EMPLOYMENT TRIBUNALS

Claimant: Mr D Chadwick-Rayner

Respondent: Ford Retail Ltd T/A Trustford

Heard at: Leeds **On:** 20th to 23rd February 2023

Before: Employment Judge Moxon

Representation

Claimant: Present and unrepresented
Respondent: Mr McLean, counsel

JUDGMENT

1. The complaint of constructive unfair dismissal fails and is dismissed
2. The complaint of failure to pay holiday pay fails and is dismissed
3. The complaint of failure to pay notice pay fails and is dismissed
4. The complaint of unauthorised deduction from wages fails and is dismissed
5. The Respondent's application for costs is refused

REASONS

These reasons are supplied at the request of the Claimant.

Background

1. The Respondent is a motorcar retailer and employed the Claimant as a sales executive in the New Car Sales Department from 23rd April 2018.

2. The Claimant's contract permitted 33 days holiday annually. His normal wage, for the calculation of holiday pay, was taken from his last 12 months' income with the Respondent, namely 260 working days, given that he worked five days per week.

3. Clause 1.20 of that the Claimant's employment contract stated:

> "*Any bonus scheme in place from time to time may be varied or terminated by the Company in its absolute discretion. Participation in any bonus scheme or schemes in any year does not oblige the Company to extend or repeat that participation thereafter*".

4. In Late 2018 / early 2019, the Respondent introduced a new service for customers, known as the Ford Pass, which was an app that customers could activate upon their smart phones to obtain information about their vehicle. Sales executives were required to encourage customers to activate the app.

5. In February 2020, the Claimant submitted a grievance upon an allegation that he had been covertly filmed at work by Mr Matthew Kitson, General Manager of the Castleford dealership, whilst interacting with a customer. The grievance was dismissed on 20th July 2020 and the Claimant did not appeal that decision.

6. The Claimant was placed on furlough on account of the Covid-19 pandemic in March 2020. He queried the rate of his furlough payments in April 2020 and May 2020. Whilst his initial queries were dismissed, the matter was resolved in his favour in November 2020.

7. In 2021 the Respondent changed the payment of commission. Instead of being paid upon the completed sale of a motor vehicle, it was paid in advance and recouped from the employee if the sale did not materialise or if the employee left the Respondent's employ. The recoupment was termed "*claw back*".

8. A new payment plan, effective from 1st January 2022, introduced a larger starting salary but lesser commission.

9. The Claimant queried the claw back provisions and 2022 payment plan within an email dated 21st February 2022 to Ms Heather Bennett, Regional HR Partner. Upon conversations with Mr Kitson, he was incorrectly told that 2022 commission was subject to claw back. He was also told that commission would be clawed back if he left the Respondent's employ or moved department prior to completion of sales for which the commissions related. The Claimant was aware of a colleague who had moved department but had not been subjected to the claw back.

10. The Claimant resigned by letter dated 7th March 2022. That letter contained no reason for his resignation.

11. The following day, the Claimant submitted a grievance by email in which he said that he wished to complain about the way his notice period was being handled and the rules about claw back of commission payments. He stated that he was awaiting confirmation as to whether he would receive a DPA payment of £230 and confirmation about how his holiday pay was calculated.

12. The Claimant attended a grievance meeting chaired by Mr Dermot Rafferty, Regional Director for Northern Ireland and the Channel Islands, on 15th March 2022. It was confirmed that 2022 commission was not subject to claw back and that he would receive the £230 DPA, as would his colleagues who had also not

been paid the bonus. He was told that moving department would not result in a claw back of commission. He was given the opportunity to reconsider his resignation.

13. The Claimant's contract of employment ended on 7th April 2022.

14. After he handed in his resignation, the Claimant disclosed to the Respondent what he believed to be data breaches concerning customer information, arising out of the use of the Ford Pass app.

15. The Claimant presented a claim to the Employment Tribunal on 10th June 2022 alleging constructive unfair dismissal, failure to pay notice and holiday pay and unlawful deduction of wages. All claims were resisted by the Respondent.

Issues

16. The issues in the case were agreed during a preliminary hearing before Employment Judge Shepherd on 10th October 2022. The parties were given seven days to correct that list of issues and did not do so. At the outset of the final hearing, the parties reiterated that the list of issues was correct.

17. The main claim was one of constrictive dismissal. The Claimant claimed that he had resigned, on 7th March 2022, on account of the following conduct by the Respondent:

    i. Fail to deal properly with a grievance in respect of a video taken of the claimant.

    ii. Change the commission scheme and recoupment provisions.

    iii. Administration of the Ford pass scheme.

    iv. Incorrect holiday pay calculation; and

    v. Incorrect payment of furlough pay.

18. To succeed in the claim, the Claimant had to prove the conduct alleged, and that any conduct constituted a fundamental breach of an implied or express term of his employment contract. Further, he had to show that he resigned as a consequence of a fundamental breach and that he had not affirmed the contract prior to his resignation.

19. In relation to the other claims, the Claimant confirmed that he had been paid his notice pay but believed that there were unauthorised deductions, namely a failure to pay owed commission. In relation to holiday pay, the Claimant confirmed that the sole issue was the calculation of his average week's pay and that it was improper to use the 260 figure as that includes days that he is on holiday and not earning commission and that the correct figure should be 227 days.

20. I noted at the outset that there appeared to be dispute within the pleadings as to the dates of the Claimant's employment, however the Claimant confirmed that the dates provided by the Respondent were accurate. His start date was 23rd April 2018, as detailed upon his contract of employment, and his official end date was 7th April 2018, albeit due to days off and taking days in lieu his last day within the business was on 3rd April 2018.

The law

21. Lord Denning, in *Western Excavation (ECC) Ltd v Sharp* 1978 ICR 221, CA, held:

> "*If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed*"

22. A breach of the implied contractual term of trust and confidence occurs where:

> "…*without reasonable and proper cause [the employer] conduct[s] itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee*".

23. The authorities are clear that a failure to specify the reason for resignation in the letter of resignation, and the service of notice period, are not relevant considerations and do not defeat a claim for constructive dismissal

The hearing

24. The parties relied upon an agreed bundle of 237 pages. The Claimant stated that he had hoped to obtain a greater volume of emails from the Respondent by virtue of Subject Access Requests. He told me that he had hoped to obtain all emails that referenced him throughout his employment, which I noted did not appear to have been a reasonably targeted request. In any event, Ms Bennett confirmed that all disclosable emails had been provided to the Claimant.

25. Regrettably, the Respondent had been the victim of a cyber-attack and many emails prior to March 2022 were no longer available. The Claimant had been able to provide emails pre-dating that by virtue of the fact that he had forwarded those emails to his personal email account prior to the cyber-attack. I was satisfied that the parties had both adhered to their duties of disclosure and that there were no documents that remained available but not before me that would have assisted me in determining the issues.

26. On behalf of the Claimant, I received witness statements and oral evidence from himself and Mr Kallum Chester, a former colleague who had worked for the Respondent between approximately May 2019 and February 2020.

27. On behalf of the Respondent, I received witness statements and oral evidence from the following:
    i. Julia Greenhough, Marketing Director;
    ii. Matthew Kitson, General Manager of the Castleford dealership;
    iii. Heather Bennett, Regional HR Business Partner;
    iv. Benjamin Heeley, New Car Sales Manager of the Castleford dealership;
    v. Chris Jukes, Financial Controller; and
    vi. Dermot Rafferty, Regional Director for Northern Ireland and the Channel Islands.

28. Due to his non-availability in the first day and a half of the hearing, which had been identified at the Preliminary Hearing as the period in which the Claimant's evidence would be heard, Mr Chester was called out of turn and during the Respondent's evidence. This was agreed between the parties, as was his giving evidence by BT MeetMe on account of him being unavailable to travel to the venue and difficulties with CVP. None of those features caused any prejudice or unfairness to either part.

Findings of fact

Holiday pay

29. The calculation of the Claimant's average pay, for the purpose of holiday pay, was based upon his average daily income over a working year; that being 260 days, as he worked five days per week. The Claimant always disagreed with the use of 260 to work out the average and believes his 33 holiday days, where he would not earn commission, should be discounted and, that as a consequence, 227 days should be used to work out his average. He has queried the Respondent's use of 260 days on numerous occasions and was informed by the Payroll department that this was an industry standard method of calculation.

30. I am satisfied that the use of averaging the rate of pay received over the year is in compliance of the Employment Right Act 1996.

Ford Pass

31. In late 2018 / early 2019 the Ford Pass app was introduced which allows Ford motor vehicle owners to use their smart phones to track the location of their vehicle (which may be helpful if parked in a large car park), view their fuel levels and to unlock their vehicle. Whilst the Claimant did not see the attraction of the app, he was nevertheless tasked with encouraging customers to activate it on their phones and, in August 2019, he requested further training.

32. There were some teething problems with the app, not least how long it takes to activate, which has been a disincentive to new customers who wish to collect their new motor vehicle and go on their way without delay.

33. If a customer declines the app, the sales executive is required fill in a waiver form, signed by the customer, which shows that the customer has been told of

the app. There are targets imposed upon each of the Respondent's dealerships that a certain percentage of customers either have to have activated the app or signed a waiver. The target is therefore to show attempts to encourage customers to use the app. Failure to meet those targets could result in a penalty on a dealership's bonus but, I accept, upon considering their evidence, had no financial consequences to managers within each dealership.

34. A practice took place by the Claimant, and other sales executives in the Castleford dealership, that they would activate the app on behalf of customers on their own (the sales executives') mobile telephones at the time a vehicle sale was agreed. Upon completion of the sale, the sales executive would then give the customer the password, which would either be the customer's surname or the car's registration, and the customer would be encouraged to sign into the app upon their phone (the customers' phone) and change the password, which would automatically delete it from the sales executive's telephone.

35. During the time the app is activated on a sales executive's telephone, the sales executive is able to track the vehicle and unlock it. That is not a problem while the vehicle remains in the showroom. However, upon a sale being completed, and the vehicle being driven away by the customer, the sales executive will still be able to track and unlock it, unless the sales executive has deactivated the vehicle from their phone or the customer has changed the password, which automatically deactivates it from the sales executive's phone.

36. At the beginning of the hearing, there initially appeared to be some dispute as to what was known by management. However, it was confirmed by both the Claimant and Mr Heeley, during the former's cross-examination of the latter, that everyone was aware of the system that was being adopted, namely of sales executives activating the app on their own telephones. The purpose was to have the app activated and ready for customers in order to prevent delay when they collected their new vehicle. That was an admirable intention, but it was not appropriate in light of what Mr Heeley described as "*pitfalls*" to the system.

37. Those pitfalls are that, for a period of time, a sales executive would have tracking information on a customer's vehicle when they had no need or permission to have such information. Further, the umbrella Ford company was being given an inaccurate picture of the sign-up rate for the app, as sales executives were activating the app for some customers who ultimately did not want or ever use the app, and who had never signed a waiver.

38. There was clearly insufficient management oversight of the process as there should have been a system to ensure that sales executives deleted a vehicle's details from their telephones at the moment a customer drove off the forecourt, unless given express permission to retain it for a period until the password could be changed by the customer upon their own handset. It would appear from an email from the Claimant to Mr Heely, dated 2nd March 2022 asking about deleting vehicles from his phone, that management within the Castleford dealership knew that some sales executives were building a backlog of activated vehicles on their telephones which were only being deleted every month or every quarter.

39. However, that failure of management oversight does not excuse or explain the wrongdoing of the sales executives, including the Claimant, who were knowingly activating the app and retaining the details on their mobile telephones and were failing to delete them within a reasonable timeframe. The Claimant stated in his oral evidence that he knew that his actions were morally wrong, yet he continued that activity from 2018/2019 until March 2022. He could, at any time, have stopped the activity. He could have waited until the completed sale of a vehicle and activated the app directly on the customer's telephone for those that wanted the app, or filled out waiver forms for those who did not want it. Alternatively, he could have deactivated sold vehicles from his mobile telephone the moment they were driven off the forecourt by customers. He was never expressly told not to do those things: he himself made a conscious decision.

40. I do not accept that the email from Mr Heeley to the team, dated 25th February 2022, congratulating them on 100% activation for a period, to have caused the sudden circumspection that the Claimant asserts. He says that at this point he thought "*enough was enough*". I am satisfied that he knew of the pitfalls and the immorality of his actions throughout the period he was doing it, which was a period of approximately three years.

2020 Grievance

41. In February 2020, the Claimant submitted a grievance upon an allegation that he had been filmed at work by Mr Matthew Kitson, General Manager of the Castleford dealership, whilst interacting with a customer.

42. He summarised his complaint within the grievance meeting conducted by Ms Greenhough on 9th July 2020:

> "*My understanding was that Matt had videoed me over the balcony at Castleford. I think this happened, whether it did or not is my grievance. As I walked past, good timing, or what, Matt said to Jon [Eccles] did you see that video I posted wedging a customer in warranty, I presumed it went unto some sort of management WhatsApp group. Jonathan is part of it on the management team, so there is no way I have seen it*…"

43. "*Wedging*" in this regard relates to railroading or pressurising a customer into a warranty. The Claimant states that he has never done this, either on the day in question or any other time.

44. The Claimant and others, including Mr Kitson, attended grievance meetings chaired by Julia Greenhough. The Claimant was notified of the dismissal of the grievance by letter dated 20th July 2020. He did not utilise his right of appeal.

45. The complaint was put to both Mr Kitson and Mr Eccles and they denied it. They denied the existence of the video and they denied the comments that the Claimant believed he overheard.

46. In his first meeting, Mr Kitson stated that he films in the compound and sends footage to his staff if he believes that cars have not been parked where there should have been. He said that he "*wouldn't video colleagues*". He was asked whether he had "….*ever taken a video of colleagues without their knowledge, covertly, track how they are interacting with customers or otherwise*?" and he replied "*no*".

47. During a second meeting with Ms Greenhough, he showed the management WhatsApp group on his telephone and there was no post of a video during the material period nor was there any deleted posts.

48. The Claimant, within his oral evidence, accepted that the only concern that he had about the grievance procedure was that Mr Kitson was told of the contents of the grievance in advance of his mobile telephone being checked, which gave him the opportunity to delete the video. The Claimant clarified that he was not asserting an unreasonable delay in determining the grievance as many people were not working soon after he submitted the grievance on account of the Covid pandemic.

49. The Claimant has since seen a video that was taken in January 2019 from the balcony where he asserts that he had been filmed, showing a colleague cleaning a car and another colleague in the background. It lasts four seconds and does not show any customers or customer interaction. Mr Kitson accepts taking that video for social media purposes. It was shared to staff, including the Claimant, in September 2020. The Claimant states that this undermines Mr Kitson's assertion during the grievance procedure that he had not taken videos. I don't accept that. The video of the gentleman cleaning the car did not contain any customer or customer interaction and was taken for a specific promotional purpose. Whilst Mr Kitson stated that he did not have the member of staff's express permission to take the video, I accept that he understood that there would be no objection, which has been proved to be correct as, upon sharing the video, there was no challenge by any member of staff.

50. In any event, the discovery of that video cannot be said to have impacted upon the fairness of the July 2020 grievance procedure as it was not known to the Claimant or Ms Greenhough at the time. Upon the evidence before her, she made a decision that no video of the Claimant had been taken. That was a perfectly reasonable conclusion in light of the fact that the height of the complaint was that the Claimant "*understood*" a video had been taken, but had not seen it himself; that the alleged taker and recipient of the video denied its existence; and that there was no evidence of the video or a deleted post upon the WhatsApp group that the Claimant alleged it had been posted upon at the relevant period.

51. Further, as outlined by Ms Greenhough within the grievance outcome letter, dated 20th July 2020:

> "….*I find it unlikely that Matt could have taken a video of you 'wedging a customer into a warranty' as this was not the circumstances you described the situation to be*.".

52. There is significant force in that observation. If the Claimant denies ever having wedged a customer into a warranty, how could there be a video in existence showing him doing so.

53. The Claimant states that following the submission of the 2020 grievance his desk was moved to be closer to Mr Kitson's office. I am not satisfied that this was in any way associated with the grievance and accept the account of Mr Kitson, which was not materially challenged by the Claimant, that the layout of the showroom changed upon return to work after lockdown; that other sales executives had already taken the other desks; and that in any event Mr Kitson wanted the Claimant near him as there was some concern about the manner in which he was speaking to or about customers.

54. The Claimant also claims that soon after he submitted the grievance, Mr Heeley told him that his life would never be the same again, or words to that affect. I am not satisfied that this was said. I note that the Claimant made no contemporaneous complaint. He said that the comment was made during the grievance procedure, yet it was not raised at the time to Ms Greenhough. Mr Heeley stated in his oral evidence that he could not recall saying such words and denied it in his written evidence.

Furlough pay

55. The Covid pandemic resulted in the Claimant and his colleagues being placed on furlough in March 2020. He queried the rate of pay in April and May 2020 and those queries initially fell on deaf ears, before the matter was resolved in his favour in November 2020.

Commission – claw back

56. At some point in 2021 the Respondent changed the way in which commission was paid to sales executives, including the Claimant. Traditionally, a sales executive would only get commission upon the completion of a sale and provided that the sales executive was still employed by the Respondent at the time of completion. However, in light of Covid, which resulted in a reduction in motor vehicle manufacturing and therefore sales, the Respondent changed the payment of commission to pay a portion of it in advance. This was intended to ensure that staff maintained a reasonable income during that difficult period. Commission was paid to a sales executive upon the agreement of a sale, but would be repayable if the sale collapsed for any reason or, at the time of completion, the sales executive was no longer working for the Respondent.

57. The Claimant submitted a query about the pay plan in an email to Ms Bennett on 21st February 2022. He asked what would happen to his paid commission if he was to resign or move departments.

58. There followed a meeting between the Claimant and Mr Kitson where Mr Kitson stated, it transpires incorrectly, that 2022 commission was subjected to claw back and that all commission would be clawed back if the Claimant was to move department. Mr Heeley accepts, within his witness statement, that he also gave

the incorrect information to the Claimant about claw back of the 2022 commission.

59. I accept that the Claimant is frustrated that he was given incorrect information and that it was only rectified upon him submitting the March 2022 grievance. He learnt that only the 2021 commission would be clawed back and only if he left the Respondent's employment, but not if he changed department.

Commission – 2022 pay plan

60. In December 2021 the Claimant and his colleagues were notified of a change to their pay plan, commencing on 1st January 2022. There were material differences between the 2021 and 2022 payment plans. In summary, the basic wage of sales executives was increased but commission reduced. They would receive commission based on unit sales rather than chassis profit. For the Claimant, this resulted in his basic wage of £14,800 being increased to £20,300, but a consequent reduction in commission. There is some dispute as to whether this would result in a reduction in the Claimant's overall earnings, although he accepted that any reduction would be minimal.

61. Within his email to Ms Bennett, dated 21st February 2022, he stated that he was dissatisfied with the change.

62. His email stated:

> "*The pay structure for me personally is by no-way a rise and, in fact, if I underachieve then it is beneficial for me. With examples I have received: if I sell 156 units per year I am £200 better off a year however Used Cars Sales on the examples received can be 10k better off a year selling the same amount of units…The element of having the ability to earn a 'percentage of profit' has been removed and this has really demotivated me. I have worked in the industry for 9 years and this has always been part of my pay plan*"

63. Despite those objections, I accept the evidence of Mr Rafferty, who was involved in the designing of the 2022 payment plan, that it was designed to ensure a better living wage for staff and that it had proved extremely popular amongst sales executives, including all 60 of the sales executives in his own region. I accept the evidence and the spreadsheets from Mr Heely that the Claimant would not have been disadvantaged by the change. Whilst the Claimant believes otherwise, he stated in his oral evidence that he believed it would be a slight difference on an estimated sale of 200 cars of £1,000: from £44,000 to £43,000.

Reason for resignation

64. In the email to Ms Bennett, dated 21st February 2022, the Claimant first asked what would happen with his paid commissions if he was to leave the organisation. That is a clear intention that he was considering leaving the Respondent.

65. During his grievance meeting with Mr Rafferty, on 15th March 2022, the Claimant is recorded as saying the following upon being asked about his objection to the 2022 pay plan:

> "…*I am there for the money I have a son at university it will impact me financially this does not work for me hence why I resigned*…"

66. He later stated:

> "*The reason why I have resigned is the profit element was not in 2022 pay*…"

67. Within his witness statement, Mr Rafferty stated the following:

> "*I felt we might be able come to an agreement where the outcome was that he didn't leave and asked him if he would be happy to stay. Dennis was insistent that he would not stay with the new pay plan being in place*."

68. Mr Rafferty continued:

> "*I understand that in his complaint to the Tribunal Dennis has suggested that one of his reasons for leaving was related to issues relating to the Ford Pass app. Dennis made no mention whatsoever of this to me and during our discussions was quite clear in saying that his reason for leaving was the change in the pay plan from "chassis profit" to an order take based commission*."

69. During the hearing the Claimant did not challenge the accuracy of Mr Rafferty's recollections, which in part are corroborated by contemporaneous notes from the grievance meetings. The accuracy of the notes was not challenged.

70. There is no reference in any of the notes to the Ford Pass being part of the reason for resignation, nor is there refence to any matter other than the Claimant's dissatisfaction with the 2022 pay plan being a reason for his resignation. There is reference to the Claimant being asked to reconsider his resignation, which he declined due to the 2022 pay plan.

71. I therefore accept that Mr Rafferty's account is reflective of his meetings with the Claimant.

72. I am therefore satisfied that the reason that the Claimant resigned was solely due to his dissatisfaction with the 2022 pay plan, and not for the reasons that he has subsequently asserted.

Conclusions – Constructive dismissal

Holiday pay

73. The holiday pay complaint is the first chronologically as the Appellant asserts that this has been ongoing since he commenced employment with the Respondent.

74. He worked full time, five days a week, and so his average daily wage would be considered upon the last 260 days' work (upon him completing a year's employment with the Respondent). That figure comes from 5 days x 52 weeks. The Claimant asserts that the use of 260 days is unfair, and that instead 227 days should be used, which are the working days excluding his 33 days entitled holiday. He believes that his calculations would be fairer because including his 33 days holiday in the calculation reduces the average daily rate as he is not earning commissions when he is on holiday. Whilst I appreciate the logic of his argument, I do not consider it to have merit. The use of averaging the rate of pay received over the year is in compliance of the Employment Right Act 1996 and so cannot be considered to be a breach of contract.

75. In any event, given that this had always been the case since he was employed by the Respondent, the employment contract was affirmed by the Claimant as he continued to work upon that holiday calculation rate for almost four years.

76. Further, I am not satisfied that it formed any part of his resignation. I take into account the passage of time that he was subject to that manner of calculation and the fact that, whilst he raised the matter in his March 2022 grievance, he did not assert that it was a reason for resigning. I reiterate my finding that the sole reason for the Claimant's resignation was his dissatisfaction with the 2022 pay plan.

The Ford Pass

77. Whilst it appears that the Respondent knew of the Claimant's wrongdoing, but did not stop it, I do not consider that this is a breach of contract by the Respondent as the Claimant was never compelled to undertake the activity and could have acted otherwise, as outlined above.

78. In any event, even had this amounted to a breach of contract by the Respondent, the Claimant affirmed the contract by being, in his word, "*complicit*" in the activity for over three years.

79. Further, given that length of time, the fact that he could have stopped the activity at any time, and the lack of any reference to it being a cause of his resignation during the 2022 grievance meeting, I am not satisfied that it had any part in his decision to resign. I reiterate my finding that the sole reason for the Claimant's resignation was his dissatisfaction with the 2022 pay plan.

2020 Grievance

80. I note at this point that the allegation of Mr Kitson taking a video and making the above comment to Mr Eccles is not one of the reasons why the Claimant says that he resigned. He asserts that it was the handling of the grievance procedure that contributed to his resignation.

81. However, he said in oral evidence that he was satisfied about the grievance procedure, save and except that he believes that Mr Kitson's phone should have been confiscated as soon as the complaint was submitted, rather than

giving him the opportunity to delete anything incriminating. I do not consider that resulted in any unfairness during the procedure because, as outlined by Ms Greenhough, WhatsApp groups display if something has been deleted and she looked at the relevant timeline of the management group upon Mr Kitson's mobile telephone and saw that there was no video within the group nor was there any refence to a deleted post. I do not accept that she should have asked to look at his personal mobile telephone or other WhatsApp groups as the allegation by the Claimant was that it had been posted upon the management group.

82. The handling of the grievance procedure was therefore fair and reached reasonable conclusions. The Claimant was given the opportunity to appeal, but did not do so. He did not re-raise the issue upon seeing the September 2020 video, which indicates that the matter, as far as he was concerned, was closed.

83. Therefore, the grievance procedure did not amount to a breach of any express or implied terms of the employment contract. In any event, the employment contract was affirmed by the fact that the Claimant continued to work for the Respondent for over 18 months thereafter.

84. Further, I do not accept that it formed any part of his reasons for resigning in March 2022 and take into account that the matter had been settled without appeal or being re-raised; and within his March 2022 grievance, following his resignation, he made no reference to the handling of the 2020 grievance being a feature of his decision to resign. I reiterate my finding that the sole reason for the Claimant's resignation was his dissatisfaction with the 2022 pay plan.

85. Even had I accepted that the Claimant's desk was moved as a retaliatory act, and that Mr Heeley made a threatening comment, and even if I was to accept that these features constituted a breach of the implied term of trust and confidence, the contract was nevertheless affirmed by the Claimant as he continued to work for the Respondent for over 18 months. Even had such breaches occurred, they did not contribute to his reasons for resignation given the passage of time; and within his March 2022 grievance, following his resignation, he made no reference to treatment by Mr Kitson and Mr Heeley arising from the 2020 grievance being a feature of his decision to resign. I reiterate my finding that the sole reason for the Claimant's resignation was his dissatisfaction with the 2022 pay plan.

Furlough pay

86. In April 2020 and May 2020 the Claimant raised a query about whether he was being paid the correct furlough pay. It transpired that he was correct to raise the query and that the initial answer that he was given was incorrect and unhelpful. The rate of pay was not adequate and this was rectified by November 2020. I accept that there was a potential breach of contract in April and May 2020. However, the contract was affirmed by the Claimant as he did not resign and remained in the employment for almost two years. Further, it was rectified satisfactorily in November 2020, almost 18 months prior to his resignation.

87. I do not consider that it formed any part of his reason for resigning in March 2022 and I take into account the passage of time; and within his March 2022 grievance, following his resignation, he made no reference to initially incorrect furlough pay in 2020 being a feature of his decision to resign. I reiterate my finding that the sole reason for the Claimant's resignation was his dissatisfaction with the 2022 pay plan.

Clawback of commission

88. The Claimant never adequately articulated his objection to the introduction of advanced commission, which was clearly implemented to assist himself and his colleagues by paying money in advance at a time that it was needed. His sole objection appears to be that he may have to pay some of it back, but that is money that under the old system he would never have received in any event, and so his objection is not reasonable. The system of advance payment of commission to ease the financial burden of lack of sales upon staff, but the requirement that the commission be repaid if a sale was to collapse or the employee leave their employ, cannot reasonably be said to be calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee.

89. In any event, the system of advanced commission and claw back was introduced in 2021 and the Claimant did not submit his resignation until 7th March 2022. As such, the contract was affirmed by him.

90. I again reiterate my finding that the sole reason for the Claimant's resignation was his dissatisfaction with the 2022 pay plan.

91. The communication of wrong information by Mr Kitson and Mr Heeley about clawback, which was then clarified by the Respondent upon it being challenged by the Claimant during the 2022 grievance, is not a fundamental breach of the implied contractual term of trust and confidence. I am satisfied, and no contrary argument has been raised by the Claimant, that the incorrect information given was in error and was not done intentionally or wilfully. I am not satisfied that it was calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee. The Claimant would not have been treated differently than the colleague who moved department, as it has transpired that commission is not clawed back as a consequence of departmental transfer. Upon him escalating the concern, the wrong information was corrected.

92. Even had Mr Kitson's information been correct, and even had another member of staff been treated differently, it would not have constituted a breach of the employment contract in light of clause 1.20 of the Claimant's employment contract, as outlined above.

93. In any event, I do not consider that any perceived breach, or anticipatory breach, of contract was the reason why the Claimant resigned. It is clear, as found as a fact, that the reason for the resignation was solely on account of a disagreement with the 2022 pay plan.

94. That conclusion is further supported by the fact that, upon the Claimant's subsequent grievance being found in his favour, and it being clarified that 2022 commission would not be clawed back and that transfer to another department would not result in a claw back, he nevertheless declined the opportunity to withdraw his resignation.

2022 payment plan

95. There is no breach of contract associated with the changing of the payment plan on account of clause 1.20 of the written contract as outlined above.

96. Even if there was a breach of contract, the contract was affirmed by the Claimant as he continued to work for the Respondent after being notified in December 2021 of the changes and did not submit his resignation until over two months later.

97. I need not make a positive finding as to why the Claimant resigned from the Respondent, I must simply determine whether he has proved that it was on account of a breach of contract. Whilst I do accept that the Claiming resigned because of the commission rates, I do not believe it was due to any breach of contract, but simply because it was not as advantageous as he had hoped a new plan would be.

98. He has therefore failed to satisfy me that he was constructively dismissed.

Conclusions – Payment claims

99. The Claimant accepts that he worked and was paid his notice pay. That claim must therefore fail

100. The Claimant's holiday pay is based upon the method used to calculate his average income. For the reasons given above, the method used was lawful and appropriate and so the claim fails.

101. The claim of unauthorised deduction relates to the fact that the Claimant believes that he was not paid some commission owed to him. He has never quantified what he says that he was owed, despite the burden being upon him to prove his case. In any event, the Respondent asserts that he was paid everything that he was owed. I therefore dismiss that claim.

Costs

102. Upon conclusion of the hearing, Mr McLean made an application for costs on the basis that the claim had no reasonable prospect of success, pursuant to rule 76(2) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

103. I refused that application.

104. Whilst the case had been dismissed, nothing in my reasons indicate that there was no reasonable prospect of success and, in fact, there have been adverse

findings against the Respondent in relation to incorrect information being communicated to the Claimant and insufficient management oversight of his activities.

105. In any event, I am unpersuaded to use my discretion in light of those adverse findings against the Respondent. Further, as properly accepted by Mr McLean, there had been no application to strike out the claim or for a deposit order; there had been no warning that there would be a cost application; there is no cost schedule; and consideration of costs would result in an adjournment, which would further increase costs, and would not be pursuant to the overriding objective under rule 2.

106. That concluded the case.

Employment Judge **Moxon**

JUDGMENT SENT TO THE PARTIES ON
24th February 2023

Danielle Wiles
FOR THE TRIBUNAL OFFICE