



EMPLOYMENT TRIBUNALS

Claimant: Mr C Sims

Respondent: Michael Rogers LLP

Heard at: Croydon (by CVP)

On: 25, 26, 27th November
& 4th December 2024

Before: Employment Judge Richter

REPRESENTATION:

Claimant: Ms Yang (Counsel)

Respondent: Mr Pickett (Counsel)

JUDGMENT

The judgment of the Tribunal is as follows:

1.1 Mr. Christopher Sims brings claims that he was unfairly dismissed by the Respondent

Michael Rogers LLP and that they have made unlawful deductions from his wages.

1.2 It is common ground that Mr Sims was employed by the Respondent. He commenced

employment at the start of 2017 and on 21st November 2023, by email, he indicated

that he considered his last day of employment would be 23rd November 2023. He

alleged in the email that the Respondent had failed to properly pay him commission

payments which he regarded as a fundamental breach of his contract of employment which therefore entitled him to terminate it.

1.3 The central issue in dispute concerns a purported variation to the claimant's contract in respect of his commission payments. Mr Sims contends that a variation was made orally by Mr Lewis, a partner of the Respondent, in around April 2020 and that from that date, he had then claimed commission in line with the variation.

1.4 The Respondent asserts however that the variation alleged by Sims was not made and that they were unaware he was claiming commission on a mistaken and incorrect basis until this was detected in the late Summer of 2023. The Respondent claims when it sought to try and recover sums that it considered it had overpaid to Mr Sims and to return his commission claims to the previously agreed regime, he resigned.

1.5 I have heard evidence and submissions over three days. I have heard oral evidence from Mr Sims and Mr Lewis, and also from Ms Ramsden, secretary to the Partner's at the Respondent and from Ms Manster an accountant retained by the Respondent. I have been referred to an agreed bundle prepared for this hearing consisting of 528 pages. I have seen a spreadsheet prepared by Mr Pickett of counsel acting for the Respondent which seeks to assist in illustrating figures drawn from materials within the agreed bundle. I have heard submissions from Mr Pickett and from Ms Yang acting for the Claimant.

The Law

- 2.1 S.95(1)(C) of the ERA provides that an employee is dismissed by his employer where the 'employee terminates the contract under which he is employed...in circumstances where he entitled to terminate the contract without notice by reason of the employers conduct.'
- 2.2 The focus for this Tribunal is to determine the nature of the conduct of the employer which entitled the employee to resign and in the leading case of Western Excavating (ECC) Ltd v Sharp [1978] QB 761 Lord Denning, as he then was, confirmed that the employer must be in breach of contract for a claim of constructive dismissal to succeed. The test, he stressed, is purely a contractual one and not one of unreasonableness, to be judge objectively.
- 2.3 The key question then is whether the employers' conduct is clearly a fundamental breach of one of the terms of the contract and therefore sufficiently important to be a repudiation of the contract by the employer. In Pederson v Camden Lonodn Borough Council [1981] ICR 674 it was confirmed that this was a mixed question of fact and law.
- 2.4 I observe that what Mr Sims alleges is a failure to pay commission as had been agreed and I note that generally a failure to remunerate as per the employment

contract will be regarded as a fundamental breach. If I were to find that Mr Sims was dismissed I must determine if dismissal was potentially fair and sufficient reason in the circumstances as set out at s.98(4) ERA.

- 2.5 As far as the unlawful deduction in wages is concerned this too focusses upon the disputed variation, if the contract was varied it is agreed that the Respondent has made unlawful deductions from wages which would be due to Mr Sims, if the contract was not varied then they have not.

The Facts

A number of matters of background are not in dispute and are supported by contemporaneous documentation within the hearing bundle.

- 3.1 Mr Christopher Sims is now 74 years old. He is a respected Chartered Valuation and Development surveyor. He is a fellow of the Royal Institute of Chartered Surveyors and an Associate of the Chartered Institute of Arbitrators. He has over 35 years of professional experience with leading real estate organisations, including in the last 20 years or so, appointments at Board level within largely well known national and international companies. At the end of October 2016 Mr Sims signed a contract of employment with Michael Rogers LLP as a Chartered

Surveyor to undertake professional work (as opposed to agency work) commencing employment at the start of 2017.

3.2 It is not been disputed that Michael Rogers LLP are a niche practice of Chartered Surveyors specialising in business space agency. The practice covers the southern corridor of the M25 from three offices, Sevenoaks, Reigate and Richmond. They also undertake commercial property valuations and lease advisory work. Michael Rogers LLP is a relatively small practice which was opened in 1990 by Mr Michael Lewes and two other partners who intended the business to remain a niche business as opposed to a larger concern. The company therefore never had a managing partner and instead was directed by the equity partners who would meet monthly.

3.3 In order to assist partners with the operation of the business in due course, Ms Theresa Ramsden was engaged as a partnership secretary and L. H. Manster & Co Accountants Ltd, a separate entity from the Respondent, was retained to provide accountancy services, book-keeping and preparing accounts. Ms Manster worked at the company and processed the payments which were made to employees of the Respondent.

3.4 It is common ground that the employment contract signed by Mr Sims provided he would be paid a salary of £37,500 p.a. which would be reviewed annually. The

contract provided that any debts incurred by Mr Sims to the Respondent could be deducted from salary (or from other payments falling due to Mr Sims). The contract also provided that commission was payable in the terms set out in schedule to the employment contract. (Bundle p.78)

- 3.5 The schedule referred to above provided that the commission structure would be reviewed annually prior to the end of the Respondent's financial year and that the provisions of the structure might be varied.
- 3.6 The structure initially set out in the schedule was that: 1) should the employee achieve aggregated settled personal billings during the financial year under £50,000 no commission was payable, 2) on billings between £50,000 - £100,000 20% commission would be paid and 3) on billing on sums over £100,000 30% commission was due to be paid to the employee. (Bundle p.92)
- 3.7 The schedule stated that the commission would be paid monthly in arrears after the submission of an appropriate claim to the partner in charge of the Sevenoakes office, who at all material times was the Claimant's line manager Mr Lewis.

- 3.8 When Mr Sims commenced his employment in January 2017 he completed a 4 month probationary period. At the end of the period Mr Sims gave evidence that he requested a pay rise although this it seems was declined at that stage.
- 3.9 It is clear however that on 2nd September 2017 Mr Sims wrote an email to Mr Lewis saying he had been approached by another company who had made an offer of employment which included a £60,000 basic salary and so he asked again for his pay to be revised (Bundle p.93). A revision to £45,000 basic salary and an alteration to the commission structure was approved at a partners meeting on 11th September and the revised pay award was backdated to 1st September 2017. That day Mr Lewis emailed the accountants and Ms Ramsden notifying them of the variation and asking them to action it and confirm it in writing (Bundle p.94).
- 3.10 The revised commission structure consisted of the following scheme, no commission remained payable on the first £50,000 of receipts in each commission year, a reduced rate of 10% commission would now apply to receipts between £50,000 and £100,000 and 20% commission to receipts in excess of £100,000.
- 3.11 Again it is common ground that up until the May of 2018 Mr Sims sent his commission claims to Mr Lewis as set out the schedule to the contract of employment. After that date however Mr Sims stopped submitting his claims to Mr

Lewis but instead sent them directly to L.H. Manster and Co who would effect the payments. Mr Sims explained this change in his evidence saying that as he worked longer at the company he grew to know its processes and he became aware that the practice was for commission claims to be sent straight to the accountants and were not copied to Mr Lewis. In his own evidence Mr Lewis denied this asserting that the other members of staff who made commission claims did still send him their claims but he accepts he never raised the absence of claims with Mr Sims or chased him for them. Mr Lewis further accepted that he did not descend into looking into the detail of any commission claim he was sent. He explained he trusted the people who were making the claims, and that the office consisted of 'adults', by which he meant experienced staff not for example trainees or people who had recently qualified. Further Mr Lewis said Mr Sims was a senior member of staff and he did not seek to micro manage him.

3.12 I do not find it necessary to try and resolve whether other staff did send their commission claims to Mr Lewis or not. Given that Mr Sims stopped sending his commission claims to Mr Lewis well in advance of the alleged and disputed variation there is no suggestion that Mr Sims did so with any ulterior intent to hide his claims from the Respondent and I am satisfied that he did not intend to do so. Indeed it appears a full reconciliation has now been conducted looking at all of Mr Sims claims since he commenced employment and no issue with the claims made from May 2018 up until the time of the disputed claims from later in 2020 onwards

has been raised. Mr Sims had it seems properly operated the commission structure and claimed correctly up until the time of the disputed variation.

3.13 Although as I have set out above I find it was not done with any ulterior intent, the change to exclude Mr Lewis from sight of Mr Sims commission claims did have the effect however that no one at Michael Rogers had direct knowledge of the sums Mr Sims was claiming or the basis upon which he was making the commission claims. The payment of the commission claims was, as set out, handled by L.H. Manster the external accountants who were now alone in receiving the commission claims.

3.14 Ms Manster gave evidence that she did not notice the failure by Mr Sims to copy in Mr Lewis to his commission claims after May 2018 and in any event she says it was not her role to do so. Nor, Ms Manster explained and I accept, did she check through the commission claims in any way apart from confirming that the client invoices that the claim was based upon had in fact been paid. This was necessary because, as noted above, commission was only payable on settled invoices. Above that check she did not do any extra work to confirm that the employee had correctly claimed commission or was operating any 'graduated scheme' properly. Ms Manster explained and I accept, her primary focus was simply looking at the 'bottom line' figure which had been submitted for payment and confirming that the invoices had been paid. Ms Manster explained in evidence that she was not

specifically aware of any commission negotiations between individuals and the Respondent and she was not involved in the same. As far as accounts were concerned Ms Manster said she would prepare management accounts monthly for her senior partner who attended the Michael Roger's partners meeting but she was unaware of the detail of those discussions.

- 3.15 It is again clear from the documentation that in August 2019 Mr Sims requested a further revision to his commission scheme. In an email to Mr Lewis he proposed that new 'tiers' should be introduced as follows for each commission year:

£50,000 - £75,000 – 10%

£75,000 - £100,000 – 15%

£100,000 - £150,000 – 20%

Over £150,000 – 25%

It remained the case that no commission was payable on the first £50,000 of receipts in each commission year. This proposal was discussed at Mr Sims Annual Review meeting in August 2019. (Bundle p.99)

- 3.16 Both Mr Sims and Mr Lewis give evidence that it was the practice of the Respondent to conduct annual reviews with its staff. In preparation for that meeting a spreadsheet document was prepared which provided a high level overview of

the financial position of the staff member. The document, of which there are examples at p.98 and 112 of the Bundle, did not break down the exact amounts of commission which had been claimed or paid in a year but only provided a snapshot of projected costs to Michael Rogers and income should differing levels of fees be achieved by the employee in the financial year.

3.17 Giving evidence Mr Lewis initially indicated that the document would be shown to staff members at the meeting and indeed went further to say that they were given a copy to take away. This however is disputed by Mr Sims and when he was cross examined Mr Lewis was much less certain that this always occurred. As such I find I can not be satisfied that the document was always shown to staff members or even discussed in any detail at the annual review. What is clear from the documents however is that they do not provide a detailed breakdown of the actual level of payments made to a member of staff in the year under review and so there is no information which might alert Michael Rogers to the levels of payment which were actually being made to the individual member of staff.

3.18 Having discussed the new commission structure Mr Lewis gave evidence that it was discussed at a partners meeting and agreed. It was put in place and operated until the disputed events which occurred in early 2020.

- 3.19 During this hearing Mr Pickett produced a spreadsheet illustrating the operation of the claimant's commission scheme from the agreed figures within the bundle. The spreadsheet demonstrates that under this 2019 commission scheme Mr Sims would receive c.£17,500 commission in his best performing year for Respondents when commission was paid to him on receipts of around £155,00. It also shows that about £11,700 in commission would be paid to Mr Sims in his worst performing year when he generated receipts in the region of c.£128,000.
- 3.20 Not long after the introduction of this new commission structure in March 2020 the COVID pandemic brought the country to its first national lockdown. Mr Lewis gave unchallenged evidence, which I accept, that the effect upon the commercial rental sector was unprecedented with business effectively stopping. As a result the company had to take action to safeguard its financial position and looked to furlough staff when the government's 'Jobs Retention Scheme' was introduced. Mr Sims was identified as one of four members of staff who were to be approached to see if they consented to moving onto the furlough scheme.

The central dispute

- 4.1 It is at this point that Mr Sims alleges that a further variation to his commission structure was agreed between himself and Mr Lewis when they were discussing working arrangements at this time. As set out in his witness statement and in his evidence to me Mr Sims asserts that Mr Lewis agreed to the variation in a single

telephone call. Mr Sims dates the call to around a week after he had first been instructed to work at home on 18th March 2020.

4.2 Mr Sims gave evidence that a number of matters were agreed in the above call. Firstly a reduction to the commission thresholds to reflect the position that staff were not able to work at all during the lockdown period was agreed (the top rate of £150,000 became he asserts £137,000). Secondly Mr Sims states that Mr Lewis agreed that once that top rate had been reached then the graduated commission structure would end and would be replaced with a wholly new scheme. This scheme would not have tiers nor would it 'reset' each year but would operate for as long as Mr Sims was working from home. It would now mean that commission was paid on all receipts at a flat rate of 25%.

4.3 Mr Sims asserts that the above was his clear recollection from the telephone call and so from around the Sept of 2020, when he reached the £137,000 figure for receipts, he then commenced claiming commission at 25% on all future receipts and continued to do so. He recorded that he was doing so on each of his commission claims which he submitted to the accountants. No issue was raised with him about the amount of commission claimed at any stage and Mr Sims explains he was aware that the partners met monthly to discuss the business generally and he would have expected them to have had regard to the financial performance of staff. Further, although annual reviews did not take place in 2020

and 2021 due to the disruption caused by the pandemic, no issue was raised at his annual reviews in 2022 or 2023 when he would have anticipated that his financial position within the company would have been examined in detail.

4.4 Mr Sims accepts however that there is no contemporaneous paperwork which records this purported change over and above his submission of commission claims at the new rate to the accountants.

4.5 Mr Lewis asserts that no such variation was agreed. He accepts that a telephone call did occur around the time alleged by the Claimant. Mr Lewis detailed that for many years he has been in the habit of making notes in a 'day book' when matters of significance arise. In preparation for the hearing he had looked back and found an entry for a telephone call made with Mr Sims on 2nd April 2020.

4.6 Having seen the note Mr Lewis recalls that he was to make a call to four members of staff to seek their agreement to be 'furloughed' as part of the government scheme. The note appears at p.230 of the bundle and a typed version of it has been produced to assist the parties at the hearing. The note records Mr Sims agreement to the furlough proposal at 80% of his pay together with commission payments. The note however is silent as to any variation of the commission scheme. Mr Lewis gave evidence to me that he did not and would not have agreed

to a flat 25% commission proposal in the telephone call. It would he says have been a 'red flag' for him particularly at that time when he was contacting staff to ask them to volunteer for furloughing.

- 4.7 As I have set out no issue was raised in relation to Mr Sims claims for commission payments until late 2023. In evidence Mr Lewis explained that at that time performance in the Respondent's commercial sector was struggling and the area was no longer profitable. He explains that this was initially thought by the partners to be due to the increased costs of indemnity insurance for staff and so the Respondent began to explore possible options for the business. One proposal was to contract the claimant and so this was discussed with Mr Sims at his annual review meeting. This proposal led to a detailed examination of his current remuneration which was conducted by Ms Ramsden. Ms Ramsden gave evidence that when she obtained figures from Ms Manster as to the payments made to the Claimant this led to the discovery that his commission payments could not be reconciled to what the Respondent believed he should have been paid. It is right to observe that some of the initial correspondence from Ms Ramsden does reveal uncertainty as to what the position in respect of commission payments to the Claimant should be, but this is then explored by her in more detail as she checks and confirms the position.

Issues and submissions

- 5.1 The parties have agreed a list of issues for the hearing and correctly, in my view, identify that the key question is whether the Respondent varied the Claimant's contract in respect of commission in 2020. It is common ground that there was a variation in relation to that year, that is to pro-rata the levels to account for lockdown period when no income could be generated, but the key question is was the agreed variation more substantial. Did the variation go much further and completely revise the previous scheme replacing it with a single rate of 25% on all billings?
- 5.2 For the Claimant Ms Yang submits that the Tribunal, as is often the case when an oral variation of contract is alleged, is in a difficult position when finding facts. She urges me to have regard to the exemplary character of the claimant who has a long and unblemished career working at the highest levels in his industry and is a man of the highest integrity. She urges me to have regard to the deficiencies in the running of the Respondent company which overall suggest that it was not as closely control or as well organised as the Respondent's witnesses seek to presents it. Further Ms Yang asks me to consider whether a variation has occurred when the position is analyzed in a strictly contractual way through the long period of payment of Mr Sims commission claims which were openly submitted at the 25% rate.

5.3 Mr Pickett for the Respondent submits that no allegation of dishonesty or other reprehensible conduct is made against the Claimant in respect of him making claims for commission payments, it is instead alleged that Mr Sims has made a mistake. In the circumstances Mr Pickett submits that there are errors in Mr Sims evidence which detract from his credibility and reliability. Further he submits that the contemporaneous paperwork supports the Respondent's case. The bundle contains material which demonstrates that a variation to commission payments was only discussed **after** the telephone call in which the claimant says agreement had already been reached. He further argues that there is no question of variation arising by the Respondent's conduct in paying the commission claims, as the Respondent was unaware of the change and the accountants had no agency to agree a variation.

Findings of Fact

6.1 Overall I did find Mr Sims to be a credible witness. I accept his evidence as to his professional qualities and his long and unblemished career in the industry. Although he was cross examined in respect of a number of matters which it was said detracted from his credibility, such as complaining he had not had a pay rise when in fact he had, or that commission had been paid at an incorrect rate when in fact it had not been, I found that these inaccuracies, such as they were, did not significantly reflect upon the core of his account. With that said however it is noteworthy that it is not alleged that Mr Sims has been deceitful in his evidence

regarding a variation, it is simply alleged that he has made a mistake in his understanding of the future operation of the commission scheme. It is then the case that whilst I found Mr Sims to be an honest witness I do find him to be a mistaken one as, for the reasons given below, I am satisfied that Mr Lewis did not materially alter the scheme of the Claimant's commission during 2020 (save as is common ground and set out above in relation to taking account of the COVID lockdown.)

6.2 Turning to Mr Lewis I found him to be a credible and impressive witness. He readily accepted failings in his own line management of the Claimant. He readily acknowledged breaches of the Claimant's contract in not reviewing his salary or commission on a yearly basis. He also however acknowledged the Claimant's good qualities and spoke of how he never doubted his ability and found him to be a good worker and he valued his opinion as a professional. Mr Lewis gave evidence in a thoughtful and measured way, conceding as he did a number of failings, but importantly gave an account that in my judgment is supported by the whole of the evidence.

6.2.1 Firstly – As set out above the Respondent is a small firm operated by three partners. Mr Lewis gave evidence that, although whilst technically possible, a variation to commission arrangements would not be made unilaterally by a single partner. Mr Lewis gave evidence that such a change would require discussion and

agreement at one of the monthly partners meetings. In this case such a significant change to the Claimant's remuneration package would I accept need to be discussed and confirmed at such a meeting and as such would not have agreed the same in a single telephone call. I accept Mr Lewis evidence that the structure of the company, run by three partners as a small business, is one that in my view not suited to such as to significant revision being agreed by a single partner in a single telephone call.

6.2.2 Secondly – The fact that the above process (agreement at a partners' meeting) was followed is borne out and supported by the audit trail which exists for the variations to pay made in 2017 and 2019. As set out there is no equivalent document which refers to any such alteration in 2020. When the matter came to light in 2023 Mr Lewis gave evidence that Mr Sims told him that he had a written record of the agreed variation and Mr Lewis, in my view compellingly, spoke of the relief he felt upon hearing the same. He described how he thought that there would be material which would explain the apparent discrepancy in commission payments. Mr Lewis wrote to Mr Sims on 18th August referring back to their initial telephone conversation and asking if the written record could be produced (Bundle p.133). Mr Sims replied (Bundle p.132) submitting his commission claims which reflected the alleged rate. Mr Lewis wrote again on 25th August acknowledging the commission claims but again noting that Mr Sims had mentioned a record of the agreement and asked for it. (Bundle p.131) but nothing beyond the commission claims was ever produced.

6.2.3 As noted the effect of the change is striking doing away with the entire tiered regime and removing the annual 'reset'. Such a major change to the structure of Mr Sims commission payments would in my judgment have been set out in writing as had occurred on previous occasions. The fact that no record of such a radical revision of the scheme is in my assessment of considerable significance, demonstrating that such a variation did not occur.

6.2.4 Thirdly - Viability – the alleged variation was clearly a major change to the remuneration package which had preceded it. It produces the effect that Mr Sims was to be paid c.£39,000 commission in his best performing year and c.£31,000 in his worst as opposed to the figures which I have set out above. It is said that this was agreed at outset of COVID pandemic and at a time when staff were being asked to accept furlough arrangements and the commercial property market had ceased to trade. It is clear that this was a period of immense uncertainty for employers with limited insight into how and when 'business as normal' might return. As noted the effect of the alleged variation was to significantly increase Mr Sims' remuneration, albeit from commission. As Mr Lewis explained in evidence such a request at that point would be a 'red flag' and I accept that in the circumstances prevailing at the time it is highly unlikely that the Respondent would not have made such a significant alteration.

6.2.5 Fourthly - It is suggested that the variation was enabled because of a significant reduction in costs associated with Mr Sims not working from the office. There is however in my judgement no real evidence of any significant cost savings. Mr Lewis gave evidence, which I accept, that the downsizing of office space was not related to the Claimant working from home as other staff were ending their employment. Further the reality was an office space was specifically provided for the Claimant at the new office. The Claimant himself acknowledges that he did not remain working entirely from home and, post covid, attended the office one day a week. The Claimant cites other cost savings such as providing his own computer at an outlay of £800 but as observed by Mr Pickett for the Respondent that was a cost swiftly offset by the much enhanced commission structure. Such savings as were identified simply do not accord with the scale of the change to the commission regime.

6.2.6 Fifthly – Notes of the telephone call support Mr Lewis’s account – at p. 230 of the Bundle is the contemporaneous note of the telephone discussion of 2nd April 2020 made by Mr Lewis. The note records Mr Sims agreement to furlough scheme at 80% salary. It is noted that commission payments would continue to be made but absent from the note however is any record of discussion of variation to the commission scheme. Although it clearly is an incomplete record of the telephone call it does in my assessment does provide substantial support for Mr Lewis’ evidence that commission was not discussed, certainly not in any detail at the 2nd April meeting. If it had been then I accept a note of such discussion would have

been made so that Mr Lewis could raise it with his fellow partners as set out above or at least to have recorded the main points of agreement.

6.2.7 This interpretation is further supported by additionally material within the agreed bundle. At p.102 of the Bundle Mr Pickett draws attention to an email written by Mr Sims on 3rd April 2020, the day after the central telephone call. In the email Mr Sims highlights that April is the last month of his '12 month commission cycle' and asks for a pro-rata reduction to the targets to reflect the 3 weeks of lockdown when no income could be generated. Mr Lewis replies agreeing to the same and highlighting that a re-calculation would need to take place to ensure that everyone is treated fairly. I find it compelling that if the significant change to the commission structure had been agreed in the telephone call the day before that it would not have been set out by Mr Sims in this email. The fact that Mr Sims highlights that his commission year is coming to an end and asks for an adjustment further reinforces in my judgment that no settled agreement, as now asserted by Sims, had in fact been agreed in the telephone conversation the day before. Further a few days later on 7th April 2020 Mr Sims emails Mr Lewis again - p.358 of the Bundle. In that email Mr Sims notes he has recalculated his commission stages to account for 49 weeks due to the COVID lockdown. Again there is no mention in the email of a newly agreed commission structure going forward which, in my assessment, would logically have been mentioned at that point. At p.359 of the Bundle Mr Lewis acknowledges Mr Sims email and the commission calculations but says he will discuss them with David before they can be agreed. This

exchange, in my judgment, further supports Mr Lewis' evidence that he would need to discuss and agree commission changes and would not approve them unilaterally.

Variation by conduct

7.1 Given that I can find that no material variation was agreed in 2020 as alleged I next consider, if a variation is established by conduct. Mr Sims incredulity at the challenge made to his commission claims in Autumn 2023 after such a long period of them being paid without challenge can well be understood. I am satisfied however that a variation by conduct did not occur. Given that Mr Sims was not copying his commission claims to Mr Lewis I am satisfied that the Respondent did not have actual knowledge of the basis upon which he was submitting his claims and so any proposed variation to the commission scheme. I am satisfied that no issue of agency arises as between the Respondent and L H Manster. It has not been challenged that L.H. Manster were solely retained to provide accountancy services to the Respondent and they were clearly not in position to agree a variation of employment contracts issued by Michael Rogers. Nor is there any evidence produced to suggest otherwise.

7.2 In any event the simple submission of commission claims without any further discussion or notification or explanation is in my judgment comparable to entering into negotiations to vary Mr Sims contract of employment. How was the

Respondent to know what was being proposed? How were they to discern that the commission claims were in fact a newly proposed scheme as opposed, to what they in fact were, a mistaken operation of the existing scheme. Looking at the matter on a purely objective footing I find there was no obvious offer or acceptance or negotiation with an intention to create legal relations in the submission by Mr Sims of the challenged commission claims.

- 7.3 Further it is not the Claimant's pleaded case that the variation to his commission payments were made by conduct. Mr Sims does not assert that he set out to vary his commission structure by the mechanism of submitting invoices at 25%, rather he asserts that it had been specifically varied in telephone call, as discussed above and he was simply operating that new scheme by submitting the claims.

Conclusions

- 8.1 In all the circumstances therefore I find that there was no material variation to the Claimant's commission scheme was made in 2020 and I answer the first question on the list of issues in the negative. As such I find that the Respondent did not breach the contract in November 2023 in refusing to pay Mr Sims the commission payments he had claimed. The other breaches of contract which have been acknowledged during this hearing, such as not conducting annual reviews of salary or performance are not pleaded as amounting to fundamental breaches entitling

Mr Sims to repudiate the contract and in any event I would find that they clearly are not fundamental breaches which would entitle repudiation.

8.2 In all the circumstances therefore I find that Mr Sims was not dismissed in November 2023 pursuant to s.95(c) ERA nor then were any unlawful deductions made from his wages. With those findings these claims then must be dismissed.

8.3 This is a case has been put on the basis of genuine mistake being made by Mr Sims. Given that commission clearly was being discussed at the stressful period which was the outset of the pandemic, as I have set out, there is in my assessment clear potential for a misunderstanding to have occurred. No allegation of dishonesty on the part of Mr Sims has been made and this judgment does not and should not be taken as making any finding of such. The significant period of delay in the discovery of Mr Sims misunderstanding is, I can only observe, deeply unfortunate and clearly does not lie with Mr Sims who was declaring how he had calculated his commission on the claims he submitted.

**Employment Judge Richter
23rd December 2024**

Judgment sent to the parties on
2nd January 2025

For the Tribunal Office

Note

Reasons for the judgment were given orally at the hearing. Written reasons will not be provided unless a party asked for them at the hearing or a party makes a written request within 14 days of the sending of this written record of the decision.

Public access to employment tribunal decisions

Judgments (apart from judgments under rule 52) and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.