



EMPLOYMENT TRIBUNALS

Claimant
Mr J Kaufman

Respondent
Mabey Hire Ltd

Heard at: Leeds by CVP
Before: Employment Judge Jaleel

On: 6-7 November 2023

Appearances

For the Claimant:

Mr Epstein (solicitor)

For the Respondent:

Mr Tinnion (counsel)

RESERVED JUDGMENT

1. The complaint of unfair dismissal is not well-founded and is dismissed.
2. The complaint of unauthorised deduction from wages is not well-founded and is dismissed.
3. The complaint of breach of contract is not well-founded and is dismissed.
4. The claim for holiday pay is dismissed on withdrawal by the claimant.

REASONS

Introduction

1. These were complaints of unfair dismissal, unauthorised deduction from wages, breach of contract and holiday pay brought by the claimant.
2. I had before me a bundle of papers up to page 382 as prepared by the respondent.
3. The claimant's representative confirmed that he had prepared a separate bundle of papers but stated that he did not wish to utilise this for the purposes of the hearing. Mr Epstein confirmed that the vast majority of documents in his bundle were in any event duplicates of the bundle prepared by the respondent.

4. I took some time to privately read into the witness statements exchanged between the parties and relevant documentation.
5. Both parties agreed a list of issues which was finalised and agreed upon during the Hearing.
6. I heard evidence from the respondent's witnesses, David Garden (Sales and Marketing Director) and Rhian Edwards (HR Director).
7. I then heard evidence from the claimant.
8. I sought to hear from Mr Epstein in respect of outstanding disclosure applications made on behalf of the claimant. Mr Epstein confirmed that he would not be pursuing the applications, which had been made to the tribunal prior to the hearing. The claimant confirmed that he wished to proceed with the hearing without the benefit of the additional documentation that had been referred to in his applications.
9. A combination of technical issues, finalising the list of issues, discussions between parties and consideration of the bundle of documents led to a delay in hearing from witnesses. This meant that there was unlikely to be enough time to conclude the proceedings. I also found that the parties had not adequately prepared to deal with any remedy applicable. I therefore determined that this would be dealt with, if required, at a separate hearing. I confirmed that, on this basis and changed circumstances, I would consider any arguments either that compensation ought to be reduced to reflect the claimant's pre-dismissal conduct and/or on the basis that, if there had been a defect in procedure, it may not have made a difference to the outcome.
10. It was originally envisaged that parties would provide written submissions which would be supported by oral submissions on Day 2 of the Hearing. It became apparent that Mr Epstein would be unable to provide written submissions shortly after hearing the claimant's evidence. I therefore directed that parties email their written submissions to the tribunal on 10 November 2023. It was also made clear at the hearing, whilst parties were given additional time to submit respective written submissions, neither party was granted the right to reply. I have not set out here either party's written submissions in full but took them fully into account.

List of issues

11. The issues to be determined were:

Claim 1: Unfair dismissal (ss.94-98 Employment Rights Act 1996)

1. Did the Claimant's employment contract contain the following contractual terms:
 - (a) express and/or implied term (whether or not based on parties' custom and practice) entitling Claimant to be paid 1% commission

on all turnover generated by Instrumentation/"the Division" that was contractual and not discretionary;

- (b) implied term imposing a duty on the parties not to, without reasonable and proper cause, engage in conduct calculated or likely to destroy or serious damage the relationship of trust and confidence between employer and employee.
2. If it did, did the Respondent breach one or both of those terms by not paying the Claimant a 1% commission on all turnover generated by Instrumentation/"the Division" on the following dates:
 - (a) 15 December 2022
 - (b) 15 January 2023
 - (c) 15 February 2023
 - (d) 15 March 2023
 - (e) 15 April 2023
 - (f) 15 May 2023
3. If there was one (or more) breach of the above terms of the Claimant's employment contract, was that a repudiatory breach of contract by the Respondent?
4. If it was, did the Claimant by his conduct after the breach affirm the continued existence of his employment contract, losing the right to resign and claim constructive dismissal?
5. If not, did the Claimant timely resign in response (in whole or in part) to the breach, not for some other unconnected reason?
6. If yes, was the Claimant constructively dismissed by the Respondent?
7. If the Claimant was constructively dismissed, what was the Respondent's reason (or principal reason if more than one) for dismissing the Claimant? The Respondent will say it was to ensure/obtain a fit for purpose commission scheme for the Claimant.
8. Was that reason a potentially fair reason for dismissal? The Respondent relies on "some other substantial reason" as potentially justifying the Claimant's dismissal.
9. If it was, was the Claimant's dismissal for that reason within or outwith the band of reasonable responses open to the Respondent at the time, given its size and administrative resources, equity and the substantial merits of the case?
10. If the Claimant was unfairly dismissed, is there a chance – and if so how great a chance – that the Claimant would have been fairly dismissed had a fair dismissal/termination of employment procedure been applied by the Respondent?

11. Did the Claimant engage in culpable conduct which caused or contributed to his dismissal? If yes, what conduct and by how much?

Claim 2: Unauthorised deductions from wages (s.13 Employment Rights Act 1996)

12. The Claimant alleges that the Respondent made unauthorised deductions from his wages by not paying him a 1% commission on all turnover generated by Instrumentation/"the Division" on the dates set out below:
- (a) 15 December 2022
 - (b) 15 January 2023
 - (c) 15 February 2023
 - (d) 15 March 2023
 - (e) 15 April 2023
 - (f) 15 May 2023.
13. Has the Claimant presented his claim in respect of these alleged unauthorised deductions in time?
14. If not, was it reasonably practicable for the Claimant to have presented the relevant claim in time?
15. If it was not reasonably practicable, was the relevant claim presented within such further period of time as the Tribunal considers reasonable?
16. If and to the extent the relevant claim is in time, did the Respondent make these alleged deductions from the Claimant's wages?
17. If and to the extent it did, was the relevant deduction required or authorised to be made by virtue of
- (a) a statutory provision; and/or
 - (b) a relevant provision of the Claimant's employment contract?
18. If not, did the Claimant previously signify in writing his agreement/consent to the making of the deduction?

Claim 3: Breach of contract/contractual failure to pay wages due

19. Does the Tribunal have jurisdiction over this claim (the ET1 having been presented on 18 May 2023, the Claimant's effective date of termination having been 29 May 2023)?
20. Did the Claimant's employment contract contain the following contractual terms:

- (a) Express and/or implied term (whether or not based on parties' custom and practice) entitling Claimant to be paid 1% commission on all turnover generated by Instrumentation/"the Division";
 - (b) Implied term imposing a duty on the parties not to, without reasonable and proper cause, engage in conduct calculated or likely to destroy or serious damage the relationship of trust and confidence between employer and employee.
21. If it did, did the Respondent breach that term by not paying the Claimant a 1% commission on all turnover generated by Instrumentation/"the Division" on the following dates:
- (a) 15 December 2022
 - (b) 15 January 2023
 - (c) 15 February 2023
 - (d) 15 March 2023
 - (e) 15 April 2023
 - (f) 15 May 2023?

Claim 4: Holiday pay claim (legal basis unstated in ET1)

22. During the Hearing the Respondent accepted it owed the Claimant 5 days' holiday pay in the total sum of £1,200, which it has agreed to pay to the Claimant by 5pm on 10 November 2023. Subject to that, the Claimant withdraws his claim to a further five days' holiday pay.

Findings of fact

12. I start with the commission documents that are contained in the hearing bundle and set out in the index under the policies and procedures section from page 39 onwards:
- a) 2017 Discretionary Commission Scheme 2017 (39-44)
 - b) 2020 Discretionary Commission Scheme 2020 (45-50)
 - c) Business Development Manager's Discretionary Commission Scheme (51-56)
 - d) Regional and Sales Manager Commission Document (57 – 64)
 - e) FY23 Sales Manager Monitoring Commission Scheme 2023 (70 – 75)
 - f) FY23 Sales Manager Monitoring Commission Scheme 2023 (76-81)
13. The above commission schemes are each headed 'discretionary scheme' and within the body of each document it is stated:

“..We recognise that as in any business, our environment is fluid and therefore to ensure our ability to remain agile our scheme is non-contractual and subject to change...”

14. Mr Epstein pointed out that the 2017 and 2020 commission schemes included in the file were identical. In cross-examination David Green accepted that duplicate documents were contained in the bundle i.e. the document in the index stated to be the ‘2017 commission scheme’ was in fact a duplicate of the ‘2020 commission scheme’.
15. Mr Epstein probed this omission further during cross-examination of David Garden. I found David Green to be consistent and credible with regards to his response when giving evidence. David Green joined the respondent in January 2020 as a Sales and Marketing Director. He is responsible for the management and administration of discretionary schemes in place for the employed sales team across all roles including Business Development Managers (BDM). He had not been privy to a 2017 commission policy document (if one existed), he was not part of the organisation at the time, he could only comment on events that he was aware of and unfortunately the persons with whom the claimant had his initial discussions with were no longer part of the company; he was not privy to the discussions between the claimant, Gordon McDonald (Chief Executive) and Chris Carter (Commercial Director) who were responsible for employing the claimant.
16. Prior to joining the respondent, the claimant was working in the same industry earning a salary of £38,000 plus commission in the sum of £20,000. His commission was non-contractual and discretionary.
17. The claimant held discussions with Gordon McDonald together with Chris Carter regarding employment as a Business Development Manager (BDM) to the respondent’s Instrumentation and Monitoring Division. This was to be a new department solely headed up by the claimant.
18. Gordon McDonald and Chris Carter have since left the business and I therefore do not have the benefit of their version of events.
19. However, I consider the internal email from Gordon McDonald to Chris Carter dated 11 January 2017 at page 82 to be a contemporaneous record of the interview that was carried out (albeit a summary) between the claimant and Gordon McDonald prior to an offer of employment being made:

“Hi Chris

Just finished the interview with Jake.

I obviously didn’t press him on his technical ability, more the conversation was around fit.

I think he is a very good candidate and would hit the ground running.

He has one offer on the table right now and expects to have a second very shortly. I believe him and don't think it's a bluff.

He has an offer of £45K plus commission on the table right now.

I think to get him we would need to say that the 7.5% that he gets is the company bonus scheme and that we will create another commission scheme for him before he joins (we need to do this for the BDM's in regional sales anyway).

If both commission schemes are available to him then somewhere between 43 and 45 is likely to get him (I'd be happy to pay the 45 but your call).

If you don't want him for the BDM role then I think we should look at getting him into the business anyway...."

20. It is obvious that the claimant was seen as such a good fit that Gordon McDonald was prepared to accommodate him in a different role even if he was not selected for the BDM position. However, whilst there is reference to 'creating' a commission scheme for the claimant this is further qualified by the fact that this needed to be carried out 'for the BDM in regional sales anyway'. I therefore found that the make-up of a new commission scheme was envisaged to be rolled out for the claimant and other BDMs. Whilst I accept that the respondent was willing to make the claimant a more attractive offer in comparison to other BDMs I am not persuaded that the communications showed that they would be prepared to offer him a contractual non-discretionary commission scheme, which would then be incorporated company wide. He also confirmed that in his previous role his commission was discretionary and non-contractual. If it was envisaged that the respondent was to introduce a contractual non-discretionary scheme I would have expected that to be explicitly highlighted within the email (as this would not be the norm). I would also have expected further communication regarding the working arrangements of such a scheme. This wasn't the case.
21. In his own evidence the claimant accepted that he had not been informed during his interactions with Gordon and Chris that the commission would be contractual but emphasised that had he been told it was non-contractual/ discretionary he would have ceased discussions at that point. I found that Gordon McDonald and Chris Carter did not explicitly state the contractual basis of the commission scheme.
22. I found that the parties discussed a remuneration package whereby the claimant would be earning a salary of £45,000 plus commission of '1% turnover generated by his Division'. The claimant estimated that this would give him an overall income of around £65,000 per annum.
23. The claimant was sent an offer letter dated 13 January 2017:

"Further to your recent interview I have pleasure in offering you employment with this Company as Business Development Manager at our Haydock Office.....The offer of employment is subject to the attached contract of

employment which will apply as from the date of commencement of your employment...

24. Whilst the letter sets out in summary the main terms and conditions it is silent as to commission but does state the following in respect of the company bonus:

“You are also eligible, from 1 March 2017, to join any Company Bonus Scheme plan operated by the Company (subject to the rules relating to the Company Bonus Scheme plan from time to time). Please note that this plan and any payments paid are discretionary and the plan does not constitute a contractual term”.

25. The ‘Request for Job Offer/Contract of employment’ document which is signed by Chris Carter on 12 January 2017 at page 90 contains details of the job offer to the claimant including his salary and start date. The salary is stated as £45,000, however in the benefits section it is stated:

COMMISSION (provide detail) Bonus on Instrumentation performance to be advised and agreed.

26. The attached contract of employment is also silent about any commission or bonus entitlement of the claimant.

27. The claimant accepted the offer of employment and commenced his employment on 13 February 2017.

28. The letter dated 13 March 2017 confirms that Chris Carter wrote to the claimant confirming that his commission would be payable at the rate of 1% of all turnover generated in his department. He also confirmed that the commission scheme would not form part of the claimant’s contract of employment and would be subject to change at any time:

“...Dear Jake

I am pleased to confirm that commission will be paid to you at 1% for all turnover generated by Instrumentation, effective 13 February 2017.

Commission is paid 1 month in arrears and will commence in your April 2017 salary. Any commission due to you will also be backdated.

Please note that commission is not pensionable and does not form part of your Contract of Employment, and may be subject to change at any time.”

29. I found that this correspondence followed on in the logical sense of securing the services of the claimant and filled in the gap that that was obvious in the job offer documentation – the rate of commission the claimant was entitled to. The document was not ambiguous in respect of the contractual nature of the commission scheme, it said that it did not form part of the claimant’s employment of contract.

30. Mr Epstein both during the hearing and as part of his written submissions makes much of the fact that the '2017 commission scheme' was missing and that the claimant is still unaware what this scheme consists of. Of course, as Mr Epstein submits, a commission scheme document equivalent to the 2020 version would have been highly relevant. However, I do take account of the fact that the internal email at page 82 did highlight that a new commission scheme was required for the claimant and the BDMs in regional sales. At that point, both Gordon and Chris were still discussing the final offer that was to be made to the claimant and the request for job offer reflected this, whilst the commission details remained unspecified. On the balance of probabilities I found that the communication of 13 March 2017 represented the scheme as agreed, albeit it in its most basic form. I found that the respondent did not create a substantive policy document until 2020. The claimant was the sole BDM and person responsible for his new department and the respondent lacked in its efforts to crystallise the scheme by way of a more formal document which is in conjunction with the later schemes contained in the bundle.
31. The claimant received commission payments of 1% of the turnover as agreed in March 2017 and did not have any complaints regarding the calculation of the same.
32. In any event on receipt of the letter dated 13 March 2017 the claimant did not seek to challenge the fact that the correspondence stated that the commission was non-contractual and 'may be subject to change at any time'. The claimant lists a number of reasons for his inaction at paragraph 8 of his witness statement. I set this out in full given its relevance:

8.1 If the First Commission Notification was a new contractual offer (my Contract having been asserted to be the whole contract, but which was silent as to commissions), then it was in conflict with what had been offered by the Respondent as an inducement to me to take up employment with them and accepted by me as such inducement, in the series of discussions in January 2017;

8.2 by 13 March 2017, the Respondent was the dominant party and I subservient one, such that it was improper for the Respondent to seek to impose on me an oppressive term after I had left security of my previous employment;

8.3 unsurprisingly, being in a subservient and vulnerable position, I chose not to risk my new employment by objecting to the proposed new and oppressive terms, believing that, there having been no mention of the commission being discretionary or non-contractual by Mr McDonald at interview:-

8.3.1 the Respondent had done no more than make a mistake in the First Commission Notification that they would correct in the fullness of time; or

8.3.2 my understanding could properly be that-

(a) I could rely upon the representations made and inducements offered by Mr McDonald to, accepted by me in discussions prior to my employment; and

(b) A company with the profile and reputation of the Respondent could be trusted to act not only in good faith but also in compliance with its contractual obligations, particularly in an employment contract.

33. I found that this did not reflect the Claimant's thinking at the time but was an explanation provided with hindsight for the purposes of this hearing. The Claimant's explanations appeared unlikely to me: if he genuinely thought a simple mistake had been made because the letter did not reflect his discussions with Mr McDonald, it makes no sense that he would not have pointed that out. He does not identify anything that had happened that made him doubt the Respondent's good faith. Indeed, he says that he could rely on it.
34. I also found that while the claimant was generally open and straightforward with his responses in evidence, his answers about this issue appeared evasive. He was unwilling to accept that he had not done anything in 2017 to put the respondent on notice that he did not agree that his commission scheme was non-contractual. When those questions required a simple yes or no response, the claimant tried to deflect any criticism of himself, or referred to documents and passages that did not necessarily answer the question but then eventually confirmed he did not raise this with the respondent.
35. By way of letter dated 20 February 2018 the respondent confirmed the claimant's bonus arrangements in the financial year 2018 at 7.5% of salary. This reflects the post-interview internal email at page 82. Further the letter stated that:
- “..The bonus plan is non-contractual and rules of the scheme may change at any time in line with business requirements....”
36. With effect from 5 March 2018 the claimant's job role was changed to Business Development Manager and his new line manager was Andy Murray (page 111). HR was also informed that all other terms and conditions of his employment remain unchanged. A revised job description was sent to the claimant for signature.
37. By way of letter dated 5 February 2019 the claimant was informed that his new line manager was Richard Hinkley and he was again sent a change form confirming this (page 117 – 118).
38. In the email dated 30 October 2019 from Andy McGhee to Richard Hinkley (pages 124 – 126) it is stated that the new commission scheme moves all sales staff to a standardised payment date of 2 months in arrears. The claimant is identified as 'one of a small number currently on a payment date of 1 month in arrears'. To accommodate the change it was decided that the claimant would receive a one off payment equivalent to the average of his last six months commission payments. The email which is headed 'commission scheme for Jake Kaufman' did not suggest that the claimant was in a unique or special situation whereby he had a non-discretionary contractual scheme.

39. There is no evidence to suggest that the claimant was dissatisfied with this or took the opportunity to inform the respondent that he was entitled to a contractual, non-discretionary commission scheme.
40. In February 2020 the claimant noticed that he was not being paid in accordance with the 1% of turnover that had been agreed. This is confirmed by way of email dated 14 February 2020 at page 128. It was confirmed that the claimant received 1% of the turnover but there was some confusion regarding the 20% banked element. The email also confirms that the claimant was not under the standard BDM scheme at that point in time. This reinforces that the claimant was employed to head up a new department, was provided with a commission scheme which would be attractive to him, in a simplified manner which would not be restrictive i.e. 1% of takeover in that department as per the letter dated 13 March 2017. I found this was further evidence of the lack of a 2017 commission policy document. If there had been one, I would have expected it to be referred to.
41. I do not regard the email of 14 February 2021 as evidence of the claimant's attempt to clarify his commission scheme over a two-year period as contended by Mr Epstein. The claimant's concern related solely to issues with the standardised payment and banked element of 20% which had arisen recently.
42. On 28 February 2020 Claire Watson (People Director) sent the claimant an email advising him of details of a salary increase and the commission scheme rules which were applicable to his role following his discussions with Gordon McDonald:

"...Gordon has asked me to write to you confirming your conversation earlier this week relating to your salary and to provide you the details of the commission scheme.

So, on the salary I can confirm that from 1 March 2020 your salary will increase to £50,000, this will be paid in your March pay.

I have attached the BDM Commission scheme rules which are the rules applicable to your role. As your role is slightly different to other BDMs in the company Element 2 of the scheme will not apply to you on the basis that you do not have accountability for National Records. Should you have any further questions in relation to this please give David Garden a shout and he will be able to help..."

43. Sarah Ahmed (HR Business Partner) followed this up by way of a formal letter dated 3 March 2020 (page 129) and change form which formally recorded changes to the Claimant's contract of employment effective from 1 March 2020:

"...I can confirm that you are part of the BDM commission scheme as discussed, please note Element 2 of the scheme will not apply to you. As with all benefits these do not form part of your contractual terms and conditions and can be amended at any time...."

All other terms and conditions remained unchanged...”

44. The 2020 commission scheme which now applied to the claimant confirmed his commission entitlement as being 1.05% and how this would be calculated. The document was clearly headed ‘discretionary scheme’ and within the introduction section it stated:

“..We recognise that as in any business, our environment is fluid and therefore to ensure our ability to remain agile our scheme is non-contractual and subject to change...”
45. Despite this, the claimant did not raise any concerns that his original agreement was contractual and non-discretionary. Further it is apparent that the claimant had discussed the matter with Gordon McDonald. I have no doubt that had there been any discrepancies in respect of the contractual nature of the scheme or other misunderstanding, the Claimant would have mentioned them. The discussions clarified that element 2 of the BDM would not apply to the claimant.
46. It was apparent that the respondent was seeking to bring the claimant’s commission earnings in line with other BDM’s. This accords with the evidence of David Garden who confirmed that the respondent was seeking to standardise the process across the board at the end of 2019 and into 2020. He also confirmed that projections had been made and it was envisaged that the claimant would be better off under this scheme. I accept this evidence.
47. I therefore found that the claimant was part of and aware of the 2020 commission scheme from 1 March 2020 as per the change form (pages 129 – 130). His commission scheme was non-contractual and could be changed by the respondent at any time.
48. On 1 June 2021 the claimant was promoted to the role of National Account Manager within his team. This was confirmed by way of letter dated 25 May 2021 (page 143).
49. David Garden became the claimant’s line manger as of 15 June 2020.
50. The claimant queried his commission value with David Garden and the email of 29 October 2020 (page 138) clarified how ASCM claims can impact upon commission and the need to monitor such claims. In his evidence David Garden also clarified how the BDM dashboard and CRM is utilised across the business; he confirmed that the claimant was amongst a small proportion of persons who elected not to utilise the system, which impacted on commission. David Garden was clear and concise in respect of the operation of the systems and as the key figure implementing commission schemes in the business I have no reason or evidence to reject his evidence in this regard. In his communication the claimant did not assert that he was entitled to a contractual, non-discretionary commission scheme. I find that the claimant was merely concerned about total commission achieved. His concern was whether he was operating within a scheme that would allow him a reasonable opportunity to achieve financial success, not whether the scheme was contractual or otherwise.

51. In his evidence the claimant stated that as he was very busy with his role he was unable to pursue his efforts to seek clarity in respect of his commission scheme, as he would have liked. He did say that he discussed the matter with David Garden on occasion. I found that evidence inherently unlikely. I noted, for example, that the claimant in his email dated 10 September 2021 (page 315) raised issues of concern relating to the lack of consideration by David Garden for the National Accounts Director role; this confirms that the claimant would find time to pursue any complaints/clarification in a timely manner and undermines his contention that he was simply too busy to pursue and seek clarity in respect of a key component of his contract.
52. In November 2021 the claimant was promoted to National Sales Manager of the Division and his salary was increased to £58,000 per annum. The commission scheme remained the same.
53. Towards the end of 2021 discussions were held with the claimant in respect of recruitment into his department. In 2022 the respondent invested in the claimant's team. Three salespersons were employed who would work under the claimant and would also receive commission. Up until this point, the claimant was the only salesperson in the team.
54. On 15 November 2021 the claimant sent an email to Martyn Rogers regarding his concerns pertaining to 'Salary and commission'. He highlighted that he had not received a response from other persons he had raised this issue with. The claimant queried shortfalls in commission payments due to him for last two financial years. Within this email he stated:
- "... My commission structure was originally based on an across the board 1% commission pay out of departmental turnover irrelevant of hire or sales generated.*
- On 28/2/20 my commission was adjusted however by Gordon McDonald and Andy McGee to bring me more in line with the rest of the business thus meaning that I only receive .75% on revenue generated via sale and a commission structure at a flat 1% on generated departmental revenue as is incrementally increased in percentage as copied in above..."*
55. On 30 November 2021 the claimant sent David Garden an email (page 163) regarding his salary and commission. He confirmed that he raised this issue in October 2020 and had only received a response to his concerns on 17 November 2021. In response to that email the claimant stated:
- "...I joined the business under the commission structure terms based on a 1% commission pay out of the departmental turnover. Irrelevant of hire or sale revenue generated. Therefore an achieved budget of £2m would guarantee a £20K commission payout (agreed under Chris Carter and Gordon McDonald, January 2017).*

On 28/2/20 my commission scheme was adjusted without my knowledge (I think you had only been in the business for a couple of weeks at the time but I recall speaking with you regarding the situation). The reasoning for this, was explained to me at the time, was to bring me more in line with the rest of the business thus meaning that I only receive .75% on revenue generated via sale and a commission structure starting at a flat 1% on generated departmental revenue that is incrementally increased in percentage upon revenue growth.

Andy McDonald and Gordon McDonald met with me at the time – non mention of commission splits or ‘ACSM requests’ were discussed. Gordon had, within a previous meeting, explained that there would be an inevitable period of ‘double dipping’ once that a wider sales engagement was established which both he and I were not comfortable with. This, according to Gordon would be reviewed upon as and when he saw necessary.....

Up until my persistent questioning of the shortfall of my commission payments I was unaware of any such claims of either 50-100% against my commission payments. Martyn has kindly identified as to where these claims lie within the correspondence below.

Following this new found information, my understanding is that I have been switched a commission scheme that guaranteed a commission pay out of 1% revenue generated to a ‘new’ scheme that leads me completely exposed to external commission claims to which I have no notification or input within thus potentially halving or even worse, eradicating my commission payments.

This was not how it was explained and nor would I have agreed to it.....

I recognise that this communication may come across as self-orientated or greedy however this is not my point. I am simply questioning the process as it appears that I have lost a guaranteed 1% and have been transferred to a commission scheme which could, in theory generate zero commission for my efforts due to claims to which I have no notification or control over....”

56. I found that whilst the claimant was dissatisfied with how his commission scheme has evolved over the years, he did not seek to suggest that his original agreement formed a contractual right which was non-discretionary. If that was the case, I would have expected the claimant simply to refuse the proposals made by the respondent in 2020 and assert his alleged right. In fact, within the email the claimant acknowledges that on developing a wider sales team a review may be required of the commission scheme. The claimant was therefore anticipating changes to the commission scheme going forward but was not happy with the potential impact that ACSM deductions could have upon his commission. He also refers to the fact that he met with Gordon McDonald at the time; it is therefore implausible that the claimant would not have referred to what he considered to have been agreed on the commencement of his employment. As referred to above, following this meeting the claimant was sent a letter from Sarah Ahmed confirming that he was part of the BDM commission scheme as discussed but Element 2 of the scheme would not apply to him. This confirms

that the claimant had sought clarification at the time as to how the scheme applied to him, this had been provided and was formally recorded.

57. By spring 2022 two new additional team members joined the claimant's team. In August 2022 David Green then liaised with the claimant regarding a new commission scheme 'the 2022 commission scheme' (page 176 – 177). In his email of 5 September 2022 (page 186) David Garden made it clear:

"...Going forward I am drafting a scheme that rewards you as an individual but moreover based on team performance, now that you are a line manager and must manage the team to get to a budget..."

58. David Garden continued to liaise with the claimant and sent him a further draft of the monitoring commission document on 21 September 2022:

"...On the back of the sales plan which is coming along nicely, I have trimmed back the complexity of the Monitoring commission schemes as a further DRAFT for your team and yourself..."

59. The claimant sent David Garden a response on 25 September 2022 in which in principle he agreed with the framework laid out within the proposal but added:

"...the numbers do not stack up concerning my own package.

Before you continue to read my communication I wish to state the following:

- 1. I am aware that my situation is an inherited problem and not of your doing.*
- 2. My commission scheme is out of kilter with the rest of the organisation.*
- 3. I earn more in take home pay than some of the more senior members of Mabey Hire.*

60. He went on to add:

"..In my view however, the situation is reasonably simple. For the new financial year, I am to be under instruction to deliver a bigger budget, undertake a higher level of responsibility and accept a significantly reduced wage package....."

61. He also set out his comments regarding the Element 1 – 3 which made up the commission scheme and highlighted in addition:

"I recognise and accept that there may be some ground required to be given on my part in terms of how my salary packet presents however, under the newly proposed agreements there is a gulf in difference to the extent of which I can't afford to let alone, willingly accept.

I joined Mabey Hire business under an agreement with both Gordon McDonald and Chris Carter. The agreement of a 1% commission bonus of divisional turnover. This agreement has been eroded somewhat over the years whereby penalties have been introduced to reduce the amount of remuneration for my

efforts. Despite this I have continued to be professional and given the role my all....”

62. The claimant engaged in the consultation about the commission schemes with David Garden but was obviously concerned and dissatisfied with his earning capacity under the scheme. He did not dispute that a revised scheme was needed bearing in mind the new additions to his team and in fact was in agreement with their commission entitlement. However, the claimant again failed to assert that his initial agreement upon joining the respondent was contractual and non-discretionary. He made reference to his discussions with Gordon and Chris and the erosion of his agreement yet did not suggest at any point that this would constitute a breach of contract. In fact, the claimant accepted that there ‘may be some ground required’ on his part in respect of his salary i.e. he was anticipating that he would be required to compromise on his pay but he did not anticipate what was being proposed by David Garden. This again undermines the argument that the claimant was entitled to a contractual non-discretionary commission.
63. In his evidence David Garden stated that to his knowledge the claimant was receiving 1% commission up until February 2020 when he was moved to the ‘2020 commission scheme’. David also outlined how the 2022 commission was required to take on board that the claimant’s team had grown, the internal systems had also been updated and there was always a business requirement to ensure business efficacy going forward and budgets were met. David also stated as far as he was aware he was not required to consult with the claimant in respect of the scheme but did so to take on board the claimant’s suggestions and to ensure good relations were maintained. I found that David Garden did consult extensively with the claimant before confirming implementation of the finalised 2022 commission scheme, and that he did so by way of good employment practice to maintain good relations.
64. In his email of 3 October 2022 David Garden provided the claimant with two updated commission schemes (for both himself and the sales managers). David advised that he had improved them as best as he could.
65. From October 2022 the claimant was not paid any further commission payments.
66. On 24 February 2023 David Garden provided the claimant with an adjusted commission scheme. A copy of the revised scheme ‘the 2023 commission scheme’ is at page 257 of the bundle. The department was adrift of budget and it had been recognised that the team was not achieving commission. The adjustment was introduced from February 1 – September 2023 as a means to try and bolster the department. This is confirmed by email:

“...Therefore we took the decision to consider a short term adjustment to the commission scheme for you both, one which rewards recovery and just changing the scheme hopefully demonstrates the importance of both of you within the team..”

67. The claimant suffered from depression and had 12 sessions with a psychotherapist between 31 October and 7 March 2023. This was via the respondent's private health insurance.

68. On 6 March 2023 the claimant resigned from his role (page 197):

"Good evening David

After a period of reflection, I believe I have no alternative but to raise a formal grievance and resign from my role within Mabey Hire.

The company has acted in a manner which is inequitable in relation to my pay by significantly adapting the terms of the commission structure to my detriment.

With the exception of Rhian Edwards, a systematic denial for the existence of documentation relating to the terms of my employment have endured. Mabey Hire senior management and board sitting members have repeatedly refused to acknowledge my contractual terms.

These actions have significantly reduced my earnings and have detrimentally impacted me personally.

The recently proposed specific short term adjustment to my commission structure offered as a means of making good due to persistent, poor handling of the situation is meagre and unacceptable in comparison to my previous year's remuneration.

A proposed 'absolute best case' sum of £5,272 for the current financial year pales in significant to £23,000 generated within the previous financial term..."

69. It is apparent that the claimant resigned from his role as he was dissatisfied that his commission scheme had been amended to his detriment. This was the first time since the commencement of his employment that the claimant had made reference to his contractual entitlement. However, in his evidence the claimant confirmed that he was receiving legal advice and had been assisted in the drafting of his grievance letter.

70. The claimant attached a copy of his grievance letter to his resignation (page 198 – 201). Within his grievance the claimant provided a timeline of events and the amendments that were made to the commission schemes between 2017 and 2021. He then detailed events that transpired in 2022 whereby he was informed by David Garden in August 2022 that there would be a significant change to the commission scheme. The claimant alleged that the changes were made without consultation and that he refused to accept the change and was working under protest.

71. The claimant stated that he was offered a tweaked version of the 2020 commission scheme but was not provided with documents relating to the terms of the particular scheme. He stated that the documents provided by Claire Watson were designed for a temporary works business development manager,

which was irrelevant and not related to the 2020 scheme as agreed by Gordon McDonald. I found that this had not been raised by the claimant previously.

72. The claimant accepted that his contract of employment was silent on commission but stated that being paid commission over a substantial period of time had resulted in the 2020 scheme being implied by custom and practice in his employment contract, making it a contractual, non- discretionary term. The claimant said that the subsequent variation of the commission scheme from 2022 amounted to an 'obvious breach of a contractual term by the Company'. The claimant said the he felt he had no option but to resign:

"..I have seen a huge reduction in my take home pay due to the actions of the Company and its refusal to acknowledge my concerns has had a detrimental effect on my mental health. This was the last straw as the Company has taken an entrenched position and acted in breach of contract as detailed above..."

73. In his evidence at the hearing the claimant stated that a contributing factor to his resignation was also the conduct of David Garden towards him. It was put to David Garden that the comment in the email dated 18 January 2022 where he stated "wish I was a pound behind you" demonstrated David was jealous of the claimant. He also alluded to David discussing/seeking information regarding the claimant with a third party, Mr Harkness and the fact that he was not promoted to National Accounts Director. The conduct of David Green in this regard had not been mentioned previously as a reason as to why the claimant resigned. It was not referred to in his resignation, grievance letter or subsequent hearing, appeal letter, claim form or witness statement and it did not form part of the list of issues agreed between parties. I found that the claimant resigned as a result of the changes that were made to his commission scheme. The conduct of David Garden appeared as an afterthought on part of the claimant to bolster his claim.
74. I found that from the commencement of his employment up until September 2023 the claimant was achieving a very attractive commission, such that his earnings exceeded the majority of his colleagues.
75. The claimant gave evidence that Rhian Edwards advised him during a meeting on 9 February 2023 that the respondent had managed his commission poorly. Rhian Edwards gave evidence at paragraph 10 of her witness statement that she had not said that the respondent had managed the Claimant's commission issue poorly. Rather, she had acknowledged from the Claimant's standpoint that he felt he had been treated poorly. I accepted Rhian Edwards's evidence in this regard and find that she was not critical of the respondent's treatment of the claimant and had not suggested that the respondent had acted improperly in respect of administering the commission schemes. I found Rhian Edwards to be a credible witness.
76. Suzanne Birkett (HR Operations Business Partner) corresponded with the claimant in respect of the grievance process (page 202-203) and resignation (page 204 – 205). The respondent accepted his resignation and informed the claimant that he was to be placed on garden leave from 20 March 2023 until the

termination of employment as of 29 May 2023 (taking into account his notice period).

77. I do not need to deal in detail with the grievance process. I note that the Claimant's grievance and grievance appeal were both ultimately rejected. I also note that the focus of the grievance was the Claimant's concerns about the 2020 changes, although the Claimant was also now alleging that his commission scheme was contractual. The Respondent disagreed.
78. The focus of the claimant's grievance relates to the 2020 commission scheme which is at odds with an element of contested tribunal claim; during the grievance process he did not suggest that the commission scheme agreed at the outset in 2017 formed part of his contract and is non-discretionary. In fact, when it was put to him in the grievance meeting that 'Chris Carter gave you a letter in 2017 confirming 2017 scheme' the claimant remained silent on this and did not dispute or challenge that he was not provided with a scheme or was awaiting a corrected version as is a central feature in his claim. This lends credence to the fact that the claimant accepted at the time that the document dated 13 March 2017 was confirmation of the 2017 commission scheme and it expressly advised that the scheme was non-contractual and discretionary.
79. In respect of his claim for holiday pay the claimant stated that he made a note (having access to the system at the time) that he was owed 10 days' holiday at the point of taking garden leave. Mr Tinnion pressed the claimant on this point. The claimant was not able to produce a physical note and it was put to him that he was lying. The claimant then said that he took a 'mental note' rather than a 'physical note'. Further, the claimant accepted that during the period of garden leave he did take some time off but he said that he did not think this would be taken as annual leave as the process was not explained to him. However, 19his point became academic because the respondent confirmed that holiday pay was owed to the claimant in the sum of £1,200.00 which accounted for 5 days' annual leave and the claimant agreed and withdrew his claim for holiday pay. However, I did not consider that the claimant had lied. I accept that at the time of leaving he had seen a screenshot/documents which confirmed his leave entitlement at the time and that he had taken a mental note rather than a physical note.

The Law

Interpretation of contractual terms

80. The proper approach to the construction of a contract was confirmed by the Supreme Court in *Arnold v Britton* [2015] UKSC 36. The Tribunal should interpret the intention of the parties as to the meaning of the terms by reference to "*what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean*".
81. The Supreme Court identified six relevant factors [para 15]:

1. the natural and ordinary meaning of the clause;
 2. any other relevant provision of the contract);
 3. the overall purpose of the clause and the contract;
 4. the facts and circumstances known or assumed by the parties at the time that the document was executed; and
 5. commercial common sense; but
 6. disregarding subjective evidence of any party's intentions.
82. This is an objective exercise. The ordinary language of the provision should not be undervalued by any reliance on what is said to be commercial common sense within the surrounding circumstances [para 17]. The clearer the natural meaning of a clause, the more difficult it is to justify departing from that meaning [para 18].
83. The grounds on which a term may be implied into a contract are very limited. The general principle is that terms can only be implied into a particular contract if the Tribunal can presume that it would have been the intention of the parties to include them in the agreement. It is not sufficient for the proposed term to be a reasonable one in all the circumstances.
84. There are a number of bases on which such a presumption can be made:
- a. Business efficacy
 - b. The officious bystander
 - c. Custom and practice
85. The Tribunal should *first* determine what the express terms of the contract are and what they mean, before considering whether any terms ought to be implied. *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd* [2016] AC 472.
86. The Marks and Spencer case contains a detailed discussion of recent authorities and the applicable principles relating to the business efficacy and officious bystander tests. In practice, it will be a rare case where one of those conditions is satisfied but not the other. In short:
- a) The question is whether the parties can be presumed to have intended to include the term at issue. That is to be judged at the time the contract was made.
 - b) The parties may well have chosen deliberately not to make provision for a particular situation. It is not enough to show that if the parties had foreseen the situation they would have wanted to make provision for it.
 - c) A term cannot be implied if it contradicts an express term of the contract.
 - d) An implied must be reasonable and equitable.
 - e) An implied term must be capable of clear expression.

- f) A term can be implied if it is necessary to do so to give business efficacy to the contract - no term will be implied if the contract is effective without it.
- g) The test is one of necessity not reasonableness, although it is not a test of “absolute necessity”. One approach would be to ask whether, without the term, the contract would “lack commercial or practical coherence.”
- h) A term can be implied if it is left not expressed because it is so obvious that that “it goes without saying” The approach is sometimes described as ‘the officious bystander test’. (if suggested by an officious bystander the parties would “testily suppress him with a common, “Oh, of course!”). However, such a term should not be implied unless it is necessary to give effect to the agreement.

87. In respect of custom and practice the proper approach was set out by the Court of Appeal in *Park Cakes Ltd v Shumba* [2013] IRLR 800. Lord Justice Underhill, giving the judgment of the Court, analysed various authorities including *Albion Automotive Ltd v Walker* [2002] EWCA Civ 946 (which is relied on by the claimant) and *Solectron Scotland Ltd v Roper* [2004] IRLR 4 EAT (which is relied on by the respondent), before holding in paragraphs 34 to 36:

“34: ...the essential object is to ascertain what the parties must have, or must be taken to have, understood from each other’s conduct and words, applying ordinary contractual principles: the terminology of ‘custom and practice’ should not be allowed to obscure that enquiry.

35: Taking that approach, the essential question in a case of present kind must be whether, by his conduct in making available a particular benefit to employees over a period, in the context of all the surrounding circumstances, the employer has evinced to the relevant employees an intention that they should enjoy that benefit as of right. If so, the benefit forms part of the remuneration which is offered the employee for his work (or, perhaps more accurately in most cases, his willingness to work), and the employee works on that basis. ... It follows that the focus must be on what the employer has communicated to the employees. What he may have personally understood or intended is irrelevant except to the extent that the employees are or should be reasonably have been aware of it.”

88. Lord Justice Underhill stressed that he was not setting out a comprehensive list of relevant circumstances, but stated that the following would typically be relevant:

- a) on how many occasions and over how long a period, the benefits in questions have been paid;
- b) whether the benefits are always the same;
- c) the extent to which the enhanced benefits are publicised generally;
- d) how the terms are described;

- e) what is said in the express contract;

“As a matter of ordinary contractual principles, no term should be implied, whether by custom or otherwise, which is inconsistent with the express terms of the contract, at least unless an intention to vary can be understood.”

- f) Equivocalness, by which is meant whether the practice, viewed objectively, is equally explicable as an exercise of discretion rather than as compliance with a legal obligation.

89. The burden of establishing that the practice has become contractual is on the employee.

Constructive unfair dismissal

90. Section 95 of the Employment Rights Act 1996 defines a dismissal for the purposes of a claim for unfair dismissal. By virtue of s 95(1)(c) this includes constructive dismissal, defined as follows :

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) ..., only if) –

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

91. In the leading case of *Western Excavating (ECC) Limited v Sharp* [1978] ICR 221, the proper approach was set out. The Tribunal must ask:

8.1 Was there a repudiatory breach of contract?

8.2 If so, did the Claimant resign in response to that breach and not for another reason?

8.3 If so, did the Claimant nevertheless affirm the contract, whether by delaying too long in resigning, or by words or actions which demonstrated that they chose to keep the contract alive?

92. If a relevant contractual term exists and a breach (actual or anticipatory) has occurred, it must then be considered whether the breach is fundamental — i.e. whether it repudiated the whole contract. A key factor to take into account is the effect that the breach has on the employee concerned.

93. The employer’s motive for the conduct causing the employee to resign is irrelevant. It makes no difference to the issue of whether or not there has been a fundamental breach that the employer did not intend to end the contract — *Bliss v South East Thames Regional Health Authority* [1987] ICR 700. Similarly, the circumstances that induced the employer to act in breach of contract have no bearing on the issue of whether a fundamental breach has occurred — *Wadham Stringer Commercial (London) Ltd v Brown* [1983] IRLR 46, where the EAT

stressed that the test of fundamental breach is a purely contractual one and that the surrounding circumstances are not relevant.

94. The Claimant also asserted that there had been a breach of the implied term of mutual trust and confidence. That was explained by the House of Lords in *Malik v BCCI SA (in compulsory liquidation)* [1997] ICR 606, where Lord Steyn held that it imposed an obligation that the employer shall not, “*without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee*”.
95. It has been clear, since *Woods v WM Car Services (Peterborough) Ltd* [1981] ICR 666, that any breach of the implied term of mutual trust and confidence will be a repudiatory breach. However, as noted in *Malik*, the conduct has to be such that it is likely to “destroy or seriously damage” the relationship of trust and confidence.
96. The proper approach to constructive dismissal in a trust and confidence case has been more recently summarised by the Court of Appeal in *Omilaju v Waltham Forest London Borough Council* [2005] ICR 481, to which I have also had regard.

Conclusions

97. Applying the above principles to the facts as found, I reach the following conclusions. It is clear that the key issue in this case is whether the claimant was contractually entitled to be paid a 1% commission on total Instrumentation/Monitoring revenues or not.
98. I therefore deal with the following issues together given the relevance of them to the issues at hand:

Claim 1: Unfair Dismissal

Did the Claimant's employment contract contain the following contractual terms:

- (a) *express and/or implied term (whether or not based on parties' custom and practice) entitling Claimant to be paid 1% commission on all turnover generated by Instrumentation/"the Division" that was contractual and not discretionary;*
- (b) *implied term imposing a duty on the parties not to, without reasonable and proper cause, engage in conduct calculated or likely to destroy or serious damage the relationship of trust and confidence between employer and employee.*

Issue 1(a)

99. **I find that the claimant's contract of employment did not contain an express term (written or verbal) giving him a contractual right to be paid commission:**

- a) In his own evidence the claimant accepted that he had not been informed during his interactions at the interview stage as to whether his commission would be contractual; he was advised that he would receive a commission payment of 1%. The internal email between Gordon McDonald and Chris Carter was silent on the issue but the claimant accepted that in the main the industry practice was for commission schemes to be non-contractual and discretionary. The evidence from David Garden (whose role involved structuring and maintaining such schemes) also confirmed that it was industry practice for commission schemes to be non-contractual and discretionary. I accepted his evidence.
- b) The claimant was subsequently sent a copy of his contract of employment in February 2017 as well as a job offer document. The employment contract did not contain an express term giving the claimant a contractual right to be paid commission. The job offer document was also silent as to the commission agreed. The claimant did not seek to rectify the point and there is no plausible explanation for this.
- c) Within a month of working for the respondent the claimant did in fact receive correspondence which made it clear:

"Dear Jake

I am pleased to confirm that commission will be paid to you at 1% for all turnover generated by Instrumentation, effective 13 February 2017.

Commission is paid 1 month in arrears and will commence in your April 2017 salary. Any commission due to you will also be backdated.

Please note that commission is not pensionable and does not form part of your Contract of Employment, and may be subject to change at any time.."

- d) The communication is unequivocal and in accordance with the commission rate that had been agreed at the interview stage. The position concerning the claimant's entitlement is unambiguous and he was clearly advised that the commission scheme did not form part of his contract and was subject to change at any time.
- e) The claimant read and understood the document but did not advise the respondent that it was inaccurate. I did not accept the reasons given by the claimant in paragraph 8 of his witness statement for not disputing the contents of the email in 2017. His evidence was not plausible.

- f) The claimant has demonstrated that he will pursue the respondent for clarification in a timely manner as and when issues have arisen, for example on 14 February 2020 he sent an email querying the standardised payment method and 20% banked element relating to commission (which had only been introduced in November 2019). He also chased up David Garden regarding his disappointment with the job vacancy between July and September 2021. As set out above, I do not find that the email of 14 February 2020 and 15 November 2021 constituted evidence that 'the claimant had been asking in vain for his commission arrangements to be clarified for over two years' as set out in Mr Epstein's submissions. In fact, the claimant acknowledged that his scheme had been adjusted on 28 February 2020 to bring him in line with the business. He also goes on to refer to the 2020 commission scheme as well as the original 'commission structure' but he does not (i) state that he did not agree to this and/or (ii) suggest that his commission scheme was contractual and should not have been amended. The email reads as a query in respect of the commission he has received rather than a protest over the contractual nature of the schemes that he has been part of.
- g) I reject the assertion made by Mr Epstein in his written submission that as the letter dated 13 March 2017 did not reflect the oral discussion on 11 January 2017 it amounted to evidence either that:

"...21.1 the Respondent had made a mistake, that could be rectified in the fullness of time (but it was not), or the position was otherwise, as set out in paragraph 8 of WS2-JK; or

21.2 the parties had not been ad idem on 11th January 2017, such that there was no contract in effect between the parties, because each of them had a different understanding of the oral agreement they reached; or

21.3 the 13/03 Letter the CEO had rendered the representation by the CEO into a misrepresentation....."

- h) In his own evidence the claimant confirmed that the contractual basis of the commission scheme had not been discussed. The letter dated 13 March 2017 clarified the commission scheme that applied and had been referred to in the job offer form. The notion that the respondent had therefore made a mistake is not plausible – the letter clearly confirmed the respondent's intention regarding the scheme. The claimant did not seek to challenge this as set out above. I also do not accept the premise that the claimant was simply entitled to 'await' what he considered to be the correct terms if he had not pointed out the alleged mistake or misunderstanding that had arisen. As explained, I do not find that there was a mistake. The respondent's understanding was clear – that the scheme was discretionary. It set that out in writing and the claimant did not dispute that. I find that this is because it was his understanding too.
- i) The Claimant's conduct continued to be inconsistent with the contention that there had been an express agreement that the commission would be contractual. On 28 February 2020 the claimant was advised that he was being moved to the '2020 commission scheme'. The claimant flagged up a potential

discrepancy in qualifying under the scheme and this quickly resolved by Claire Watson and Sarah Ahmed. In her letter of 3 March 2020, Sarah Ahmed confirmed that the claimant was part of the BDM commission scheme but Element 2 of the scheme would not apply to him. It was made clear that commission did not form part of his contractual terms and the terms could be amended at any time. This also confirms that the claimant had sought clarification at the time as to how the scheme applied to him, this had been provided and was formally recorded.

- j) Once again, when the claimant was promoted to National Account Manager in 2021 he was again reminded that all other terms and conditions remained unchanged.
- k) From August 2022 the claimant was involved in consultation with David Garden regarding a new commission scheme that he was seeking to impose. This scheme can be differentiated from the previous schemes as it was felt by the claimant to materially affect his earnings capacity. This is evident in his communications to David Garden on this point. However, again there is no suggestion on part of the claimant:
 - a. that he had a contractual right to commission
 - b. his commission scheme could not be changed without his consent and
 - c. any amendment or change to the scheme would constitute a breach of contract.
- l) The claimant did not at any point (until 6 March 2023) contend that he was contractually entitled to be paid commission, it could not be changed and/or the actions of the respondent would breach his contract. I have referred to the evidence of David Garden in respect of the enquiries raised by the claimant in my fact-finding section.
- m) There are no documents within the hearing bundle until 6 March 2023 which suggest that the claimant was contractually entitled to be paid commission.
- n) There are no documents within the hearing bundle until 6 March 2023 whereby the claimant challenged the respondent on his contractual entitlement to commission.
- o) The respondent's later commission schemes as found in the bundle clearly state that they are all non-contractual and discretionary. During his employment the claimant did not seek to challenge that his commission entitlement was contractual despite been made aware of the same within one month of his employment commencing with the respondent.
- p) I did not find that there was a subsequent variation to incorporate such an implied term. Whenever the claimant's contractual terms were amended i.e. job description or salary this was always documented in writing and by way of 'change forms'. Each time, it was made clear that the claimant's other terms remained unchanged including commission. There is no evidence to suggest that the claimant's non-contractual entitlement to commission was changed

during his employment. The contract of employment retains all benefits that the claimant is contractually entitled to. The omission of the commission scheme enforces the view that it treated as a separate non-contractual benefit. If the respondent had intended for it be a contractual element they could have easily advised of this by way of correspondence with attached change form that it utilised in respect of all contractual changes. This wasn't the case.

I find that there was not an implied term entitling Claimant to be paid 1% commission on all turnover generated by Instrumentation/"the Division" because:

- q) I considered the business efficacy and officious bystander tests that I have referred to above. I did not find that the parties intended to create a contractual non-discretionary commission scheme. The initial job offer and contractual letters were silent on this point but it was advised that commission was to be agreed. The letter dated 13 March 2017 confirmed that the commission scheme was to be non-contractual and amended at any time. The claimant did not challenge this and all subsequent correspondence regarding commission was consistent with this approach. Whilst the claimant enjoyed payment of commission over a number of years he was advised from the outset that it did not form part of his contract of employment and was subject to change at any time (letter dated 13 March 2017).
- r) Whilst commission was paid over a number of years it must be borne in mind that the claimant was employed as the sole salesperson to head up a new department. The payment of commission was linked to the growth and profitability of the department. The claimant confirmed that in his previous employment his commission entitlement was non-contractual and discretionary and this was an accepted practice. There was no 'business necessity' to depart from this. David Garden whose evidence I found credible stated that all commission schemes within the organisation were non-contractual and it wasn't in the interest of the business to depart from this. The scheme worked well and following investment into the claimant's team, taking into account budgetary and financial constraints the respondent elected to use its discretion to amend the scheme to fit with business needs. The claimant also envisaged changes to be made to his remuneration including commission as his department evolved.
- s) I then went on to consider if the custom and practice of paying commission resulted in a contractual entitlement. I did not find this to be the case. Whilst the claimant enjoyed commission payments throughout his employment the respondent has always maintained that these were discretionary and did not contractual. All documentation and communication pertaining to commission schemes were advised to be discretionary and non-contractual across the workforce. The claimant was informed of this within a month of commencing his job role. The respondent had a practice to advise the claimant and to record any changes to his contract of employment. Throughout the duration of his employment the respondent maintained that commission payments were non-contractual and at the discretion of the employer. This was maintained throughout his employment from 2017 to 2023.

- t) The schemes that were introduced by the respondent across its workforce all allude to them being discretionary and non-contractual. The claimant was advised that the respondent wanted to ensure a standardised process re commission schemes across the board; these schemes were discretionary and non-contractual.

Issue 1(b)

100. The claimant relies on a breach of the implied term of trust and confidence.
101. I do not accept the respondent's case that the claimant's contract of employment did not include an implied term of trust and confidence. It is a fundamental breach of contract for either party, without reasonable and proper cause, to conduct itself in a manner 'calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer 30 and employee' (Courtaulds Northern Textiles Ltd v Andrew [1979] IRLR 84, EAT, Malik v BCCI [1997] ICR 606).
102. However, I am minded to agree with Mr Tinnion on this point; as I have found the claimant did not have a contractual entitlement to commission and as the respondent was under no express or implied contractual obligation to pay commission the respondent cannot be held to have been in breach of the implied term of trust and confidence in this regard. The claimant had been made aware that the commission scheme was non-contractual and could be amended at any time.
103. David Garden in his evidence explained why the commission scheme necessitated a change in 2022 and had reasonable cause for his conduct; additional team members had joined the team and he had to take account of budgetary constraints. The scheme was devised to deliver budget and reward all team members. The claimant in his email dated 25 September 2022 confirmed that in principle he was agreeable to the framework that had been proposed regarding the commission scheme for himself and his team members. The claimant recognised that a scheme was required and added "...there may exist strong sensibility or justification driving the requirement for significant alteration to my salary package.." He sought to justify why the proposed commission scheme did not suit his circumstances and efforts. I found that David Garden entered into reasonable consultation with the claimant despite not being contractually required to do so and despite the claimant feeling aggrieved at his potential earning capacity this was an unfortunate consequence of meeting budgetary targets.
104. Furthermore, on 24 February 2023 David Garden provided the claimant with an adjusted commission scheme. The department was adrift of budget and it had been recognised that the team was not achieving commission. The adjustment was introduced from February 1 – September 2023 as a means to try and bolster the department and to try and demonstrate the importance of the claimant and his team within the business. This emphasises that David Garden was receptive to the ongoing situation, was acting in good faith and was not

intent on introducing measures solely to the detriment of the claimant. Had the claimant and his team hit target going forward it is reasonable to assume that a further scheme may have been introduced which incentivised them and increased their earning capacity.

105. Against this background I cannot find that there was any conduct in this respect which, without reasonable and proper cause, was conduct which was calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.
106. I therefore do not find that the Respondent breached the implied term of trust and confidence in the circumstances.
107. It therefore follows that there was no repudiatory breach of contract not to make those commission payments to the claimant. The Respondent legitimately, reasonably, and in good faith, exercised its discretion not to make those payments. As a consequence, I am not required to consider the outstanding issues under the heading of constructive unfair dismissal.
108. Consequently, as I have found that that the claimant did not have a contractual right to be paid commission his claims for unlawful deduction from wages and breach of contract fall away.

**Employment Judge Jaleel
21 December 2023**