EMPLOYMENT TRIBUNALS

Claimant: **Geoffrey Gershon Williams**

Respondent: **Aspire Communications Limited**

Record of an Attended Hearing at the Employment Tribunal Audio Recorded by CVP

Heard at: **Nottingham**

Heard on: **12 November 2024**

Before: **Employment Judge Broughton (sitting alone)**

Appearances:

Claimant: **In person**

Respondent: **Mr Johnson, Counsel**

JUDGMENT

The Claimant's claim of an unlawful deduction of wages is well founded and succeeds.

The Respondent is Ordered to pay the Claimant the sum of **£4,037.49 gross** (which is the agreed sum of £4,638.57 less the annual leave overpayment of £601.08).

REASONS

The claim

1. The Claimant presented his claim of an unlawful deduction of wages, for unpaid commission, to the Tribunal on 15 March 2023 following a period of ACAS Conciliation between 20 December 2022 to 31 January 2024.

2. On the 8 September 2024 the Claimant applied to amend his claim to add a claim for further commission payments which he asserts to be payable during the period March to November 2024. This application was granted by Regional Employment Judge Swann on 19 September 2024.

3. The Claimant confirmed at the outset of today's hearing, that he is however only seeking unpaid commission (Standard Commission) which he claims was payable up to **August 2024,** on the basis that any further commission falling due after this date, is so minimal that he does not wish to trouble the Tribunal with a claim for those payments.

Background

4. The Claimant was employed by the Respondent as a Field Sales Account Manager (**FSAM**) from 8 October 2018 until his employment ended on **3 November 2023.** He resigned and worked his notice, his last working day was 3 November.

5. The Respondent was a Local Business Sales Agency for BT covering the East Midlands Sales Territory.

6. A BT Local Business is a franchise arrangement, where an independent telecom business forms part of a network of businesses who sell BT products and businesses on behalf of BT locally. The customers contract directly with BT.

7. The Respondent's BT Local Business Licence was revoked at the end of 2023. The Claimant had an option, along with the rest of the FSAM's, of moving to a BT Local Business in Lincoln or in South Yorkshire, pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE").

8. The Claimant elected not to transfer under TUPE but secured employment with another business which was also a BT Local Business but covering Birmingham and Hereford.

Hearing

9. This case had been listed for a final hearing on 9 August 2023 however, for reasons set out in the case management orders from that hearing, if had to be adjourned and re-listed to 12 November 2024.

10. At today's hearing the Respondent produced a bundle which ran to 125 pages and called two witnesses, the Managing Directors Mr Balbir Singh Kang and Mr Mark Peter Shilton.

11. The Claimant also produced a witness statement and gave evidence and produced his own bundle which ran to 66 pages.

12. Hereinafter any reference to the Claimant's bundle will be prefixed by the initials CB and to the Respondents by RB.

The issues to be determined

13. The Claimant is seeking payment of the Standard Commission for sales he made while employed by the Respondent and which were closed/ installed during the period December 2023 to August 2024.

14. The issues for the Tribunal are:

1.1 Did the Respondent make unauthorised deductions from the Claimant's wages and if so how much was deducted? (less an agreed sum of £1,500 which the Claimant accepts he owed the Respondent and wants to be taken into account)

1.2 Is the Claimant entitled to **Standard Commission Payments** (SCP)for the period December 2023 to August 2024?

1.3 Is the Claimant entitled to those payments in light of the clause in his contract of employment which states that he ceases to be eligible to earn commission on the termination of employment?

1.4 Does the Respondent have the contractual right under the express terms of the contract of employment to vary the commission scheme and did it vary the scheme, as set out in the 30 June 2023 email, so as to deprive the claimant of entitlement to the SCPs?

1.5 Did the Respondent have a custom and practice of clawing back from SCPs, **Accelerator Bonus Payments** which had been overpaid because of subsequent cancellations?

1.6 Is the Respondent entitled to reduce the SPCs payable to the Claimant (if any) by the amount of excess annual leave he took?

15. The Claimant confirmed at the outset that his complaint is bought pursuant to section 13 ERA and not as a claim for breach of contract. The Respondent's position is that if it is found that agreement was made during the Claimant's employment to pay the Standard Commission payments he is claiming, section 13 must apply to the payments due to the Claimant as and when they fall due (i.e. when the sales closed, whenever that may have been).

Finding of Fact

16. All findings of fact are based on a balance of probabilities. All the evidence has been considered, however only the evidence relevant to the issues to be determined is set out in this judgment.

Terms of Employment

17. The Claimant was employed under a contract of employment (**Contract**)(RB pages 27-34).

18. The relevant provisions of the Contract are as follows:

"Other Payments and Benefits

In addition to your basic salary there is the commission incentive scheme, details of which will be provided to you separately. The commission that is earned in one month will be paid with your salary two months in arrears, plus standard related commission which is paid quarterly. The scheme will be reviewed 6 months from your start date and annually thereafter. ***The Employer reserve the right to vary the terms and conditions under which the commission is paid at its discretion.***

You cease to become eligible to ***earn commission*** *on the termination of your employment.*

Tribunal stress

Holiday Entitlement

The holiday year runs from 1 January to 31 December. You are entitled to 24 days holiday a year calculated at the rate of 150 second of the annual entitlement for each complete week of service remaining in the current holiday year….

Holiday Pay (RB page 29)

Payment for holidays will be at your normal basic rate under your terms and conditions of employment your normal hours of work.

On termination of employment holidays will be calculated in proportion to the full entitlement. If you have taken less than this entitlement the surplus holiday pay will be added to your final pay. If you have taken more than this entitlement the excess holiday will be deducted from your final pay.

Deduction from Wages (RB page 32)

If during or on termination of your employment you owe any money to the employer you agree the employer has a right to deduct this money from your pay or any other monies it owes to you. By signing this agreement you expressly consent to any such deduction pursuant to the Employment Rights Act 1996. Examples of such deduction which may be made by the employer include, but not limited to the following:

- *Annual leave taken over and above your accrued entitlement."*

19. Although there is no document produced by the parties which sets out the commission scheme rules, how it operated at the relevant time is largely uncontentious, apart from clawback.

20. The Claimant gave unchallenged evidence in his cross examination, which the Tribunal accept, that when he started working for the Respondent in 2018 he received Standard Commission a month in arrears. In June 2020 the Respondent changed the scheme and decided to make payments only once they had received their commission statement from BT (**Cobra statement**) which showed how many sales had actually been installed (i.e. closed/finalised) and then they paid Standard Commission to the FSAMs responsible for those sales, based on those figures, in the next payroll.

21. There were two parts to the commission scheme. The Basic/Standard Commission element was based on closed sales. Where certain sales thresholds were met (in terms of the revenue from the orders the FSAM had secure), commission was paid at an enhanced rate/percentage, which is referred to as an Accelerator Commission (a higher rate of commission).

22. Basic/Standard commission was paid at the rate of 10% on the payments received from BT.

23. The Accelerator Commission, was paid when specific sales thresholds had been met, at commission rates ranging up to 25%. The Accelerator Commission was paid retrospectively and quarterly, two months after the relevant financial quarter had closed.

24. However, because the Accelerator Commission was not based on closed sales (i.e. was not paid on installation) the situation could arise where if not all sales were installed/closed and as a result the FSAM's installed sales dropped below the threshold which had triggered the higher % rate of commission, the FSAM will have been 'overpaid' Accelerator Commission for the relevant financial quarter.

Claimant's claim to Basic/Standard unpaid commission

25. The Claimant's complaint is that some sales that he had made during his employment, were closed off/installed, only after his employment ended and he believes that he should be paid the Basic/Standard commission for those sales. He does not seek to argue that he is entitled to any payment where the sales were not closed off or for any Accelerator Commission for those sales. The Respondent argues that even if he is due Standard Commission for sales closed after his employment ended, the Respondent has the right to clawback Accelerator Commission paid to him on previous sales before making the payment.

26. The Claimant was paid his wages on or about the 6th of each month in arrears and therefore his last payment of salary was on 6th December 2023 (which was for November's salary).

The Process

27. The process was as follows;

    i. The customer agreed to buy a new product or upgrade to a faster business broad band package and signs a BT Sales Order Form.

    ii. The FSAM passes the order onto BT order fulfilment system (usually within 24 – 48 hours of the customer signing the Sales Order Form.)

    iii. The Sales Order is then installed. This can take 6 months from the Sales Order Form but installation may **not** take place for a variety of reason e.g. the customer changes their mind. Mr King's evidence is that the cancellation rate was about 25%. The undisputed evidence of the Claimant which is accepted, is that his cancellation rate was significantly lower, due to his performance, for example it was about 3.32% in April 2022 to October 2023.

    iv. The Respondent received a weekly and monthly report from BT listing all installations/ closed orders but from November 2023, the Respondent was only sent a monthly report.

    v. The FSAM is paid their Standard Commission in the next payroll after receipt by the Respondent of the monthly report from BT for any sales installed.

    vi. The Respondent's commission may be subject to clawback from BT for mis-sold Sales.

Right to Earn Commission

28. The Respondent's primary position is that under the Contract the Claimant is not entitled to any payment of commission after his employment ended because of the commission clause (RB page 28) provides that:

    *"You cease to become eligible **to earn commission** on termination of employment"*.

29. The Respondent's position therefore, is simply that the Claimant is not able to *earn* commission after his employment ended in November 2023 and thus is not entitled to Standard Commission for any sales which were installed after that date.

30. The Claimant relies on an agreement by the Respondent to pay him the Basic/Standard commission on sales made before his employment ended but which were not installed until after his employment ended, and which is confirmed in emails between him and Mr Mark

Shilton in October 2023 and which we shall turn to shortly.

31. Further, the Claimant does not accept that the Respondent had a contractual right to clawback Accelerator Commission from the Standard Commission owed to him. He argues that he was not aware of how the Accelerator Commission clawback was operated for others but for him, because he was such a good performer, it was agreed that clawback would not be applied to his sales.

32. It is common between the parties that the Respondent received from BT a statement on 25th of each month of the commission that was payable on business which has been installed/closed. The Claimant accepts that the Respondent has continued to send him commission statements and he does not dispute the figures on the statement or the dates in the statements about when his sales have been closed/installed.

Contractual Right to Standard Commission Payments Post Termination

October meeting and discussions

33. The Claimant wrote to Mr Shilton **on 4 October 2020** (page 35). He explained that he was not going to move to either of the Local Businesses as part of the TUPE transfer and wanted to discuss a suitable solution over outstanding commission and proposed a one off payment which would include looking at orders yet to be closed. In this email the Claimant referred to a meeting on 'the Monday' i.e. **2 October** ; "*In Monday's meeting you did commit to paying everyone what they are owed…".* There are no minutes of the 2 October meeting.

34. The reply from Mr Shilton on 4 October (CB page 34) includes the following:

"*The intention at the moment **is to pay people commission they're owed as and when we receive the commission from BT**. If you have a solution that is better for both parties then I'm happy to discuss it…"*

35. It is clear the Tribunal find that the above was referring to Standard Commission payments only. There was no mention of clawing back Accelerator Payments in this email but it did refer to paying what people were 'owed'.

36. The Respondent sent a further email on 9 October 2022. The Respondent were clearly keen to keep the sales staff engaged and selling up to the transfer or termination date (CB page 32);

*"As we're not going to complete Q3, **there will be no accelerators or incentive payments**.*

***To encourage everyone to continue to sell as much as possible**, all **orders** taken from the October 1st to November 8th will be paid at **15%** .*

There's plenty in the pipeline so there is a real opportunity to earn some serious commission in time for Christmas." Tribunal stress

37. On **13 October** Mr Shilton wrote to the Claimant and other colleagues (CB page 29 -30) in an email which included the following statements:

"3. Pay next month, paid on the 6th December will be 6 days basic …

4. Commission due after that will be through your new BTLBs payroll. I will provide a file to BT with all commissions, and add it to the other BTLB's commission.

5. This should carry on until around April/May next year. Any outstanding commissions after that point will most likely be paid as one last lump sum. We'll need to agree that final commission and I will need agreement form each of you at that point that you I'll accept the final offer. There shouldn't be a huge amount of commission owed at this point but BT will apply a breakage rate and ask us to agree that its acceptable."

38. On the 26 October 2023 the Claimant wrote (CB page 27) wanting to agree a final payment and threatening legal action if a final payment was not agreed by 27 October 2023. He was concerned that the Respondent may cease to operate and thus did not want to wait for orders to close before he was paid. He then extended this deadline to 30 October (CB page 26).

39. Mr Shilton replied on 30 October 2023 4.25pm to the Claimant (CB page 25);

"…I can confirm that we do not accept your proposal for a full and final payment. As you are aware BT make payments to Aspire Communications Ltd based on completed installations ***so we will continue to pay out commissions based on installed orders to our staff*** *who are transferring to the Lincoln and SYH BT Local Businesses in line with the TUPE regulations.*

I would like to remind you that contractually we do not have to pay any commission payments once an employee has resigned. ***However, as you've told Steve that you are going to work for the Birmingham BT Local Business, we are happy to apply the same commission payment principles as for the sales employees that are transferring to Lincoln and SYH.***

You will receive your outstanding commission once we have received it from BT and after any reconciliation have been made where appropriate for cancelled orders and Bonus thresholds etc…" *Tribunal stress*

40. There is no explicit reference to Accelerator Commission which has already been paid or to 'clawback'. There is no explanation of what is meant by 'Bonus thresholds' and how this was intended to apply.

41. The evidence of Mr Kang is that the word 'threshold' is a reference to Accelerator Commission, however there was also reference in emails sent around this period to minimum 'bonus threshold' or 'minimum threshold' (which are referred to later in this judgment eg CB page 14) being met before Standard Commission would be paid. It is therefore not clear that 'Bonus threshold' is a reference to Accelerator Commission thresholds and the absence of the word 'clawback' would seem to further indicate otherwise.

42. Earlier on 30 October 2023 at 3.21pm (CB at page 23-24) Mark Shilton had written out to the Claimant and the other staff subject to the TUPE transfer, regarding their commission. That email states that for those staff who were moving to BT local businesses in Yorkshire or Lincoln, those businesses had agreed to pay them outstanding commission through their own payroll (i.e. commission on sales made while employed by the Respondent) and Mark Shilton agreed to send them a statement each month so that they would know what commission payments were due***:***

"…Pay from January onwards will be based on information that BT send me as I no longer have access to the reporting systems that we currently use. Bob and I will attend a commission sign off call each month where we agree the commission and bonuses to be paid. These sign off calls are typically 2 to 3 days before I get the BT statement so we will be a month behind. Therefore:

Your January pay (normally paid by us on 6th February) will be based on the statement we

receive on the 1st December.

Your February pay (normally paid by us on 6th March) will be based on the statement we receive on 25th January

Your March pay (normally paid by us on 6th April) will be based on the statement we receive on 23rd February.

Your April pay (normally paid by us on 6th May) will be based on the statement we receive on the 25th March."

43. In terms of the Claimant, the following provision in the letter applied to him:

"For those of you not going to either LB, you will receive any commission ***that you are entitled to*** *through the Aspire Payroll. Could you let me have an email address that I can send any payslips to please". Tribunal stress*

44. Mr Shilton in giving evidence for the Respondent confirmed that the intention was to continue to pay the Claimant after his employment had ended via the payroll, deducting tax and National Insurance.

45. The Claimant's unchallenged oral evidence, which the Tribunal accept on balance, is that he would have replied to the email from Mr Shilton and made enquiries about how the payment was to be paid through the payroll (although there was no email from the Claimant included in the bundle) and that in response Mr Mark Shilton sent him a further email on the 1 November 2023 (RB at page 22) which includes the following:

"Morning Geoff in answer to the below

- *Your payslip will go through the accountants and they will make the necessary tax deductions and issue a payslip. It would be prudent for you to contact HMRC when you start your new job to make sure they understand the situation and don't issue an emergency code.*

- *Yes. I think you are familiar Cobra. We won't have access to Sch5 anymore so I will have to reconcile Netsuite with Cobra each month. I will then issue a statement to each individual that shows the status of each outstanding order.*

- *Noted. Thanks.*

I believe ***you are in on Friday so we will go through that the outstanding commission*** *and bonuses with you then." Tribunal stress*

46. There appear to have been therefore conversations alongside the emails.

47. The Claimant sent some queries about his Standard Commission in November 2023 (CB page 20). Mr Shilton sent an email on 29 November 2023 (CB page 18/19) to the Claimant and others:

"I'll shortly send out your commissions statements for this month. The statements will include all orders from Q1 22 onwards.

There's a few points to take into account for the statement:

- *I no longer have access to Schedule 5 which is the weekly report that we used for*

determine which orders had closed. Instead, I now have to use a monthly statement called Cobar. The last Cobra statement I had was this Monday 27th .

- *I've gone through each item that we've been paid this morning and changed the status on the Netsuite report to " November Closed."*
- *I've checked the commission payable and in some instances I've adjusted the commission that you're owed to reflect the correct amount. Where I've made an adjustment, I've highlighted the change in yellow. There are quite a few cloud orders that are on Netsuite as "new" when they're actually migrations. Migrations are paid at a lower rate. If you think any of these are wrong, let know, and I'll raise it with BT*
- *As the last commission run was the end of November, there's not many orders added.*
- *Similarly as Cobra isn't as up to date as Schedule 5 , there's not a huge change in the amount of closed orders.*

Any bonuses that are due to prior to Q2 23 I'll continue to pay as normal. Each quarterly bonus due is now detailed on a spreadsheet on your commission statement and summarised on the front sheet.

As discussed with nearly all of you in the final few days, the Q2 bonus will be paid on closed business . ***Quite a few have hit the Q2 bonus, but the payments will only be released once the minimum threshold has been closed****. Some have already passed the threshold in closed business and will get the payments next week. A few of you are going to have wait [sic] for a bit more business to close the Cobra report before the bonus is released.*

My next Cobra statement should be around the 17th December so I should be able to get your December statement out before Christmas." Tribunal stress

48. The Claimant replied on 30 November 2023 (CB page 16) which included the following in response to the previous comment about payment of the Q2 bonus:

"This has not been communicated to me at any stage during the last few days, either by email or verbally and I expect you to pay me in December which has ***closed already****, so based on the commission spreadsheet it stands at £3,963.40…*

If I'm not paid my Q2 bonus in December's payroll then I will contact ACAS…"

49. Mr Shilton replied on 4 December 2023 (CB page 14);

"*All orders marked as Q2 23 and closed have already had the uplift applied this month…*

For the evidence of doubt , you will not be paid your Q2 bonus in this month's payroll. You will receive the first payment ***once the minimum threshold has been installed****…*

I agree that you have been a hard-working, dedicated and profitable employee. As a consequence, we have offered to continue to pay you outstanding commission over the coming months, despite having no legal obligation to do so*…*

Lastly, I've had enough of your demands, threats and ultimatums."

Tribunal stress

50. There is no reference to operating clawback.

Payment Date – variation : Standard Commission

51. The Claimant gave evidence that if the Respondent received their commission payment from BT (the Cobra payment) at the end of the month (it would be about 25th of each month) then the Claimant and other staff would be paid their Standard Commission on the closed sales on 6th of the following month in with their salary, therefore, if the Respondent received their Cobra statement from BT on 25 November 2023 the Claimant would get his commission paid on the installations confirmed in that statement, on 6 December 2024.

52. The Respondent had unilaterally therefore changed the payment date for Standard Commission, holding it back until reconciliations had taken place. Rather than 'Bonus threshold' referring to Accelerator Commission, 'threshold' appears to refer to a minimum threshold and the uplift of presumably the 15%. This delay in payment of Standard Commission was, the Tribunal find, only communicated to the Claimant on 29 November 2023 (CB page 18). The Claimant did not agree to this delay and objected to this by email of the 30 November 2023 (CB 16-19).

53. Even if the Respondent was entitled to clawback from Standard Commission payments any Accelerator Payments which had been 'overpaid' to the Claimant for past sales, what the Respondent was doing now was changing the payment date for the Standard Commission. The commission clause in the Contract does not specifically refer to reserving the right to alter the payment date in a manner which is detrimental to employees but even if changing the payment date was within the scope of the commission clause in the Contract, delaying the payment date without giving a reasonable period of notice, particularly where Standard Commission is such a significant part of the FSAM's remuneration package, would be potentially in breach of the implied term not to exercise a discretion in a manner which is perverse.

54. The delay in payment potentially gave rise to an unlawful deduction of wages on each payroll date when the Standard Commission was not paid in accordance with what had been the normal practice. However, that is not how the Claimant puts his claim.

Solicitors Letter

55. A letter was sent from the Claimant's Solicitors to the Respondent on **7 December 2023** (RB page 54). It complained that the Respondent had ignored attempts by the Claimant to agree his final commission payment and that his commission had not been paid on 6 December 2023 in accordance with the normal practice. It set out what the Claimant believed he was owed at that point (although this included some sales which had not yet been closed), in the total sum of **£20,721.45.**

56. That demand for payment then lead to a breakdown between the parties and the Respondent clearly decided not to make good on the promise to pay further outstanding Standard Commission payments until it had clawed back previous 'overpaid' Accelerator Commission.

57. On receipt of that solicitors' letter and that claim for circa £20,000, the Respondent undertook, what Mr Kang described in his oral evidence, as *"a forensic"* examination of commission paid to the Claimant. This involved working out whether the Claimant had been overpaid Accelerator Commission going back to sales in January 2021 and whether the closed sales had dropped below the thresholds for Accelerator Commission.

58. On the 5 January 2024 (RB page 59) Mr Shilton now wrote stating that:

"*Your commission statement for December 2023 is attached*.

In addition *when completing the payroll for December, our accountant has also highlighted that you were overpaid £1,500 in November's pay run. You will recall that you requested an advance on your salary of £1,500 in early November, which was granted. You should therefore have been paid £3,774.40 as per your payslip but you actually received £5,274.40. I am disappointed that you did not notify me of this overpayment.*

Thus the total overpayment to you by Aspire Communications Ltd is £8,261.01. Consequently , in account with your contract of employment, no commission payment will be made for December. Instead the £1,245.49 will be deducted from the overpayment of £8,261. 01 leaving an outstanding overpayment balance of £7,015.53…"

Amounts due

59. The Claimant had produced a figure in his bundle for what he says the outstanding Standard Commission is which is owed to him up to August 2024 . His figure, as set out in his witness statement, for the period December 2023 to August 2024 (less an advanced payment of salary of £1,500 which he accepts he was paid and he informed the Tribunal that he is willing to deduct from the sums he claims are owed to him) is **£4,870.95**.

60. The Tribunal must stress that in terms of offsetting this £1,500, payment that is not a matter the Tribunal have adjudicated upon, the Claimant accepts that this was an advance of salary which had not been repaid and has chosen to seek payment of a sum which takes that into account.

61. The Respondent at the outset of the hearing, when trying to clarify exactly what was the dispute between them, confirmed that the figure they calculated the Claimant is owed by way of Standard Commission, if it is deemed payable, is **£4,638.57**.

62. The Claimant confirmed that he is happy to accept the Respondent's calculation of the Standard Commission owed to him from December 2023, namely the figure of £4,638.57.

Clawback of overpayments

63. The Respondent produced a document submitted to the Claimant's Solicitors in December 2023, (which the Claimant had sight of in January 2024). This sets out the commission that the Claimant had been paid back to Quarter 4 2020 (21 January to 21 March 2020) (CB page 1 -2). It sets out what is said to be the overpayments where the Claimant had received an Accelerator Commission but where that sales subsequently had not closed and the closed sales he had made, had fallen below the Accelerator Commission threshold and thus there had been an overpayment which they now claim a right to deduct from any Standard Commission owed to him.

64. The Claimant did not seek to dispute during these tribunal proceedings, how the overpayment figures had been calculated by the Respondent. He did not cross examine Mr Shilton or Mr Kang or put it to them that those calculations were incorrect or put forward his own calculations of what the overpayments were. The Tribunal on balance therefore accept the accuracy of those figures.

Treatment of Clawback

65. There is nothing in the Contract which deals with clawback. There are no other written document produced to this Tribunal which sets out the terms of the commission scheme and the operation of clawback.

66. Mr Shilton in cross examination agreed with the Claimant that there had been a verbal

conversation between them during which Mr Shilton (who was responsible for finance and payroll) had agreed to turn "*a blind eye*" to any overpayments of Accelerator Commission and not apply clawback to the Claimant.

67. Mr Shilton had made no mention of this verbal agreement in his evidence in chief. He had in fact, in his sworn statement, given evidence before the Tribunal which he therefore knew to be misleading:

"*Accelerated commission payments were clawed back **whenever** an Account Manager's sales fell below the applicable threshold levels in force e.g. page 42" (para 9 w/s) Tribunal stress*

68. The Claimant was a high performer, which is why Mr Shilton was prepared to turn a *'blind eye'* to any overpayments and not seek any repayment of them. Mr Shilton had told the Claimant that he did not have the same arrangement with the other FSAM's and told the Claimant not to disclose this agreement to them.

69. While the parties did not identify the date of this conversation, the Tribunal find on a balance of probabilities, that it must have predated January 2021 because Mr Shilton' evidence is that but for letter from the Claimant's Solicitor, he would never have gone back to the overpayments which relate to Q4 2020.

70. The Respondent argues that its position changed from June 2023 and that it now communicated its intention to apply clawback.

71. The Respondent relies on an email sent on 27 June 2023 to the Claimant (CB page 42) which refers to a cancellation in Q3 22 which had taken the Claimant's commission for that relevant quarter below the £10,500 'hurdle'. Mr Shilton addressed that as follows:

"***At the moment** I don't intend to clawback **the overpayment**. I do however **reserve the right to review** if there are any further **significant** cancellations". Tribunal stress*

72. Mr Shilton does not clarify in that email what he means by 'significant cancellations'.

73. During his oral evidence before this Tribunal Mr Shilton was not able to clarify what number of cancellations would have qualified as 'significant'. He does not allege that he had clarified what he meant by 'significant at the time with the Claimant.

74. The email of the 27 June also does not reference any period beyond Q3 22 and refers only to 'the overpayment', singular.

75. The Respondent seeks to clawback as an overpayment of Accelerator Commission a sum of £1,582.11 for the period of Q3 22. That is set out in their schedule of overpayments (CB page 1). However, Mr Kang when asked by the Tribunal, gave evidence that he had no idea what the alleged overpayment was by the date the email of the 27 June 2023. If it was already at £1,582.11, there cannot have been any further significant cancellations for that period.

76. In terms of the 27June email, Mr Shilton gave evidence that there were no further significant cancellations to Q3 22 at the time he sent the email on 27 June 2023, almost all the sales in Q3 22 were by that stage either installed/closed or had been cancelled therefore they knew what the position was going to be. Mr Shilton therefore argues that what he was referring to in that email was any significant cancellations going forward and that if there were, he would seek to clawback the £1,582.11 for Q3 22. He alleges as follows:

"*I made an agreement not to **clawback on occasions**, I said **if it keeps on happening** I*

want to claw it back as well". Tribunal stress

77. The Tribunal was not impressed with either of the Respondent's witnesses. Mr Kang did not present as a credible witness of fact. The Tribunal found him to be evasive at times. He was unable to confirm he said, whether Accelerator Commission had ever been clawed back from the Claimant or comment on the Claimant's evidence that only Standard Commission had been subject to clawback (but only before June 2020), despite his alleged 'forensic investigation' into the commission paid to the Claimant. Mr Shilton gave evidence under cross examination which in materially respects was inconsistent with his evidence in chief.

78. In answer to a question from the Tribunal Mr Shilton gave further oral evidence about what his intention had been, in sending the letter of the 27 June (CB page 42):

"If it keeps happening that there is an overpayment I intended to claw it back, that is what I ***meant to say*** *at page 42. There is no point saying if there were further significant cancellations in that Quarter (Q3 22) because there were no significant sales still open, so I must have meant further Quarters." Tribunal stress*

79. It was never put to the Claimant in cross examination that he had been told and understood, that if there was any further overpayment **after** Q3 22, the Respondent would seek clawback of the overpayment of the Accelerator Commission paid for Q3 22. This was also not evidence set out in the Respondent's witness statements either. However, Mr Shilton's comment about what he had 'meant to say', appears to be an acceptance that this intention was not made clear in the email.

80. A later email on **29 June 2023** sent at 4:37pm set out the commission the Claimant had earned (CB page 40- 41) and stated that that his commission had dropped below the £10,500 'threshold' for Q3 22 (it sets out here that commission is paid at 25% where the threshold of £10,500 plus is met) and that **no further commission** was due for that quarter. It did not state that there would be claw back of any Accelerator Commission.

81. Notably this email was only sent to the Claimant and Mr Kang, none of the other FSAMs were copied in.

82. When Mr Kang was asked about this email referring to the sales falling below the Accelerator Commission threshold but making no mention of any clawback, his attempt at an explanation was unconvincing, he replied merely that the email of the 29 June, "*does not confirm either way*" whether clawback will apply and; *"it does not refer to Accelerator Bonus".*

83. However, the reference to thresholds is consistent with the Accelerator thresholds set out in an email on 30 June 2023 (CB page 39). The Tribunal find on balance the email of the 29 June was informing the Claimant that his closed sales had brought his sales under the Accelerator thresholds which had been applied when working out his commission payments, however it made no mention of clawing any of the Accelerator Commission back.

84. Mr Kang was asked by the Judge when the Respondent would have known that the Claimant had not hit the threshold for January to March 2021, his evidence was that it was difficult to say when they would have been aware of the overpayment (despite his alleged 'forensic investigation'). Eventually he gave evidence that it would be about 9 to 12 months later, that would mean by about **March 2022.** However by December 2023, the Respondent has taken no steps to recover the alleged overpayment (as a result of an Accelerator Commission rate) (RB page 10) of £2,359.53 for the period Q4 Jan 21 to March 21. That is consistent with the existence of an agreement between the Claimant and the Respondent for clawback not to apply .

85. The Tribunal find that there was no attempt before the Claimant's employment ended and the Respondent and Claimant fell out, to clawback any Accelerator Bonus from Q3 22. That is evident from the Respondent's table (RB page 1) . The alleged overpayment of £1,582.11 from Q3 22 was not subject to claw back. Mr Kang attempted to explain away raising these past 'overpayments' only in December 2023 on the grounds that he had only carried out a 'forensic investigation' in December 2023. The Tribunal however do not find it plausible that neither he nor Mr Shilton were aware of them prior to December 2023. Mr Shilton, as is evident from the documents in the bundle, kept a careful record of the commission situation.

86. Mr Kang also accepted, in cross examination, that he only carried out this investigation: *"in response to the solicitors claim for £20,000."* It is therefore reasonable to conclude that but for that letter, the Respondent would never have sought to recover these sums.

87. Mr Shilton, also in cross examination conceded that; "*to be candid we had gone back further when working out the overpayments for Accelerator Commission than we would have otherwise done*". He said that this was for two reasons, number one that BT had "slapped" the Respondent with 5 years of cancelled orders and because the Claimant had sent a Solicitors letter claiming £20,000. In terms of the 5 years of cancelled orders, Mr Shilton confirmed that those cancelled orders were not related to the payments of commission to Claimant and that for the most part he had already been made aware of any of the Claimant's orders which had been cancelled. The Tribunal conclude, that the only real reason Mr Shilton wanted to clawback any payments, was because he was also upset at receiving the solicitor's letter.

88. Mr Shilton went on to give evidence that had they not received the solicitor's letter, he would not have sought any clawback in respect of the first Quarter in Q4 20 (i.e. the sum of £2,359.53 for the period January 21 to March 21) or for Q4 21 (i.e. January 22 to March 22, and the sum of £2,218.29) but alleges the Respondent would have looked to clawback the more recent 'overpayments'.

89. The Claimant makes the very valid argument in his oral evidence, that the table produced by the Respondent which sets out overpayments from Jan to March 2021, is itself evidence that the Respondent in practice did not seek to apply clawback, otherwise they would have invoked the clawback in 2021, 2022 and 2023 and that they only decided to clawback Accelerator Commission once the Claimant has sought the assistance of a solicitor to recover timely payment of the Standard Commission.

90. Mr Shilton sent a further email to the FSAMs, including the Claimant, on **30 June 2023** (CB page 39) which included the following:

    "*For **Q2 23/24** commission will continue to be paid at 10% of the rate card.*

    Accelerators will be based on the following quarterly performance.

    £7,500 plus in a quarter equals 15% commission.

    £9,000 plus in a quarter equals 20% commission.

    £10,500 plus in a quarter equals 25% commission.

    *As discussed, any **subsequent cancellations** that result in a quarterly commission drop in below the relevant hurdle will result in an **immediate 100% clawback of the overpayment**." Tribunal stress*

91. The Claimant's evidence, which on balance the Tribunal accepts, is that this is the only email

he received that mentioned possible clawback but in the event there was no Accelerator Commission paid for Q2 2023/24.

92. The email does not refer to "*significant cancellations*" and the Tribunal find on balance, that this email was not intended to apply to the Claimant but the other FSAMs and that it is more likely than not, that the Claimant was included in the distribution list to give the appearance of consistent treatment. The wording of this email is not consistent with Mr Shilton's evidence that he had told the Claimant that he would apply clawback if 'significant cancellations' kept happening.

93. The Claimant presented as a credible and reliable witness, under cross examination he gave persuasive evidence, that he had no idea whether Accelerator Commission applied to other account managers, all he could say was that it was never applied to him and, therefore, he was unable to say whether it was standard practice or not. He had of course been told not to share information about with his colleagues about his agreement with Mr Shilton.

94. In terms of custom and practice, there is very little evidence from Mr Kang or Mr Shilton about how clawback operated for other FSAMs. There were some emails produced in the bundle which the Respondent alleges had been sent to other FSAMs however, the names have been redacted and therefore it is not clear whether these emails were to the same or different people and if so, how many (RB page 116 - 124). The emails date back to 2020 with the latest being sent in April 2021. The Respondent witnesses did not seek to explain why more recent examples were not produced. Further those few emails do not refer to Accelerator Commission. The clawback which is referred to could therefore have related to Standard Commission before the scheme changed in June 2020 or mis-sold sales (which Mr Kang gave evidence they would also clawback).

95. Mr Shilton confirmed in cross examination that from January 2021 to the Claimant leaving on 3 November 2023, the Respondent had never clawed back any Accelerator Commission payments from the Claimant.

96. The Tribunal accept the Claimant's evidence that the clawbacks shown on documents produced by the Respondent are for Standard Commission payments before the commission scheme was changed to payment only on installation (e.g. RB page 114 /115). The figure shown of £386.40 (RB page 115) does not show on the Respondent's schedule of clawback payments due.

97. An email was then sent on **21 December 2023** from Mr Kang to the Claimant's Solicitor (RB page 57) which states as follows:

"I am sorry that Mr Williams feels there is an unlawful deduction from wages. This is not the case according to our records. In fact, Mr Williams has been overpaid and currently owes us via communication £6,761.00 [accelerator/enhanced commission payments]…

As per Mr Williams's contract attached and under the clause 'other payments and benefits', he will see clearly that contractually states:

"You cease to become eligible to earn commission on the termination of employment. On the basis that Mr Williams did not transfer under TUPE, and in fact left the business that any commissions he is detailing to you would not be payable.

However, even though Mr Williams did not TUPE and therefore did not have the protection of terms and conditions, but resigned and terminated the terms and conditions, ***we agreed to treat Mr Williams in the same way as staff transferred which is that we will honour any commissions <u>that come to fruition</u> and will pay them in the normal way*****.**

With regards to any bonus payments that had been referenced, Mr Williams will, I am sure have made you aware that these are not contractual. However, whereas in the past we have ***made payments upfront and then undertaken a reconciliation to take into account cancellations of orders, dropping employees below the threshold resulting in an overpayment of the bonus, which is clawed back, we will be making payments for any bonuses due on meeting the required threshold we have set in due course and taking into account any reconciliations."*** Tribunal stress

98. The Tribunal find that on a natural reading of the above email, the reference to payments which will come to fruition, is a reference to the Standard Commissions payments which 'come to fruition' when sales are installed. Paid in the normal way must be a reference to paying them through the payroll on the usual date. The email however was disingenuous, in that clawback had never been applied to the Claimant.

99. Mr Kang in his witness statement (para 9) sets out calculations, that at the end of December 2023, the Claimant owed the Respondent **£8261.01** from overpayment of Accelerator Commission. The schedule produced (CB page 1) dates back to overpayment from Jan – March 2021.

100. Mr Shilton during cross examination informed the Tribunal that the Respondent were "*happy to ignore*" the alleged overpayments in Q4 20 and Q4 21 (i.e. alleged overpayments of £2,359.53 and £2,218.29).

Statements after effective date of termination

101. In **August 2024**, Mr Shilton emailed the Claimant (CB page 5) attaching a commission statement, informing him that no commission will be made for July and that the overpayment remains at £2,500.45. On **2 September 2024** Mr Shilton again sent a commission statement to the Claimant informing him that cancellations in Q4 in 2022 have now taken the total commission below the £7500 threshold and there has been a commission overpayment of £3440.45 for that quarter and his overpayment balance is £5562.90.

102. After his employment ended, any past overpaid Accelerator Commission, was adjusted and the Claimant was told what the new overpayment figure was however, as clear from the example commission statements in August and September 2024, he appears to still have been credited for the sales which were installed after his employment ended, when calculating what overpayment/clawback was due.

103. If the Claimant was not entitled to ongoing Standard Commission, it was inconsistent to give him credit for his sales installed after his employment ended and offsetting the alleged overpayment against those sales.

Holiday

104. It was alleged that the Claimant had taken more holiday than he was entitled to and there had been an adjustment for that although this has now shown on his final payslip. The leave year in question is January to December 2023. The Claimant was prepared to concede that he may have taken more leave that he was entitled to and agrees that the figure for unpaid commission should be reduced by the figure put forward by the Claimant for overpayment of annual leave.

Submissions

105. Mr Johnson, counsel for the Respondent conceded that if the Claimant was entitled to the Standard Commission payments on the basis that sales he had made before his employment

had ended, had been installed after the date his employment terminated, then subject to any argument on clawback, those were payments which the Claimant could lawfully seek repayment of an unlawful deduction from his wages, pursuant to section 13 of the Employment Rights Act.

106. I invited the parties to address me on the case of ***Brand v Compro Computer Services Ltd 2005*** IRLR ***196, CA*****.** This was a case where the Court of Appeal held that B, who had been summarily dismissed, remained contractually entitled to the payment of commission he had earned prior to the termination of his employment, notwithstanding a contractual clause that stated that he would '*remain in full-time employment with [the employer] at all times in order to qualify for the commission payments'***.**

107. The Court of Appeal in Compro determined that commission was payable with Lord Justice Peter Gibson commenting as follows:

"38.. For my part, I do not accept that such a one-sided bargain is one which the parties should be taken to have entered into, ***in the absence of clear words*** *making plain that any accrued entitlement to commission was dependent on the employee also being in employment at the date when the commission would be payable. There are no such words in clause 4.1 or in clause 6(1).*

39.. As for Miss Romney's point about an open-ended entitlement to commission ***provided that signed time sheets were received by Compro, it has not been contended before us on behalf of Mr Brand that he is entitled to further payments as a result of time sheets being received by Compro after his employment ceased*** *and, for my part, I would prefer to say nothing on this particular point" Tribunal stress*

108. In the Compro case, it was determined that the commission was '*earned*' when the time sheets were signed.

109. Counsel for the Respondent submits that the comparable situation to the Compro case in the case before us, is that commission was payable when the services were installed, because payment is triggered by the installation/closing of the sale, rather than the sale itself and thus the commission is 'earned' only at the point of installation and the Respondent relies essentially on the Contract which provides that the Claimant ceases to earn commission on termination of employment.

110. In terms of whether the Respondent accepts that potentially there was a variation of the contractual terms as a result of what the Respondent has said about making ongoing payments of Standard Commission, it is submitted that any variation of those contractual terms has been qualified by the provision that it would be subject to reconciliation and there is express reference to the bonus thresholds and that must, therefore, cover the ability to clawback for overpayment of Accelerator Commission.

111. Mr Johnson also referred to page 24 of the Claimant's bundle and emphasised that what was agreed to be paid was what the Claimant "*was entitled to*" and he argues again that would be subject to clawback of the Accelerator Commission.

112. In terms of the document at page 42, counsel submits that what is significant about the wording is that Mr Shilton used the words, that "*at the moment*" he did not intend to clawback.

113. Counsel refers to pages 116 to 124 as evidence of clawback for their employees and thus argues that this shows a practice of clawing back for other FSAM's.

114. In terms of the 30 June 2023 email (RB page 42), Mr Johnson submits that this is a clear

indication of what the Respondent reserves the right to do.

Claimant

115. Mr Williams made brief submissions. With regards to whether there was a custom and practice, he submits that Mr Shilton confirmed that he never took any overpayment off the Claimant from June 2020 to November 2023 for Accelerator Commission and the evidence of how it operated for other people is irrelevant in his claim.

116. The arrangement was waived for him because he was a top performer and they wanted to keep him motivated and the only reason they even looked at the clawbacks was because he threatened legal action.

117. He refers to them seeking clawback as being done out of spite with no justification.

Legal Principles

118. Section 13 Employment Rights Act 1996 [RB to drop in section 13 here]

(1)An employer shall not make a deduction from ***wages of a worker*** *employed by him unless—*

(a)the deduction is required or authorised to be made by virtue of a statutory provision or a relevant *provision of the* ***worker's contract****, or*

(b)the worker has ***previously signified in writing his agreement or consent*** *to the making of the deduction.*

*(2)****In this section "relevant provision", in relation to a worker's contract, means a*** provision ***of the contract comprised—***

(a)in one or more written terms of the contract of which the employer has given the worker a copy on an *occasion prior to the employer making the deduction in question, or*

(b)in one or more terms of the contract (whether express or ***implied a****nd, if express, whether* oral *or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.*

(3)Where the total amount of wages paid on any occasion ***by an employer*** *to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.*

(4)Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(5)For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does ***not operate to authorise the making of a*** deduction ***on account of any conduct of the worker, or any other event occurring, before the variation took effect.***

(6)For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or

any other event occurring, before the agreement or consent was signified.

(7)This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer.

(8)In relation to deductions from amounts of qualifying tips, gratuities and service charges allocated *to workers under Part 2B, subsection (1) applies as if—*

(a)in paragraph (a), the words "or a relevant provision of the worker's contract" were omitted*, and*

(b)paragraph (b) were omitted

119. The provision which deals with bringing a complaint in the Tribunal is section 23 ERA and provides as follows:

(1)A worker may present a complaint to an employment tribunal—

(a)that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),

(b)that his employer has received from him a payment in contravention of section 15 (including a payment received in contravention of that section as it applies by virtue of section 20(1)),

(c)that his employer has recovered from his wages by means of one or more deductions falling within section 18(1) an amount or aggregate amount exceeding the limit applying to the deduction or deductions under that provision, or

(d)that his employer has received from him in pursuance of one or more demands for payment made (in accordance with section 20) on a particular pay day, a payment or payments of an amount or aggregate amount exceeding the limit applying to the demand or demands under section 21(1)

(2)Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—

(a)in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or

(b)in the case of a complaint relating to a payment received by the employer, the date when the payment was received.

(3)Where a complaint is brought under this section in respect of—

(a)a series of deductions or payments, or

(b)a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,

the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

(3A)Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2).

(4)Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

(4A)An employment tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.

(4B)Subsection (4A) does not apply so far as a complaint relates to a deduction from wages that are of a kind mentioned in section 27(1)(b) to (j).

(5)No complaint shall be presented under this section in respect of any deduction made in contravention of section 86 of the Trade Union and Labour Relations (Consolidation) Act 1992 (deduction of political fund contribution where certificate of exemption or objection has been given).

120. Section 27(1)(a) of the ERA defines wages as including "*any bonus [or] commission … whether* payable *under [the employee's] contract or otherwise".*

121. In determining what is "properly payable" to the worker in accordance with section 13 of the ERA, tribunals must resolve disputes over the amount of the wages that the worker was contractually entitled to receive from the employer. The approach that the Tribunal should adopt in resolving such disputes is the same as that adopted by the civil courts in claims for breach of contract :**Greg May (Carpet Fitters & Contractors) Limited v Dring 1990 ICR 118 EAT**. The Tribunal must decide, according to the ordinary principles of common law and contract, the total amount of wages that were properly payable to the worker on any relevant occasion. If what was actually paid was less than the amount properly payable, then there will have been a deduction

Wages

122. **Robertson v Blackstone Franks Investment Management Limited 1998 IRLR 376**, is authority for the proposition that the definition of wages according to section 27(1)(a) of the ERA refers to any sums payable to a worker in connection with employment, but without limit as to the time when it is payable or paid.

Contractual Construction.

123. The Supreme Court in ***Autoclenz Ltd v Belcher and ors 2011 ICR 1157, SC*****,** acknowledged that employment contracts are an exception to ordinary contractual principles as the circumstances under which they are agreed are often very different from those under which commercial contracts are agreed, with employers largely able to dictate the terms. The Court held that 'the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part'.

124. When interpreting the express terms of a contract, the court or tribunal's aim is to give effect to what the parties intended.

125. The 'golden rule' in ascertaining that intention is that the words of the contract should be interpreted in their **grammatical and ordinary sense in context,** except to the extent that some modification is necessary to avoid absurdity, inconsistency or 'repugnancy'.

126. The primary source for determining what the parties meant when they entered into their agreement are the words actually used in the contract, interpreted in accordance with conventional usage.

127. Any alternative technical or specialist meaning is eschewed unless there is evidence that that alternative meaning was intended.

128. Mr Justice McCombe remarked in ***Harlow v Artemis International Corporation Ltd 2008 IRLR 629, QBD*****,** that employment contract 'are designed to be read in an informal and common sense manner in the context of a relationship affecting ordinary people in their everyday lives'.

129. The correct meaning of a word is to be found from that commonly attached to it by *the users* of that word. Accordingly, a business meaning will be given to business contracts.

130. The 'parol evidence rule' is a general rule of contract that extrinsic evidence is not admissible to help interpret a written contract but arguably only applies where the court is satisfied that the terms of the agreement between the parties are wholly contained within the written document.

131. A party may adduce extrinsic evidence to prove that the written agreement is not a complete record of the contract in ascertaining the parties' intentions: ***Royal National Lifeboat Institution v Bushaway 2005 IRLR 675, EAT*****.**

132. In ***Investors Compensation Scheme Ltd v West Bromwich Building Society (No.1) 1998 1 WLR 896, HL***, Lord Hoffmann emphasised that a contract should be interpreted not according to the subjective view of either party but in line with the meaning it would convey to 'a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract'.

133. In ***Arnold v Britton and ors 2015 AC 1619, SC***, Lord Neuberger summarised the general principles that apply to the interpretation of express contractual terms thus: '*When interpreting a written contract, the court is concerned to identify the intention of the parties 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*" to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [below]. And it does so by focussing on the meaning of the relevant words… in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the [contractual agreement], (iii) the overall purpose of the clause and the [agreement], (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions.'

134. If a contract is badly drafted and its literal interpretation would lead to a result that had clearly never been intended by the parties, it should be interpreted in light of the context and commercial background behind it: ***Chartbrook Ltd and anor v Persimmon Homes Ltd and anor 2009 1 AC 1101, HL*****.**

135. In the absence of an express term, it is not, entitled to imply a term into a contract based on an assessment of what it thinks would be a fair bargain : ***Vision Events (UK) Ltd (formerly known as Sound and Vision AV Ltd) v Paterson EATS 0015/13*.**

136. In ***Adams and ors v British Airways plc 1996 IRLR 574, CA***, the Court of Appeal confirmed that an employment contract should not be interpreted in a vacuum and that, when resolving any ambiguity in its express terms, it is proper to have regard to the factual setting in which the contract was made.

137. Clear words are needed to deprive the claimant of a benefit, the words must be set out "clearly and unambiguously" (paragraph 59) **Peninsula Business Services Limited v Sweeney 2004 IRLR 49.**

138. If performance targets are vague, courts and tribunals are likely to construe the contract in favour of the employee: ***Murphy and ors v Enterprise-Liverpool Ltd ET Case No.2101706/06*** the claimants contracts of employment entitled them to the payment of a bonus if they provided 'the required level of productivity and full capacity vehicle loads in order to improve the efficiency of the service. The employer contended that conditions for paying the bonus had not been met.. The employment tribunal upheld the claimants' claims for unlawful deduction from wages, noting the lack of precision in the bonus term. For example, nowhere was it stated what the required level of productivity was. It would clearly be unsatisfactory if employees were deprived of what was a relatively substantial element of their wages without knowing or understanding the basis for that deprivation. The claimants were entitled to assume that they had met the required level of productivity unless it was expressly or impliedly clear to them that they had not.

139. To incorporate a term into a contract through custom and practice, the term must be 'reasonable, notorious and certain': ***Sagar v H Ridehalgh and Son Ltd 1931 1 Ch 310, CA*).**

140. In ***Duke v Reliance Systems Ltd 1982 ICR 449, EAT***, the EAT stated that: 'A policy adopted by management unilaterally cannot become a term of the employees' contracts on the grounds that it is an established custom and practice unless it is shown that the policy has been drawn to the attention of the employees or has been followed without exception for a substantial period.' Where a benefit is discretionary, however, the fact that it had been granted for a number of years will not necessarily convert it into an implied term.

Variation

141. In ***Jones v Associated Tunnelling Co Ltd 1981 IRLR 477, EAT*,** the EAT took the view that implying an agreement to a variation of contract is a 'course which should be adopted with great caution'. It went on to state that: 'If the variation relates to a matter which has immediate practical application (e.g. the rate of pay) and the employee continues to work without objection after effect has been given to the variation (e.g. his pay packet has been reduced) then obviously he may well be taken to have impliedly agreed. But where the variation has no immediate practical effect the position is not the same.'

142. It is well established that any contractual discretion must be exercised in good faith and in a way which is neither arbitrary, capricious nor irrational. In ***Birmingham City Council v Wetherill and ors 2007 IRLR 781,*** *CA*, it was held that a clause in the employees' contracts allowing the Council to unilaterally alter the terms of a car-user allowance was subject to an implied term that it 'could not be exercised for an improper purpose, capriciously or arbitrarily, or in a way in which no reasonable employer, acting reasonably, would exercise it'. The implied term was necessary to give effect to the reasonable expectation of the parties, since the Court considered that an employee who has entered into financial commitments in relation to the purchase of a car on the basis of an existing practice is entitled to expect that

the practice will not be changed without giving him or her sufficient opportunity to adjust his or her commitments without loss.

Acceptance

143. Where a proposed contractual variation is wholly to the employee's benefit, the courts may more readily infer acceptance from the fact that the employee has continued to discharge his or her contractual obligations.

144. The High Court in **Attrill and ors v Dresdner Kleinwort Ltd and anor 2012 IRLR 553, QBD,** reference was made to the decision in Sheet Metal Components Ltd v Plumridge [1974] ICR 373:

166. But if, on a proper analysis, acceptance of the offer contained in the promise made by Dr Jentzsch on 18 August was not waived, it is necessary to consider whether there was acceptance. It is common ground that there was no express acceptance of the promise by any of the claimants. The question is therefore whether in such circumstances, namely an announcement by an employer to employees of a change in their terms of conditions to their benefit, the change is accepted by the employees by continuing in the employment

167. In this context there is a distinction to be drawn between the unilateral announcement of variations beneficial to an employee, and of variation to his or her disadvantage. Thus in ***Sheet Metal Components Ltd v Plumridge [1974] ICR 373 S****ir John Donaldson said:*
"It is without doubt the law that there is no dismissal where both parties to a contract of employment freely and voluntarily agreed to vary its terms. This happens whenever there is an increase in rates of pay or a promotion. However, the courts have rightly been slow to find that there has been a consensual variation where an employee has been faced with the alternative of dismissal and where the variation has been adverse to his interests. "

145. In *Attrill*, the employer made an announcement to the workforce at large that there would be a guaranteed minimum bonus pool. The High Court held that this was a promise capable of having contractual effect and that, having regard to the fact that it was wholly advantageous to the employees (being analogous to the announcement of a pay rise), the employer had impliedly waived the need for acceptance. However, it went on to note that if it were wrong about the waiver and acceptance was in fact required, it would not have inferred acceptance from the employees' continuing to work under their existing contracts. The High Court's decision was subsequently appealed, the Court of Appeal did not revisit this issue other than to acknowledge that it was unrealistic for the employer to argue that the promise, which was purely to the benefit of employees, would require individual acceptance before becoming enforceable.

146. In ***Hershaw and ors v Sheffield City Council 2014 ICR 1120, EAT*****,** the fact that the employees continued to work was sufficient to show acceptance. In that case the question was whether the employees had validly accepted the employer's offer of higher pay, as set out in a letter from the employer to the employees informing them that their grievance about pay had been partially successful. The EAT held that there was a binding agreement. Where an additional benefit is offered for the foreseeable future, with no apparent downside, the parties will be taken to have agreed that the benefit is thenceforth a term of the contract, and the employee will readily (and usually) be taken to have accepted it as such merely by continuing to work. Nothing formal is required by way of acceptance. The pay rise takes effect the moment an employee with notification of it continues in the work that he or she has been doing previously.

Consideration

147. As a general rule a court or tribunal is not concerned with the adequacy of consideration and in Court ***of Appeal in Williams v Roffey Bros & Nicholls (Contractors Ltd) [1991] 1 QB 1*** in which the court considered the modern approach to consideration. Purchas LJ said at page 23D: *"I consider that the modern approach to the question of consideration would be that where there were benefits derived by each party to a contract of variation even though one party did not suffer a detriment, this would not be fatal to the establishing of sufficient consideration to support the agreement. If both parties benefit from an agreement it is not necessary that each also suffers a detriment."*

Conclusion and Analysis

148. In construing the relevant documents this Tribunal bear in mind that the function of this Tribunal is to ascertain what objectively was the intention of the parties from the words used by them against the background of facts known to both parties.

Wages

149. The Respondent does not seek to argue that the commission would not qualify as wages.

150. The Tribunal conclude that pursuant to section 27 ERA, the Standard Commission payments are covered by the statutory definition of wages.

What is properly payable to the Claimant under section 27 (1)(a) ERA

The Contract

151. The Tribunal conclude that the Standard Commission is 'earned', giving rise to a contractual entitlement to payment, when the sale has been installed and closed off.

152. The Tribunal conclude that giving the commission clause in the Contract its ordinary meaning in context, it must be interpreted as meaning and being understood by the parties as meaning, that a FSAM must be employed when a sale is installed to be entitled under the Contract to commission for that sale. This must be objectively what was intended by the commission clause because it is simply not possible for the Claimant to 'earn' commission after his employment has ended by making sales and achieving orders, there is no way in which he would have access to the customers to continue to do that.

153. 'Earning' commission therefore must relate to some other condition/trigger for entitlement to arise, otherwise there would simply be no requirement for the clause. The commission clause in the Contract could only therefore in practice be intended to cease entitlement in connection with sales made before employment ended but which are installed after employment ends. The Claimant did not seek to put forward an alternative explanation which would which make any commercial sense in the context of this business model.

154. The Tribunal conclude that while the commission clause in the Contract only benefited the Respondent and was therefore a one side bargain, the words in the Contract are sufficiently clear to make it obvious what was intended.

155. The Claimant was not (as in the Compro case), dismissed before the date when the Standard Commission had been earned (i.e. installed) and fell to be paid in the payroll, he was dismissed before the Standard Commission had been *'earned'* under the Contract.

156. It is clear to the Tribunal that the Claimant understood that he had not earned the Standard

Commission until installation because he has based his claim only on those payments which have been installed and thus his claim has been revised to take into account, since the termination date, those orders which have not materialised into actual installations.

157. The next question however, is whether that Contract term had been varied such that the Claimant became entitled to paid for any installations which took place after his employment ended. The Respondent refutes any variation.

Variation

158. The Respondent agreed at the 2 October meeting as confirmed in the 4 October 2020 email, to pay the FSAM's Standard Commission after their employment with them had ended, both those who would transfer to other BT Local Businesses under TUPE and the Claimant. That is the only interpretation which objectively it is reasonable to place on the emails in early October, giving the words their ordinary meaning in the context and making findings of fact on a balance of probabilities.

159. It is clear, the Tribunal conclude, on the evidence, that this was the intention of the Respondent and the understanding of the Claimant. In reliance on that offer the Claimant continued to sell and place orders (no doubt with his usual high level of performance), until his employment ended. That was the offer made by Mr Shilton, albeit he had stated that he would consider any alternative proposals (CB page 34).

160. There would have been be no need to make any alternative proposals if the Respondent had intended to rely on the terms of the Contract, the Respondent would have merely referred back to the Contract itself. In any event Mr Shilton was candid in his evidence that this was the Respondent's intention, to pay people after their employment ended the Standard Commission for orders taken before their employment ended but installed at a later date.

Consideration

161. The offer of the continuing payments was not altruistic, it benefited the Respondent directly. The Respondent were wanting FSAMs to continue to place orders, they wanted to "*encourage everyone to continue to sell as much as possible*" (CB page 32) i.e. to continue to make money for the Respondent as well as themselves during the short period between October and their employment with the Respondent ending.

162. The FSAMs would receive payments after their employment ended for the sales they would deliver at an enchanted basis rate of 15% (and not 10%) and in return the Respondent would continue to make profit from their sales. There was valid consideration for this agreement from both parties.

Acceptance

163. The offer of continued Standard Commission was beneficial to the Claimant and the Tribunal consider that merely continuing to work in those circumstances amounted to acceptance by the Claimant of the offer: ***Sheet Metal Components Ltd v Plumridge [1974] ICR 373.***

164. The burden is on the Respondent to establish that the Claimant did not act in reliance on or on the faith of the promise and no evidence or submissions were advanced on the point.

165. A communication from an offeree about the terms of an offer *may* be construed as a counter offer and hence as a rejection of the original. Whether the communication is a counter offer or a request for information depends on the intention, objectively ascertained, with which it was made: ***Tinn v Hoffmann & Co (1873) 29 L.T. 271, 278*****;** ***Grant v Bragg [2009] EWCA***

***Civ 1228, [2010] 1 All E.R. (Comm) 1166* at [17],** [22

166. The Respondent however does not seek to argue that there was a counter offer and a rejection of the offer to make ongoing Standard Commission payments.

167. In any event, the Respondent had the contractual right to vary the commission scheme under the commission clause in the Contract and this was not a change which was detrimental to the Claimant. Therefore, even if the Claimant's communication could have amounted to a rejection of the offer, the Claimant had the contractual right to make the variation and thus it did not require acceptance.

168. The Tribunal conclude that the Claimant was contractually entitled to be paid Standard Commission payments for the sales which were installed after his employment ended.

169. However, were the payments subject to clawback for previous sales for which he had been 'overpaid' Accelerator Commission? He did not receive any Acceleratory Commission for sales installed after his employment ended, therefore this relates to previous Accelerator Commission .

Clawback

170. The Contract does not include any provision about clawback. The Claimant denies clawback applied to him and has no idea how it applied, if at all, to others and he was not challenged on this.

171. That clawback of Accelerator was a contractual term incorporated through custom and practice is not a position set out in the Respondent's written statements or within the Grounds of Resistance. The evidence of any common practice from the Respondent is scant and the few documents produced are only from 2020 and 2021. Further, it cannot be said that it was followed without exception: ***Duke v Reliance Systems Ltd 1982 ICR 449, EAT*,** because at the very least Mr Shilton agreed to turn a 'blind eye' and not apply it to the Claimant.

172. In any event, whether something is custom and practice cannot displace an express term and Mr Shilton had expressly agreed with the Claimant not to apply it to him.

173. The Tribunal conclude that there was no term implied by custom and practice that clawback of Accelerator Commission applied to the Claimant and in practice it was not applied.

174. The Tribunal conclude that clawback had never been applied to the Claimant's commission payments and accept that where there are references to past clawback in statements provided to the Claimant (e.g. RB page 115) these refer to clawbacks to Standard Commission before the scheme was changed to payment on installation. The change to the scheme was not disputed by the Respondent.

175. In terms of the 27 June 2023 email (CB page 42), Mr Shilton merely referred to the right to review whether to apply Accelerator clawback, (stating only at this stage that he was considering whether to review it),and this does not give him the contractual right in itself to do so.

176. The Tribunal do not find that when he agreed initially to 'turn a blind eye' to clawback, he explained that he would reserve the right to introduce clawback or when and in what circumstances he would do so. He did not attach conditions to the agreement entered into with the Claimant.

177. Mr Shilton did not give evidence that he was relying upon the commission clause in the

Contract to amend the agreement he had with the Claimant and introduce clawback. The Respondent's position, as set out in Mr Shilton's witness statement at paragraphs 9 to 12, is that clawback had been applied to the Claimant and that he had applied a discretion not to clawback commission on a specific occasion on 27 June 2023. The Tribunal find that this, as admitted by Mr Shilton, is not what happened. Mr Shilton had verbally agreed before June 2023 not to apply clawback for 'overpaid' Accelerator Commission to the Claimant's commission payments and he had never done so. The 27 June email was not Mr Shilton exercise a discretion on that particular occasion not to clawback, it was a warning that he may consider doing so if his cancellations were 'significant'.

178. The Tribunal do not find, on the evidence, that there were conditions attached to the agreement not to apply clawback. If the intention was to make the agreement conditional, Mr Shilton does not assert this in his evidence or set out what the conditions were.

179. If the email of the 27 June was an attempt to vary the agreement and/or invoke the commission clause to vary the commission scheme as at applied to the Claimant, the email was vague, failing to set out what was meant by '*significant cancellations'* and reads as if it was intended to apply to Q3 22 only.

180. The email of the 29 June 2023 was only sent to the Claimant and made no mention of clawback being applied for Q3 22.

181. In terms of the email of the 30 June 2023, the Tribunal find that it relates to Q2 23 only. The Claimant has however not been paid and is not seeking any Accelerator Commission on sales made in Q2 23. Further, as set out in the findings of fact, the Tribunal find that it was not in any event, intended to apply to the Claimant.

182. If there was a practice of applying clawback (whether under the terms of the commission clause in the Contract or otherwise), this offer by Mr Shilton to turn a 'blind eye' benefitted the Claimant and the Respondent. It was a legally binding agreement with an offer, acceptance, (implied at least by the Claimant's continued work without protest), and consideration on both sides. If the Respondent wanted to vary that agreement, it needed to invoke the commission clause in the Contract and effect a valid variation or otherwise vary it with the Claimant's agreement, implied or express.

183. If the 27 June or 30 June 2023 emails are relied upon as a variation of the agreement in place, that is problematic for the Respondent.

184. The natural and ordinary reading of the email of the 27 June, (and this is what the Claimant alleges he understood by it), is the Tribunal conclude, that it related to only to Q3 22. If this email was an attempt to vary the agreement more widely, there are two clear difficulties with that. Firstly, the cancellation rate which the Respondent would consider 'significant' in order to invoke clawback, lacked precision. It would be unsatisfactory to deprive an employee of a substantial element of his wages without understanding what performance/sales criteria would be applied : ***Murphy and ors v Enterprise-Liverpool Ltd ET Case No.2101706/06.*** Further, to decide to now apply clawback in relation to past orders rather than future orders/sales, would be changing an existing agreement without giving the Claimant sufficient opportunity to adjust his financial commitments to avoid loss. He had performed and made sales based on the existing agreement: **Birmingham City Council v Wetherill and ors 2007 IRLR 781.** This was not about introducing clawback on future cancelled sales, but in respect of cancelled installations on past sales for which Accelerator Commission had already been paid. If the Respondent had given reasonable notice that it was being introduced (and was clear on what terms), that at least would have enabled the Claimant to make financial provision for the change, which may have included setting aside the Accelerator element of commission in case it needs to be repaid through clawback. To

introduce clawback after an agreement not to do so with respect to significant payments which have already been paid on the express understanding that they would not be clawed back, would be a perverse exercise of the flexibility in the commission clause and it would potentially engage issues of estoppel but in any event the Tribunal conclude that such a change would not fall within the scope of the express commission clause.

185. The Tribunal reminds itself that the law does not require employers to operate flexibility clauses in an objectively reasonable manner however, a contractual discretion must be exercised in good faith and in a way which is neither arbitrary, capricious nor irrational: ***Birmingham City Council v Wetherill and ors 2007 IRLR 781, CA*.**

186. The Respondent made an offer to the Claimant to continue to pay him Standard Commission after his employment ended. That offer was made on **2 and 4 October** and it did not include any reference to repaying Accelerator Commission, that was not part of the existing agreement in place with the Claimant or a term of the original offer made in early October, which was legally binding (for the reasons set out above).

187. Further, for the reasons set out above, the Tribunal also conclude that the 30 October 2023 email did not amend the agreement which had been entered into in early October to introduce clawback in respect of previous Accelerator Commission payments which had been made to the Claimant. There was no acceptance of this by the Claimant: ***Sheet Metal Components Ltd v Plumridge [1974] ICR 373*** and indeed the Respondent does not argue there was.

188. To invoke the commission clause in the Contract and amend the now varied commission scheme in a way which would be clearly adverse to the Claimant, would require wording which was clear and ambiguous: **Peninsula Business Services Limited v Sweeney 2004 IRLR 49.** It is not at all clear that the reference to 'Bonus threshold' meant the past thresholds in place for paid Accelerator Commission or clawback.

189. Further, the Tribunal conclude that it was **not** the intention of the Respondent to amend the Contract to introduce Accelerator Commission clawback for the Claimant either from June 2023 or (CB page 39) or from 30 October 2023 or indeed at any point, until the parties fell out after the Claimant's employment ended. That this was the intention and the Claimant's understanding from Mr Shilton, is the Tribunal find proven on a balance of probabilities.

190. On 4 December 2023 (CB page 14/15) Mr Shilton wrote that :

"The agreement to pay you outstanding commission is a goodwill gesture. ***Turning a blind eye to over £8000 of quarterly bonuses that I should have clawed back from you is also a good will gesture****…If you continue with your ultimatums, then I will revisit our legal obligations to pay any further commission to you." Tribunal stress*

191. It was not however a goodwill gesture, it was a mutually beneficial legally binding agreement.

192. The commission clause in the Contract does not envisage operation of the commission after employment ends and in any event, any attempt to vary the Contract terms in such an onerous manner would need the communication of that change to be explicit and clear. The Respondent does not assert that the email of the 4 December 2023 gave it the contractual right to clawback the payments, but even if that was its position, it is flawed. The Respondent had no such right to do implement such a change under the scope of the commission clause and the Claimant patently was not in agreement with any such variation.

193. The complaint of unlawful deductions from wages therefore succeeds.

194. In terms of annual leave after some discussion the Respondent gave evidence that he was content to concede that he may owe the Respondent some annual leave and that should be offset against his payment. The Claimant was prepared to concede that point. The holiday payment is agreed to be £601.08 and that has been offset against the commission payments due to the Claimant.

Employment Judge Broughton

Date: 26 January 2025

JUDGMENT SENT TO THE PARTIES ON

.....28 January 2025.....

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FOR THE TRIBUNAL OFFICE

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