



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr C. Pigott

**Respondent:** CDW Ltd

**London Central by CVP**

**10, 11 October 2024**

**Employment Judge Goodman**

**Representation:**

**Claimant:** Robin Pickard, counsel

**Respondent:** Joanne Twomey, counsel

## RESERVED JUDGMENT

1. The unfair dismissal claim fails.
2. The respondent did not make unauthorised deductions from the claimant's wages.
3. The hearing on 23 January 2025 will not take place.

## REASONS

1. The claimant resigned his employment on 2 January 2024, giving one month's notice. He has brought two claims. The first is for unauthorised deductions from wages, a claim for commission which relates factually to changes in the allocation of work in June 2023, and to repayment of overpaid commission which came to light in November 2023. The second claim is of (constructive) unfair dismissal, which concerns how information about the changes and about the repayment was provided to him over this period.
2. The claim had not been subject to case management before the final hearing. Counsel had usefully drafted and agreed a list of issues when preparing for the hearing, although even then the commission issues evolved over the course of the hearing. The list is appended to these reasons. An employer contract claim was withdrawn.

## Evidence

3. I heard evidence from the claimant, **Christopher Pigott**, from his line manager, **Neil Bailey**, and from **William McGinnety**, who was responsible for calculating commission. There was an agreed bundle of 899 pages. I read those to which I was directed.
4. Some of the commission issues were clarified in the course of the evidence. By the end of the second of the two allocated hearing days judgment was reserved. Oral submissions made on the afternoon of the second day were supplemented by further notes about commission that counsel sent to the tribunal on 14 October.
5. It was agreed at the outset that many of the calculations as to remedy may depend on the findings on the merits. A further remedy hearing was set for 23 January 2025 if required.

## Findings of Fact

6. The respondent is an international company providing integrated technology solutions in the private and public sector.
7. The claimant was recruited on the 3rd of August 2020 as an account director to work on public sector projects.
8. His contract of employment provided for an annual salary of £40,000 per annum, plus commission. The initial offer of employment provided a guaranteed commission of £1,500 per month for 12 months, or actual commission if higher. The contract of employment states:

*7.1 Commission is paid one month in arrears with normal payroll payments in terms of your Commission scheme. In the event that a salesperson resigns from the company, commission will be earned up to and including the last active working day and shall exclude any garden leave.*

*7.2 the company reserves the right to amend the Commission scheme giving 4 weeks written notice.*

9. The contract terms as to remuneration also provide, at 6.3:

*“you agree that the company may recover any sums that you may from time to time over the company... the company may recover these sums by deduction from salary, Commission, or any other payment due to you in respect of your employment with the company.”*

10. The Commission scheme itself was not formally written down, but it was understood and accepted by managers and sales staff (including the

claimant) that in each month, gross profit billed to their allocated accounts (i.e. customers) would be eligible for commission at 22%, after deducting an amount equivalent to six months gross salary, (“threshold”).

11. Initially the claimant worked on a range of accounts which he built up profitably. Then in July 2021 the respondent obtained two large contracts with the Department for Work and Pensions (DWP), essentially to supply and maintain hardware and software for their technology systems for two years. The team of CDW staff working on it was led by Steve Fisher and the claimant, with Mr Fisher as front of house and the claimant providing support to the account. The team members agreed how to split the commission between them. Initially the claimant received 40% and Mr Fisher 60%. Their percentages reduced a little as the sales team on the DWP contract enlarged.
12. As the respondent puts it in the grounds of response, “the DWP account was a lucrative arrangement for the respondent”. The claimant’s year-end tax statements bear this out. In the tax year ending April 2022, his income before tax was £74,543. In the tax year ending April 2023, income before tax was £321,287. It was later discovered that there had been a substantial overpayment, but even so, the commission element of his pay was around £100,000. It can be seen therefore that with an annual salary of £40,000, later £45,690, his commission earnings were important.
13. The DWP contract was due for re-tender in Q3 of 2023, and was to end on 31st of December 2023. In the run up to possible renewal, DWP indicated their unhappiness with some of the service provision, in particular that the CDW team on the contract was led by salespeople, rather than service support staff. Mr Fisher left the team in February 2023 and was allocated to other accounts. Neil Bailey, who arrived to manage the team in March 2023, says that he was informed of this by Tristan Thorpe. ( Mr Thorpe was originally a DWP employee, had joined CDW on the contract, then left to rejoin DWP). The DWP considered this was now a mature account which no longer needed a sales team.

#### Claimant removed from DWP contract

14. Neil Bailey broke the news to the claimant at a working lunch he had arranged for the purpose on 16th of June 2023. He told him that all sales staff were being removed from the DWP account. The claimant was visibly upset and took the rest of the day off.
15. This upset was compounded on the 19th of June. DWP had queried the billing figures. The claimant attended a meeting with DWP to justify the figures. The meeting was not a success. The claimant had had to pull the data together in a hurry, and, in his words, the DWP staff present ‘stormed out’. He went sick with stress, returning to work a month later on 17th of July 2023.

16. While off work, the claimant emailed Neil Bailey on 30 June: “can you please request in writing, directly from DWP the reason for the request to have me removed from the account”. On his return to work on 17th of July 2023 he asked for an update, and what he was to do next:

*“statement in writing confirming why I was moved off the DWP account. Confirmation of next actions: ie who am I pointing all communication from DWP to, list of free accounts within central Gov for me to focus on etc”.*

17. They had a discussion that morning. Later that day Mr Bailey emailed Tristan Thorpe: “to follow up on our recent conversation around the DWP account team. As we transition to a service led engage on the DSRS contract I am writing to confirm that we have removed both Chris Piggott and Jack Cabot from the DWP account team, effective 1st July 2023”. He said their roles were transitioning to the PMO (project management) function led by Cheryl Gibson. Chris Piggott and Jack Cabot would be available for the next six weeks to support PMO where required, and to pick up on historical queries.

18. At the same time Neil Bailey sent the claimant an initial list of 69 sales accounts for him to prospect. About 20 of these were public sector. He said more would be added in August, when he had worked it out with the wider team. In evidence he said that most sellers (sales staff) were expected just to look at the company’s list of free accounts and pick out those they wanted, but he felt he should help the claimant in the particular circumstances, where he had been dedicated to one contract for so long.

19. On 24th of July Neil Bailey sent the claimant the written confirmation of the change he had asked for - Mr Bailey had the drafting approved by his superiors. This explained that the decision to remove all sales people from the contract had been “requested by the customer”. The customer saw this as a services led engagement, did not see the value of salespeople being aligned, and had asked CDP to remove the account team. The new structure, with the services focus, “allies to customer need and business expectation, the transition of ownership to services aligned to any future delivery model should CDW be successful on the future DSRS contract”. He went on to say that this was no reflection on the claimant’s efforts to date, and they would work with him to realign a set of central government accounts for him to work with going forwards. As for ongoing payments against the DWP account, “we will phase off your Commission payments against the DWP account from July with payments made at 75% for July/August, 50% for September/ October and 25% for November/December, with no further payments to be made on the DWP account to you from January 2024”. This tapering period is known as ramp off.

#### Activity during Ramp off

20. The claimant, who had amassed considerable knowledge of a complex contract, made a conscientious handover to Cheryl Gibson. Over August he prepared a very detailed written analysis for the PMO taking over. Meanwhile, on the 18th of July, Cheryl Gibson had raised with the claimant some invoicing discrepancies, and asked for a breakdown, as the Respondent was reviewing and reconciling customer invoicing to check all was in order for when the contract ended at the end of the year. The claimant volunteered on 25 July to look at historic billing “to ensure that CDW is not put at risk, especially with the confusion following the invoices relating to last year”. Dealing with historic queries is expected of an outgoing seller, and is one of the reasons for continuing to pay them a proportion of the contract commission. Working from the documents bundle, Cheryl Gibson’s first query came in August.
21. On the 11th of September 2023 Neil Bailey sent the claimant a second and much longer list of new accounts to prospect, 121 in all, almost all of them public sector, though many may have been quite small. He asked the claimant to review and contact them by the end of the week. However, the claimant does not seem to have done anything to develop any of the prospects listed, whether in July or in September. His immediate response was to ask whether his request for 75% (rather than 50%) of commission entitlement for September could be authorised. (It was not.)
22. The claimant continued to unravel past invoices, and to do the monthly sales forecast, the one task not yet handed over to Cheryl Gibson. According to Mr Bailey, this task takes 2 days.
23. At the beginning of October CDW learned that their re tender for the DWP contract had been successful. The claimant was told (the tribunal does not know by whom) that CDW acknowledged the need for sales function on the account, “even this was kept was kept hidden from the client”, and he expressed an interest in the possibility of such a role. He was told that any decision on that job role would be influenced by the tender outcome. He asked for a response before the Christmas break, but did not get one. It was suggested he speak to Jon Stern, the new public sector director, about it.
24. There was a week in October when Mr Bailey, the claimant, and another senior manager were all on holiday, and Mr Bailey asked who was providing cover for DWP actions. The claimant said Cheryl Gibson was also away, but he would keep his mobile on should he be needed, adding: “I’m happy to take the laptop and work from poolside for the low price of reinstating 100% DWP until the end of December (smiley face emoji). On a serious note, all billing...”. The claimant presented this to the tribunal as an attempt to renegotiate the ramping down of his commission which had been ignored. Mr Bailey understood it as a joke, not an invitation to renegotiate. The tribunal agrees.
25. When Cheryl Gibson returned from holiday she gave a month’s notice,

which expired 24th November 2023 (she had been offered employment by DWP). The claimant now had to begin the handover again, although this time he did have the detailed process notes he had written in August. Recognising the demands this imposed on the claimant's time, which might otherwise have been spent prospecting for new accounts, it was agreed that his commission for November and December would remain at 50%, rather than reducing to 25%.

26. The respondent's evidence on the ramping down of commission share for salesman when removed from an account is that this steady reduction over six months is a standard arrangement. It can certainly be seen in the arrangements for Mr Fisher from March 2023. The steady reduction reflects the demands of an orderly handover, and the need to deal with historic queries where only the outgoing salesman may know the answer, and recognises that this can impede the salesman's ability to focus fully on prospecting and developing his new accounts, plus the fact that it takes time for the new accounts to mature and produce the sales on which commission is paid. The upward revision from 25% to 50% for the last two months of ramp off was agreed because of the unexpected requirement to restart the handover. On the other hand, the respondent maintained that the standard ramping off was not to be varied where a salesman *volunteered* for extra work. It was suggested that the claimant had spent more time than was required on his detailed process report in August, and that he had volunteered to deal with historic invoices for Cheryl Gibson when he could have been getting on with his new accounts. Another additional task that took up time was that Steve Fisher asked the claimant to reconcile costs with invoices for the months from February 2023, as he suspected his own commission was being understated by the respondent's calculations. This detailed reconciliation report seems to have required around 10 days' work.
27. At the end of November Tristan Thorpe queried why the claimant's name still appeared on some communications - was he being brought back on to the account under the new contract? Neil Bailey replied that the claimant had been removed from full-time duties on the DWP account, but there were some legacy aspects of his role being transitioned; he had also been used from time to time for back office holiday cover to the sales operation team. They were training additional team members to remove the need to involve the claimant in the future. This tends to confirm the respondent's account that the initiative to remove sales personnel (including the claimant) from the DWP account came for the customer.

### GSNI

28. Towards the end of November 2023 the claimant learned from the contract accounts team, and reported to his managers, that there was a hole in the accounts on the DWP contract. For a period of 15 months from August 2022, third party supplier costs had not been attributed to the DWP contract, with the result that gross profit had been overstated to the tune of £526,711.

This error is called GSNI ('goods shipped not invoiced'). There seems to have been some malfunction in the computer programme applied to multi-invoice suppliers' invoices. William McGinnity's initial review on 29th November 2023 suggested that there was some error on the computer programme instructions not to part-invoice.

29. The respondent suspected at one time that this function in the programme had been manually switched off by someone (which would flatter the profit figures and increase payable commission), but there has been no investigation. It was also suggested that the claimant, responsible for accounting on the contract, should have recognised that profit was being overstated and costs unattributed. The evidence on this is not complete. There are some emails between the finance team and the sales team in December 2022 and January 2023 showing that they could see the profit margin was unusually high, and the claimant replying with the explanation that third party invoices were not being processed due to short staffing in the accounting team. There are no more such emails in the bundle, so no conclusion can be drawn about whether the profit margin continued to be unusually high.
30. Recovering an overpayment of commission was, William McGinnity pointed out, going to be complicated, given the recent changes on the account, and he suggested "there could be justification that this hit when it does land in the comms ledger could be absorbed at a team level rather than an individual level, particularly since those that might have created this mess no longer are benefiting from DWP".
31. That suggestion however was not taken up. Instead, the excess was to be clawed back from individual sellers in the team at the time commission was paid. The claimant protested that this error was not caused by the sales team, nor could they have known about it.
32. The Respondent's policy is not to offset debt against salary payments, only against commission, to save any difficulty with net payments dipping below the national minimum wage.
33. The practical result was that five of the six people who had been paid commission based on the overstated gross profit on the DWP contract had to pay it back. (Tristan Thorpe's overpaid share, £4,049, was written off because he had left.) The claimant had to refund £162,736. He did not, and does not, dispute that this amount had to be repaid. He understood that the standard method of recovering the debt was to apply it retrospectively to the monthly gross profit figure, so as to reduce the gross profit for the current month, and consequently the commission payable, and discussion focused on the period over which repayment had to be made.
34. The Respondent's case is that their initial offer to all was repayment over six months, but the rest of the team asked to repay it over three months, which

was agreed. The claimant asked for a longer repayment period than the six months on offer, suggesting 12-18 months. He was told this was not acceptable. He also proposed that debt accrued during the ramp off. should be passed to the profit centre getting the commission portion which would otherwise have been paid to the claimant, and set off against their gross profit.

35. This being the conclusion of the current DWP contract, there were several discussions about final billing before business came to a halt for Christmas. The claimant followed up whether there might yet be a job for him under the new contract, and was told that personnel had not yet been finalised with the client.

### Resignation

36. Over the Christmas break, the claimant decided to resign. The discussions with more senior team members, as well as Neil Bailey and another senior manager, were too vague; he had not had “meaningful response to any of my queries in writing”. He felt fobbed off. The final straw was when he heard that Steve Fisher’s successor had been authorised to take his partner out for a meal at company expense; the claimant felt that his own contribution to the DWP account’s success was not valued, despite his continued behind the scenes work during the ramp-off period. He resented that his managers were happy to use him to their benefit, while giving nothing in return.
37. His resignation e-mail of 2nd of January 2024 however does not state any of this. He says only that he has decided to give four weeks’ notice, effective 31st January 2024, and was “happy to elaborate further on my reasoning, should this be required”. He added that as he was no longer on the DWP account, nor being compensated for his efforts on that account, someone else would have to complete the billing by midnight that day - although he seems to have continued working on figures despite that.
38. There was a discussion with Neil Bailey later that day about repayment of commission, and on 5th of January the claimant asked when the GSNI hit was going to take effect, and over what period the repayment would be spread.
39. Neil Bailey was now in discussion with colleagues about how to recover overpaid commission when the claimant was about to leave. December commission, due to be paid in January, had been impacted by the overpayment. Neil Bailey made a number of suggestions to his manager, including that he would be happy to apply clawback to all the commission due to be paid in January, but he was conscious that he needed the claimant’s help with handover, which might not be forthcoming if there was no payment at all. Jon Stern's response was that he would be inclined to take most of it, “but hold £10-15,000 back which we will pay”, subject to a professional handover, pointing out that the claimant had had the benefit of



the error, and anything he received on exit was “generous”. It was agreed that the claimant would be left with commission of 22% on that £15,000, the rest to be subject to repayment. William McGinnity suggested various ways of achieving this result in the accounts.

40. The claimant, already frustrated by the “perceived arrogance” of senior managers removing him from the DWP account at all, has expressed how this felt hostile to him.
41. The Claimant told Neil Bailey during his notice that he would rescind his resignation if he could be offered an operational role in PMO on the DWP contract. Mr Bailey did not dismiss the idea out of hand because he valued the claimant’s knowledge of back office operations, but as of January 2024 he did not know if such a role could be created, as the structure had yet to be agreed, and the claimant would be disappointed by the remuneration, as at best it would carry an annual salary of £60,000 with £40,000. Mr Bailey also recalls the claimant saying he would stay if the repayment of overpaid commission could be spread over 18 months.
42. Aside from this, on the 11th of January 2024 all sales personnel in CDW were informed that effective from 1st of January 2024, the 22% Commission rate was being reduced to 20%.
43. Other employees were affected by then unattributed invoices, including Mr Fisher, and his replacement, John-Paul Wieteska. Mr Bailey’s bonus was reduced. These were not attributions of blame, but adjustments of incentive payments based on overstated figures.

### Grievance

44. The claimant’s resignation was formally acknowledged on 24th of January, when he was also given the figures for his final payments. He was told that the recovery of overpaid commission was “ongoing”. On 26th of January he was sent his pay slip for January, which showed a figure for commission about £10,000 less than that on the 11th of January commission statement. He wanted a breakdown of how the figure had been reached. On 29th of January he lodged a formal grievance about his commission payment. He was being paid £3,300, although the commission statement advised £13,300 and £5,199. He was also expecting some commission in February for the work he was doing in January. He said he must continue on the DWP account because CDW had never issued a “contract change document” to DWP, (which was required when CDW changed the personnel allocated to the contract; the respondent argues that this has no relevance as it was DWP, not CDW, requiring changes to personnel). He had not been told when or how much would be clawed back until after he had resigned. He was still chasing for clarity.
45. There was an exit interview with Neil Bailey on 31st January. Discussion

focused on commission and repayment. The claimant expressed his dissatisfaction with “the whole lack of communication”, measured against his own professionalism in the January handover.

46. The respondents replied to the grievance on the 29th of February 2024. It was explained that the January commission statement had wrongly left out the clawback of GSNI. That was why it was more than the final payment. The delay in responding to the grievance was because the gross profit numbers for January 2024 were not finalised until mid-February.

## **Relevant Law**

### **(1) Constructive Dismissal**

47. Where an employee resigns, he must be able to establish in law that this amounts to a dismissal if he is to claim unfair dismissal. By section 95(1) of the Employment Rights Act 1996, a dismissal can occur where:

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer’s conduct.

48. As made clear in **Western Excavating (ECC) Ltd v Sharp (1978) IRLR 27**, it is not enough that the employer’s conduct is unreasonable. It must amount to a fundamental breach of the contractual employment terms such that the employee can treat the contract as at an end by reason of the employer’s repudiatory conduct. **Woods v WM Cars (Peterborough) Ltd (1981) IRLR 347**, upheld in the Court of Appeal, and approved by the House of Lords in **Malik v BCCI** makes clear there can be:

“implied in the contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract. The Industrial tribunal’s function is to look at the employer’s conduct as a whole and to determine whether it is such that its cumulative effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it”.

49. This is an objective assessment. It is not necessary to prove that the employer intended to breach the contract, nor to find that because the employee objected to the employer’s conduct, the conduct must have been intolerable - **Omilaju v Waltham Forest Borough Council (2005) EWCA Civ 493**. The conduct can be a series of actions - **United Bank Limited v Akhtar (1989) IRLR 507**

50. Where the conduct being considered is the exercise of a discretion, rather than contractual entitlement, there is a high bar to showing that the employer exercising discretion repudiated the contract. It must be not just unreasonable but irrational - **Horkulak v Cantor Fitzgerald (2004) EWCA**

51. On the other hand, the fact that a commission scheme is not contractual but discretionary does not give the employer carte blanche to decide whether to pay or not. **Small v Boots plc EAT 248/08** confirms that “custom and practice can regulate the way in which a term is construed”; and **Khatri v Cooperatieve Centralen Raffeisen- Boerenleenen Bank IRLR 2010 EWCA 715** makes clear that the same terms of construction apply to commission schemes as to contracts: how it would be understood by a reasonable person having all the background knowledge which would reasonably become available to the parties in the situation they were in at the time of the contract. As for what is “discretionary”:

“If banks decide to reward their employees by means of purely discretionary bonuses then they should say so openly and not seek to dress up such a bonus with the language of entitlement qualified by a slight phrase which does not make it absolutely clear that there is in fact no entitlement at all. If you are to give with one hand and take away with the other, you must make that clear”.

52. In **Star Newspapers v Jordan EAT 344/1993**, an employment tribunal had held that when an employer had reduced a salesperson's sales area, resulting in a fall in commission income, with no proposal for maintaining her income, that was a breach of contract. Where commission was a significant part of earnings, there was an implied term not to deprive sales staff of opportunities to earn commission. The EAT agreed. The employee must have resigned in response to the breach. If he has delayed doing so, he may be held to have affirmed the breach. If there is an accumulation of actions amounting to breach, earlier affirmation by inaction may not be fatal if there has been a subsequent breach – **Kaur v Leeds Teaching Hospitals NHS Trust (2019) ICR 1.**

53. If dismissal is established, the employment tribunal must still consider whether it was unfair - does it relate to one of the potentially fair factors in section 98(1), or some other substantial reason justifying dismissal, and, having regard to the size and administrative resources of the employer, and the equity and the merits of the case, could a reasonable employer have acted in this way - section 98(4) - **Buckland v Bournemouth University Higher Education Corporation [2010] ICR 908 CA.**

## Relevant Law

### (2) Deductions from Wages.

54. By section 13 of the Employment Rights Act 1996 an employee has the right not suffer unauthorised deductions. Deduction means a difference between the amount “properly payable” and the amount actually paid, unless the deduction is required by a relevant provision of the worker’s contract. In addition, section 14 states that section 13 does not apply where the purpose of the deduction is: “the reimbursement of the employer in respect of an

overpayment of wages made for any reason by the employers of the worker”.

55. “Wages” are defined in section 27 as including “any fee, bonus, commission,... or other emolument referable to his employment, whether payable under his contract or otherwise”. Thus the provisions bite on commission.
56. Deciding what was “properly payable”, under section 13, involves analysis of the terms, contractual or otherwise, under which payments were made,

## **Discussion and Conclusion**

### **Unfair Dismissal**

57. As set out in the list of issues, the claimant relies on a series of actions on the part of the respondent as overall constituting a breach of the implied term of mutual trust and confidence. In submissions it was clarified that a substantial part of trust and confidence in this case was the effect on the claimants income of removing him from the DWP contract. In succession, these were removing him from the account without an appropriate plan for transferring him to other accounts, asserting that DWP wanted him removed, and the progressive reduction of commission in the six month ramp off from July to December 2023, when he was still going to have to work on the DWP account, and was precluded by his duties on the account from developing other opportunities. They should have assessed the hours he had to spend on the account from October to December 2023 and awarded commission pro rata. Finally, he says, the respondent did not adequately explain to the claimant in December how the overpaid commission was going to be clawed back, and took no note of his written representations about this to Mr McGinnity.
58. Addressing these matters one by one, in the tribunal’s finding the claimant was taken off the DWP account at the request of DWP, as was Jack Cabot. It was not a unilateral decision on the respondent’s part, and Tristan Thorpe’s query in November about the claimants continuing involvement indicates that it was something DWP cared about. Of course the news was a shock to the claimant, and he had a bare two weeks’ notice of the end of his assignment to the contract, but Mr Bailey recognised this, and took some care to break the news carefully, rather than by e-mail or conversation over the desk. Further, nothing the respondent did could reasonably lead the claimant to think that taking him off the account was for any other reason than that the client wanted it.
59. Nor can it be said- as the claimant concedes- that he was entitled to work on the DWP account. Contracts came and went. It was the job of a seller to prospect for work. The claimant’s position was little unusual, in that it was a very big contract and he had worked on it for some time, so losing it was an

abrupt and unwelcome change. He was however given a list of accounts to prospect in July, and although there it was not a big list, he would probably not have had time at that stage for a longer one, because of the handover requirement. By September, when he could have been expected to have far more time available, he had a very long list of prospective accounts. There is no evidence that the claimant tried to develop them. The respondent was not required to provide him with a list of accounts: most salesman would be picking up a number of accounts, as the claimant had done himself before the DWP contract. He was provided with the list in recognition that his case involved an abrupt change to remuneration and he needed some help. Nor is it correct that he was “required” to do so much work on the DWP contract that he had no time to prospect the new accounts. He was expected to deal with historic queries that only he could handle, but he volunteered for far more than that. This went against his own interest. Nor was he required to assist Mr Fisher, and that request could have been passed on or turned down. He may have preferred to keep working on familiar tasks. It is also possible that he held on to DWP tasks in the hope or expectation that he would be assigned some other back up role related to it that he enquired about. Whatever the reason, he did not start developing new accounts when he could.

60. As for commission, he was not entitled to commission on the DWP contract once he had been removed from it. Nevertheless, the respondent recognised potential unfairness – and their own need for an outgoing sellers’ goodwill - and offered the six month ramp off with diminishing commission. There is evidence that this was a standard arrangement when a contract ended, certainly it was the offer made to the other sellers assigned to this contract. The claimant argues that this was insufficient because he was putting in almost full-time hours on the DWP contract, but commission is not related to hours worked, and if he volunteered, without being required, to do more to help the PMO, he was not entitled to be paid for it pro rata. When Cheryl Gibson gave notice and it became clear that he would have to repeat the handover, the respondent increased the commission share for the final two months. This is the action of an employer concerned to deal fairly with staff. It was a reasonable act in the circumstances.

61. These actions on the part of an employer do not amount to a breach of trust and confidence. The decision was out of the employer’s hands. They did what they could to soften the blow. It can also be said that a seller should expect ups and downs in commission income, whatever his own efforts, as some prospects come to fruition, others result in no orders. There was a period of uncertainty in the summer about his commission arrangements and what would happen next during the month that he was off sick after he got the news, but employers are rightly careful about communication with staff who are off sick and it was reasonable not to communicate the. Mr Bailey took prompt action when he returned.

62. Up till now the claimant will have been unhappy about the change and likely

dip in commission income, but it cannot be said the employer's actions amounted to a breach of contract, including any breach of an implied term of mutual confidence and trust.

63. The claimant's real difficulty was the discovery of the unbilled invoices in November. He accepts that this meant gross profit was substantially overstated, that commission had therefore been overpaid, and that it had to be repaid. The discussion was about how much and when. It is not the case that his proposals to Mr McGinnity to diminish the amount he would have to refund were ignored, because, unknown to him, Mr McGinnity in fact proposed an arrangement by which the team would absorb the loss, rather than individuals assigned at the time. By the time work shut down for Christmas there was no news on how the amount would be recovered, and a decision had yet to be made. Did the respondent's failure to come back with a firm answer before Christmas amount to a breach of the duty of trust and confidence, repudiatory or otherwise? They had made their own proposal in discussion. There had been a discussion about extending the time, or attributing it to current team earnings; the claimant had proposed reducing the claw back amount proportionate to his ramped down commission, but there was nothing in writing. There was no very long delay however, and these discussions were taking place very close to Christmas, when many people are away, and were expected to be resolved on the new year. It was not a breach of confidence and trust not to provide a definitive reply until the new year. The claimant knew there had to be refund of overpaid commission, what was unclear was when, and (to him if not to the respondent) whether he could achieve some reduction. By the new year, when a definitive answer was expected, the game had changed, as the claimant was leaving.
64. The claimant's personal difficulty was that the commission to be clawed back would be set against any commission he earned in the coming months, from December to May. That was likely to be very low, as he had not worked up new prospects, and he may well have been reduced to his basic salary in the repayment period. Resigning meant that anything not clawed back by the time he left would be written off.
65. The tribunal concludes that the respondent's actions did not amount to a repudiatory breach of an implied term as to opportunity to earn commission, or of trust and confidence in the way it was done. Unlike the claimant in **Star Newspapers v Jordan**, this was not a unilateral decision on the part of the respondent to reduce his area and so his income. The axe was wielded by the customer, a "reasonable and proper cause" for removing him from the contract, and the respondent did then take steps to allocate likely looking accounts so he could prospect for replacement commission income, unlike Ms Jordan, who had no further opportunities to earn commission. The tapering reduction in commission after the seller was no longer assigned to the contract was, so far as is known, not part of the (unwritten) commission scheme, but a concession in this case, where a seller had been allocated to

only one contract for some time, to cushion the blow, and recognise the need for handover and managing historic queries. The claimant accepted this at the time, even if he resented it when called on to cover for a few days when several staff were away in October.

66. As for the argument that the claimant should have been allocated commission on the DWP account during the ramp off period proportionate to the hours he was putting in on DWP contract matters, commission is not paid to reward hours. A salesperson is incentivised by commission to focus his efforts on likely sales prospects. He may put in hours and days pursuing a likely customer who never places an order, so his effort is unrewarded, and he may find orders fall into his lap from a customer to whom he had paid little attention. That is the nature of commission. The claimant did not have to spend as much time as he did on DWP back office work in the ramp off period. When he had to repeat a handover, he was recompensed by the commission increase in the last two months, a reasonable concession to the change in ramp off circumstances.
67. If, contrary to the tribunal's conclusion, there was some element of lack of trust in the employer's approach to the DWP termination of sales involvement in their contract, the tribunal doubts that this was the reason for resignation. It was the discovery of unbilled invoices and the need for repayment that fatally undermined his confidence. The fact that in the new year he was still inquiring about a non-sales role on the DWP contract suggests that his confidence in the employer was not broken. He would be prepared to carry on even in a less well remunerated role had it been available. In January, after he had resigned, the uncertainty was what commission he would receive in January and in February, and any lack of clarity on that was because he had resigned and the repayment question had to be re-examined. It was not a breach of trust but difficulty deciding what to do about paying commission when so much, so recently discovered, still had to be repaid.

## **Discussion and Conclusion**

### **Unauthorised Deductions**

#### Notice

68. A point arose in the claimant's post-hearing submissions about whether the claimant had been given proper notice of the change in commission arrangements effective 1 July 2023. As stated in the facts, he was told on 16 June that the change would take effect from 1 July. On 17 July he asked for written confirmation of what he had been told. This was provided on 24 July.
69. The commission scheme was not written down, but a matter of custom, so it is not clear what the formalities were (if any) about being allocated to any particular account. Clause 7.2 provides for 4 weeks' notice of a change to

the scheme. The respondent suggests this is what occurred in January 2024 when all sales teams were told (retrospectively) that commission for all sellers was reducing from 22% to 20%. It is implied in the claimant's post-hearing submission, but nowhere seems to have been argued by the respondent as the claimant suggests, that notice had to be given of changes in payment for orders on accounts, but not of changes to accounts.

70. The grounds of claim contain much detail about how commission was and should have been calculated in the ramp off period, but nothing about any failure to give notice of change. The further particulars do not raise it. It was not a cause of complaint in the claimant's grievance in January 2024. The amended grounds of response are silent on this. It does not feature in the otherwise detailed schedule of loss. It is in no way clear that there is a claim for breach of any requirement to give notice.
71. Until this hearing the claimant was a litigant in person and should be allowed some tolerance in pleading points. However, the fact that he did not complain about it in his grievance or mention it when presenting his structured and detailed claim indicates that the claimant did not consider there was any breach. His understanding of the unwritten commission scheme is important in assessing what its terms were. The tribunal concludes that the term providing for notice of changes to the scheme only applied to changes to the scheme as to payment, not to changes in allocation of accounts. It is also possible that the unwritten terms included a ramp-off period to compensate for such changes, although the respondent argues that the arrangement on the DWP contract was unusual, even unique, as in other cases accounts were reallocated or switched without notice. Whichever is right, a ramp-off period was applied to Mr Fisher who had been removed from the contract earlier in 2023. If there is claim for breach of clause 7.2, it is not shown on the evidence that this applied to changes in allocation of accounts, as well as changes to the scheme of payment.

#### Commission during Ramp -off

72. Turning to the claim for unpaid commission during the ramp off period (25% reduction for 2 months, 50% reduction for 4 months) the claimant argues that this was irrational, unfair and arbitrary, and that there was an implied term that he could earn commission (at 100%) as recognition for work done. As discussed in (65) above, it cannot be implied that commission, as commonly understood, is paid pro rata to effort. It is pro-rated to results, in the form of orders invoiced.
73. Nor is it shown that the tapered reduction was irrational. It was reasonable in that it represented recognition that handover and dealing with queries would take up time that could be spent developing other accounts. As the respondent argues, when the claimant was no longer allocated to an account he had no right to be paid commission on it. There was an arbitrary



element in the tapering, as the reduction was a rule of thumb approximation, but it reflected the need for the claimant to spend some time on handover, compatible with an incentive to start work on prospecting new accounts. It was not irrational.

74. Commission payments were “wages” as defined in section 27, as an emolument referable to employment. As such they were subject to the section 14 exclusion of a deduction made in “reimbursement of the employer in respect of an overpayment of wages”, as here wages will include commission as well as salary.

Commission for December 2023

75. In 11 January 2024 the claimant was provided with a commission statement based on his December figures, showing a payment of £13,352. This queried at the time. based on his share of gross profit for the month of £83,536, less threshold £22,845, leaving £60,691, of which 22% is £13,352. However, this calculation contained no clawback for past overpayment, something the claimant queried with Neil Bailey at the time.
76. A further calculation was made, this time by William McGinnity, and he was in fact paid £3,300.
77. The clawback calculation made by William McGinnity, applies what he says is the method used whenever clawback is necessary, that is, to identify the total GSNI cost per month that should have been allocated to the DWP team, then identify the portion of gross profit awarded to each seller in that month (in the claimant’s case this was usually 36%) and then to apply that percentage to the total GSNI figure. This they say, reflects the individual’s liability for GSNI. This calculation appears uncontested. That proportion is then set against gross profit for the month, so as to reduce gross profit before calculating commission.
78. Mr McGinnity explains that usually repayments that not recovered in one month are rolled forward to the next month until all has been settled. (The DWP figures were usually high). The claimant’s resignation meant that the company could only recover overpayment from his commission payment for December, payable in January. (The respondent had offered to take repayment over 6 months, and the claimant was asking a longer period, no agreement had been reached by the time he resigned).
79. At the time, his gross profit was calculated at £99,022, plus £9,782 from other accounts, but on later reconciliation his gross profit for December 2023 was finally established at around £130,000, once the DWP accounts had closed (in contrast to the £85,536 on which the initial 11 January calculation was based). Mr McGinnity was instructed to off-set as much of the GSNI payment as he could, while leaving the claimant £15,000 on which commission could be paid.

80. In order to achieve the £15,000 suggested, he removed £92,559 (part of the GSNI attributed to the claimant), leaving £37,845. He then deducted the threshold (an agreed figure) of £22,845, leaving commission payable on £15,000, namely £3,300 which was paid. That left still £70,177 GSNI outstanding which would have to enter the calculation were any further commission payable.
81. In his grievance querying commission figures the claimant said he assumed the reduction between 11 and 24 January was to do with the GSNI repayment, and he wanted clarity on the calculation.
82. With respect to the claim for unauthorised deduction from December commission, the claimant argues that the respondent has miscalculated the refund due by reclaiming overstated gross profit, rather than the commission paid as a proportion of overstated profit, and by misapplying the threshold. This affects the commission payments for December 2023 and January 2024. However, the method used by the respondent does not show that this is what happened. Gross profit for the current period was reduced by the hitherto unattributed costs (GSNI), and the net amount used as the basis for calculating commission. The result was that overpaid commission in past periods was recouped by underpaying commission going forward.
83. The respondent calculated gross profit on which commission was due *with* the 50% ramp off reduction applied, before GSNI was deducted. The claimant's calculations include a claim that the GSNI should be deducted from total of his 36% of gross profit, *before* applying his ramp off reduction to the resulting net figure. Calculated in this way, his December commission was underpaid by £5,761.96. This would however mean that while his past commission was overpaid by the full GSNI figure, he is only in effect refunding half the past overpayment of commission. The tribunal finds that the respondent's approach to this calculation is correct. They could reclaim overpayment from whatever was payable in the current period. They did not have to reduce the amount to be repaid by the ramp off percentage.
84. The claimant also argues that the repayment calculations should have taken account of the threshold for each month that gross profit was calculated until GSNI came to light at the end of November 2023. It is suggested this would reduce the overpayment of commission (there is no calculation). However, as the claimant's share of gross profit (judging by the overall amount of commission paid) so much exceeded threshold in these months, it is hard to see that it would make any difference to the amount of commission paid. Net profit (that is, after deducting GSNI attributable to that month, is likely to have well exceeded threshold.
85. The respondent says no commission is payable for the month of January (actual payment in February) because the ramp-off period finished at the end of December, as set out in the e-mail of 24th of July acknowledged by

the claimant the same day. They add that even if commission was payable for the month of January 2024, the GSNi outstanding would still exceed the amount payable, as DWP profit overall for January 2024 was in the order of £60,000, and the claimant's share of that was far less than the £70,177 outstanding. Anything due would have been extinguished by the refund: no gross profit would be left for a commission calculation. Were there to be a calculation of January commission, it would have to be at 22%, not 20%, of profit, as insufficient notice of that scheme change had been given. It would still have been extinguished by the balance of unattributed costs on the DWP contract.

86. The tribunal concludes that unauthorised deductions were not made from the claimant's commission, which was correctly calculated. The deduction made was a section 14 exclusion from section 13. The unauthorised deductions claim does not succeed.

Unrecognised Sales

87. There is a further claim for unrecognised sales of £7,343.10. It is not clear if this is a commission calculation, or before or after clawback. This appears as a figure in the schedule of loss. It is not mentioned in the witness statement, nor does it feature in the grievance. There has been no supplementary evidence. The claim is denied by the respondent. This claim has not been proved and is dismissed.

Employment Judge Goodman  
16 December 2024

JUDGMENT AND REASONS SENT to the PARTIES ON  
24 December 2024 .

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.....  
FOR THE TRIBUNAL OFFICE

**APPENDIX  
AGREED LIST OF ISSUES**

Constructive dismissal

1. Did R do the following things:

- a. The decision to move the Claimant away from the DWP account in June 2023 (“**the Account**”), in circumstances where the Claimant had significantly increased the Account’s profitability, and without an appropriate plan for transferring the Claimant onto other accounts.
- b. The Respondent’s assertion that DWP had requested that the Claimant should be removed from the Account.
- c. Proposing that the Claimant’s commission on the Account would reduce in percentage terms by 25/50/75% over a six-month period (July to December 2023) (“**the Ramp-off period**”), regardless of the hours that the Claimant would be required to work on the Account.
- d. Requiring the Claimant to work at or close to full capacity on the Account and conducting a detailed handover to services during the Ramp-off period, such that he was unable to develop his own opportunities.
- e. The Respondent’s ongoing failure (between 16 June 2023 and the Claimant’s resignation on 2 January 2024) to provide suitable alternative accounts on which the Claimant could work, despite the Claimant’s repeated requests for alternative accounts.
- f. Reducing the Claimant’s commission percentage on the Account without assessing the hours that the Claimant had spent on the Account (notably in October to December 2023).
- g. When historical expenses were identified in November 2023, which allegedly meant that the Claimant had previously received enhanced commission on the Account:
  - i. The Claimant was not informed as to how these expenses would be clawed back, nor the rate/amount at which the expenses would recouped;
  - ii. The Claimant’s written representations to Mr McGinnety on 5 December 2023 as to why the Sales Team (and the Claimant) should not be subject to a clawback were ignored;

- iii. The Respondent did not consult with the Claimant as to how they would clawback substantial sums of money.
  - h. The Respondent did not provide any assurances to the Claimant as to the accounts that he would work on from January 2024 after the end of the Ramp-off period.
2. Did the above individually or collectively breach the implied term of trust and confidence? The Tribunal will need to decide:
    - a. Whether R behaved in a way which was calculated or likely to destroy or seriously damage the trust and confidence between C and R; and
    - b. Whether it had reasonable and proper cause for doing so.
  3. Did C resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for C's resignation.
  4. Did C affirm the contract before resigning? The Tribunal will need to decide whether C's words or actions showed that he chose to keep the contract alive even after the breach.
  5. If C was dismissed, what was the reason or principal reason for the dismissal – i.e., what was the reason for the breach of contract?
  6. Was it a potentially fair reason?
  7. Did R act reasonably in all the circumstances in treating it as sufficient reason to dismiss C?

**Remedy for constructive dismissal**

8. If C was unfairly dismissed, what basic award should be made to the Claimant?
9. What compensatory award should be made to the Claimant, taking into account what is just and equitable in all the circumstances having regard to the loss sustained by the Claimant in consequence of the dismissal in so

far as that loss is attributable to action taken by the employer. In particular:

- a. What past financial losses has the Claimant sustained as a result of his dismissal?
- b. What future losses is the Claimant likely to sustain as a result of his dismissal?
- c. Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job? The Respondent has the burden of proving any failure to mitigate.
- d. Should any compensatory award be reduced to reflect any outstanding commission overpayment found to be owed by the Claimant to the Respondent?
- e. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? Did R or C unreasonably fail to comply with it? If so, is it just and equitable to increase or decrease any award payable to C? By what proportion, up to 25%?
- f. Does the statutory cap of fifty-two weeks' pay apply?
- g. What is the effect of grossing-up?
- h. What interest should be awarded?
- i. What amount should be awarded for loss of statutory rights?

**Unlawful deduction of wages/breach of contract**

10. What wages were properly payable to the Claimant by the Respondent?

11. Was the total amount of wages paid on any occasion by the Respondent to the Claimant less than the total amount of wages properly payable to the Claimant on that occasion?

*Commission during the Ramp-off period (1 July – 31 December 2023)*

12. Did the Respondent breach clause 7.1 of the contract of employment by irrationally, unfairly and/or arbitrarily reducing the percentage of the Claimant's commission payments during the Ramp-off period?
13. Did the contract of employment contain an implied term that individuals had the opportunity to earn commission so that there was recognition for work done?
14. If so, did the Respondent breach that implied term? The Claimant alleges he was not paid commission which reflected the responsibilities and/or time that he spent on the Account in the Ramp-off period.
15. Do the commission payments during the Ramp-off period amount to "wages" under s. 27 of the Employment Rights Act 1996?
16. If so, did the Respondent make an unlawful deduction by reducing the percentage of commission payable by 25/50 %, in circumstances where the Claimant alleges he was engaged on the Account for at or close to 100% of his time (Cf paras 10-11)?
17. Was the deduction from wages (s. 13 Employment Rights Act 1996):
  - a. required or authorised to be made by virtue of a statutory provision or a relevant provision of the Claimant's contract, or
  - b. had the Claimant previously signified in writing his agreement or consent to the making of the deduction?

***Commission payment for January 2024***

18. Did the Claimant generate gross profit in January 2024 that can be classed as relating to work done in December 2023?
19. If so, how much gross profit did the Claimant generate in January 2024? What percentage reduction, if any, would the Respondent have been entitled to apply to this gross profit (in light of the matters raised at paras 10-15 above)?
20. In light of clause 7.2 of the contract of employment, should any unpaid commission generated in January 2024 have been paid at the established

previous customary rate of 22% (as opposed to 20%), with the same threshold, £22,845.28, and with the Claimant receiving the same split of team gross profit, 34%?<sup>1</sup>

21. If January 2024's gross profit should have been allocated within January, was the Respondent entitled to withhold any commission from the Claimant because he was no longer recognised on the Account?

***Clawed back payment in January 2024***

22. Was any deduction from the Claimant's commission in January 2024 made for the purpose of reimbursing the employer in respect of an overpayment of wages?

23. If so, is the deduction an excepted deduction pursuant to s. 14 Employment Rights Act 1996 such that s. 13 Employment Rights Act 1996 does not apply?

***Other deductions***

24. Did the Respondent breach clause 7.1 and/or the implied term at para 11 above by failing to recognise sales<sup>2</sup> that the Claimant had made?
25. If so, in light of clause 7.2 of the contract of employment, should that commission have been paid at the established previous customary rate of 22% (as opposed to 20%), with the same threshold, £22,845.28, and with the Claimant receiving the same split of team gross profit, 34%?
26. Did this otherwise amount to an unlawful deduction of wages?

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<sup>1</sup> See pages 712-715.

<sup>2</sup> See page 68, para 59 (GOR); and page 870 (schedule of loss).  
10.2 Judgment - rule 61