EMPLOYMENT TRIBUNALS

Claimants: Mr I Fogg
Mr G Rowlands

Respondent: Professional Cost Management Group Ltd

HELD AT: Manchester **ON:** 17, 18 & 19 October 2017
20 November 2017
8 December 2017 (In Chambers)

BEFORE: Employment Judge Hill

REPRESENTATION:

Claimants: **Mr T Kenward - Counsel**
Respondent: **Mr D Northall - Counsel**

JUDGMENT

The Claimants' claims for unfair dismissal fail and are dismissed.
The Claimants' claims for unlawful deduction of earnings/underpayment of holiday pay fail and are dismissed.

REASONS

The Evidence

1. The Tribunal was provided with the following:

1.1.1. An agreed bundle of documents page numbered 1 - 542

1.1.2. Witness statements for the Claimants, Mr Fogg and Mr Rowlands.

1.1.3. Two witness statements for the respondent: Ms Jennifer Draper; Mr Matthieu Pettex Sabarot.

Claims

2. The Claimants complained of unfair dismissal as a result of their contracts of employment being terminated by Respondent after failed negotiations to vary their contracts of employment and their non-acceptance of re-engagement on different terms. The Claimants also bring claims of unlawful deduction of wages for failure to include commission payments with their holiday pay.

3. The respondent resisted the claims on the basis that they had a fair reason to dismiss, SOSR, and that the Respondent did not make unlawful deductions from the Claimants' holiday pay payments.

4. At the beginning of the hearing the Tribunal in discussion with the parties agreed that the following issues would need to be determined:

Issues to be determined

Unfair Dismissal

5. What was the reason, or principal reason for dismissal?

5.1. The Respondent relies upon SOSR

6. Did the Respondent act reasonably in treating that reason as sufficient for each of the Claimants' dismissals.

7. In the event that each dismissal is found to be unfair:

7.1. Would a fair procedure have resulted in dismissal in any event (Polkey)?

7.2. Did each Claimants fail to mitigate his loss by unreasonably refusing an offer of reengagement?

7.3. Should any compensation payable to C1 be reduced to take into account the alleged damage to a company issued laptop?

8. Holiday Pay

8.1. Was each Claimants' commission normal remuneration within the meaning of Article 7 of the Working Time Directive?

8.2. If so, what is the correct Reference period for averaging pay for the calculation of holiday pay?

8.2.1. The Claimants contend it was 2 years

8.2.2. The Respondent contends it is 12 weeks as required by s221 [3] ERA.

8.3. Over what period had each Claimant suffered a series of deductions? In particular has the series been broken by a period of 3 months or more at any time and if so is any part of any complaint out of time?

Findings of Fact

9. The Respondent was a subsidiary of Ayming Group. Ayming had expectations that the Respondent was profitable and due to lack of profitability had for a number of years attempted to sell the business as it was loss making. No sale had taken place, so in 2015 the Respondent appointed a Managing Director who was tasked with bringing the business back into profit. Previously there had been no MD in place.

10. The Claimants were employed by the Respondent as Senior Telecoms Analysts; Mr Fogg having commenced employment on 3 July 2006 and Mr Rowlands having commenced employment on 24 November 2003.

11. The main business of the Respondent was to audit their client's historic telecommunications and electricity invoices in conjunction with the associated contracts. The objective was to identify any overcharges mainly from a regulatory or contractual perspective and secure ongoing savings and/or obtain refunds for their clients. It was usual for the Respondent to then charge their client a fee based as a percentage of the refund. The Claimants worked primarily on Communication Providers (PCs).

12. The Claimants received commission payments as part of their remuneration packages. In 2012 both Claimants approached the Respondent with a proposal to vary their commission structure. The new commission structure agreed from 1 January 2013 was:

    12.1. Commission of 25% and all net revenues for all new claim types identified (to be shared equally with both Claimants); to be paid upon receipt of payment from each client. All new claim types have to be agreed and authorised as detailed in the PCMG Limited commission claiming process.

    12.2. Net CP revenue of £1.150 to £1.299m you will receive commission of 27.5% (to be shared equally with both Claimants) to be paid upon receipt of payment from each client.

    12.3. Net CP revenue above £1.3m and above you will receive commission of 30% (to be shared equally with both Claimants) to be paid upon receipt of payment from each client.

13. A further addendum was issued on 21 December 2012 which stated:

    13.1. Further to my earlier letter I can confirm that the agreement dated 17 December 2012 effective 1 January 2013 also covers all claims on new customers that you bring to the business.

14. This commission structure remained in place until the claimants' contracts of employment were terminated.

15. In March 2016 Ms J Saward (now Draper) took up employment with the Respondent as Managing Director. Prior to this no MD had been in place for a number of years.

16. Upon her appointment Ms Draper undertook a review of costs within the business because the Respondent was operating at a loss. Prior to Ms Draper joining the business the Group had made serious attempts to market the Respondent business for sale because it had been identified as a loss making part of the group. Ms Draper's key objective was to ensure that the business became profitable and to secure its future within the Ayming Group.

17. Ms Draper began a review of the Respondent business in order to understand the Company's revenue streams and costs. At the time of her appointment the budget had been reforecast downwards from £4.9m to £4.1m. One of the first issues Ms Draper decided to tackle was taking control of costs within the business.

18. Ms Draper said that she started with what she termed 'low hanging fruit' for example, stationery and lease vehicles. Ms Draper took control of recruitment and only replaced out going employees where absolutely necessary.

19. In addition Ms Draper looked at remuneration packages including salaries, commission payments and bonuses. Ms Draper did not replace some outgoing employees which had an effect on the overall salary budget. Whilst carry out this review Ms Draper looked at the Claimants' commission payments and noticed that they were extremely high and out of line with the rest of the Respondent's business, meaning the Claimants were on higher packages and commission rates than the rest of the sales team as well as some senior managers.

20. Ms Draper looked at all the commission schemes in the business. The sales team earned 10% commission on customers brought into business and other telecom analysts received 2% on new claim types for 12 months from the date of the first invoice. The Claimant's current arrangement meant that they received higher rates and commission with no end date.

21. Ms Draper analysed this commission structure and the effect the commission payments had on the company's profitability and in particular Earnings before Interest and Taxes "EBIT" which was a key indicator of the profitability of the business.

22. Ms Draper found that commission payments to the Claimants had accounted for at least 50% of the company's commission bill for the years 2013 -2015 and had a significant impact on EBIT.

23. The Company's revenue came from essentially carrying out forensic audits of client businesses to identify whether any overcharges or duplicate payments had

occurred and focused on three main areas: Energy, which amounted to around 50% of the Company's revenue; telecoms which also involved regulatory compliance issues including reviewing Determinations made by relevant regulatory bodies and applying them to charges which had been levied on clients and determining whether those determinations could be cross applied to other clients, and Accounts payable. In all types of work the Company's revenue came from doing the work at no cost to the customer but to apply a percentage charge on whatever was recovered for the client.

24. The Claimants had identified during the course of their employment, an area of recovery focusing on new claim types which could be identified for client telecom providers on the basis of determinations made by Ofcom in relation to other providers. Other analysts mainly worked on existing claim types.

25. Both Claimants worked from home but would go into the office for meetings. They worked on claims together and did not work along side other analysts. The Claimants current commission arrangements meant that commission was shared and effectively whatever one was working on the other would benefit from or working together. The Claimants work would not unusually take months or even longer to come to fruition. Ms Draper considered that it would be better for the Company if they shared their knowledge more widely amongst the team and that the work could be shared more equitably.

26. After reviewing the business Ms Draper carried out what she referred to as a 'kick off' meeting with the Claimants (separately) on 22 June 2016. The Claimants were not warned about these meetings and neither were they provided with any documentation prior to the meeting. During the course of the meeting Ms Draper stated that she wanted "parity in terms of the business – 2%"; referring to the commission structure.

27. The Claimants were then invited to a consultation meeting on 21 July 2016 to discuss the Company's proposals and to look at any suggestions the Claimants had. Graham Rowlands therefore emailed Ms Draper asking for details of the Company's proposals and an explanation of how the proposals had been arrived at. Ms Draper did not send any proposals in writing but stated that the meeting would be about laying out the options and a collective discussion.

28. The second meeting went ahead without any written proposals being provided and Ms Draper responded to a question by Mr Rowlands in respect of what would happen if they did not agree and was informed that if terms could not be agreed ultimately the end result would be termination and reengagement on new terms.

29. At these meetings the Company's profitability and in particularly EBIT were discussed and the Claimant's provided Ms Draper with information regarding revenue and how in their view their work subsidised losses made by other parts of the business during the meeting and afterwards via email. They also requested details of the written proposals.

30. On 19 August 2016 the Claimant's were provided with the Company's proposals which were:

    30.1. 2% commission on all claims identified and recovered from the client (this is on net revenues received by PCMG invoice value to the client) for a period of 12 months from the date of the 1st invoice to be paid upon receipt of payment from each client.

    30.2. The Company reserved the right to amend the Commission Payment by giving three months notice

    30.3. The Company reserved the right to withhold payment in exceptional circumstances for example if an employee was suspended from work pending disciplinary action and if an employee is dismissed for Gross Misconduct the commission payments shall be forfeited

    30.4. All commission payments terminate immediately upon termination with the Company for any reason

31. The proposal also set out further details of transitional arrangements in respect of new claims identified by the Claimants prior to 22 June 2016.

    31.1. The Employee shall be entitled to receive commission of 12.5% of all net revenue to be paid on or prior to the End Date detailed in the attached document. Thereafter any payments received from the client in relation to these listed claim types shall be considered under the general commission rules detailed above.

    31.2. Appended to the email was a document that listed 14 new claim types with end dates ranging from 30 September 2016 to 23 May 2017.

32. A further consultation meeting took place on 6 September 2016 where Ms Draper set out a slight revision of the proposals by extended the 'end date' to 12 months. Both Claimants were unhappy with the proposals and considered that their previous agreement should be honoured.

33. After the meeting Ms Draper set out further proposals including a phased commission rate on new claims starting with 6% for six months and 3% for a further period of 12 months at which point it would revert to the 2% previously put forward.

34. The Claimant's were greatly concerned that the Respondent was seeking to curtail their commission entitlements after termination. Ms Draper considered this was not a change to their current terms and would not be removed. Further Ms Draper would not agree to amend the proposal so far as it affected retrospective claims.

35. The Claimants put forward their counter proposals in October 2016 within which they offered that their terms remained the same for New Claims and New

Customer Claims except that the % of net revenue be reduced to 15% split evenly between the two of them equating to 7.5% each. The Claimants made it clear that they would not agree to any retrospective changes.

36. A Further meeting was held on 21 October 2016 to discuss the proposed changes and discussions around the cut off date took pace. This resulted in the Claimants producing a spreadsheet in November 2016 setting out claims that had been missed off Ms Draper's original addendum to her proposals.

37. On 18 November 2016 Ms Draper sent an email setting out the Company's final proposal set out at page 240 of the bundle. This proposal set out a further concession which entitled each Claimant to 5% commission for a period of 12 months from the date of the first invoice raised following the commencement of the new terms.

38. The Claimant's rejected the proposal and in particular would not agree to any revision of their commission entitlement for Existing New Claims and they would not agree to their entitlement coming to an end upon the termination of their employment with the Company.

39. On 30 November 2016 Ms Draper sent the Claimants an email asking them to sign the new terms if they agreed, within 7 days and that the commencement date would be three months from the date of signature. She informed the Claimants that if they did not sign and agree the new terms that the Company would issue notice of dismissal the following week.

40. The Claimants did not agree and did not sign the new terms and notice was therefore issued to the Claimants on 8 December 2016. The letter confirmed that their employment was being terminated and they were offered reinstatement on new terms and they were given the right of appeal.

41. The Claimants sent a letter of appeal dated 12 December 2016. The Claimants argued that if the Company was struggling financially then the focus should be on stripping out non-profit making costs of which they considered there were many. They also stated that they had agreed to reduce their commission by up to 50% for any new claims generated post a revised contract. The main point however, for the Claimants was the retrospective effect of the proposals for work they had already performed.

42. Mr Fogg's letter of appeal specifically stated that he 'agreed to accept a reduction in commission for Future New Claims' but 'cannot accept clauses 4 and 5.3' which related to commission payable for work already undertaken.

43. Mr Matthieu Pettex Sabarot who was a member of the Amying Group Board, conducted the Appeal hearing on 17 January 2017. At the appeal meeting the Claimants argued that their part of the business was making a profit and it was other areas that were affecting the overall profitability of the business.

44. At the appeal the Claimants argued again that their part of the business had and was making a profit. However, the claimants also again stressed that they did not have a problem with reducing the commission structure for new claims but they could not agree to changes that in their view affected their statutory rights being clause 4 and 5.3 relating to work already undertaken and that commission would cease upon termination of employment.

45. After the appeal meeting the Claimants were sent copies of the appeal hearing notes by Angela Brodie the HR Manager which they did not consider were accurate and responded on 25 January 2017 reiterating that they would not accept clause 4 or 5.3 but that they would reluctantly accept the revised commission structure for work going forward ie the phased reduction in their commission for new claims from 6% to 2% over an 18 month period.

46. Angela Brodie responded to that email informing the Claimants that Matthieu was 'gathering information' and would respond to them after that. There was a delay in responding but eventually the Respondent sent a letter with the outcome of the appeal to the Claimants on 27 February 2017.

47. Mr Sabarot responded to the points raised at the appeal (see doc 390-392) but did not refer to the concession made by the Claimants in their emails of 25 January 2017. From the evidence of Mr Sabarot it would appear that he had not read that email and was not aware that the Claimants had made a concession of the commission structure going forward. Essentially Mr Sabarot concluded that Ms Draper's decision to dismissal and offer reengagement was reasonable and should stand.

Main Issues in Dispute

48. The Claimants allege that the Respondent did not have a sound business reason to make the unilateral change to their contracts of employment and therefore the reason for dismissal does not amount to some other substantial reason – SOSR.

49. The Claimants allege that the consultation process itself was flawed and in particular they were not provided with sufficient information during the process to make proper counter proposals and that the Respondent did not refer to their email dated 25 January 2017 in respect of the concession made by the Claimants either at the appeal outcome stage or at all.

50. The requirement to accept reduced commission terms in respect of work already done and that commission would cease upon termination was not fair and was unreasonable.

The Law

Unfair Dismissal

51. The burden of proof rests with the Respondent to show the reason for the dismissal. S.98 (2) of the Employment Rights Act 1996 (ERA) sets out potentially

fair reasons for dismissal, however, S98 (1) (b) provides a further potentially fair reason that of 'some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held', commonly referred to as SOSR.

52. For a unilateral change in terms and conditions to amount to SOSR the Respondent must show that the changes to those terms and conditions were not imposed for arbitrary or capricious reason but were in pursuit of a 'sound business reason'. **Hollister v National Farmers' Union [1979] ICR 542.**

53. The reason for the change does not have to be a reason that an Employment Tribunal considers sound but rather one which a reasonable employer might regard as sound.

54. The proposed changes do not need to be critical to the survival of the business and neither do they need to show a discernible improvement in the business operation. In Kerry Food Ltd v Lynch [2005] IRLR 680 the EAT referred to the 'low hurdle' for showing SOSR.

55. When determining cases of SOSR it is important for the Tribunal to ensure that it does not confuse the tests for determining the reason for the dismissal i.e. a reason that could justify dismissal and the reasonableness of the dismissal under S.98(4).

56. The Respondent is required to show that the substantial reason for the dismissal was a potentially fair one and it is then for the Tribunal to decide whether they acted reasonably under S.98(4) of the ERA.

57. Section 98 of the Employment Rights Act 1996,

(a) did the respondent have a potentially fair reason to dismiss?

(b) did the employer act reasonably or unreasonably in dismissing the claimant for the reason given?

58. Section 98(4) provides that the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer):

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and

(b) shall be determined in accordance with equity and the substantial merits of the case.

59. In respect of proposed contractual changes whilst an employee is contractually entitled to resist such changes it does not automatically mean that the dismissal will

be unfair. Although, it is accepted that a basic principal of contract law is that any variation to the contract should be agreed by both parties in order to take effect, an employer can fairly dismiss an employee for refusing to accept the changes where there is a sound business reason for doing so.

60. If the Respondent can establish SOSR as a reason for dismissal, the Tribunal is required to apply S. (98) (4) and consider the reasonableness of the change/s and dismissal. The Tribunal must ask itself whether the decision to dismiss for SOSR falls within the band of reasonable responses that a reasonable employer might adopt.

61.When assessing the reasonableness of the dismissal the Tribunal will often be required to carry out a balancing act and in **Richmond Precision Engineering Ltd v Pearce 1985 IRLR 197 the EAT** said *"the task of weighing the advantages to the employer against the disadvantages to the employee is accordance with the equity and substantial merits of the case. Merely because there are disadvantages to the employee, it does not by any means follow that the employer has acted unreasonably in treating the failure to accept the terms which they have offered as a reason for dismissal."*

62. Further in **Catamaran Cruisers Ltd v Williams and ors [1994] IRLR 386,** the EAT confirmed that the Tribunal is required to carry out a balancing process and approved comments made by the EAT in **Chubb Fire Security Ltd v Harper [1983 IRLR 311,** that even if it was reasonable for an employee to refuse to accept the new terms it did not necessarily follow that it was unreasonable for the employer to dismiss.

Holiday Pay

63. The Working Time Regulations 1998 (WTR 1998) as amended allows for 28 days leave inclusive of 8 public holidays. WTR regulation 16(1) provides that a worker is entitled to be paid at the rate of a weeks pay in respect of each week of annual leave to which he or she is entitled. A weeks pay is calculated in accordance with sections 221 to 224 of the ERA 1996.

64. In **Lock v British Gas Trading Ltd [2014] C-539/12 IRLR 648** the ECJ held that pay under the Working Time Directive cannot be calculated on salary alone where a worker's remuneration includes commission determined with reference to sales achieved. The purpose is to ensure that workers are not placed at a financial disadvantage when taking their statutory leave since no commission will be generated during that leave.

65. In respect of the calculation period; under ERA 1996 s.221(3) a period of 12 weeks should be used to calculate pay where there are no normal working hours or where pay varies according to the amount of work done.

66. The Lock decision did make reference to the issue of calculation period and said "it is for the national court or tribunal to assess, in the light of the principles identified in the court's case law, as referred to above, on the basis of an average over a reference period which is considered to be representative, under national law, the methods of calculating the commission payable to a worker such as the claimant in respect of his annual leave achieve the objective pursued by article 7 of the Directive 2003/88".

67. The Court of Appeal in this case did suggest that there might be cases where a different reference period would need to be used such as cases that involve an annual bonus. However, in Bear Scotland v Fulton [2015] IRLR 15 the EAT implied that the 12 week reference period in S.221 (3) of the ERA 1996 was sufficiently representative.

68. The purpose is to ensure that taking annual leave does not financially disadvantage the worker.

Conclusions

Unfair Dismissal

The Reason for the Dismissal

69. The Tribunal finds that the reason for the dismissal was SOSR. The Tribunal finds that the Respondent has shown that there was a sound business reason for imposing the new terms and that they were not for arbitrary or capricious reasons.

70. The Respondent set out reasons why they proposed changes to the claimants' terms and conditions and in particular their commission payments. The business was financially underperforming and Ms Draper had undertaken to look at the costs of the business and had looked at various aspects including the claimants' commission figures. It was clear from the evidence before the tribunal that the claimants' commission payments were out of step with the rest of the business with the effect that their commission payments represented between 50-73% of the total commission bill per annum. This in turn had an effect on the profitability of the business and Ms Draper was tasked with making the business more profitable.

71. Whilst it is noted that the Claimants' did not agree with the analysis of profitability of the business, it was clear to the Respondent and on the Claimants' own evidence that the business as a whole was showing a negative impact on EBIT. The Claimants' sought to separate their work from the rest of the business during the course of the consultation process, appeal and during this hearing. The Respondent was, however, looking at the business as a whole. The Tribunal finds that it was reasonable for the Respondent to take this approach and a reasonable employer would be entitled to do so.

72. When looking at the commission structure that was in place for the Claimants the Respondent considered that commission being paid out predominantly in relation to historic new claim types and as a result new opportunities were not coming into the

business. The Respondent also looked at other cost saving initiatives including reducing headcount and the Claimants were not 'singled out' but that their commission structure was out of line with the rest of the business and had a significant impact on the profitability of the business.

Reasonableness of the Decision to Dismiss

73. In considering the reasonableness of the decision to dismiss the Tribunal has considered the submissions of parties and the law referred to above. Clearly the effect of the changes to the Claimants terms and conditions would have a significant impact of their income and the Claimants were entitled to refuse to agree to the terms. However, the tribunal is reminded that merely because there is a disadvantage to the employee it does not automatically mean that the Respondent has acted unreasonably. The Claimants' commission payments were having a significant impact on the profitability of the company as a whole and the Respondent's view that by amending the terms in respect of commission would positively impact of the profitability as a whole was not unreasonable and the decision to dismiss because the claimants refused to accept the changes to their terms was not unreasonable and was a decision that fell within the band of reasonable responses open to an employer faced with similar circumstances.

74. No other employees in the business had commission structures that were similar to the Claimants. They were unique and it was therefore reasonable for the Respondent as any reasonable employer to look at their commission structure and to try and seek some level of parity with its other employees.

75. If the Respondent had allowed this state of affairs to continue then the profitability of the business would continue to be affected. It is therefore not unreasonable for an employer to decide the only option, after a period of consultation and negotiation, was to dismiss and offer reengagement on new terms. The Claimants argued that 'their' part of the business was profitable. Throughout this case a large proportion of the Claimants case centred on separating out the work they did from the rest of the business. The Tribunal finds that it was reasonable and normal that the Respondent looked at the business as a whole. The Claimants view that their work was separate was not the reality of the situation.

76. The Claimants also argued that the consultation process was inadequate and that they were not provided with details of the proposed changes early enough. They also allege that the meeting notes were not always accurate although they did not indicate how their alleged inaccuracy impacted on the outcome. It is noted that whilst the Claimants dispute the accuracy of the meeting notes they have generally not provided this tribunal with an account of what was wrong or attempted to correct those minutes either prior to the hearing or during the course of these proceedings.

77. The Claimants argued that the decision to dismiss had been pre-determined at the start and that effective and meaningful consultation had not taken place. The Tribunal finds that the Respondent entered into a lengthy consultation process. Indeed the Claimants' argument that the Respondents had pre determined the outcome is not borne out by the evidence. The Respondent did not provide the

Claimants' with a fait accompli at the beginning; the Claimants were provided with written proposals only after Ms Draper had had preliminary or kick off meetings with the Claimants and sought their views. The Tribunal finds this was reasonable in the circumstances.

78. Further the Respondent's final proposals had undergone revision and taken into account the Claimants views in particular by introducing a phased commission structure. The Claimants had over the period of negotiation and in particular after the appeal hearing agreed to all the terms except for the clause 4 and 5.3. Both parties having negotiated had made concessions. The Tribunal finds that this is the purpose of consultation and was therefore effective consultation.

79. There were two main areas of dispute between the parties at the conclusion of the consultation process and at the point of dismissal:

Clause 4 - The retrospective effect of the changes to work already done and

Clause 5.3 - the ending of their entitlement to commission payments upon termination of their employment.

80. It should be noted that the Claimants had made a concession after the appeal hearing agreeing to the 2% flat rate on future new claims and that the respondent failed to respond to that. It was suggested that the failure by the Respondent to engage further with the Claimants after this concession meant that the consultation process was flawed and that had further consultation taken place then further agreement may have been reached. The Tribunal accepts that this is a reasonable argument, however, the Claimants stated categorically during these proceedings and during submissions that they would never have accepted clause 5.3. The claimants were specifically asked the question during cross examination and the Tribunal also referred to this point during submissions where again it was confirmed that this point was non negotiable as far as the Claimants were concerned and further the Respondent also considered this to be a non-negotiable point.

81. In additional whilst the Tribunal agrees that it might have been better if the Respondent had followed up the 'concession email' sent after the appeal it was clear at that point that the Claimants would not agree to clause 4 or 5.3 and the Respondent would not negotiate further on clause 5.3. It is also noted that the Claimants did not at any time try to reopen negotiations with the Respondent or seek to follow up on their email.

82. The Tribunal is therefore faced with the fact that despite any alleged failings by the Respondent during the consultation process and or the fairness of the new terms offered, the Claimants and the Respondent would never have agreed to commission ceasing upon termination of employment. The Claimants' suggestion that had a further period of consultation taken place after their concession on clause 2 might have resulted in agreement between the parties does not stand up. It is clear that agreement would never have been reached because neither the Claimants nor the Respondent would move on clause 5.3.

83. The Claimants suggested during submissions that their entitlement would and should continue after termination ad infinitum. The Tribunal finds this to be an unreasonable position to adopt. The Respondent argued, "In the absence of an express provision to the contrary (which did not exist in this case) that this is how bonus or commission arrangements work. Fundamentally, commission is an incentive for continued good work. If the employment ends, the reason for the incentive ends too." The Tribunal agrees.

84. The Tribunal notes that the 2013 terms are silent on the point of what happens after the termination of employment and therefore is required to consider the Respondent's interpretation or the Claimants' interpretation of that contract and which is correct. The Claimants asserted that they would remain entitled to commission forever and when asked during cross examination and during submissions confirmed this to be the case. As an example, this Tribunal asked whether they would expect commission on claims submitted for example in 30 years from the end of employment the answer was a definite yes. The Respondent argued that this was an untenable position and was not and would not have been the intention of the terms in 2013 or indeed the intention at any point.

85. The Tribunal therefore has to decide what would have been agreed had this point been specifically addressed at the time the 2013 contract was entered into. Obviously where there is a dispute between the parties in the present day about what would have been agreed, the Tribunal is tasked with is determining what would have been obvious to the parties at the time. This is commonly referred to as the 'officious bystander' test.

86. The Tribunal finds that had the parties turned their mind to what would happen upon termination of the employment relationship that commission in these circumstances would have ceased. In the case of 'sales' commission where an employee sells a car and 'earns' commission on that sale it is reasonable and likely that payment would be made in the final salary of the employee. However, in this case the work carried out by the Claimants could be applied to new clients at any point in the future by other employees of the business; was not due until payment was received from the client in any event and did not affect accrued rights as with the example of the car sales employee. The Tribunal finds that the retrospective argument put forward by the claimants does not hold.

87. It is inconceivable that an employer would agree to pay commission to an ex employee for as long as the business benefited from the work the employee had done during their employment. For example, if as referred to above, the car sales employee negotiated a good deal with another car dealer to get reduced priced vehicles and the business benefited from this work after termination but this would be reasonable. If the customer who was sold the vehicle returned for further vehicles in the future again it would be reasonable for the employer to benefit from the work the car sales employee had done prior to departure. Whilst the Tribunal is not suggesting that this is a perfect analogy of the current situation it is akin to the reasonable expectation of an employer once the employment relationship had ended.

88. In addition the Tribunal considers that no reasonable employer would continue to pay commission in such circumstances once the employment relationship had ended not least because the financial implications to the business but also because of the actual mechanics of monitoring and paying the commission. The Claimants in theory would be entitled to access to the Respondent business's accounts and confidential information despite the employment relationship having ended to ensure payments were made correctly. This was not reasonable and a reasonable employer would not have agreed to this. The Tribunal finds that it was entirely reasonable of the Respondent to the cease payment upon termination.

89. The Tribunal finds that the Respondent was entirely reasonable in expecting the Claimants to agree to clause 5.3 and that their refusal to agree to that clause alone renders the decision to dismissal fair. The Claimants were in no doubt that they would never have agreed to this terms so even if they had been able to negotiate on clause 4 it would have made no difference to the outcome. The Tribunal finds that whilst the effect of clause 4 did impact on work that had already been done but accepts the Respondents argument that by allowing retrospective claims beyond that agreed in the new terms, did not provide an incentive to drive the business forward.

90. The Tribunal finds that the dismissal was fair and the Respondent acted reasonably in treating the reason, SOSR, as sufficient for each of the Claimants' dismissals.

Holiday Pay

91. The Tribunal accepts the Respondent's submission that the decision in Lock provides for earnings to include an element of commission payments in order that employees do not suffer a shortfall in earnings as a result of taking annual leave. If this were not the case employees may be deterred from taking annual leave.

92. In the Lock decision the boiler salesmen would be deprived of the opportunity to earn commission when taking annual leave. Referring to the analogy earlier in this judgment the same would apply to a car sales person who while on annual would not see customers and would therefore lose the opportunity to make sales during a period of annual leave.

93. The present case is different for a number of reasons. Firstly they worked together in isolation on work that was not carried out by any of the other analyst. No one else 'picked up' their work and benefited from it whether they were on annual leave or not. Even if both Claimants took annual leave at the same time their work was not pick up or covered by anyone else. The Claimants confirmed this was the case. No other employee was doing the work they did.

94. Secondly the work they carried out, on their own evidence, took a long time to come to fruition. These were not quick 'one off sales'. It was not the case that they had to respond to a client on a certain day and if they did not hey lost the opportunity of any commission. Taking annual leave did not mean any opportunities disappeared.

95. Finally the Claimants benefited from a joint commission structure during this period. This meant that it did not matter which of them undertook the work they would both benefit.

96. The Tribunal was not provided with any evidence showing that taking annual leave led to any lost opportunities or that others took work they would have done had they been in work.

97. The Tribunal accepts the Respondent's argument set out at para 45 of the submissions in that they did not have periods of reduced remuneration payments following annual leave; there was no evidence of any financial disadvantage and neither claimant were deterred from taking annual leave.

98. The Tribunal finds that the commission element of their pay does not amount to normal remuneration for the purposes holiday pay.

Employment Judge Elayne Hill

19 January 2018

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON

24 January 2018

FOR THE TRIBUNAL OFFICE

[AF]