EMPLOYMENT TRIBUNALS

Claimant: Mr M Hanson

Respondent: SAS Software Limited

Heard at: Remotely (by CVP) **On:** 12 February 2021

Before: Employment Judge Holmes (sitting alone)

Representatives
For the claimant: Ms H Gardiner, Counsel
For the respondents: Mr M Humphreys , Counsel

JUDGMENT ON PRELIMINARY HEARING

It is the judgment of the Tribunal that:

The claimant's claim of unlawful deduction from wages has no reasonable prospects of success, and is struck out pursuant to rule 37(1) of the 2013 rules of procedure.

REASONS

1. This preliminary hearing was listed pursuant to an application made by the respondent in para. 111 of its Grounds of Resistance.

2. The "Code "V" in the heading indicates that this was a remote hearing by CVP conference call **,** to which the parties have consented. A face to face hearing was not held because both parties were able to deal with the application and case management issues remotely. The respondent had completed an agenda form, and the respondent had provided the Tribunal with an electronic copy of the salient documents required for the purposes of the hearing.

3. The claimant was represented by Ms Gardiner of counsel, and the respondent by Mr Humphreys of counsel. Both counsel had prepared written submissions, there was a preliminary hearing bundle, and a witness statement from the claimant , who was also in attendance, were before the Tribunal. The claimant did not give evidence.

4. The hearing concluded, and judgment was reserved. The claimant was afforded a further 7 days in which to submit any financial information, if he wished the Tribunal to take his means into account when considering whether a deposit order should be made.

No further information as to his means has been provided. Further, there was discussion during the hearing as to whether the claimant may seek to amend his claims, to plead them on an alternative basis, but no such application to amend has been received. The only communication from the claimant's solicitors received since the hearing has been an email of 15 March 2021 enquiring, understandably, when the Tribunal would be promulgating its judgment.

5. The Tribunal has accordingly proceeded to conclude its deliberations and determine the application on the claims as they were presented , and the submissions made at the hearing. The Employment Judge apologises for the delay in this judgment being promulgated, occasioned in part by the Tribunal awaiting any further information or application from the claimant , in part by the pressure of judicial business and in part by restricted access to judicial premises and facilities during the current lockdown.

The claims and procedural history.

6. By a claim form presented on 30 July 2020 the claimant brings claims of unlawful deductions from wages in relation to the non – payment of commission to which he claims he was entitled in the sum of £501,583.74 , pursuant to the terms of a commission scheme , the SAS Sales Compensation Plan ("the Plan" , but referred to by the respondent as "the Policy") , that was applicable to his service as a Strategic Account Client Manager , under a contract of employment dated 7 June 2017.

7. In short, the claimant contends that pursuant to the terms of the Plan he was entitled to be paid a total of £801,583.74 by way of commission in respect of transactions (or more particularly one transaction) he effected in 2019 , but the respondent has only paid just over £300,000.His claim is for the shortfall.

8. The respondent admits the deduction, in the sense that it only paid the claimant £300,412 as commission, but denies that the claimant has any greater entitlement under the terms of the Plan, the terms of which it contends it has applied, and operated entirely lawfully, so the claimant has no greater entitlement.

The legal framework – the Plan and its terms.

9. It is common ground between the parties that the terms of the claimant's employment and the commission regime were contained in the following documents:

The Contract of Employment (pages 53 to 68 of the bundle)

The Sales Compensation Plan which comprised:

i. The '2019 Sales Compensation Plan Policy Mixed Territory & Large Territory Plan' (pages 69-81 of the bundle).

ii. The claimant's On Target Variable Pay ("OTVP") of £96,000

iii. The Acknowledgment Form (pages 82-86 of the bundle).

The Plan included the following term:, referred to as the "300%" Term, (page 80 of the bundle), at Clause 6(h) in these terms:

"Any pay out over 300% of On Target Variable Pay is subject to review and approval by the Executive Vice President and Chief Sales Officer… "

The basis of the claims.

10. The claimant's case is that in the relevant period he achieved sales which met, and exceeded, the targets set for the 2019 sales year, of which there were three elements, New Sales Credit ("NSC") , Total Operating Revenue ("TOR") and Annual Recurring Revenue ("ARR").

11. This was largely due to one particular transaction with one client, which was worth $26.9m over 5 years. This had the effect, he claims, of him achieving 504.09% of his NSC target, 196.36% of his TOR target and 100.32% of his ARR target.

12. On this basis the claimant's entitlement to commission would be £801,584. The respondent, at para. 62 of the response, accepts this as a calculation, and , if not agreed as a fact, for the purposes of this application, it will be assumed that the claimant will be able to establish that entitlement , subject to the respondent's arguments as to the effect of the 300% term upon any entitlement exceeding the threshold of £288,000, that being 300% of the claimant's OTVP .

13. The claimant's claim is simple. Total commission of £801,584 was his entitlement, based upon what he had actually achieved, and the respondent was not entitled to seek, retrospectively , to reduce it by the purported operation of any of the terms of the Plan.

The respondent's payment of commission, and the basis for the reduction applied.

14. The claimant's potential commission being calculated and visible to his management on an internal system, Orion, it was reviewed, and on 3 February 2020 (on the claimant's case, but this is not disputed) by one Simon Overton, who informed the claimant that the respondent would not be able to pay his full commission. Such a sum would require approval by senior management in North Carolina (i.e the Executive Vice President and Chief Sales Officer), who were likely to query whether the UK and Ireland management had correctly set the claimant's targets when he was then able to earn such substantial amounts of commission. To avoid this, or to reduce the impact it may have, he therefore proposed to adjust, retrospectively, the claimant's targets, increasing them , and thereby reducing the commission payable. This was to be applied to his NSC target, the effect of which would be to reduce the total commission payable to £400,412. That additional sum was then to be subject to payment in instalments in 2020 and 2021, and to the achievement of Management By Objective ("MBO") tasks.

15. The claimant did not agree to this proposal. Then, the claimant was subsequently informed that the respondent was now limiting the commission to £300,000. It was then the sum (in fact £300,412) that was paid.

16. The claimant raised a complaint (pages 104 to 106 of the bundle) about the failure to pay his commission in full, and by email of 24 March 2020 (page 107 of the bundle) he was informed that Chief Sales Officer and VP of Sales Operations had both considered the matter, and had stood by the original decision.

17. Thereafter the respondent on 20 August 2020 (page 108 of the bundle) withdrew the additional £100,000 payable upon achievement of the set MBO tasks.

The issues.

18. For the purpose of this application, the issue is a simple one. All other issues aside, the respondent contends that the effect of the 300% term is such that it was entitled, retrospectively, to refuse to sanction payment of the amount of commission that the claimant had, prima facie , generated. If that is right, the claimant's claim cannot succeed. The respondent's case is that the 300% term was not a cap, but was a condition precedent - the claimant's entitlement was subject to that condition being satisfied, and it never was. The claim fails *in limine* .

The respondent's submissions.

19. Mr Humphreys prefaced his submissions with the caveat that the claimant's case was not altogether clear. Was he contending that the effect of the 300% term was not as the respondent contends it is? Was he contending that term was not a term of the agreement ? If not, in order to succeed in the claim, the claimant must therefore demonstrate that there was an agreement between the parties to vary the compensation documentation such that the 300% term did not apply to the claimant.

20. If so, the respondent says that there never was such agreement. However, critically for the Application, there is nothing in the claimant's pleaded case, nor in his witness statement prepared for the Preliminary Hearing, from which the Tribunal could properly conclude that the compensation documentation was varied in the necessary way. On the claimant's own case the claim must fail.

21. The claimant's case as to the 300% term is unclear. The respondent has sought clarification of it, in the Grounds of Resistance at para. 32 Page 38, but had received no response. The claimant's witness statement does not deal with it.

22. On the respondent's reading there are two paragraphs in the Grounds of Claim where the claimant appears to partially address the operation of the 300% term. The first is paragraph 51 (page 23 of the bundle). The Respondent's response to this paragraph is set out at paragraph 105 of the Grounds of Resistance (page 50 of the bundle). However, the critical point for the Application is that whether or not the respondent sought to amend the claimant's targets is irrelevant to the enforceability of the 300% term; it cannot amount to an agreement to vary the application of that term.

23. Similarly, the fact that Mr. Overton referred to the '300% cap' in an email in August 2020 (page 108 of the bundle) does not, and cannot, change the proper construction of the 2019 compensation documents.

24. In his witness statement at para. 43 the claimant asserts that another employee received in excess of 300% of their OTVP with commission payments spread out over several years. The respondent is not aware of the employee referred to or of the arrangement alleged, but even if the claimant is correct, how it was applied in a different case does not change the application of the 300% term in the claimant's case. This is not a discrimination claim.

25. Further, again on the claimant's case, the fact that those payments were spread out over several years in this other case , rather than payable immediately , emphasises not the absence , but the application of the 300% term.

26. The second reference in the Grounds of Claim is at Paragraph 36 (page 21 of the bundle) . This paragraph sets out the claimant's position regarding his call with Mr. Overton on 3 February 2020. The claimant makes no assertion that there was an express agreement that the 300% term would not apply to him. The claimant's position seems to rest on 2 points.

a. That there was a 300% cap. Even taking the claimant's case at its highest this cannot have changed the proper construction of the 2019 commission documents. At most it would indicate that when potential payments above the 300% term were put to the Executive Vice President and Chief Sales Officer they were, at least at that time, being refused. This is an application of the 300% term.

b. The Grounds of Claim go on to say "…based on the proposal that the claimant received on 3 February 2020, it was the claimant's understanding that this cap was not being applied to him." That did not amount to a contractual variation that the 300% term did not apply to him, nor does the claimant say that it was.

27. This is a statement , Mr Humphreys submitted, of the claimant's subjective sentiments. That of itself cannot create a contractual variation which requires the agreement of the Parties.

28. The ground for the claimant's belief is that he was made an offer for staggered commission payments, in excess of the 300% threshold, but below the amount now claimed, with performance requirements. The claimant was made such an offer, the circumstances of which are set out in the Grounds of Resistance. This could properly found the Claimant's belief that the respondent's offer was in excess of the 300% threshold, because it was. What it cannot found, nor does the claimant say that it did, is an agreement to vary the compensation documentation such that the 300% term would be disapplied to the claimant.

29. The claimant's primary concern, both in the Grounds of Claim and his witness statement appears to be his objection to the way the respondent amended his sales targets in 2020, with respect to 2019. If this were determinative of the claim there is no doubt that a full hearing would be necessary. But it is not determinative. The 300% term applied in the claimant's case and operated such that he has no entitlement to commission above the 300% threshold, which he has already been paid. Consequently, the sum now claimed was not payable to the claimant, either within the meaning of s.27 ERA, or at all and so was not part of his wages. The claim must accordingly fail.

30. The compensation now claimed by the claimant was not approved by the Executive Vice President and Chief Sales Officer, and so the condition precedent was not met: Grounds of Resistance Paragraph 31 (page 38 of the bundle). Importantly for the Application, it is no part of the claimant's case that it was met:

a. No assertion to that effect is made in the Grounds of Claim.

b. The Grounds of Claim cite the respondent's response to the Claimant's appeal including the statement, unchallenged in the Grounds of Claim that: "All the evidence has been considered and raised to both the Chief Sales Officer and VP of Sales Operations who stand by the original decision".

c. The point is not addressed in the claimant's witness statement.

31. In his oral submissions Mr Humphreys made these additional points. There was no alternative claim in the claim form and Grounds of Claim for the £400,000 total commission payable as to £100,000 in two instalments, and subject to what the claimant contends are impermissible conditions. Any such claim would have to be made by amendment.

32. In terms of the plea of perversity/irrationality advanced now in the claimant's submissions, this too had not been pleaded, and would similarly require an amendment. This argument has not previously been raised by the claimant until this application.

The claimant's submissions.

33. For the claimant Ms Gardiner clarified that it was not asserted by the claimant that the 300% Term was waived. Rather, he asserts that an application of the 300% term was "improper", such that he is entitled to the commission as claimed. Alternatively, once the 300% term was implemented and his targets were adjusted, the respondent was not permitted within the terms of the Plan to defer the payment or align it to new targets. Accordingly, the failure to pay the additional £100,412 amounts to an unlawful deduction from wages.

34. Pursuant to the 300% term, payments in excess of 300% are subject to "review" and "approval". As a matter of contractual interpretation, and ordinary language, it was contended by Ms Gardiner that "review and approval" requires:

a. a review for irregularities in the way in which the target was attained;

b. alternatively, it allows for a review and a change on fair and reasonable grounds (importing the language at clause 6(a)).

35. What the respondent does not have, she submitted is an unfettered discretion to refuse all payments over 300%. If acting irrationally or perversely, the respondent acts in breach of contract, reference being made to ***Clark v Nomura International plc, [2000] IRLR76)***.

36. The Tribunal must, therefore, look at the reason why the respondent exercised the 300% term in the way it did. It does not appear to be in issue between the parties

that in the event that any such investigation would require a final hearing and findings of fact following contested evidence. For the avoidance of doubt, claimant contends that the respondent reduced his commission payment unlawfully, by reason of the size of his commission and not in response to any alleged requirement of the respondent's business.

37. Alternatively, the claimant has a real prospect of successfully arguing that the Respondent unfairly deducted the sum of £100,412.00 from his wages, being the difference between the sum paid, and the sum set out in the email from Mr. Overton on 3rd February 2020 .That is a proposal which had been approved in accordance with the 300% term (para. 82, page 47 of the bundle)).

38. By making the proposal of adjusted targets, the respondent "reviewed and approved" a payment over 300% of on target variable pay. It went a step further, in aligning payment of £100,000 of the target to future MBOs. That alignment was not permitted within the terms of the Plan:

a. On target variable pay is earned "through the achievement of factors related to Annual Sales Targets, assigned by sales management to Participants" (paragraph 4 page 71 of the bundle).

b. The Annual Sales Targets are broken down into SC, ARR and TOR. There is no mention in the Plan of commission being payable on the achievement of MOB targets.

c. Clause 6(b) (page 77 of the bundle) deals with timing for payouts under the Plan, but does not contemplate deferral beyond the usual payment dates;

d. Clause 6(h) (page 80 of the bundle) reserves to the respondent the right to review and adjust sales credit and associated payments, but provides no contractual right to defer payments or realign earned commission to new targets.

39. Having reviewed and approved the claimant's commission, the respondent offered a payment in excess of the sum received by the claimant. Putting aside any dispute about the respondent's ability to adjust targets retrospectively, once it did so it gave rise to an entitlement to the higher sum.

40. The claimant rejected the proposal on the basis that he was being asked to re-earn the commission which he had already earned (page 109 of the bundle). That led to the improper withdrawal of the £100,000 attached to those MBOs (page 108 of the bundle). The balance of the commission (being an additional £412) has neither been withdrawn nor paid. The said withdrawal, and the failure to pay, was a deduction from wages within the meaning of s.27(1) ERA, and is actionable.

41. In the circumstances, this case is not apt either for strike out or deposit, and should proceed to a final hearing.

42. In her oral submissions Ms Gardiner added that the claimant had, in the Grounds of Claim, pleaded, at para. 52 , irrationality. The email from Simon Overton suggests that the revised targets had been approved under clause 6(a), the attainment of the new

MBOs which was imposed was not within the terms of the Plan on any view. The decision itself was an irrational exercise.

43. The claimant was advancing an alternative claim for the £100,000 offered, even if that was not clearly pleaded. If that requires amendment , the respondent would not be prejudiced by any such amendment. The respondent may be able to make a case that its discretion for not paying in excess of £800,000 was a properly exercised, but it could not say that in relation to the payment of £400,000 , which it did agree to, which must have been a proper exercise of that discretion. The claimant will also say that he was inconsistently treated.

44. In summary, she submitted that an in depth factual examination of the reasons why the respondent acted as it did is required, and the claims should not be struck out, or made subject to any requirement to pay a deposit.

Discussion and ruling.

45. The claimant's case has been very helpfully clarified by Ms Gardiner. He is not now arguing (despite para.36 of the Grounds of Claim) any waiver of the 300% term. Rather, he now seeks to argue that it was "improper", or was improperly applied. The Tribunal is not quite sure what this means. There is no concept in the law of contract of "improper" terms, or their application. The term "improper" comes very close to "unfair", and the Courts' and Tribunals' jurisdiction in respect of unfair contract terms is very circumscribed, and no argument has been, nor could be, advanced that the law of unfair contract terms has any application in these circumstances.

46. Ms Gardiner argues at para. 13 of her submissions that as a matter of contractual interpretation, and ordinary language, that "review and approval" requires:

a. a review for irregularities in the way in which the target was attained;

b. alternatively, it allows for a review and a change on fair and reasonable grounds (importing the language at clause 6(a)).

47. With respect , the Tribunal cannot agree. It can see no basis for limiting the scope of a review to whether any irregularities have occurred. Why, as seems to have happened here, can it not include a review of the way in which the targets were set? In terms of the wording of clause 6(h), the claimant seeks to import the wording of 6(a) where the respondent undertakes to "use its best efforts to administer changes reasonably and fairly".

48. That is, however, to confuse the two terms. Clause 6(a) is about changes to the Plan, and how , and indeed, when they may be effected. Clause 6(h) is, as its heading denotes, about the limitations of the Plan, which are quite simply, that no employee will be entitled to a payout of over 300% of On Target Variable Pay unless and until such a payment is reviewed and approved by the Executive Vice President & Chief Sales Officer (it appearing that these are two separate individuals). That is a straightforward and express limitation.

49. To some extent the fact there is no mention, unlike clause 6(a), of reasonability and fairness rather undermines any argument that such a gloss should be imposed. It will be appreciated that any commission scheme that allows an employee to earn 3 times their basic salary is a very generous one, and seeking to impose some form of upper limit, which requires high level approval to breach is not surprising. Frankly whether it is a cap or not is not of any importance. It is , and has not been argued not to be, a condition precedent to the payment of any amount over the 300% limit. Why then should such a term then be subject any reasonableness or fairness limitation? Certainty is a contractual requirement. This clause is certain. Imposing a reasonableness and fairness requirement upon it would undermine that certainty.

50. The issue of retrospectivity does not arise in this context. Whilst Ms Gardiner has argued that Clause 6(a), despite its wording , would be subject some restriction upon retrospectivity of adjustments to target, clause 6(h) is totally retrospective. It presupposes that the employee will have earned the commission which would exceed 300% of his OTVP , but makes payment subject to the approval of the Executive Vice President & Chief Sales Officer. There is no need, in order to operate this clause for the respondent , retrospectively to revise any targets, it simply applies this limit.

51. That Simon Overton proposed variation of targets as the mechanism for recalculating the claimant's entitlement, which would then be approved under clause 6(h) should not obscure the difference between clauses 6(a) and 6(h).

52. The Tribunal now turns to the second limb of the claimant's response , the alternative claim for £100,00 on the basis that this was the sum payable, after Simon Overton told the claimant that this would be paid after the variation that he sought to impose in February 2020. The respondent then became liable to pay it, it is argued, and was not entitled to seek to do so in two instalments.

53. There are , with respect to Ms Gardiner, a number of flaws in this submission. The first is that this alternative claim is not pleaded. Nowhere in the professionally pleaded Grounds of Claim is this alternative claim pleaded. The claim, and the sole claim as pleaded , is for £501,583.74, no other sum. The respondent submitted, and the Tribunal agrees, an amendment would be required for this purpose. No amendment application has been received, even after the hearing.

54. Secondly, and more importantly, there is a compelling argument that such a claim cannot succeed in any event. As the claimant pleads (for the Grounds of Claim set out these facts) Simon Overton made an offer , or proposal , which the claimant did not accept (paras.34 and 37). The claimant seems now to be arguing that , notwithstanding his lack of agreement to this proposal, the respondent then became liable to pay this sum. That is the effect of para. 17 of Ms Gardiner's submissions, where she says:

By making the proposal of adjusted targets, the Respondent "reviewed and approved" a payment over 300% of on target variable pay.

That cannot be right. The claimant seizes upon this as being the respondent approving a payment in excess of 300% , so it is argued that the respondent thereby , operating its own terms, then gave the requisite approval , which gives the claimant this alternative

entitlement. That is a flawed analysis. As the pleaded case shows, and reading of the email from Simon Overton on 3 February 2020 demonstrates, this was not the respondent agreeing to pay £400,000 in commission, unilaterally and irrevocably operating the terms of the Plan, this was the respondent seeking the claimant's agreement to such a proposal. If given, there would then be a binding agreement for payment of that sum, and the respondent would then gain the approval of the necessary officers, and pay it (or would be estopped from denying liability to pay it).

55. The claimant cannot have it both ways. He cannot on the on hand insist upon his full claim for £501,000, but on the other, then claim in the alternative the £100,000 that was offered to him as a compromise which he turned down. There was a condition precedent to the payment of the £100,000, and that was the claimant's agreement. He would neither agree the amount , nor the payment in instalments. He cannot now claim that sum as the sum properly due.

56. Ms Gardiner's final argument on behalf of the claimant rests upon the importation of an implied term into the express terms of the Plan. That is an implied term that when exercising a discretion with regard to a bonus payment the employer must not act in a manner which is irrational or perverse. Equally, it must not ignore factors that are relevant or take account of irrelevant considerations . This irrationality/perversity test was identified some years ago by Burton J in ***Clark v Nomura International plc [2000] IRLR 766, QBD*** and was formulated in the following terms (see [40] of his judgment):

"My conclusion is that the right test is one of irrationality or perversity (of which caprice or capriciousness would be a good example) i.e. that no reasonable employer would have exercised his discretion in this way."

57. Ms Gardiner cited this authority, and provided the Tribunal with a copy of it. The irrationality test was initially viewed as an aspect of (or certainly buttressed by) the implied term of trust and confidence and the obligation of 'fair dealing' referred to by Lord Steyn in ***Johnson v Unisys Ltd [2001] IRLR 279***. It has echoes of the "***Wednesbury"*** unreasonableness test in the public law field, whereby a court will not intervene to quash a public body's decision unless: (1) that body took into account irrelevant factors or failed to take into account relevant ones; or alternatively that (2) any discretion was exercised in such a way that no reasonable body could have arrived at that particular decision. Burton J did not refer in express terms to the ***Wednesbury*** decision. However, his formulation of the irrationality/perversity test is clearly very similar to the second limb of ***Wednesbury***. As applied in ***Nomura***, the test meant that the employer's decision to award a nil bonus to an employee who was entitled to a discretionary bonus 'dependent on individual performance', and who had, amongst other things, earned profits of over £6 million during the relevant period was plainly perverse and irrational and so amounted to a breach of contract.

58. The irrationality/perversity test (in the sense that the employer's decision is one that no reasonable employer would have reached) was adopted by the Court of Appeal in a number of cases dealing with discretionary decisions including ***Mallone v BPB Industries Ltd [2002] IRLR 452***, ***Horkulak v Cantor Fitzgerald International [2004] IRLR 942*** and ***Commerzbank AG v Keen [2007] IRLR 132.*** More recently, the Court of Appeal has confirmed in express terms that in a case involving the exercise of

discretionary powers the test to apply is a rationality test equivalent to that set out in ***Wednesbury*** .

59. The bar is set very high for potential claimants. Merely contesting that the exercise of the employer's discretion is unreasonable from the employee's standpoint will be insufficient to show a breach of the trust and confidence term. Equally, although the employee's reasonable expectations may be a relevant factor, they will not be determinative. As the court put it in ***IBM UK Holdings v Dalgleish [2018] IRLR*** at [229]: '…to elevate [reasonable expectations] to a status in which they [have] overriding significance over and above other relevant factors [is] erroneous in law'. As a result, the statement of Moses LJ in ***Commerzbank AG v Keen***, that the mere fact that the employee had received higher bonus awards in previous years did not assist 'in any way' with the assessment whether a later award was irrational, should now be treated with caution. The failure to honour reasonable expectations may well need to be taken into account but only as one factor in the decision.

60. Secondly, whilst the bar remains high, the decisions in ***Braganza v BP Shipping Ltd [2015] IRLR 487*** and ***IBM v Dalgleish*** appear to import both limbs of ***Wednesbury*** into the relevant test. So although the employee may be unable to show that the bonus decision was one that no reasonable employer could have reached, he may be able to demonstrate, for example, that relevant factors have been disregarded. This was the interpretation given to ***Braganza*** by the High Court in ***Patural v DG Services (UK) Ltd [2015] EWHC 3659 (QB), [2016] IRLR 286,*** a case concerning the employer's decision to award the claimant a lower bonus than that given to his peers. Mr Justice Singh held that ***Braganza*** had imported the full ***Wednesbury*** test into employment law with the result that the bonus decision could be subjected to scrutiny under both limbs of the test. Nonetheless, the court went on to dismiss the claim. Firstly, on a fair reading of the particulars of claim, there was no allegation that irrelevant considerations had been taken into account. Secondly, the claimant had not been able to overcome the 'high hurdle' of establishing that no rational bank would have paid him a bonus of that amount.

61. The Court of Appeal took the same approach in ***IBM v Dalgleish***, stating that the test to be applied included both limbs of Wednesbury. As Sir Timothy Lloyd put it at [45]:

"… in cases which… involve the exercise of an employer's discretionary powers, whether express (as in many of the bonus cases, and in Braganza) or implied, then, in our judgment, the effect of the recent case law is that, in order to decide whether the employer's act is or is not in breach of the implied duty, a rationality approach equivalent to the Wednesbury test (including both its limbs) should be adopted, taking into account the employment context of the given case. Such an approach is required because the court does not and must not substitute its own decision for that of the decision-maker, in these cases the employer'.'

62. The Court of Appeal in ***IBM v Dalgleish*** decided that both of the ***Wednesbury*** limbs were imported into the test, an approach endorsed recently in the employment law context by Mrs Justice Moulder in ***Faieta v ICAP Management Services Ltd [2018] IRLR 227***. The upshot of this analysis is that the bar remains high, with possibly two limbs open upon which to challenge the exercise of the employer's discretion. The second, that irrelevant consideration had been taken into account is not advanced by

the claimant in this case. He simply says he was not paid the full commission because it was too much.

63. The third point to make in this context is that the burden of proof in such cases 'lies with the claimant throughout'. As explained at [57] of ***IBM v Dalgleish***:

"If… the claimants show a prima facie case that the decision is at least questionable, then an evidential burden may shift to the employer to show what its reasons were. In such a case if no such evidence is placed before the court, the inference might be drawn that the decision lacked rationality. However in all cases the legal burden of proof rests on the claimant."

64. This was the approach taken in ***Hills v Niksun Inc [2016] EWCA Civ 115, [2016] IRLR 715***, which was cited with approval in ***IBM v Dalgleish***. The Niksun case concerned the exercise of the employer's discretion to allocate a commission payment in respect of a particular international transaction. On the facts, Niksun had failed to discharge that burden, with the result that this was one of the relatively rare cases where the employee's challenge to the employer's exercise of discretion succeeded.

65. Having said that, it is probably still true to say as Moses LJ did in ***Commerzbank AG v Keen [2006] EWCA Civ 1536, [2007] IRLR 132,*** that if the employer has paid some form of meaningful bonus then the onus of establishing that the employer had acted in a way which was perverse would be 'a very heavy one', and would most likely require some form of independent evidence to support the claim of irrationality. By contrast, where the employee had received nothing it would clearly be easier for the employee to prove irrationality since an employer would need solid grounds to justify paying no bonus at all.

66. Applying that caselaw to this case, assuming that the lack of an express pleading of this implied term is not fatal to the claimant advancing his case on this basis, the following observations can be made. If the claimant is to rely upon such an argument, the burden of proof is upon him. That would require him to plead at least facts upon which he can establish a prima facie case of perversity or irrationality . He has not done so. The closest that he comes to doing so is in para. 44 of his Grounds of Claim, where he pleads that the deferral proposal was "unreasonable in the circumstances", and para. 52 , where he contends that the respondent's conduct (although the word "claimant" is used in error) in retrospectively reducing the commission payable was "unwarranted, irrational and undermines the purpose of the Policy and the Plan which is to encourage and reward employees who excel". He goes on to make reference to an alleged discretionary payment made to a third party company in respect of the deal , which he says had a lesser claim to any payment than he did, which showed that his treatment was "unfair".

67. That is all that is pleaded. It is little more than bare assertion of irrationality. The only pleaded additional fact is the payment to the third party. It is noted that the respondent (para. 106 of the Grounds of Resistance) denies that was a discretionary payment, saying that the payment was due to that company for work it did. Assuming, however, in the claimant's favour , for the purposes of this application, that he is right , that is the only fact he has thus far pleaded in support of his case based upon the implied term of perversity or irrationality.

68. In para. 43 of the claimant's witness statement, however, he makes reference to another (unidentified) employee who was awarded "substantially more than 300%", again not further particularised, with commission payments spread over several years, without having to achieve further Management By Objective ("MBO") tasks.

69. Against that, on any view , the following observations must be made:

a) The operation of clause 6(h) did not deprive the claimant of any commission at all, it merely limited what he would be paid. It was in any event not fully applied, he was allowed to breach the 300% limit.

b) A clause which limits potential earnings by way of commission to three times the employee's basic remuneration is not, on the face of it , being operated perversely or irrationally when it is operated to deny the employee a commission of over eight times his basic remuneration.

c) Where the employee's remuneration is heavily dependent upon commission, and without it the remuneration payable would be very low, or even below the NMW, the Tribunal would be more likely to scrutinise the decision not to pay commission, or to limit what would be paid, but that was not the case here. The observations by Moses LJ in ***Commerzbank AG v Keen [2006] EWCA Civ 1536, [2007] IRLR 132,*** cited at para. 63 above are relevant here.

d) The profitability of the deal that the claimant effected with client X was clearly going to be reduced by any commission payable to him. Whilst no concrete figures have been provided, it has been pleaded (para. 27 of the Grounds of Claim) that the deal was worth $26.9m over 5 years. That is, presumably revenue, not profit. That is roughly, £19.54m at today's rates, maybe nearer £20m at the time. The respondent's profit margins are not revealed, but whatever they are, £0.5m would presumably have eroded the margin on this deal somewhat.

e) Further, the value of the deal, of course, is over 5 years, and the Tribunal presumes that this would not result in £20m of income in the first year. The commission, however, as the claimant's case clearly sets out, was payable in one lump sum in 2020. Thus whilst the respondent would indeed earn the profit on the deal over its lifetime, to pay the claimant his full commission would involve it in an up front payment of £0.5m (on top of whatever other part of the commission agreed to be payable was referable to this deal.) That the respondent's proposal on 3 February 2020 was for the additional £100,000 that it might sanction was to be (albeit on the claimant's case, impermissibly) paid over two instalments rather demonstrates that the timing of the payment was a relevant factor in its considerations.

f) That another payment was made, whether discretionary or not, to a third party in respect of this deal is a double edged sword. Quite apart from what the commercial reasons for making such a payment may have been, the fact that the respondent had this additional cost of securing the deal may well be a factor which militated against also paying the claimant any commission in excess of the 300% limit.

g) The claimant's evidence of another employee who was awarded more the 300% is of no assistance to him. The claimant has provided no details of by how much that commission exceeded the 300% limit, nor whether the respondent paid all that this employee claimed to be entitled to , or whether the commission actually paid was less than the employee had otherwise earned , but for the application of the limit. Further, the claimant suggests that this commission was spread over several years, which, as Mr Humphreys points out in para. 42 of his Submissions, suggests that respondent did apply the limitation clause to some extent, otherwise the full earned commission would, as the claimant claims his should have been, have been payable in one payment. This echoes the point made at sub- para.(e) above.

h) The respondent has, in fact, by paying the sum of £300,412 in excess of the 300% figure of £288,000 that clause 6(h) would otherwise have been the limit of the commission payable to the claimant , exercised its discretion in the claimant's favour.

i) There is nothing irrational or perverse in a commercial concern wishing to maximise its profits, which is the only reason that seems to be suggested by the claimant for the action it took. The essence of the dispute appears to be that the respondent did not see the claimant's potential commission coming, because the deal that gave rise to it was not included when setting his targets for the year. Whose fault that was is in dispute, but perhaps underlines the wisdom of the respondent in providing , and applying , this safety net clause when unforeseen circumstances lead to unforeseen commission entitlements of this magnitude. Ms Gardiner's Submissions , at para. 15 , argue that the respondent reduced his commission payment (unlawfully) by reason of the size of his commission, and not in response to any alleged requirement of the business. That may be so, but that does not make it , of itself , perverse or irrational. The claimant has not suggested any other motive, and simply says this was unfair. It may have been, but that is not the test .

70. All of the above is a basic analysis of what are the simple and obvious commercial facts, and the facts alleged by the claimant , assumed in his favour. What there is not , in all this, is anything from the claimant , other than the payment to the third party, which itself is an equivocal factor, and the vague reference to another employee being awarded commission in excess of 300% , which even begins to raise a prima facie case of perversity or irrationality. Certainly nothing is else is pleaded, nor is there anything else in the claimant's witness statement.

71. Assuming for a moment that then the claimant can advance his claim relying upon upon the unpleaded implied term, there are no pleaded or otherwise alleged facts from which he could hope to raise a prima facie case of breach of the implied term of perversity or irrationality. Any claim on this basis would have no reasonable prospects of success.

Striking out.

72. The law on striking out claims in these circumstances is summarised in Mr Humphreys' submissions, and is not disputed. This is not a discrimination claim. The

facts are not in dispute, or where they are, even assumed in the claimant's favour, the contractual position is clear, and the claimant has not begun to establish a prima facie factual case that affords him any prospects of success. No alternative grounds for not striking the claim out if it is found to have no reasonable prospects of success have been advanced, nor, frankly, could they be. The claim is accordingly struck out.

Employment Judge Holmes

DATE : 30 March 2021

RESERVED JUDGMENT SENT TO THE PARTIES ON: 31 March 2021

FOR THE TRIBUNAL OFFICE

All judgments and reasons for the judgments are published, in full, online at *www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.