement, and the case was therefore relisted for a telephone case management hearing to relist the final hearing.
8. That hearing occurred before me on 3 January 2020 when I listed the matter for final hearing on the 8 and 9 July 2020 and clarified the precise basis of the claims.
9. In relation to the claims for unpaid annual leave, I drew the parties' attention to the decision of the European Court of Justice in Terveys- ja sosiaalialan neuvottelujärjestö (TSN) ry v Hyvinvointialan liitto ry and another case Case C-609/17, which confirmed the prior decision of the Employment Appeal Tribunal in Sood Enterprises Ltd v Healy [2013] ICR 1361. In Sood it was held that, in the absence of a relevant agreement under Regulation 13A(7), the Working Time Directive ("The Directive") does not operate so as to carry over the additional 1.6 weeks' leave permitted under Regulation 13A.
10. I advised the claimant that in consequence, the Directive did not preclude national laws that fail to provide for a payment in lieu where a worker had been unable to take additional annual leave, which in the UK consists of the 1.6 weeks' annual leave granted by Reg 13A (see British Gas Trading Ltd v Lock and anor [2017] ICR 1, CA). I suggested that in consequence, the claimant would be unable to pursue any part of the 18 days claimed which consisted of leave derived from Regulation 13A as opposed to the ordinary four weeks leave under Regulation 13 and invited the parties to consider the extent to which the claim for annual leave could be agreed.

Procedure, Hearing and Evidence

11. The hearing took place in person, despite the Covid-19 pandemic, with the exception that the respondent's only witness, Mr Justyn Rowley, needed to give evidence by video link, given that his partner was shielding as she was vulnerable to the Covid-19 virus.
12. I was provided with the following for use at the hearing:

- 12.1. an agreed bundle of 232 pages;
 - 12.2. For the claimant: the statements of Mr Stenner and Mr Keiran Fraiser. Mr Fraiser did not attend to give evidence, and the claimant had previously been warned that his evidence would therefore be given limited weight;
 - 12.3. For the respondent: a statement and supplementary statement of Mr Rowley.
13. The claimant and Mr Rowley gave evidence by affirmation and answered questions from Miss Boorer and Miss Vickery respectively, and from me.

Concessions:

14. The respondents had prepared a counter schedule of loss an opening note, which made the following concessions in respect of the claimant's claims (the concessions in the opening note differed from those in the schedule):
- 14.1. The claimant had been underpaid the sum of £1950.01 in respect of the National Minimum Wage.
 - 14.2. The claimant had not been paid annual leave and was entitled to £3,554.18.
 - 14.3. The respondent had not made pension contributions and the claimant was therefore entitled to unpaid pension contributions in the sum of £490.85.
 - 14.4. The claimant's claim for unpaid bonus was well founded in respect of the August bonus and the claimant was entitled to £718.00.
 - 14.5. The claimant's claim for unpaid commission was well founded in respect of clients Boden and Marshall and the claimant was entitled to £202.00 in that respect.
15. The claimant, for his part made the following concessions during the hearing and in his closing submissions which further narrowed the issues for me to determine:
- 15.1. First, he accepted that the respondent's counter schedule dated 20 August 2019, supported by spreadsheets, detailing the days he worked and the pay he earned (as invoiced), was correct. He accepted that if the NMW Regulations 2015 ("the Regulations") permitted payments of commission bonus to be allocated to the weeks in which they were earned, he had received payment in accordance with the Regulations. His argument was that the Regulations only permitted the tribunal to consider payments that were received in the relevant reference period and not those that were received later.
 - 15.2. Secondly, he was prepared to accept the respondent's calculations for his claims for unpaid annual leave, pension contributions and the figures for the August bonus and the commission for clients Boden and Marshall in satisfaction of those claims.

15.3. Thirdly, in respect of his claim for commission payments, he accepted that no commission was due in respect of client Blake and that he had been paid in respect of client Hallett.

15.4. Finally, in respect of his claim for unpaid bonus he accepted that if the client Holmes cancelled his order then the claimant did not achieve his targets for May and so no bonus would be owed. He maintained, however, that the order had not been cancelled.

The issues

16. In consequence, the following issues remained for me to determine:

Unlawful deduction from wages

16.1. *Failure to pay the National minimum wage*: should payments of commission and bonus to be allocated to the period in which they were earned, despite being received in the following reference period, in accordance with Regulation 9(1)(b) NMW Regulations 2015?

16.2. *Unpaid commission*:

16.2.1. What wages were 'properly payable' to the claimant? In particular, what was the claimant's contractual entitlement to commission?

16.2.2. Was claimant paid commission to which he was entitled as detailed below:-

16.2.2.1. Holmes: the factual issue is whether the order was cancelled;

16.2.2.2. Turner: the issue is whether the terms of the contract relating to commission stipulated that commission was not payable if the rules relating to deposits were not adhered to and, if so, whether the claimant failed to comply with those rules;

16.2.2.3. Hysa: the factual issue is whether the sale was a split sale with the effect that the claimant was entitled to £140 or a sole sale in which case the claimant was entitled to £280. It is accepted that the claimant was paid £140.

16.2.3. *Unpaid bonus*: the factual issue is whether the claimant entitled to commission in respect of Holmes. If so, it is accepted that the claimant would be owed bonus for May.

Breach of contract

16.3. Does the respondent prove on the balance of probabilities that the claimant committed gross misconduct, so that the respondent was entitled to dismiss without notice, because he altered the Goldmine system to allocate sales that had been achieved by others to himself?

16.4. S. 207A TULRCA 1992

- 16.4.1. It is accepted that the ACAS Code of Practice on Disciplinary and Grievance Procedures applied and that the respondent failed to comply with it. Was that failure unreasonable?
- 16.4.2. If so, is it just and equitable to increase any award payable to the claimant and, if so, by what proportion up to 25%?

16.5. S.38 ERA 2002

- 16.5.1. When these proceedings were begun, was the respondent in breach of its duty to give the claimant a written statement of employment particulars or of a change to those particulars?
- 16.5.2. If the claim succeeds, are there exceptional circumstances that would make it unjust or inequitable to make the minimum award of two weeks' pay under section 38 of the Employment Act 2002? If not, the tribunal must award two weeks' pay and may award four weeks' pay.
- 16.5.3. Would it be just and equitable to award four weeks' pay?

Background facts

17. The respondent is an authorised dealer of Hot Springs spas and hot tubs, and operates five showrooms across the South West. Mr Justin Rowley is the respondent's Managing Director. He employed his daughter, Rose Rowley, as a Showroom Manager, with responsibility for the Bristol and Plymouth showrooms, and engaged a number of sales consultants to sell his products.
18. Mr Nick Miles was initially employed as a sales consultant but had been promoted to Showroom Manager, with responsibility for the Swansea, Cardiff and Chepstow showrooms, when Miss Rowley was on maternity leave. Each showroom had CCTV fitted.
19. The respondent employed the claimant as a Sales Consultant on 27 March 2017. The claimant's employment ended on 13 September 2018. The claimant worked predominantly in the respondent's Bristol showroom, working 10 AM to 5 PM for five days a week and 11 AM to 4 PM on Sundays. He reported to Rose Rowley.
20. The nature of that engagement has been determined to be one of a contract for service. It is unnecessary to set out the precise working practices of that engagement, however, as the respondent wished the claimant to be treated as self-employed, he was not provided with any written particulars of employment.
21. Similarly, as the dispute between the parties does not relate to the percentage level of the commission in respect of the products sold, but rather the circumstances in which commission was payable at all, it is unnecessary to record the commission structure in respect of the various products that were sold by the respondent.
22. However, the following matters are relevant. Sales consultants were paid a fee of £40 a day to work in the respondent's showrooms. That fee was to cover their costs of travelling to and from those locations. They were not

required to work full-time from the showrooms, and could work from home, but in practice the claimant worked regularly and far more consistently from the showroom than from home; that was inevitable given the showroom contained the stock which could be demonstrated to clients. Thus, by way of example, in October 2017 the claimant worked the following days in one week - 16, 17, 18, 20, 21, and 22.

23. The sales consultants were not required to clock in or clock out when they attended a showroom but were required to submit weekly invoices for the daily fee and commission that they had made on sales in that week. The parties agree that payment would be made the following week.

The Respondent's Commission payments

24. Commission in respect of a sale of a product was paid in accordance with two documents; one entitled 'Price Commission Matrix' ("the Matrix") and the second entitled 'Showroom Rules' ("the Rules").

25. The Matrix identify a specific commission identified as a percentage of the sale price, ranging between 2% and 7%. Sales consultant were permitted discretion to sale products between a specific range of prices. The higher the sales price the greater the commission percentage they were entitled to receive.

26. The Rules consist of a code of conduct in relation to sales, rather than the pure contractual terms on which commission would be calculated and paid to the sales consultants. The Rules are not clear or precise, but I find specified that:

26.1. New online enquiries should be shared amongst sales consultants sequentially.

26.2. Where a prospective client had made contact with the respondent and had had their details entered onto the respondent's customer and sales system ('Goldmine'), any future enquiry or sales made through the showroom at which the initial enquiry had been made had to be passed to the sales consultant who handled the initial enquiry and entered the client onto Goldmine, unless they were busy and agreed that another sales consultant could handle the sale.

26.3. If a sale involved two sales consultants (as in the example above) and the first sales consultant had taken a deposit, the commission due in respect of the sale was split between the sales consultants.

26.4. If a prospective client whose details were on Goldmine entered a different showroom to that at which their details had been entered, a sales consultant in the second showroom would be entitled to handle the sale, but the commission would be split between the two sales consultant's who had been involved.

26.5. If a client who purchased a hot tub had been referred by a previous customer and that fact were recorded on the contact sheet, the commission was to be split between the sales consultant responsible for

the initial sale and the new sale. If the new sale were a split sale, the commission would be split 3 ways.

- 26.6. If a client requested a test soak of a hot tub at a different showroom to that at which their details were entered onto Goldmine, the original sales consultant could attend and if a sale were made would be entitled to the entirety of the commission on the sale.
 - 26.7. In the scenario above, if the original sales consultant could not attend, the commission would be split with the sales consultant who made the sale, unless the client paid the deposit on the day of the test soak and subsequently bought the hot tub; in which event the sales consultant who conducted the test soak would be entitled to all of the commission.
 - 26.8. Any scenario not covered above had to be referred to the Sales Manager, whose decision as to commission would be final.
27. Although not identified in either the Matrix or the Rules, the parties agreed in evidence two further terms relating to the commission:
- 27.1. First, commission on a sale was only due when a product was delivered and accepted by a client; and
 - 27.2. Secondly, that in order to be entitled to commission the sales consultant either had to take a deposit of £99 and the finance agreement had to be approved (if the hot tub was purchased through finance) or had to take a deposit equating to 20% of the sale price (if purchased in cash). That is the issue in relation to client Turner; the respondent argues that the claimant did not take the necessary deposit, the claimant that he did.
28. Save that there is a dispute between the parties as to how commission would be paid if a customer rejected a product on delivery, but subsequently ordered and accepted another product, the parties agree that bonuses and commission were to be paid in accordance with the terms above; thus whether they were express terms (in the Rules) or implied terms (through construction of the Rules and practice) I find that they were incorporated into the contract to give it business efficacy.
29. In relation to the disputed term, the respondent argues that the scenario would result in a split sale, the claimant that the original sales consultant would be entitled to all the commission. That is the issue in this case in relation to the client Hysa. I resolve that dispute in the conclusions below.

Bonuses

30. The sales consultants could earn distinct and different bonuses:
- 30.1. A showroom bonus - payable in relation to the gross sales of a specific showroom, divided between those that worked at the showroom;
 - 30.2. A personal bonus - payable if a sales consultant exceeded a specific monthly sales target expressed as a number of units. The parties agree that the bonus was only payable upon the last unit being delivered and accepted. That is the issue in relation to the claim for the bonus payment

in May 2018; the respondent argues that the order was cancelled, so the claimant was not entitled to commission and did not achieve his monthly sales bonus target, the claimant argues that the hot tub was delivered.

31. The targets were communicated to the sales consultants by Christine Pelper.

The respondent's customer and sales database system (Goldmine)

32. The respondent operated an electronic database system which recorded customers' details, the sales consultants who had dealt with them, the dates of those dealings, the manner in which the purchase was made (finance or cash) and the sale price and delivery date.

33. Each sales consultant had an account which permitted them to enter details on the Goldmine. To access Goldmine the sales consultant required a username and password. These were set up by Mr Rowley but were not disclosed to other sales consultants. Where an individual made an entry on the system, their identity was indicated by initials, and a date and time for the entry was recorded. The claimant's initials were 'MS', Mr Miles 'NIK'.

34. When questioned in relation to an entry on Goldmine relating to 16 July (page 112) the claimant initially sought to suggest that the initials did not relate to his username, but he subsequently accepted that they might. I am satisfied on the balance of probabilities that the initials 'MS' on the system indicate entries made by the claimant's account; those initials are shown on the Goldmine system print outs with the claimant's name at page 126.

35. Mr Rowley, Miss Rowley and Mr Miles had administrator level access to Goldmine which enabled them to make amendments to previous entries; no other staff had such capability through their accounts. However, the ability to alter entries did not extend to the date of the entries; I accept Mr Rowley's evidence that that his access did not permit him to alter 'date stamps,' as he referred to them. Mr Miles was provided with a laptop to access the system; the other sales consultants were required to login using the systems in the show rooms (Mr Rowley's evidence on that point was not challenged).

36. Further, I accept Mr Rowley's evidence that the version of Goldmine used by the respondent was quite old and did not automatically log a user out of the service following a period of inactivity. The contrary position was not advanced by the claimant in the claim form or in his statement; he raised it for the first time in cross-examination. I found Mr Rowley's evidence credible and truthful on that point.

The events leading to the claimant's dismissal

37. The claimant was a very successful salesman and was consistently one of the best performers across all the showrooms. In August 2018, by way of example, he exceeded his target by 40% and had a sales' conversion rate of 43.8%.

38. On 16 July 2018, the respondent argues that Mr Miles and the claimant were the only Sales Consultants working at the Bristol Cadbury showroom.

39. In his answers to cross-examination the claimant argued that he was not at work on that day but was required to attend a pool training course in Cardiff and he produced an unsigned expense claim for that course, dated 25 July 2018. The expense does not appear on the invoices which he submitted after that date, and there was no evidence indicating that it was paid. Furthermore, that was not an argument which he raised in his initial statement which he had prepared for the preliminary hearing in October 2019 despite describing the events in July which led to his dismissal within it.
40. The Goldmine login records show the claimant logged in to the system at 10:04 and logged out at 17:44 on 16 July. The year is not visible on the records. I note however that the record shows entries for the claimant on 13, 14, 15, 16, 17, 18, 19 and 21 July. The claimant's invoices for 2017 and 2018 show that in July 2017 the claimant invoiced for the 13, 14, 17, 18, 19 and 20 and in July 2018 for 13, 14, 15, 18, 19, 20 and 21. Neither accords with the Goldmine record. In short, that evidence is inconclusive as to whether the claimant worked on 16 July 2018 or not.
41. However, given that the bundle for the Tribunal hearing in October 2019 contained the Goldmine login records, the tracker information described below, and that Mr Rowley's statement for the hearing set out the allegation, I am satisfied that if the claimant wished to advance a positive case that he was not at work on 16 July 2019 he would have addressed that in the supplemental statement which he was permitted to produce for this hearing by Employment Judge Gray on 29 June 2020. He did not do so. Consequently, I find on the balance of probabilities that the claimant and Mr Miles were working in the showroom on 16 July 2018.
42. At around 17:30pm, it is agreed Mr Miles left the showroom to drive to Blackwood. The vehicle in which Mr Miles was travelling was a company vehicle with a GPS tracker fitted. That tracker shows that he left at 17:38 and arrived at 18:50. The Goldmine log in records show that Mr Miles logged in at 11:26 and logged out at 18:23 on 17 July. He could not have done so in 2018 as he was driving at the time.
43. That night Mr Miles emailed Mr Rowley and Miss Rowley attaching two spreadsheets detailing the sales and commission due for July (one apparently reflecting the position on Goldmine and the other the 'true position.'). The respondent did not produce either spreadsheet, nor did it call Mr Miles to explain the circumstances of the email. Mr Miles suggested that the records on the Goldmine system did not "reflect the true position for July so far." He did not identify why that was the case or who he thought was responsible. The only reference he made to the Hallet entry was as follows:
- "After speaking with [Mr Rowley] there could be a discrepancy for the sale in the name of Hallet for [the claimant] which could be changing to a split between him and [Mr Rowley] ([Mr Rowley] will be speaking to [the claimant] tomorrow).
44. The respondent alleges that the claimant accessed Goldmine on 16 July 2019 and altered the entry relating to Hallet to remove Mr Rowley's name (as the individual who had first contact with the client) with the result that the claimant would be solely entitled to the commission, rather than splitting it. The

claimant admitted that if that change were to have been made, he would be the only person to benefit from it.

45. Most unsatisfactorily, however, the respondent did not adduce the relevant page of the Goldmine system in evidence, notwithstanding that it produced other pages from the Goldmine system in relation to other clients. Mr Rowley's explanation for that omission was that he was concerned that doing so would breach the GDPR by disclosing the client's details. That argument makes no sense at all, given that the entries for other clients were provided and the names had been redacted. I raised this with Miss Boorer before lunch on the first day of the hearing, and advised that the records would be disclosable if they could be obtained (together with other documents that Mr Rowley had referred to during his cross-examination which were not in the bundle), however after the lunch break Miss Boorer confirmed that the respondent was not making any further disclosure in respect of the Hallet account. No explanation for that decision was offered by the respondent.
46. Mr Rowley suggested in his first statement that he discovered the amendment on 17 July 2018 when he accessed the system to look at the Hallet account; his statement does not make any reference to Mr Miles' email on 17 July 2018 at all, but records that he discussed the change on 18 July 2018 with Mr Miles, who confirmed that he had not made any change. In cross-examination the claimant denied that Mr Rowley had spoken to him at all about that matter although he accepted that he was in work at the showroom on that day.
47. The claimant's statement details a conversation in July 2018 which he had with Rose Rowley during which she suggested that one of his sales was a customer of Mr Rowley's and therefore the commission should be split. The claimant recalls discussing the issue shortly thereafter with Mr Miles and looking at the system.
48. On balance, I find that there was a discussion with the claimant on 18 July 2018 about the commission he was due in respect of Hallet and the need for it to be split with Mr Rowley, but it was not expressly suggested that there had any wrong doing by the claimant, only that Mr Rowley had had previous dealings with the client, that the system did not appear to reflect this and therefore the commission would be split. It is immaterial whether that discussion was with Miss or Mr Rowley.
49. The claimant was not told as part of that discussion or at any time before 13 September 2018 that the respondent believed he had accessed Goldmine and deleted Mr Rowley's involvement with the client from the record, or that it was investigating the matter. The matter was not raised again with the claimant at all until 13 September 2018.
50. On 13 September 2018, the claimant was asked to attend a meeting with Mr Miles and Mr Rowley, whilst he was working at the showroom. He was not given notice of the meeting, told that it formed part of a disciplinary hearing, or told of the allegations he faced or of his right to be represented.
51. The claimant's account of that meeting which was not directly challenged was that Mr Rowley asked the claimant whether he amended the Hallet account to

remove Mr Rowley's name (he accepted that it was likely it was suggested that had occurred on 16 July 2018); that Mr Rowley suggested that he had created the account 2-3 weeks earlier and that he remember this because it was the first hot tub he had sold in the client's street. The claimant denied it. Mr Rowley left the meeting but returned a little later, suggesting that he had simply created an account in 2009 but had not sold anything to the client.

52. Mr Miles checked the showroom computer used by the claimant to see whether it had the necessary permissions to amend the account record on Goldmine. The claimant was told that the record showed that he had created the account in 2018, whilst Mr Rowley alleged that he had created it in 2009. The meeting ended.
53. Shortly before closing time, Mr Miles returned to the showroom and told that the claimant that Mr Rowley and Mr Miles had concluded that the claimant had edited the account details on Goldmine and so had made the decision that his employment would be terminated with immediate effect. The claimant was not told of his right of appeal or how to exercise it.
54. In short, as Miss Boorer conceded, the respondent failed to offer the claimant any of the safeguards required by the ACAS Code of Practice, save that he was invited to a meeting, there was the most brief and nebulous discussion of the allegations and the least thorough investigation and some form of reason for dismissal was communicated to the claimant, albeit not in writing.
55. The claimant accepted in cross-examination if he had amended the record in the manner suggested it would represent a fundamental breach of the trust necessary to preserve the relationship.

Commission queries.

56. Following his dismissal, the claimant sought to challenge a series of payments in respect of commission. Amongst those were the disputed clients of Holmes, Turner and Hysa. It is relevant however that the claimant's challenges to the commission payments extended beyond those client to others in respect of which the claimant was to accept at the time of the response to his queries or by the time of the hearing that commission had been properly paid.

The Law

Wrongful dismissal

57. The test to be applied does not require the Tribunal to assess the reasonableness of the employer's decision to dismiss but rather to answer the factual question: Was the employee guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract? (Enable Care and Home Support Ltd v Pearson EAT 0366/09)
58. An employer's right to summarily dismiss an employee is restricted to cases where there is repudiation or fundamental breach of contract by the employee (Laws v London Chronicle (Indicator Newspapers) Ltd [1959] 1 WLR 698, CA). An act of gross misconduct is generally accepted to be an act which

fundamentally undermines the employment contract or, put another way, which amounts to repudiatory conduct by the employee going to the root of the contract (Wilson v Racher [1974] ICR 428, CA).

59. The conduct must be a deliberate and willful contradiction of the contractual terms or amount to gross negligence (Laws v London Chronicle (Indicator Newspapers Ltd) [1959] 1 WLR 698, CA) and (Sandwell and anor v Westwood EAT 0032/09)
60. The non-statutory ACAS Guide, 'Discipline and grievances at work' ('the ACAS Guide'), includes the following relevant examples of gross misconduct:
 - 60.1. theft or fraud
 - 60.2. a serious breach of confidence

Unlawful deductions from wages

61. Section 13 ERA prohibits the unlawful deduction of wages that are 'properly payable'. In order for a payment to fall within the definition of wages properly payable, there must be some legal entitlement to the sum (New Century Cleaning Co Ltd v Church [2000] IRLR 27, CA).
62. Section 27(1) ERA defines 'wages' as 'any sums payable to the worker in connection with his employment', which includes 'any fee, bonus, commission, holiday pay or other emolument referable to the employment' (S.27(1)(a)).

National Minimum Wage

63. All 'workers' are entitled to be paid the NMW provided they have ceased to be of compulsory school age and work, or ordinarily work, in the UK (Section 1 National Minimum Wage Act 1998 (NMWA)).
64. In order to determine an individual's average hourly rate, both the total pay received in the relevant pay reference period, and the total number of hours worked during that period need to be established.
65. Regulation 6 of the 2015 NMW Regulations ("the Regulations") provides that the pay reference period is a month or, if the worker is paid by reference to a period shorter than a month, that shorter period.
66. Regulation 9(1)(b) of the Regulations provides that any payments that are earned during one pay reference period (period A) but which are received in the following period (period B) are to be allocated to the period in which they are earned (i.e. period A).
67. Where a worker "is under an obligation to complete a record of the amount of work done", by for example submitting a time sheet, or here an invoice for days of attendance at the show room, and submits his or her time sheet late (i.e. less than four working days before the end of the following pay reference period — period B), then any payments made in the next pay reference period

(period C) can be allocated to the period in which they were actually earned (i.e. period A) (Reg 9(1)(c) and (2) of the Regulations).

Contractual terms - commission and bonus

68. Contractual terms should be interpreted in line with the meaning they would convey to 'a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract' (see Investors Compensation Scheme Ltd v West Bromwich Building Society (No.1) [1998] 1 WLR 896, HL).
69. If a term is badly drafted and its literal interpretation would lead to a result that had clearly never been intended by the parties, it should be interpreted by taking into account the context and commercial background (Chartbrook Ltd and anor v Persimmon Homes Ltd and anor [2009] 3 WLR 267, HL).
70. Where the contractual term relating to the payment of a bonus or commission is discretionary the court will imply a terms that the employer should not act irrationally or perversely in exercising its discretion (Clark v Nomura International plc [2000] IRLR 766, QBD.)

Discussion and conclusion

Unlawful deduction of wages - NMW Regulations 2015

71. Regulation 9(1)(b) of the 2015 Regulations (formerly Reg 30(b) of the 1999 Regulations) provides that any payments that are earned during one pay reference period (period A) but are received in the following period (period B) are to be allocated to the period in which they are earned (i.e. period A). The BEIS Guide stresses that payment delayed by more than one pay reference period cannot usually be referred back to the period in which it was earned but counts in the period in which it is paid (page 16).
72. The parties agree that the claimant would submit and invoice, which included a charge for each days attendance, akin to a time sheet indicating days of work, at the end of each week, and that he would be paid in the following week. That scenario falls squarely within that identified in Regulation 9(1)(b).
73. I therefore accept the respondent's figures and calculations in respect of the National Minimum Wage. Accordingly, the claimant's claim for unlawful deduction of wages in respect of non-payment of national minimum wage is well-founded and succeeds in the admitted sum of £1950.01.

Unlawful deduction of wages - commission/bonus

Holmes

74. The respondent produced a printout for Goldmine, where the client's name and details have been obscured, but which show that the client's details were entered on 6 May 2018 following a walk in, and that on 4 July 2018 Ms Pepler left a note for the claimant stating "Meirion, is this now cancelled." A later note on 4 April 2019 records "STATUS?? Cancelled." The system shows that

the last activity was on 18 September 2019 when Michelle Trivyzes called the client and noted the serial number for the cancelled order.

75. The respondent provided the claimant with unredacted copies of that document prior to the commencement of evidence on the second morning. The claimant maintained that the record was inaccurate, alleging that the Holmes were neighbours and had told him they had received the hot tub. That account was not in the claimant's statement and if it were right it would have been easy for the claimant to obtain a picture of the hot tub in situ or a copy of the delivery note. He produced neither.
76. Consequently, I am persuaded on the balance of probabilities that the printout from Goldmine is accurate and that the order was cancelled. The claimant received the sum properly payable and there was no unlawful deduction of wages. It follows that the claimant's claim for bonus for May 2018, which is dependent on the Holmes sales to succeed, is also not well-founded and is dismissed.

Turner

77. The claimant was provided with an unredacted copy of the Turner Goldmine printout just as he was with Holmes. He accepted it related to the Turners but argued that two accounts had been created in the name of Turner because they had moved house; one account was put in the wife's name and another in the husband's name. Again, that account was not contained in his statement. He was adamant however that he had taken a deposit and completed the finance agreement as required; that account was consistent with his emails to Ms Pepler on 6 and 16 November 2018.
78. However, as the suggestion of two Goldmine accounts for Turner was new, and had not been put to Mr Rowley, I permitted Ms Boorer to take instructions from Mr Rowley and to cross examine the claimant further if needed. Having taken instructions, Miss Boorer appeared to abandon the argument in her opening note, in relation to a breach of the Rules relating to deposits and put to the claimant that as the sale had concluded after his termination he was not entitled to any commission. He denied that.
79. Miss Boorer accepted, quite properly, when I asked, that the respondent could not adduce any evidence demonstrating that such a contractual term existed or was brought to the claimant's attention when he commenced employment. The only reference to it was in an email in November 2018 from Ms Pepler disputing liability for commission on the ground in question. She did not suggest that in that email that the term had been drawn to the claimant's attention. I note that the respondent's argument is inconsistent with that in the counter schedule where it is argued that the product was not delivered. The respondent has advanced three contradictory accounts. I reject them all for that reason.
80. Accordingly, I conclude that the claimant was entitled to commission as claimed in respect of Turner, being £110.00.

Hysa

81. The parties agreed that Mr Hysa had agreed to purchase a hot tub, that the claimant was the sales consultant who had secured the sale, and that no other consultant was involved in the initial sale. However, the parties also agreed that Mr Hysa had rejected the hot tub on delivery, but subsequently ordered and accepted an upgraded model.
82. The claimant argues that was a successful sale and he was therefore entitled to the full commission, unless the deposit was a refundable deposit and was refunded. The respondent argued at the time that since the original order was rejected and another consultant agreed the upgrade the commission should be split. It later argued that the sale occurred after the claimant was dismissed and therefore no commission was payable.
83. I reject that latter argument for the same reasons as before. In my view, the scenario is not covered by the Rules. Consequently, the general catch-all rule that the sales manager has discretion to make the final decision would apply. I therefore must consider whether the manner in which the discretion was exercised was perverse or irrational. In my view it was not but was consistent with the spirit of the Rules, of splitting sales where two consultants were involved.
84. I next consider whether the sum awarded represented the appropriate level of commission. Ms Pepler had emailed the claimant on 3 November indicating that Mr Hysa had accepted a trade in Grandee, rather than a new model and the commission was only £250 in consequence. There was no evidence that he challenged that assessment, and I accept it as being accurate. In the event, the claimant was paid £140 being more than a 50% share.
85. The claimant therefore received the sums properly payable in respect of Hysa and the claim for unlawful deduction of wages is not well-founded and is dismissed.

Breach of contract - wrongful dismissal

86. I am faced with two disparate accounts - the respondent argues that the claimant altered the Goldmine system to increase his entitlement to commission and bonus, that the Goldmine records and GPS tracker demonstrate this and the claimant admits that conduct, if it occurred, effectively amounts to gross misconduct.
87. The claimant argues that he did not alter the system, that the evidence does not demonstrate that he did as the respondent has only produced a partial record from the Goldmine Log-ins and has not produced the Goldmine account said to have been altered, and that respondent did not produce any of the evidence it now relies upon at the time.
88. As I have already noted, it is entirely unsatisfactory that the respondent has failed to produce the key and best evidence which it says it possesses. That failure occurs in circumstances where the burden rests on it to prove misconduct. Were this a discrimination case those facts alone would be more than sufficient for me to draw an inference, and the respondent's failure to provide any satisfactory explanation for the failure would be enough for the claim to succeed.

89. However, this is not a discrimination claim. The burden remains on respondent to prove its case on the balance of probabilities. In the present case, the claimant argues that reason the respondent dismissed him was because it wanted to avoid paying him the high levels of commission he was earning. That is an utterly illogical and non-sensical argument - in order to earn commission the claimant necessarily had to make sales from which the respondent would benefit. Dismissing him without basis would therefore be to cut off its nose to spite its face.
90. On the facts, the respondent did raise the allegation which it now relies upon with the claimant during the meeting at which he was dismissed. Mr Miles alluded to the claimant altering the system. In those circumstances, and where the respondent had adduced some evidence which supports the allegation and there is no other coherent reason for the dismissal advanced, I am persuaded that the respondent has proved on the balance of probabilities that the claimant committed gross misconduct as alleged.
91. The claimant's claim for notice pay is therefore not well founded and is dismissed.

S207A uplift

92. I have found that there was a wholesale and extensive failure to adhere to the central elements of the ACAS Code of Practice, save the requirement to call an employee to a meeting to discuss the allegations. The respondent has offered no explanation for that failure at any stage or in evidence, not even to identify circumstances which might mitigate the blameworthiness of its failure to comply. The failure was unreasonable. It would be just and equitable to increase the award to the claimant by 20% given the failure to comply with the majority of the Code, although I accept that in effect some element of the allegations was put at a meeting to the claimant. There could be worse cases, but this was at the very lowest end of the scale in terms of adherence to the Code and good practice.

Section 38 EA 2002

93. The claimant was not provided with written particulars of employment. The respondent adduced no evidence to explain that failure. I find that it was because the respondent knowingly and deliberately sought to avoid treating the claimant as an employee to limit the sums it had to pay to the claimant. Accordingly, there are no exceptional circumstances that would make it unjust or inequitable to make the minimum award of two weeks' pay and an award of 4 weeks' pay would be appropriate.
94. The claim is well founded, and the respondent is ordered to pay 4 weeks gross pay amounting to £2093.60 (523.40 x 4).

Time Preparation Order

95. The claimant pursues an application under Rules 76 and 79 of the Employment Tribunal Rules for the preparation time of the claimant and Mrs Vickery, his representative relating to their preparation for an attendance at the preliminary hearing. That application is brought primarily on the basis that the respondent acted and reasonably in failing to concede that the claimant

was a worker, until a very late stage, and further acted unreasonably in failing to make the concession that the claimant was an employee in the circumstances work, employment Judge Housego have set out in some detail the basis on which those contentions were doomed in the deposit order he made on 22 May 2019.

96. Conversely the respondent argues that it conceded the issue of worker status on 19 June and argues that it did not act unreasonably in defending the allegation. Its defence primarily turns upon a technical point as to whether Employment Judge Livesey permitted the respondent argue the question of employment status at the preliminary hearing on 30 July 2019 without requiring it to pay the deposit that had been ordered by Employment Judge Housego.

97. The relevant rules are contained in rules 76 and 79 .Rule 76 provides:

- (1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that
 - (a) a party has acted ... unreasonably in either the bringing of proceedings (or part) or the way that the proceedings (or part) have been conducted ; or
 - (b) any claim or response had no reasonable prospect of success.

98. Rule 79 provides

- (1) The Tribunal shall decide the number of hours in respect of which a preparation time order should be made, on the basis of
 - (a) information provided by the receiving party on time spent falling within rule 75 (2) above; and
 - (b) the Tribunal's own assessment of what it considers to be a reasonable and proportionate amount of time spent on such preparatory work, with reference to such matters as the complexity of the proceedings, number of witnesses and documentation required.
- (2) The hourly rate is £33

99. In my judgement the respondent acted unreasonably in seeking to defend the claimant's claim that he was an employee. The defence was unreasonable for the reasons identified by Employment Judge Housego at the preliminary hearing in May 2019. I do not need to repeat them here. He made a deposit order on the basis that the respondent had little reasonable prospect of making out that element of its response. Consequently, Employment Judge Livesey found that the claimant was an employee precisely for the reasons which had been identified by Employment Judge Housego.

100. The claimant has submitted a detailed schedule, in accordance with the suggestion of Employment Judge Housego, in respect of the period 15 September 2018 until 29 July 2019.

101. In my judgement, it is entirely reasonable for the claimant's application to commence on the date in which he first began to consider his position and discuss the matter. The claimant spent a significant period of time researching the statutory and legal background background and preparing the claim form and calculating his case. That time was entirely reasonable given the complexity of the law relating to employment status, and the factual scenario presented by the nature of the claimant's employment and the manner in which he was required to set up a limited company, and the manner in which commission was paid. More generally I am satisfied that the time the claimant took in preparing for and attending the various hearings was proportionate to the complexity of the issues and the nature of the documentation that had to be considered.

102. In the circumstances where there was no material challenge to the figures in the schedule and no suggestion that they were unreasonable, I conclude that the claimant is entitled to a time preparation order in respect of the full hours of work claimed, being 132 hours and 15 minutes.

103. The current hourly rate is £38 an hour. Accordingly, I make a time preparation order in the sum of £4,364.25.

Employment Judge Midgley

Date 19 November 2020