EMPLOYMENT TRIBUNALS

Claimant: Mr L Tarbuck

Respondent: Peninsula Business Services Limited

HELD AT: Manchester **ON:** 12-16 December 2016
9 January 2017
& 28 February 2017
(in Chambers)

BEFORE: Employment Judge Langridge
Mrs D Radcliffe
Mr P Stowe

REPRESENTATION:

Claimant: In person
Respondent: Mr M Pilgerstorfer, Counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. In respect of his unfair dismissal claim the claimant was entitled to rely upon the alleged breach of contract relating to the imposition of new terms and conditions in early 2014.

2. The claimant was unfairly dismissed by the respondent.

3. The claimant's dismissal was not related to his age and his claim for discrimination on the grounds of age under section 39 Equality Act 2010 is dismissed.

4. The claim that the claimant was harassed for reasons relating to his age in breach of section 26 Equality Act 2010 is not made out and is dismissed.

5. At the times material to his claims the claimant was a disabled person within the meaning of section 6 Equality Act 2010.

6. The claim for disability discrimination under sections 20 & 21 Equality Act 2010 fails and is dismissed.

7. The claimant is entitled to receive commission payments from the respondent at the rate of 15% and without the application of any sales or uplift target, from 1 July 2013 until 28 February 2014.

8. The claimant is entitled to holiday pay in accordance with his contractual entitlement of 40 days per annum, comprising 32 days plus eight bank holidays.

9. The claimant's additional claim for commission payments incorporating holiday pay continues to be stayed.

10. A remedy hearing shall be fixed to determine the issue of remedy for the unfair dismissal claim and, if the parties cannot reach agreement, to calculate the commission entitlements and holiday pay in accordance with paragraphs 7 and 8 above.

REASONS

Introduction

1. The claimant made claims for constructive unfair dismissal, age discrimination, disability discrimination, non-payment of holiday pay and non-payment of commission. These required the Tribunal to address a number of issues of law and fact, both substantive and procedural. The hearing took place over 5 days and the Tribunal took two days to review the evidence, consider the issues and reach its decision.

2. Over the course of the hearing the Tribunal heard evidence from the claimant and his former colleague Frank Kirkham, with a statement being produced from another former colleague, Anthony Mollon. Mr Mollon was unable to attend the hearing in person and the Tribunal therefore accepted his written statement on the understanding that it would carry less weight in the absence of the witness to be cross-examined.

3. For the respondent the Tribunal heard from Geoffrey Ford, Group Sales Director, Peter Swift, Finance Director, Monica Sharples, Telemarketing Manager and Darren Chadwick, Chief Commercial Officer. Although the respondent's Managing Director, Peter Done, was a direct witness to several key issues in the case, the respondent chose not to call him as a witness.

4. An extensive agreed bundle was provided, and during submissions a comprehensive skeleton argument and bundle of authorities was produced by the respondent. The hearing dealt with issues of liability only, and questions about the

scope of the hearing and potential time points were addressed as part of the case as a whole.

Issues and relevant law

Scope of the claims

5. At the outset of the hearing the Tribunal discussed the issues with the parties in order to achieve an agreed list of issues. This task was assisted greatly by the List of Issues appended to Employment Judge Franey's case management orders on 12 June 2015, a document which the claimant agreed correctly summarised his claims. An issue then arose about the scope of the arguments available to the claimant, in particular whether he was entitled to rely upon changes to his terms and conditions of employment as one of the breaches forming the basis for his constructive unfair dismissal claim.

6. In his claim to the Tribunal (ET1) the claimant identified as one of the breaches leading to his resignation the circumstances in which the respondent made changes to his contract terms, saying:

> *"In January 2014 […] I was forced to sign a new contract putting me back on terms prior to July 2013, under threat of termination. […] "I resigned in early July 2014 as I believe I was excluded by my manager from January 2014 having been threatened by him that I would no longer have a job with [the respondent], and that my days were numbered unless I signed and returned the replacement detrimental contract."*

7. On 23 January 2015 the claimant was directed to provide further particulars of his claims. Three aspects of that document are relevant to mention:

7.1 In setting out "breaches of contract leading to resignation" the claimant identified a number of matters which took place after changes were made to his terms and conditions of employment, but did not explicitly refer to the latter as a breach of any express or implied terms.

7.2 When dealing with disability discrimination the claimant identified "changing my contract in July 2013" as a reasonable adjustment, referring to more beneficial terms which he had been offered. He alleged that the subsequent removal of those terms in January 2014 was a breach of the duty to make reasonable adjustments.

7.3 In a general final section, the claimant stated: "*Breach of contract, forcing me to sign a new contract in March 2014, under threat of dismissal by P Done in January 2014."*

8. At a later case management hearing on 12 June 2015 a List of Issues was prepared by Judge Franey following discussion with the parties, and was agreed by the claimant. It was annexed to the case management orders. The list of breaches relied on for the unfair dismissal claim did not include the changes to the terms and conditions. Five issues were identified as relevant to the alleged breach of the implied duty of trust and confidence, individually or cumulatively:

8.1 In March 2014 removing experienced telesales staff from the claimant and replacing them with newer less experienced staff.

8.2 In April 2014 allocating the claimant no company seminar in that quarter.

8.3 In failing to respond to texts sent by the claimant to Mr Done detailing deals done during the quarter.

8.4 In July 2014 failing to allocate the claimant premier leads, Tribunal leads and incoming call leads.

8.5 In July 2014 booking poor quality appointments for the claimant and not allowing him to cancel or refuse those appointments, resulting in a low conversion rate.

9. In this judgment the above are referred to as the Five Issues, though during the course of the hearing the last two issues tended to be dealt with as one.

10. The issue raised by the respondent was whether, in agreeing to the List of Issues appended to Judge Franey's order of 12 June 2015, the claimant had in effect abandoned or chosen not to pursue any question of breaches of contract arising from the changes to his terms and conditions in early 2014, or the manner in which that was handled. Even on a preliminary basis, it was clear that those issues of fact formed an integral part of the evidence to be heard in the claims. It was therefore appropriate to consider the legal implications of the respondent's argument when deliberating on the claims as a whole.

11. In his skeleton argument Mr Pilgerstorfer drew the Tribunal's attention to the following cases relevant to this issue: Chapman v Simon [1994] IRLR 124, Parekh v London Borough of Brent [2012] EWCA Civ 1630, Tucker v Partnership in Care [2010] UKEAT/0455/09 and Chandock v Tirkey [2015] ICR 527.

12. The raising of this issue by the respondent had no impact on the scope of the evidence produced by either party, overlapping as it did with the issues for which the parties were already prepared. The legal implications of the respondent's argument were therefore considered after the conclusion of the hearing, as part of the Tribunal's deliberations as a whole. The Tribunal's conclusions are set out here, before the unfair dismissal claim to which they relate.

13. In Chapman the Court of Appeal held that the jurisdiction of the Tribunal is limited to those complaints which have been made to it. In that case, the matters which the Tribunal relied on in finding that there had been race discrimination were not the subject of the complaint in the originating application. It was not a matter of which the claimant had ever complained, by contrast with the present case.

14. The Court of Appeal in the more recent case of Parekh held that "a list of issues is a useful case management tool", noting that case management orders are not final decisions. The court said that a list of issues is "usually the agreed outcome of discussions" and that if agreed, "then that will, as a general rule limit the issues at the substantive hearing to those identified in the list". The court went on:

> *"As the ET that conducts the hearing is bound to ensure that the case is clearly and efficiently presented, it is not required to stick slavishly to the list of issues agreed where to do so would impair the discharge of its core duty to hear and determine the case in accordance with the law and the evidence."*

15. In that case, the claimant had not specifically taken issue with the respondent's stated reason for dismissal in his ET1, nor did he make any concession about that at the Pre Hearing Review when case management orders were made. The point did not make its way into the list of issues prepared by the judge at the PHR following discussion with the parties. In preparing the list of issues the judge had stated: "it is now definitively recorded that the issues between the parties which will be determined by the tribunal are as follows …". However, the Court of Appeal held that this did not amount to a concession by the claimant, and the list of issues "never had the drastic exclusionary effect asserted in the EAT and in this court on his ability to advance his case fully". The court held that the EAT had been wrong to suggest that the judge had been limiting the scope of the issues and excluding the issue about the reason for dismissal. The list of issues was a record of discussions and not an adjudication.

16. In the case of Tucker, the EAT held that the Tribunal "has to rule upon cases as they are presented" to it in an adversarial hearing. The formulation of the case does not depend simply on the pleadings, but where there has been a PHR it focuses "only upon the issues as so identified". "A Tribunal may take steps to identify whether there is some other claim which ought properly to be advanced providing it does so within the bounds of reason and justice …". One of the considerations in such a case is whether the respondent has had an opportunity to deal with the claim identified.

17. Finally, in Chandock the EAT held that the claim could not be struck out without hearing and determining the full facts. "… the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it." The court went on to say that the parties should "know in essence what the other is saying, so they can properly meet it …"

18. The Tribunal considered these principles and the submissions of the parties, in light of the facts of the present case. We were satisfied that the claimant's ET1 made plain that he wished to rely on the imposition of new contract terms as part of his constructive dismissal case. The extract in paragraph 6 above from that document could not have made the point more plainly. The claims were amplified and added to in the later document providing particulars, during which the factual issue of the new contract was again referred to, though in a general section. While the contract issue did not feature in the record of the case management discussion on 12 June 2015 as a specific breach relied on in the constructive dismissal claim, it cannot be said that the claimant abandoned or withdrew that part of his claim. The point was, for whatever reason, simply not included in the List of Issues.

19. It is relevant to point out that the claimant has represented himself throughout the case. The respondent has had legal representation. It has at no point been misled or disadvantaged by the absence from the List of Issues of any specific reference to the imposition of new terms as a breach relied upon. The factual basis of the claims, and the evidence which both parties prepared for the hearing before

this Tribunal, were in no way altered by the issue. This Tribunal had to do justice to the claims, looking at the documents as a whole, and is satisfied that justice is served by allowing the claimant to pursue this part of his claim.

Unfair dismissal

20. It was for the claimant to show that he had been dismissed within the meaning of section 95(1)(c) Employment Rights Act 1996 (ERA), in that he was entitled to resign with or without notice by reason of his employer's conduct.

21. The Tribunal took into account the key authorities relating to constructive unfair dismissal cases, including the decision of the Court of Appeal in London Borough of Waltham Forest v Omilaju [2005] IRLR 35, which helpfully summarises the key authorities of Western Excavating v Sharp [1978] 1 QBD 761, Malik v BCCI [1998] AC 20 and Woods v WM Car Services [1981] ICR 666. In essence, an employer must not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Conduct which is merely unreasonable does not meet the required threshold. The conduct has to be a fundamental breach of the contract going to the root of the relationship.

22. While it is necessary to examine the respondent's conduct leading up to the claimant's resignation, it is also appropriate for the Tribunal to consider the claimant's conduct. The test to be applied when considering the claimant's reaction to the conduct is an objective one; in other words, the question is whether it was reasonable for the claimant to regard the respondent's actions as a fundamental breach of his contract.

23. A breach of the implied duty of trust and confidence will be regarded as a repudiatory breach going to the root of the employment relationship: Morrow v Safeway Stores [2002] IRLR 9.

24. This case required consideration of the various breaches alleged, whether a breach of express terms and/or a breach of the implied duty of trust and confidence. The claimant relied partly on the imposition of new terms and conditions in March 2014, and partly on a breach of the implied duty of trust and confidence arising from the Five Issues. As noted, the respondent argued that the variation of the claimant's express terms and conditions was outside the scope of what he could rely on. It argued that the variation had in any event been consented to by the claimant, such that there was no breach, or that any such breach was waived and the contract affirmed. Overall, the respondent argued that none of the respondent's actions, including the Five Issues, amounted to a repudiatory breach of contract entitling the claimant to resign.

25. Where a last straw is relied on, the act in question does not have to be of the same character as the earlier acts in the series, provided that "when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant." – Omilaju.

26. The Tribunal had also to determine whether the claimant resigned in response to the breach, or whether he resigned for another reason.

27. The fact that the claimant signed a new contract on 5 March 2014 gave rise to issues about whether he had affirmed his employment contract and/or waived any right to protest about alleged breaches, as did the time elapsed between the claimant signing his new contract and resigning on 7 July 2014.

28. If the claimant persuaded the Tribunal that he was dismissed, it was then for the respondent to show the reason or principal reason for dismissal. The respondent relied on some other substantial reason under s.98(1)(b) ERA as the underlying reason.

29. The next stage would be to consider whether that dismissal was fair or unfair in all the circumstances of the case, pursuant to section 98(4) ERA. In keeping with the guidance in Iceland Frozen Foods and other authorities, it was not for the Tribunal to substitute its own view of the case but rather to consider whether the dismissal fell within or outside a range of reasonable responses.

Age discrimination

30. The claimant made two claims of age discrimination. Firstly, he alleged that a comment by Mr Swift about the "pipe and slippers brigade" was a reference to the claimant's age and amounted to unlawful harassment as defined in s.26(1) Equality Act 2010 (EqA):

> *(1) A person (A) harasses another (B) if—*
>
> *(a) A engages in unwanted conduct related to a relevant protected characteristic, and*
>
> *(b) the conduct has the purpose or effect of—*
>
> *(i) violating B's dignity, or*
>
> *(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*

31. If the Tribunal were satisfied that the conduct met this definition, it would go on to consider the subjective and objective tests set out in s.26(4) EqA:

> *(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—*
>
> *(a) the perception of B;*
>
> *(b) the other circumstances of the case;*
>
> *(c) whether it is reasonable for the conduct to have that effect.*

32. In determining these questions the Tribunal took into account the guidance in Richmond Pharmacology v Dhaliwal [2009] IRLR 336, which identified three elements (as applicable to this case):

32.1 Did the respondent engage in unwanted conduct?

32.2 Did that conduct have the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

32.3 Was that conduct related to the claimant's age?

33. The harassment claim gave rise to a time point given that the conduct in question was a one-off comment made on or around 8 January 2014. On the face of it, the 3 month time limit to bring a claim under s.123 EqA expired by 7 April 2014 at the latest, counting 3 months from the date of the act complained of. The Tribunal would only therefore have jurisdiction to hear this claim if the claimant could show that there were just and equitable reasons to extend time under s.123(1)(b).

34. The second age discrimination claim arose from the claimant's dismissal. In his pleaded case he alleged that he was forced to resign because of his age. This could amount to an act of direct discrimination in breach of s.13 and s.39 EqA.

35. Section 39(2) EqA protects employees from being dismissed for reasons related to a protected characteristic:

> *(2) An employer (A) must not discriminate against an employee of A's (B)—*
>
> *(c) by dismissing B;*

36. Section 39(7)(b) ensures that this protection extends to those who have resigned in circumstances which would amount to a constructive dismissal:

> *(7) In subsections (2)(c) and (4)(c), the reference to dismissing B includes a reference to the termination of B's employment—*
>
> *(b) by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice.*

37. It is fair to say that this aspect of the claim was all but abandoned by the claimant during the course of the hearing, as he neither produced any evidence to support it nor questioned the respondent's witnesses about it.

Disability discrimination

38. The respondent neither conceded nor disputed that the claimant was a disabled person within the meaning of s.6 EqA, such that the Tribunal had to hear evidence and reach conclusions on the point as a prerequisite for going on to consider whether the respondent was under any duty to make reasonable adjustments for the claimant under s.20.

39. Section 6(1) EqA provides that:

> *(1) A person (P) has a disability if—*
>
> *(a) P has a physical or mental impairment, and*
>
> *(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.*

40. The Tribunal took into account the general guidance provided in Goodwin v Patent Office 1999 ICR 302, EAT and J v DLA Piper UK [2010] IRLR 936.

41. Subject to the claimant's status as a disabled person being established, the Tribunal had to deal with the allegation that the respondent failed in its duty to make reasonable adjustments under s.20 EqA. The duty applicable in this case is set out in s.20(3):

> *(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*

42. The Tribunal had to decide whether the respondent had knowledge of disability in order to be fixed with the duty for the purposes of sections 20 & 21 EqA. It then had to deal with the question whether a provision, criterion or practice (PCP) of the respondent's put the claimant at a substantial disadvantage by comparison with colleagues who were not disabled. Unless substantial disadvantage is established, the duty does not arise. 'Substantial' means more than minor or trivial (s.212(1) EqA). The purpose of the comparison with others is to establish whether it is because of the disability that a particular PCP disadvantages the claimant. See for example Fareham College v Walters [2009] IRLR 991, EAT.

43. Following Environment Agency v Rowan [2008] ICR 218, it is necessary to consider the nature and extent of the disadvantage in order to ascertain whether the duty arises, and what adjustments would be reasonable in order to alleviate that disadvantage. The employer is not required to treat the claimant more favourably – Arthur v Northern Ireland Housing Executive [2007] NICA. The question of substantial disadvantage is to be viewed objectively – Copal Castings v Hinton EAT0903/04.

44. In this aspect of the claims a further time point arose. The limitation period for the claim in respect of reasonable adjustments was 3 months from the date of the act complained of (s.123(1) EqA). That gave rise to a question as to when the act took place, to which s.123(3) is relevant:

> *(3) For the purposes of this section—*
>
> *(a) conduct extending over a period is to be treated as done at the end of the period;*

(b) failure to do something is to be treated as occurring when the person in question decided on it.

45. It was therefore necessary to identify when time started to run in order to calculate the 3 month time limit. If the Tribunal decided that the claim was out of time, it would need to consider whether there were just and equitable grounds upon which to extend time under s.123(1)(b) EqA.

Breach of contract / deductions from wages

46. There were two elements to this part of the claim. The first was whether commission payments are due to the claimant for the period between 1 July 2013, when his new more favourable contract took effect, and 28 February 2014 before the subsequent changes took effect. The Tribunal had to identify the terms of the contract which applied at that time, in order to decide whether those terms had been breached and/or whether there was a deduction of wages under Part II ERA.

47. The question of which contract terms applied to the claimant in 2013 and 2014 was at the heart of these claims. The respondent chose to present an argument based on the doctrine of mistake, and the Tribunal had to reach a view as to whether that doctrine was relevant according to the facts of the case.

48. The second element to this claim was whether the respondent had paid the claimant's accrued holiday pay correctly, in accordance with the terms of his contract.

49. If these payments were properly payable to the claimant in accordance with his contractual entitlements, then any non-payment would amount to a breach of contract and an unlawful deduction of wages contrary to s.13 ERA.

Findings of fact

50. The claimant began working for the respondent on 4 January 1999 as a salesman, selling the respondent's products and services to employers looking for advice and support in relation to HR and employment issues. Initially the claimant was earning a basic salary of £8,500 plus 15% commission provided he met a sales target, known as an uplift target, of £75,000 sales per quarter. In addition to his full commission rate of 15%, the claimant was entitled to other variable commission rates according to the manner in which the sales came about, for example depending on whether they arose from the respondent's seminars, from telesales or from the claimant's own contacts.

51. The claimant was issued with a document setting out main terms and conditions of employment on joining the company. His holiday entitlement was stated at that time to be 20 days plus 8 bank holidays. In April 2006 this increased to 32 days plus 8 bank holidays, as evidenced by a note in the respondent's staff handbook. This increased holiday allowance was a benefit accruing to employees with 5 or more years' service. Although a later version of the staff handbook (dated either 2010 or 2013) referred to an entitlement of 22 days plus 8 bank holidays for employees in the field sales role held by the claimant, his own entitlement was not in fact changed at any time before his employment ended.

52. The respondent's Commission Rules were set out in a separate document which could be varied from time to time and which formed part of the claimant's terms and conditions of employment. Those Commission Rules were generic and also made provision, for example, for different commission rates to apply if sales were discounted to customers or if those customers did not pay in full. The Commission Rules included provision entitling the claimant "to an additional percentage commission based on the net value of new business if certain quarterly targets are met", as set out in the version of the Rules drawn up on 2 January 1999. In practice, because there was a requirement that customers pay at least 25% of the package they had signed up to, and many signed up to a package extending over a five year period, individual salespeople such as the claimant would not expect to receive payment of their commission until after a lead in period of nine months.

53. Throughout his time with the respondent the claimant had a number of health issues, mainly relating to his heart. In September 1999 the claimant had a myocardial infarction, and another in December 1999. He required four stents to be fitted. In 2006 the claimant had a transient ischaemic attack and then in 2008 he had a fifth stent fitted. Separate from his heart condition the claimant experienced ongoing but occasion bouts of angina which were exacerbated by stress. The claimant's GP records show that he continued to demonstrate ongoing symptoms including chest pain, tiredness and lethargy, occasional angina and hypertension. In February 2011 the claimant decided to reduce his working hours to three days a week after a period of around four weeks on sick leave due to angina. He returned to a five day week in February 2013, mainly on the grounds that he was told that he would not get premier leads allocated to him if he stayed on a three day week.

54. The claimant did not experience any particular difficulty in carrying out the duties of his job, and was not impaired in his ability to carry out the day-to-day activities involved in his work, whether that was desk-based or entailed driving to and attending meetings with clients. The claimant found that work enjoyable.

55. At home the claimant did experience some restrictions on his ability to carry out day-to-day activities, being unable to continue doing any gardening such as mowing the lawn and digging, nor hoovering, washing cars or carrying out any activity which involved lifting a weight above shoulder height.

56. The claimant was taking various medications over a long term period. In October 2015 he met a consultant, Dr Galasko, whose report dated 29 October 2015 stated that if the claimant were to stop taking aspirin, that would put him at significant risk of a future heart attack.

57. In his report Dr Galasko identified issues relating to the claimant's health which can be summarised as coronary artery disease, though not severe angina, with symptoms including occasional angina, hypertension, tiredness and fatigue. Dr Galasko noted that the claimant suffered from chest pains which were not necessarily related to his cardiac problems, particularly when stressed. He identified the possibility of the claimant suffering from ischaemia, a reduction of blood flow to the heart caused by narrowed coronary arteries, as well as the possibility of pulmonary disease.

58. The respondent had knowledge of the claimant's heart condition at least from an episode in 2008 when the claimant's Managing Director, Peter Done, contacted the claimant's wife to ask how he was after the fifth stent was fitted. The respondent certainly had knowledge of the chronic issues with the claimant's heart by the time that new terms and conditions of employment were agreed with him in July 2013.

59. In June 2013 the claimant was involved in discussions with two of the respondent's managers, Geoff Ford, Group Sales Director, and Jason Harrison, Regional Sales Manager and at the time the claimant's line manager. Discussions also took place directly between the claimant and Mr Done at this time. The result of these discussions was that a new team of salespeople was created, to be known as the Ambassadors Team, the original members of which were the claimant and his colleague, Anthony Mollon. Mr Mollon had had a heart attack in May 2010 and later had a stent fitted. After a long period of time off work to recover, he returned to work for the respondent on 2 April 2012. He had originally joined the company before the claimant, in April 1997.

60. In the case of both the claimant and Mr Mollon the issues with their health, coupled with their length of service, were part of the rationale for creating the Ambassadors Team and changing their terms and conditions. The respondent wanted to retain these experienced and successful members of their sales team and, given their successful track record, it was also important that they be retained so as not to lose them to a competitor. There were two key changes to be implemented to their terms and conditions of employment. The first was that a failure to meet sales targets in the future would not attract any disciplinary consequences whereas in the past all members of the sales team would be vulnerable to disciplinary action if targets were not being met. The lifting of this threat was therefore a significant value to the members of the Ambassadors Team who, whether for health reasons or otherwise, were performing less well than they had in the past. The other key feature of the Ambassadors Team contracts was that the uplift target would be removed, such that commission on sales would be payable at the full rate and would not be halved (in the claimant's case to 7.5%) for failure to achieve a minimum volume or value of sales in any given quarter.

61. Mr Done, who was actively involved in these discussions with the claimant in June 2013, made the proposal to change his terms and conditions in these respects partly to remove the stress of having to reach targets in order to earn full commission. While the relaxation of the uplift target would enable the claimant and his colleagues in the Ambassadors Team to earn more commission than if their sales were lower, this would not have a significant financial impact on the business given the small number of people benefitting from this relaxation. In any event, the non-financial benefits to the business were also a factor, in retaining successful and experienced salespeople and preventing them from going elsewhere.

62. These new terms and conditions of employment were to take effect for the claimant from 1 July 2013, at which point the Ambassadors Team would come into existence under the direct line management of Mr Done. A further change which benefitted the claimant at the same time was an increase to his basic salary to £30,000, in keeping with a decision made by the respondent to increase basic salaries for a number of people, particularly new starters.

63. On 5 July 2013 Deborah Wyatt joined the Ambassadors Team, followed by Paul Bradley on 22 July, Frank Kirkham on 2 September and finally Peter Hipkiss on 1 October 2013. Like the claimant and Mr Mollon, Mr Kirkham was an older member of the team and all three men were over 55. Ms Wyatt, Mr Bradley and Mr Hipkiss were all under 55. The latter had no health issues though there were some questions about their recent performance. Within the Ambassadors Team there were variations between terms and conditions, for example commission rates, but all six members of the team benefitted from the lifting of the uplift targets and the removal of the threat of disciplinary action.

64. The manner in which the changes to the claimant's terms and conditions were implemented was that Geoff Ford, on the instructions of Peter Done, spoke to the claimant to clarify the terms and then he confirmed the changes in writing by a letter dated 24 June 2013, which the claimant accepted the same day. The letter recorded the fact that "the following terms" were "discussed and agreed" to take effect:

> "*From Monday 1st July 2013 you will not be a member of Jason Harrison's Regional Sales Team but will work with the support of a Telemarketer, liaising and reporting direct to Peter Done and myself.*
>
> *You will no longer carry an individual bonus or uplift target so full commission from your sales will be paid at your normal rate (subject to commission scheme rules, discounts set commission rates for Premier, Tribunal leads) and any deals that you generate will go on a separate sundries team figure."*

65. In his evidence to the Tribunal, Mr Ford suggested that there had been a misunderstanding between him and Peter Done as to the latter's intentions, but in his evidence he did not seek to resile from the terms that he actually offered to the claimant. In other words, the communication of the new terms as between Mr Ford and the claimant was clear and unambiguous. Furthermore, the Tribunal finds that in communicating the new terms to the claimant, Mr Ford was correctly carrying out the instructions given to him by Mr Done and that the respondent did not enter into those new terms in any way relying upon a mistake of intention or understanding. The reference in the letter of 24 June 2013 to the Commission Rules applying did not detract from the express terms set out in that letter or override them. On the contrary, the Commission Rules were to apply in accordance with the generic document as amended by the letter of 24 June 2013. In this way, the usual variations to commission rates (for discounted cases or bad debts) would continue to apply.

66. The letter of 24 June 2013 was written and signed by Geoff Ford and copied simultaneously to four other individuals in the respondent's business. These were Harriet Austin, who had an HR role; Keith Simmons and Joanna Berry, both of whom had responsibility for processing commission payments; and Anthony Sutcliffe, Director of Consultancy. Mr Sutcliffe had a senior role and later featured in these events when the respondent sought to undo the deal that had been struck.

67. When the claimant emailed Harriet Austin on 24 June to accept the terms, he referred explicitly to the fact that he would "carry no target from 1 July", would not be subject to uplift rules, and would "be paid by normal commission rates as before". The new terms and conditions operated from 1 July 2013 without incident, although in October of that year some confusion arose in email exchanges. Mr Done's PA

sent an email to the members of the Ambassadors Team and other colleagues setting out various points relating to the work being done by the Ambassadors Team. This email included the following:

> *"With regard to bonus, I can confirm that you are on the same bonus structure and uplift as normal, I have asked Harriet Jenkins to clarify this. You will not be under the same pressure as the regular teams to hit target."*

68. Later than same day the claimant emailed Mr Done's PA attaching written confirmation of the terms for the members of the Ambassadors Team "as discussed with both Geoff and Peter in face to face discussions". He suggested that "some wires are getting crossed somewhere" and said that they were "all under the impression that the uplift target was removed, but that the bonus scheme wouldn't apply". In a separate email on 7 October, Harriet Jenkins sent a message to all members of the sales team in which she referred to "some confusion" over the commission and bonus arrangements for the Ambassadors Team. On Peter Done's instructions, she stated that the quarterly uplift bonus threshold would still apply to the Ambassadors Team, and commission would be paid at half rate unless that uplift was achieved. That same evening the claimant emailed Ms Jenkins a copy of the 24 June letter setting out changes to his contract terms, "especially uplift and bonus targets of which there are none!!!". On 8 October Ms Jenkins replied to the claimant saying, "Please ignore my email yesterday. This was sent to you and Anthony Mollon in error". On 8 October the claimant also received a text message from Mr Done saying, "Sorry for the cock up, my fault. In your case same deal as always".

69. In a further email on 18 October, this time to Joanna Berry, the claimant queried his commission rate, which had been reduced on the latest statement to 7.5%, and referred to the fact that he "should be paid 15% as I no longer am subject to an uplift target".

70. Accordingly, during this period some confusion arose but on each occasion the claimant took care to correct the position. His attempts to do so were not countered by any response from the respondent saying that his understanding was incorrect. On the contrary, the respondent was explicit in its assurances that the claimant had understood the position correctly.

71. The respondent's stance changed in early 2014, when Peter Swift, Finance Director, became aware of the terms for the first time. He began to investigate the arrangements and was unhappy about the Ambassadors Team members having special terms on commission. He telephoned the claimant on 6 January 2014 to discuss the issue and on the same date the claimant emailed him to confirm the deal that had been struck. This led to a conversation between Mr Swift and Mr Done on 7 January and then a further call from Mr Swift to the claimant that day about the letter of 24 June 2013 being "ambiguous". There were subsequent conversations between Mr Swift and the claimant on 7 or 8 January, during the course of which Mr Swift referred to the claimant and other members of the Ambassadors Team, using the designation "the pipe and slippers brigade". The claimant was offended by that and took it to be a reference to his age.

72. On 10 January, as these issues were bubbling up, a quarterly sales meeting took place at which Mr Done said that everyone had misunderstood the terms.

Matters started to escalate from that point. At around that time Mr Done telephoned the claimant about the uplift target, shouting down the phone and expressing his anger. On 20 January the respondent wrote to the claimant and others in the Ambassadors Team, notably Mr Mollon and Mr Kirkham, seeking to make a unilateral and immediate change to their terms and conditions by revoking the relaxation of the uplift target. The practical effect of this would be that commission would only be payable at full rate if certain sales targets were met, namely 20 deals with an aggregate value of £200,000 each quarter. The letter was posted on Tuesday 21 January and stated that it "must be signed and returned" to Mr Done by Friday 24 January. That short time limit was extended by an email of 22 January, and the claimant was given until Monday 27 January to sign and return the new contract terms.

73. On 24 January a meeting took place between the claimant and Mr Done at which the claimant was put under undue pressure to sign the terms, being told that his "days will be numbered" if he did not. Mr Done made it plain that he could not and would not keep to the original agreement, and the claimant was put in a position where he had no choice but to accept the terms. He was told by Mr Done that his future employment with the company would be at risk if he did not sign.

74. On 24 January, after the meeting with Mr Done, the claimant was signed off sick with chest pains.

75. As time passed from late January onwards, the claimant realised that Mr Done had stopped speaking to him whereas previously he had had regular contact, with weekly phone calls. This was an important part of their working relationship given that Mr Done had for some months been his line manager.

76. On 29 January Mr Mollon wrote to the respondent declining to sign his new terms and Mr Kirkham similarly rejected the new terms on 30 January. On 3 February Mr Kirkham wrote to the respondent indicating a wish to retire, and later made an age discrimination claim which was resolved. Mr Mollon resigned on 21 February.

77. In the meantime the claimant remained on sick leave until 3 March 2014 when he returned to work. That day he was given a letter written by Mr Sutcliffe noting that he had not yet signed and returned the new contract terms, and purporting to clarify a misunderstanding relating to the terms in which the letter dated 24 June 2013 was written. Mr Sutcliffe said that that letter "contained incorrect information" in stating that the claimant would no longer carry an uplift target. He claimed that Mr Ford had misunderstood the instructions given to him by Mr Done, and that that misunderstanding had found its way into the 24 June letter. He apologised for the confusion but asked the claimant to return the letter of 20 January 2014 as soon as possible.

78. On that same day the claimant did sign his agreement to the new terms, marking some minor amendments on the letter to indicate the applicable commission rates. His covering email was sent on 5 March 2014 to Mr Sutcliffe, and copied to Mr Done, Mr Swift and Mr Ford. The email did not protest against the imposition of the terms, which the claimant accepted as taking effect from 1 March 2014. The

claimant felt he had no choice but to sign in order to protect his ongoing employment.

79. The claimant continued to work for the respondent under these less favourable terms. He became increasingly unhappy with his treatment by the respondent, perceiving that he was being undermined by reference to the Five Issues. Taking each in turn:

Issue 1: Removing experienced telesales staff

80. The respondent provided members of the sales team with support from telesales staff to help develop leads, though this did not amount to a right to have a particular person allocated. It was not unusual for the respondent to move telesales staff around to work with other members of the team.

81. In January 2014 Mr Day was allocated by Monica Sharples to work with the claimant in an effort to provide him with one-to-one support with telesales. The claimant was not unhappy about that and expressed to Mrs Sharples that he was confident he would also self-generate appointments. Mrs Sharples was mindful of the fact that her telesales team needed to earn commission in their own right and this would have an impact on decisions as to who should be allocated to which salesman. In other words, allocating a member of the telesales team to the claimant at a time when he was performing more poorly than in the past would have a direct financial impact on that person.

82. The claimant was absent on sick leave from 24 January until 3 March, and as a result Mr Day was reallocated to work with others temporarily. This was understandable given that he needed to be generating appointments and maximise his chances of earning commission. Mr Day then requested a permanent move so that he could improve his chances of sales leads being converted into sales.

83. Two other telesales staff, Deborah Mitchell and Michael Rawlinson, had previously supported all the members of the Ambassadors Team in 2013. They had, however, left and it was after Mr Rawlinson's resignation that Mr Day was brought in to help the claimant.

Issue 2: Allocating no company seminar

84. The claimant had always had a company seminar allocated to him each quarter, and had a legitimate expectation that this would continue in the early part of 2014. However, no such seminar was given to him, because the allocation was based on a salesperson demonstrating a good track record in the previous quarter. Although the claimant had a successful history of sales with the respondent, his performance had not been as strong in the latter part of his employment, and he had also had some time off sick which affected his financial performance.

Issue 3: Lack of contact from Mr Done

85. From late January 2014, after Mr Done had expressed his anger towards the claimant about his contract terms, he stopped communicating with the claimant. This was a significant change from the previous position, when the two men had had weekly contact by phone and text, outside of the regular team sales meetings.

Issues 4 & 5: Poor quality leads and appointments

86. The fourth and fifth issues were similar in nature and amounted to a complaint that the respondent was undermining the claimant's ability to generate good quality leads (various leads which together might be designated as premier leads), and thereby improve his conversion rates.

87. Like the company seminars, the allocation of these premier leads was governed by the recent performance of the salespeople, the best performing individuals being given the better opportunities. This meant the claimant was not given such leads as he had not performed as well in the recent past. Similarly, the quality of the appointments given to him was poor, but neither of these steps was taken deliberately or improperly. They were simply a reflection of the respondent's policies and practices on the allocation of opportunities to the better performers. The claimant had not been performing as well as previously in the quarter prior to these decisions being made.

88. The cumulative effect of the Five Issues led the claimant to resign on 7 July 2014, sending a short email in neutral terms as he feared the respondent might withhold his final pay if he were honest about his reasons for leaving. On 11 July the claimant then expanded upon his reasons in an exit questionnaire, saying:

> *"I resigned because my contract was changed and I was forced to sign it under duress. I was frightened and stressed, causing angina pains. My original contract amendment from July 2013 was put in place to alleviate stress in view of my heart condition and to reflect my loyalty and long service despite previous poor health. My contract of employment was amended to reflect new reporting and pay structure from 1 July 2013, was subsequently rescinded in January 2014, changes made to my pay structure were immediate and backdated to July 2013 without consultation or notice and was blamed on a misunderstanding between most senior management. I felt frightened, stressed and confused, nevertheless I was order to sign the backdated amendment, I did so as I feared I would be terminated. My stress and heart condition episode was totally ignored at that stage."*

89. The claimant's employment ended on 14 July 2014, at which point he was paid for accrued but untaken holiday on the basis of an entitlement of 22 days plus 8 bank holidays. The claimant began a new temporary job on the following day. He did not resign in order to take up that job, but in response to the respondent's behaviour towards him. On 7 August he raised a grievance with the respondent and this was turned down by a decision letter dated 18 September. An appeal against that outcome was raised on 24 September but the claimant had to wait until 23 December to get a decision on that, rejecting his appeal.

Conclusions

Unfair dismissal

90. The claimant consented, under pressure, to the new terms and conditions presented to him unilaterally in January 2014. Accordingly, there was no breach of the express terms of his contract. However, in its handling of this issue the

respondent did breach the implied duty of trust and confidence entitling the claimant to resign. The claimant was therefore dismissed within the meaning of section 95(1)(c) ERA.

91. The respondent breached the implied duty of trust and confidence in that:

91.1 The respondent disingenuously tried to say that the terms agreed in July 2013 were ambiguous and sought to blame the claimant for misunderstanding the position, when he had not.

91.2 The respondent through Mr Done reacted angrily to the situation with his phone call and the meeting in January 2014.

91.3 The letter of 20 January 2014 was sent with only a few days to sign, and without any attempt to consult with the claimant or take into account his views.

91.4 The claimant was given an ultimatum in no uncertain terms at his meeting with Mr Done, which was to sign the less favourable terms or put his job at risk.

91.5 Mr Done stopped speaking to or contacting the claimant even though they had an ongoing line management relationship. That conduct was plainly a reaction to the claimant's attempts to assert his right to have his contract terms honoured.

91.6 The respondent knew the claimant had a heart condition but took no steps to alleviate the stress which would inevitably be caused by its attempt to renege on the previously agreed terms.

92. The claimant did not affirm his contract by continuing to work on the new terms nor did he waive the breach of the implied term. The recent imposition of new terms had a serious impact on the claimant's health, leading to a period of some weeks off sick. The situation was exacerbated by the lack of contact from his line manager, which turned out not to be temporary. The claimant was entitled to resign in reliance upon Mr Done's ongoing treatment of him, which was a continuing state of affairs, taken together with the cumulative breaches of trust and confidence.

93. The claimant's resignation was also influenced by his perception that he was being undermined in the way that the respondent was allocating work and leads to him. This was an understandable but mistaken interpretation of events. Viewing Issues 1, 2, 4 and 5 objectively, they did not individually or cumulatively amount to a breach of the implied duty of trust and confidence.

94. The Tribunal accepted the respondent's explanations that no salesperson had the right to any particular person to assist them with telesales, and that the company did move such people around within the team. The Tribunal also accepted the respondent's evidence that the allocation of company seminars, which can be a good source of sales, is based on the salesperson having demonstrated a good track record in the previous quarter. At the time the claimant had not performed as well as he had in the past and had also been on sick leave. This quarter was the first time that the claimant had not been allocated any company seminar but the Tribunal

is satisfied that that was neither a deliberate decision nor an attempt to undermine him. For the same reasons, the Tribunal accepted that premier leads are given to the best performing salespeople, and although it may be the case that the claimant was given some poor quality appointments during this last period of his employment, that was not deliberate conduct on the respondent's part.

95. Although the claimant was mistaken about these issues, subjectively it is unsurprising that he would see it that way. Nevertheless, the test is an objective one and the Tribunal has found that the respondent did not act improperly in the way it made these arrangements. That said, the Tribunal is satisfied that the claimant was entitled to resign on 7 July 2014 for reasons already given. The ongoing lack of contact from Mr Done, added to the previous breach of the implied duty, justified that resignation and the claimant did not affirm his contract in the interim.

96. The lack of contact from Mr Done falls into a different category, being conduct calculated or likely to destroy trust and confidence in the employment relationship, particularly against a backdrop of the events of January 2014. While the claimant reluctantly accepted his new contract terms in early March, following a period of sick leave, it took some time for him to appreciate that the lack of contact was ongoing.

97. The claimant's pleading referred specifically to a lack of responses to texts, but his case as a whole was clearly about the overall lack of contact from Mr Done, Mr Done had since July 2013 been the claimant's line manager, a relationship which requires a degree of close working and a level of trust and cooperation in order to make the relationship work. Previously the relationship had enjoyed these characteristics and had worked well.

98. This changed when in late January 2014 Mr Done expressed his anger and frustration in his last interactions with the claimant. Having not heard from Mr Done himself, and having the benefit of the claimant's unchallenged evidence on the point, the Tribunal had no difficulty in accepting that this was the case. The Tribunal infers that this arose because Mr Done felt embarrassed at the about-face he was being asked to carry out. He had personally been involved in offering more beneficial terms to the claimant in July 2013 and only a few months later his Finance Director was raising an objection to those terms. In effect, the lack of contact was a way of punishing or excluding the claimant and there was no legitimate basis for Mr Done to ignore him in this way. The claimant had simply sought to resist the unwarranted pressure he was being placed under to sign away the more beneficial terms Mr Done personally had offered only 6 months previously.

99. In principle the variation to the claimant's contract might have provided a proper basis for saying that the reason for dismissal was 'some other substantial reason' falling within s.98(1)(b) ERA, but in reality this was not a straightforward commercial decision to alter contract terms. It was rather an exercise in resiling from terms recently agreed with the claimant. No potentially fair reason was established by the respondent. Even if it had been, the Tribunal concludes that the dismissal was unfair in all the circumstances of the case and under s.98(4) ERA. No employer acting reasonably would have dismissed the claimant in the manner in which this claimant was dismissed.

Age discrimination

100. The claim for harassment related to age required the Tribunal to address the following questions in the context of s.26 EqA:

- Did the respondent engage in unwanted conduct?
- Did that conduct have the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
- Was that conduct related to the claimant's age?

101. Mr Swift did not deny making some reference to the "pipe and slippers brigade" in a conversation with the claimant on or around 8 January 2014. He did not see that as a comment relating to age and did not intend to cause offence by it. Subjectively speaking, it was not surprising that the claimant perceived the comment as a reference to his age, or that he was offended because he took it to mean he was taking it easy and working less hard than younger members of staff. The comment was an unwanted one-off remark which could be interpreted as referring to the claimant's age.

102. However, taking into account the factors set out in s.26(4) EqA, the Tribunal concludes that the comment had neither the purpose nor the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. This has to be judged objectively as well as by reference to the claimant's perception. The circumstances were such that the respondent had been taking steps to retain its experienced members of staff, some of whom like the claimant were older. There was no evidence to suggest that the respondent had a negative perception of the claimant as an older employee, and on hearing Mr Swift's evidence the Tribunal is satisfied that he did not intend any offence. As to whether it was reasonable for the claimant to perceive the comment as he did, we do not believe that this part of the test is satisfied. This was a trivial, off the cuff comment which cannot objectively be described as creating the effect required for a harassment claim to be made out. Applying the guidance in Insitu Cleaning v Heads 1995 [IRLR] 4, the Tribunal did not consider this comment to be sufficiently serious to form the basis of a complaint of harassment.

103. In any event, the claimant did not bring this claim within 3 months of the comment on 8 January 2014, and he produced no evidence to explain the delay in bringing this claim. It was therefore out of time and the Tribunal found no reason to extend time on just and equitable grounds under s.123(1)(b) EqA.

104. The claim under s.39 EqA that the claimant's dismissal was discriminatory because it related to his age was barely touched upon during the hearing and was all but abandoned by the claimant. He produced no evidence to support the claim, and when cross-examined about it had no substance with which to back it up. There was therefore no basis upon which the Tribunal could find any primary facts to support this claim, and it does not therefore succeed.

Disability

105. The Tribunal is satisfied that at the material times the claimant was a disabled person within the meaning of section 6 Equality Act 2010. He had a physical impairment (coronary artery disease) which was long term and impacted upon his ability to carry out some day to day activities.

106. The respondent had the requisite knowledge of the heart condition and the chronic nature of the claimant's health problems from 2008 onwards.

107. We considered whether any duty to make reasonable adjustments arose. This required us to consider whether there was a PCP applicable to the claimant and whether he was substantially disadvantaged as a disabled person by reference to that PCP. The question of substantial disadvantage required us to view the matter objectively. The respondent did operate a PCP, which was the criterion under the Commission Rules to achieve a minimum level of sales in order to earn commission at the full rate rather than half rate. The particular PCP which was imposed by the letter of 20 January 2014, with effect from 1 March 2014, was that the claimant must achieve 20 deals worth an aggregate of £200,000 in order to achieve 15% commission.

108. We asked ourselves whether the claimant was put to a substantial disadvantage by comparison with sales colleagues working in the respondent's sales team by virtue of his being a disabled person. We noted that the claimant along with other members of the Ambassadors Team continued even after March 2014 to benefit from the advantage of not being disciplined if he did not meet sales targets. However, having that advantage did not in our view cancel out the disadvantage of the target being imposed.

109. The imposition of the uplift target had the potential to amount to a substantial disadvantage to the claimant as a disabled person, in that he might have been unable to contribute the hours or the effort required in order to earn his full commission, which his non-disabled comparators could contribute with less difficulty. In principle, that could amount to a substantial disadvantage and that would lead us to a discussion of whether the removal of the uplift target was an adjustment that was reasonable, having regard to the financial implications for the respondent. We note that Mr Done thought that the removal of the target was a reasonable step to take when he agreed to this in July 2013. At the hearing the respondent sought through Mr Swift to persuade us that the financial consequences of removing the uplift target for the Ambassadors Team were very significant, but the respondent offered us no specific evidence in support of this, only generalisations. There might be a difference between the claimant earning 7.5% or 15% commission, but we do not accept that this would inevitably have a significant financial impact in relation to the respondent's business as a whole. If sales were poor, those commission figures would be correspondingly low. If such an adjustment were made, it would affect only a handful of people. Furthermore, it was clear that the respondent saw value in retaining experienced members of the sales team with a successful track record, and saw value in not allowing them to leave and work for a competitor. These would be factors going to reasonableness.

110. The difficulty with this aspect of the claimant's claim is that he did not provide us with any evidence that he was *actually* disadvantaged, or that a reasonable adjustment would have alleviated any such disadvantage. From July 2013 the claimant was on a higher basic salary of £30,000 which gave him a financial cushion against lower sales than he had achieved in the past. He gave no indication to the Tribunal, despite being questioned about this, as to the impact on his health of having to work harder to achieve full commission, nor did he suggest that there was any such financial pressure on him.

111. For these reasons the Tribunal concludes that the claimant was not in fact subjected to any substantial disadvantage by virtue of the PCP, by comparison with other members of the respondent's sales team who were not disabled. Accordingly, the respondent was not under a duty to make any reasonable adjustments in respect of the PCP.

112. In any event, the Tribunal considered whether this part of the claim could be entertained or whether it was in fact out of time. The decision to reinstate the uplift target (which might in hindsight be viewed as the taking away of a previous reasonable adjustment) was a conscious decision made by the respondent at the latest by 20 January 2014, albeit not implemented until 1 March that year. The three month time limit for making a claim was therefore triggered on the date the decision was made, in accordance with s.123(3)(b) EqA, but the claimant did not put in a claim to the Tribunal until many months later, on 2 December 2014. The Tribunal did not feel it was just and equitable to extend the time limit under s.123(1)(b) EqA, in the absence of any evidence from the claimant to explain the delay.

113. Therefore, if we are wrong in our conclusion that the duty to make reasonable adjustments was not triggered, any such claim was out of time and the Tribunal found no grounds upon which to exercise its discretion to extend time.

Breach of contract / unlawful deductions from wages

114. Having found that the claimant had the benefit of more favourable contract terms from 1 July 2013, the full commission rate of 15% applied from that date, without the application of any sales or uplift target. That entitlement continued until the contract terms were varied with effect from 1 March 2014. However, the respondent retrospectively paid the claimant as if the July 2013 terms had never taken effect, which was a breach of his contract. Any shortfall arising is therefore an unlawful deduction from wages under s.13 ERA, though in the absence of evidence of the amounts and due dates of the commission payments, the Tribunal was unable to determine whether any such claim was made in time. This may in any event be moot, because any shortfall in commission payments is payable to the claimant as damages for breach of contract and that claim was brought in time, within 3 months of the effective date of termination.

115. Having found that the respondent was in no way mistaken about the terms which it offered the claimant in July 2013, the doctrine of mistake has no application on the facts of this case.

Holiday pay

116. When he first joined the respondent the claimant was entitled to holiday pay as set out in his main terms and conditions of employment, amounting to 20 days plus eight bank holidays. The claimant said this increased to 32 days after five years' service, as evidenced by the extract from the respondent's handbook dated April 2006. The handbook did not have contractual effect but the Tribunal accepts that it corroborated the claimant's oral evidence, even if the handbook was not in itself capable of amending his contractual terms.

117. The respondent sought to persuade us that the later version of the handbook represented the true holiday entitlement, being 22 days plus 8 bank holidays, but there was no evidence that such an adverse change to the holiday entitlement was ever communicated to or accepted by the claimant. A reduction of 10 days' holiday, had it been implemented, would have been extremely controversial and we do not accept that a page in a handbook is sufficient to give effect to such an amendment.

118. In the context of the Commission Rules, the Tribunal was shown a memo notifying sales team staff in October 2012 of updates and revisions. The memo said that communications about changes would usually be in the form of an email memorandum. No such document evidencing changes to the claimant's holiday entitlement was produced. The Tribunal asked the respondent to produce records of the holiday actually taken by the claimant in order to help resolve this question, but the respondent was unable to produce any such evidence during the hearing.

119. The Tribunal noted that a holiday card which the respondent was able to produce for Peter Hipkiss, dated 2014, showed a holiday entitlement of 32 days. Like the claimant, Mr Hipkiss was also a field-based salesman. Mr Swift was unable to explain this record when giving evidence.

120. The Tribunal therefore accepts the claimant's oral evidence and concludes that he was entitled to an annual holiday allowance of 32 days plus eight bank holidays. Taking the entitlement of 32 days pro rata, the claimant was entitled to 17 days, of which four had been taken and nine had been paid for on the incorrect basis. The claimant is therefore entitled to a further payment for four days' holiday pay.

_____

Employment Judge Langridge

10th May 2017

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE