EMPLOYMENT TRIBUNALS

Claimant: Mr S Bowland-Kenyon

Respondent: Integrated Air Systems Ltd

Heard at: Manchester (by CVP) **On:** 17-18 January 2024

Before: Employment Judge Phil Allen (sitting alone)

REPRESENTATION:

Claimant: Mr E Stenson, counsel
Respondent: Mr R Taylor, solicitor

JUDGMENT

The judgment of the Tribunal is that:

1. The respondent made an unauthorised deduction from the claimant's wages paid on 24 January 2022 when it did not pay the claimant the sales incentive bonus due to him (in respect of calendar year 2021) of the gross sum of **£20,400**.

2. The respondent made an unauthorised deduction from the claimant's wages paid on 24 January 2023 when it did not pay the claimant the sales incentive bonus due to him (in respect of calendar year 2022) of the gross sum of **£20,000**.

REASONS

Introduction

1. The claimant is employed by the respondent as a Project Sales Engineer. He contended that he had an entitlement to outstanding Sales Incentive Bonuses totalling £40,400. He claimed that he earned a bonus of £20,400 through his sales in calendar year 2021, due to have been paid at the end of January 2022; and a further £20,000 bonus through his sales in calendar year 2022, due to have been paid at the end of January 2023. Neither sum was paid, and he claimed that each failure to pay was an unlawful deduction and together they amounted to a series of unlawful deductions. The respondent denied that the claimant was entitled to the sums

claimed, denied that there had been unlawful deductions, contended that the claim for the 2021 bonus had not been brought within the time required, and contended that the claimant had implicitly acquiesced or impliedly agreed to a variation to his contract.

Claims and Issues

2. A preliminary hearing (case management) was previously conducted in this case on 15 August 2023. Appended to the case management order made following the hearing was a list of issues. The parties confirmed at the start of this hearing that the list remained correct. The list is appended to this Judgment.

3. The case management order also recorded within it what exactly the claimant's claims were and what had been said about the timing of the alleged payments due.

4. For the preliminary hearing, the claimant had prepared a table outlining the orders upon which he relied in his claims (60). At the preliminary hearing the respondent was ordered to provide an amended response. It did so by preparing a version of the table which also included a column which stated why the orders were not considered to have resulted in the bonus entitlement claimed, identifying the respondent's arguments on each of the orders which it disputed resulted in bonus entitlement (61).

Procedure

5. The claimant was represented by Mr Stenson, counsel. The respondent was represented by Mr Taylor, solicitor.

6. The hearing was conducted by CVP remote video technology, with both parties and all witnesses attending remotely.

7. The claimant's name was amended at the start of the hearing, so that the proceedings were in his married name.

8. An agreed bundle of documents was prepared in advance of the hearing. The bundle ran to 555 pages. The claimant sought to add some additional documents to the bundle on the first morning of the hearing. A pragmatic agreement was reached between the parties about additional documents during the time taken for reading. Six additional pages were added to the bundle and the respondent did not object to those pages being added and considered (the claimant had initially sought to add significantly more pages). On the morning of the second day, the respondent sought to add a further page and, as the claimant did not object, that page was also added to the bundle. Where a number is referred to in brackets in this Judgment, that is a reference to the page number in the bundle.

9. Witness statements were provided for all the witnesses. Those statements were read on the morning of the first day, together with the pages in the bundle to which reference was made.

10. On the afternoon of the first day, evidence was heard from the claimant and (briefly) from Mr Alexander Whitehouse, a former employee of the respondent called

by the claimant. Each of them was cross examined by the respondent's representative. I also asked the claimant some questions and he was briefly re-examined by his representative. At the start of the second day, Mr Aaron Graham gave evidence for the claimant and was (briefly) cross-examined by the respondent's representative. He was also a former employee of the respondent. He gave evidence from New South Wales, Australia, it having been confirmed in advance of the hearing that he was able to give evidence from that location.

11. Mr Graham Marginson, Managing Director of the respondent, also gave evidence on the second day. He was cross examined by the claimant's representative before I asked him some questions. His evidence concluded at lunchtime on the second day.

12. After the evidence was heard, each of the parties was given the opportunity to make submissions. The respondent's representative provided his submissions in writing. The claimant's representative delivered his submissions orally on the afternoon of the second day.

13. Judgment was reserved and accordingly I provide the Judgment and reasons outlined below. I was grateful to the parties' representatives, as they conducted the hearing entirely appropriately.

Facts

14. The claimant is employed by the respondent as a project sales engineer. He has been employed since 2 September 2019.

15. In the bundle of documents was the advertisement which had been issued which had resulted in the claimant being recruited (66). That asked whether the potential applicant had the drive and enthusiasm that would see them progress to become a key person within the respondent's UK sales drive? It said that the respondent was seeking an individual with key skills in mechanical engineering projects to join a team and develop the UK air conveying, dust extraction, and filtration market. I was also shown a job description (67) which contained similar wording.

16. The claimant was employed under a statement of employment (71) which had been signed on behalf of the company on 21 August 2019. The relevant provision regarding salary (and bonus) was clause seven which said:

> "*Your initial joining salary is £*[amount] *per annum with a Sales Bonus as laid out in the offer of Employment*
>
> *This will be paid monthly in arrears on or around the 24th of the month"*

17. There was no other provision regarding bonus or commission in the statement of employment particulars. Despite the use of capitals, sales bonus was not defined elsewhere in that document. There was no dispute that the offer of employment document referred to in that clause, was the offer letter which had been sent to the claimant. The statement of terms also included a provision regarding job location and flexibility, in which it was stated that it was an express condition of the claimant's

employment that he would be prepared to transfer to alternative duties within the business.

18. The offer letter was dated 20 August 2019 and was sent from Mr Marginson (68). The first page of that letter cross-referred to the statement of employment and expressly stated that the statement and the letter together formed the claimant's contract of employment. The letter also detailed salary and working hours, probationary period, and pension entitlement.

19. The focus of this hearing was on the content of the second page of the letter (69). That page began with a section under the heading "*Sales Area*" which said the following:

> "*All of the UK including Ireland to develop new business within both existing and new clients in the Waste and Dust Extraction, Fume & Ventilation in manufacturing and process industries"*

20. It was the claimant's evidence that, in practice, the sales upon which he was asked to work were not geographically limited in the way described in that part of his offer letter. There was no dispute that he in fact worked on sales (or projects) outside the UK and Ireland. The respondent contended that the paragraph was to be read, together with the paragraph on sales targets, as limiting the transactions for which the claimant would be paid bonus (so as to limit the bonus to business in UK and Ireland, and to limit the business to that of new business for existing and new clients).

21. The next part of the offer letter addressed the products which the claimant would be required to sell and the sectors to whom he would be selling. It was the claimant's evidence that in practice his sales were not limited to the industries listed. The first line of the section stated that the claimant was required to sell ventilation, extraction and conveying systems. In his evidence, Mr Marginson drew a distinction between selling a system and selling a unit. From the sales figures provided, the claimant primarily sold units and not systems.

22. The key section of the offer letter was headed "*Sales Target*" and said:

> "*For 2020, running from 1st January to 31st December inclusive, there will be reduced £180,000 gross profit target*
>
> *This equates to a sales target of £600,000 at 30% gross profit; and take into account your probation/settling in period.*
>
> *A profit related Sales Incentive Bonus scheme will be in place, with the first payment of £2500 being paid on achieving £144,000 GP*
>
> *Achieving target, will earn an additional £2500 bonus – over target achievement will be rewarded with additional bonuses to a maximum bonus of 50% over basic salary*
>
> *This is calculated on a sliding scale of £25,000 GP increments"*

23. During the first year of the claimant's employment, he was focussed on project work and not sales. As a result, no dispute arose about any payment under the sales incentive bonus scheme. The claimant was paid a discretionary bonus by the respondent, but there appeared to be no dispute that any such bonus was separate and distinct from the bonus potentially payable under the sales incentive bonus scheme (which was accepted as not being discretionary). The discretionary bonus was paid to other employees at the respondent. The sale incentive bonus included in the claimant's offer letter was unique to the claimant. The figures included in the provision in the offer letter were never updated for later years and it was the claimant's case that those same figures continued to apply to the later sales years of 2021 and 2022.

24. In or around October 2021, the claimant spoke to Mr Snelson, the respondent's sales director. I did not hear evidence from Mr Snelson. It was the claimant's evidence that he was told to keep a record of the sales he made. The claimant understood at the time that the sales were to be considered applying the financial year and not the calendar year, and therefore the relevant year was August to July. He began collating the figures which he believed applied to the sales he made in the year August 2021 to July 2022 (he backdated the start of that list).

25. The claimant first raised the non-payment of sales incentive bonus in a meeting with Mr Marginson on Friday 2 September 2022. As at that date, he had not been paid any such bonus. It was the claimant's evidence that he had waited for the end of the relevant financial year and then, because he had got married in August, had only raised it at the start of September.

26. I was not provided with a formal record or note of the meeting on 2 September. In his grievance, the claimant had included an account of the meeting (102). In that account the claimant said that Mr Marginson had informed him that no one had commission in the sales department, the claimant had said that he did, and Mr Marginson had informed him that he would write it out of the contract. In his evidence to the Tribunal, Mr Marginson drew a distinction between commission and bonus and said that it was right that no one in the company had commission. Mr Marginson also emphasised the new bonus scheme prepared later in 2022 as being what he had meant when he referred to writing it out of the contract.

27. Following the meeting, a letter was sent to the claimant by Mr Marginson on Sunday 4 September 2022 (78). In the letter, Mr Marginson offered the claimant the position of Oil Mist Filtration Product Specialist. He confirmed that he had looked at the figures for the previous year and the claimant had been correct in that there had been near £1.4 million of orders booked and approximately £925,000 of jobs invoiced for the financial year. The letter also referred to a discretionary bonus payment being awarded as it had not been paid due an oversight and the claimant's salary was increased. There was no express variation of the sales incentive bonus scheme nor was there any reference to what was payable under it or how it was calculated. In his evidence, Mr Marginson explained that the figures referred to in the letter were not sales for which the claimant was responsible.

28. The claimant met with Mr Snelson on 5 September. The note of that meeting written by the claimant and included in his grievance (103) recorded that the claimant was told that he would only be paid commission for new clients. Mr Snelson and the

claimant then spoke to Mr Marginson. The note recorded Mr Marginson as saying he was perplexed by the claimant's attitude. Mr Marginson could not recall what he had said but confirmed that he did not understand why the claimant had raised with Mr Snelson something which Mr Marginson believed had been resolved in the meeting on the previous Friday and with the letter he sent on the Sunday.

29. An email was sent to the claimant by Mr Marginson on 20 October 2022 which attached a new sales bonus scheme with clear targets and rewards (83). That new scheme distinguished between sales to the UK market and sales stated to be for the existing client base (which was said to be re-active overseas sales and not the primary target).

30. On 14 December (erroneously dated 7 December) (89), Mr Marginson wrote to the claimant addressing the new role and the respondent's perception that the claimant's attitude needed to improve. Such matters are not relevant to these proceedings, but what was relevant was that Mr Marginson confirmed that any sales bonus could only be "*done*" after the final end of year figures were compiled and all project costs were taken into account, with the year being 1 January to 31 December (89). A further letter was sent by Mr Marginson on 21 December 2022 (91).

31. The claimant raised a formal grievance on 24 January 2023 (98). Part of the grievance was the non-payment of the bonus which was the subject of this claim. The respondent engaged Croner Face2Face to report on the grievance and a report was provided by Mr McNaughton (from whom I did not hear evidence) (121). He did not uphold the complaint and Mr Marginson adopted the conclusions of the report and did not uphold the claimant's grievance in a letter dated 13 March 2023 (119). Mr McNaughton highlighted that he made his decision based upon the information available to him, as the claimant had sought supervised access to the respondent's servers to collate the information he required, but the respondent had denied him access. Mr McNaughton observed that the fact that there had been no clarification or variation of any change to the bonus scheme "*has created a significant ambiguity in assessing SK's entitlements*".

32. The claimant placed reliance when answering questions put to him in cross-examination, upon a document he said had been prepared by the respondent as part of the grievance process. That table (271) appeared to distinguish between orders which it was accepted the claimant should be given credit for when calculating bonus and those where it was not. The respondent appeared to have acknowledged in the table prepared that the claimant was entitled to bonus for the following order numbers: 2529; 2542; 2547; 2576; 2577; 2578; 2586; 2614; 2616; 2664; 2706; 2709; and 2714. The respondent's arguments at this hearing were not consistent with the position recorded in page 271. Notably those orders included orders for the USA, Kazakhstan and Czechia. Mr Marginson's evidence was that he did not know what the table was or whether it have been prepared by the respondent.

33. The claimant appealed against the grievance outcome in a letter of 17 March 2023 (143). The appeal was heard on 26 May 2023 and not upheld in a letter of 31 May (194). I did not hear evidence from Mr Whitehead who heard the grievance appeal.

34. In its detailed grounds of response to the claim (35), the respondent stated that the claimant secured new business worth £72,917 with gross profit of £33,150 in 2021, and new business worth £268,806 with gross profit of £99,842 in 2022. Those figures were not consistent with the case which the respondent presented in its further particulars document (61) upon which it based its arguments at this hearing.

35. As I have already confirmed, considerable emphasis was placed by the parties on the tables provided (60 and 61) and on the reasons given by the respondent in its table (61). In the table which it had prepared, the respondent accepted that four orders from 2021 and four orders from 2022 could appropriately be taken into account when calculating bonus entitlement (orders 2432, 2493, 2542 and 2547 in 2021, and 2586, 2610, 2616 and 2664 in 2022). The claimant in his witness statement conceded that he was not entitled to bonus calculated on two orders in the table in 2021 (which he confirmed when giving evidence): 2502 and 2503.

36. For a large number of the entries (61), the respondent identified them as being for export and therefore not appropriate for bonus calculation. The claimant did not agree. For some identified as international orders there was also a dispute about whether the relevant consideration was the order location or the place of business of the client.

37. Many of the orders were recorded as being an existing customer. In its pleaded case (61), the respondent drew no distinction between an existing customer and new business for an existing customer. In his evidence when asked, Mr Marginson did draw a distinction and emphasised for a number of orders why he believed it was repeat business. It was confirmed in evidence that as a result of the nature of the respondent's business, all products sold (whether systems or units) were to an extent bespoke, albeit that the variables for a unit were limited. However, all units were adapted on order to fit the particular requirements of the customer, including for different/unique matters such as the altitude of the site, the measurement system used in the country, and the size of the unit. For some orders, such as those recorded in the table as spares, what was provided would have genuinely been a repeat order of a previous part, without alteration.

38. Some of the orders were recorded as having been made by someone else. The evidence heard about those was, in summary, as follows:

a. The quotation for 2457 was in fact prepared by the claimant and sent to the customer by him (284), but it was Mr Marginson's evidence that it was for work which had been passed to him by Mr Clarkson. He said that Mr Clarkson had in fact done the work on the quote, but it had been sent on his behalf by the claimant. The particular reason why Mr Clarkson had not sent the quote himself was explained;

b. It was contended by the respondent that 2512 was carried out by Mr Cooke. After he was taken to the relevant email (311), Mr Marginson accepted that the quotation had been done by the claimant;

c. It was contended by the respondent that 2639 had been a quote done by Mr Snelson. An email was included within the bundle which showed

the quotation being sent by the claimant (469). Mr Marginson's evidence was initially that the original quote was done by Mr Snelson. In his witness statement, the claimant acknowledged that the client had raised a purchase order using a previous price which it had sent to Mr Snelson, and Mr Snelson had requested that the claimant re-quote for the item. When he was shown the documents in cross-examination, Mr Marginson ultimately agreed that the order should be taken into account for the claimant's bonus calculation;

d. 2655 was recorded as a quote undertaken by Mr Marginson. The quotation included in the header Mr Marginson's email address, but was signed by the claimant (474). One of those must have been included in error. Very fairly, during cross-examination, Mr Marginson accepted that it was the claimant's quotation;

e. It was contended by the respondent that 2723 was quoted and ordered by/to Mr Snelson. The emails (489) showed the order being sought from the claimant and the claimant providing the quotation.

39. A significant number of orders included in the tables were all for 6 December 2021. They all related to the same client of the respondent (albeit different locations of that client) and the vast majority (but not all) for the same product. They applied to different locations of the client's premises (some being in the UK and some outside). An exchange of emails was provided in the main bundle. The initial emails of 25 and 26 November were between Mr Snelson and the client contact, with the claimant cc'ed. Those emails included the client confirming that he was good with the proposal and Mr Snelson thanking him for his valued business. The claimant then emailed the client on 29 November providing the quotations and the client responded on 6 December providing its purchase orders (325). Some quotation documents were provided signed by the claimant (221). Purchase orders were provided which recorded Mr Snelson as the contact person (238).

40. The additional documents provided by each of the parties also related to these related orders (the respondent's additional document was about this client generally). The claimant's additional emails showed an enquiry from the client being sent to Mr Marginson on 21 October asking for an up-to-date quotation. On the same date, Mr Marginson emailed the client to say that he had passed the request to the claimant. The claimant had then exchanged emails with the client including a quotation sent on 22 October. In his email, the claimant made clear that it was not possible to predict prices over an eighteen-month period and therefore the quotation was only valid for thirty days. From those emails it was clear that the claimant had initially quoted for the work, prior to Mr Snelson's emails (as included in the bundle). The original source of the enquiry had been an email sent to Mr Marginson. The additional document produced by the respondent, was a list of orders from the specific client, which showed that the respondent had a long relationship with the client which had (at least for other locations) pre-dated the specific orders which were the subject of the claimant's claim for bonus.

41. The claimant's verbal evidence was that the particular client had sought a discount for its order and the claimant did not have authority to give that discount. The authority was sought from and given by Mr Snelson (the sales director). Mr

Marginson's evidence in cross-examination was that the quotations were prepared after the orders had been received (he said the orders were on 26 November and the quotations prepared on 29 November after the orders had already been received). He accepted that the claimant in fact prepared the quotations. The additional documents produced by the claimant made clear that an initial quotation had been prepared by the claimant, prior to Mr Snelson's email exchange.

42. The tables (60 and 61) also differed from each other in two material respects. The amount to be taken into account for calculating bonus entitlement was not the transaction value, but the gross profit on the transaction. The gross profit figures included in the two tables differed for a number of the transactions. No evidence was led which addressed the precise gross profit figures included, or addressed any differences. No questions were asked of any witness during the hearing about the precise figures included nor were any submissions made about them. The respondent's table (61) also simply omitted one entry which had been included in the claimant's table (60) (project number 2520) and did not provide any pleaded basis upon which the entry was not accepted as being one to which bonus should be applied. That was a small order value in the context of the claim generally.

The Law

43. The claim was brought as one for unauthorised deductions from wages under section 23 of the Employment Rights Act 1996, relying upon the right under section 13 of the Employment Rights Act 1996 which provides that:

> "*An employer shall not make a deduction from the wages of a worker employed by him unless:*
>
> *(a) The action 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*."

44. Section 27 of the Employment Rights Act 1996 provides that "*wages*" includes any bonus or commission.

45. In practice I therefore needed to determine whether the claimant was contractually due amounts which were not paid to him. If he was entitled to those amounts, an unauthorised deduction would have been made.

46. In his submissions, the claimant's representative referred to four cases when explaining the contractual principles.

47. The claimant's representative relied upon **Arnold v Britton** [2015] UKSC 36 and confirmed that when interpreting a written contract, I had to identify the parties' intention by reference to what a reasonable person having all the relevant background knowledge would understand the written contract to mean. The words are to be given their natural and ordinary meaning. The guidance was that I should disregard the subjective evidence of the parties. In this case, that meant that I should not take into account the respondent's aspirations for the relevant provision. He also

relied upon **Chartbrook Ltd v Persimmon Homes Ltd** [2009] UKHL 38 and the Judgment of Lord Hoffman.

48. The claimant's representative referred to **Autoclenz Ltd v Belcher** [2011] UKSC 41, a case in which the Supreme Court addressed the nature of contracts in the employment context and the inequality of bargaining power. That decision said that an agreement might not reflect the reality of the relationship and to determine the actual agreement the written agreement was only a part. I did not find that case added anything in the circumstances I was considering in this claim.

49. The fourth case to which Mr Stenson referred was **Ostilly v Meridian Global VAT Services (UK) Ltd** EAT/0017/20, albeit his primary reason for doing so was to draw a distinction between the terms of the bonus scheme in that case and the terms which applied in this one.

50. Section 23(2) of the Employment Rights Act 1996 provides that an Employment Tribunal shall not consider a complaint under section 23 unless it was presented to the Tribunal before the end of the period of three months beginning with the date of payment of wages from which the deduction was made. Sections 23(3) and (4) provide two exceptions to that rule.

51. Section 23(3) (including subsection (a)) says that:

> "*Where a complaint is brought under this section – (a) in respect of a series of deductions… the references in subsection (2) to the deduction or payment are to the last deduction … in the series"*

52. Section 23(4) also provides for an extension where it was not reasonably practicable to have entered the claim in time, but it was confirmed in submissions that the claimant was not relying upon such an argument for an extension.

53. The Supreme Court has recently provided a very clear explanation about how the series extension should be considered in **Chief Constable of the Police Service of Northern Ireland v Agnew** [2023] UKSC 33, a decision which I re-visited in full (and informed the parties prior to their submissions that I had done so). Amongst other things the following was said in that Judgment:

> "*we agree with the Court of Appeal that the word "series" is an ordinary English word and that, broadly speaking, it means a number of things of a kind, and in this context, a number of things of a kind which follow each other in time. Hence, whether a claim in respect of two or more deductions constitutes a claim in respect of a series of deductions is essentially a question of fact, and in answering that question all relevant circumstances must be taken into account, including, in relation to the deductions in issue: their similarities and differences; their frequency, size and impact; how they came to be made and applied; what links them together, and all other relevant circumstances…*
>
> *it is helpful and important to identify the alleged series of unlawful deductions upon which reliance is placed and the fault which is said to underpin it. In these appeals, the series is a series of deductions in relation to holiday pay. Each unlawful deduction is said to be factually linked to its predecessor by the*

> *common fault or unifying vice that holiday pay was calculated by reference to basic pay rather than normal pay, and so regardless of any overtime or allowances during the reference period.*"

Conclusions – applying the Law to the Facts

54. In determining this case I considered the issues as set out in the agreed list. I did not consider them in the precise order asked. I would emphasise that the claim which I was determining was a claim for unauthorised deductions from wages. I did not need to reach any decision about the claimant's performance. I also did not need to determine whether or not the claimant had succeeded in selling the products which the respondent had hoped that he would sell when they recruited him, nor whether he had done so to the geographic area which had been the respondent's aspiration or expectation when advertising or recruiting to the role. It was clear from Mr Marginson's evidence (using my words in summary and not his), that he did not believe that the orders in which the claimant had been involved genuinely merited the bonuses being claimed. That, of course, was not what I was deciding, nor did it have any genuine relevance to the decisions which I needed to reach.

55. Issues 1.4 and 1.5 included the broad question which I needed to determine: what were the contractual terms as to bonus initially agreed between the parties? The two subsidiary but related questions, which followed from the answer to the broader question were: has the claimant proved a contractual or some other lawful entitlement to Sales Incentive Bonus on all sales by him (i.e. sales to existing customers as well as new business); and was he only entitled to bonus on sales in UK and Ireland or also on sales outside?

56. The contractual entitlement to a sales bonus was set out in clause seven of the statement of terms of employment (73). That stated it was the sales bonus in the offer of employment. There was no dispute that the document referred to as the offer of employment, was the letter of 20 August 2019 from Mr Marginson. In any event, that letter itself stated that the claimant's contract of employment was set out in the offer letter and the statement of employment.

57. The offer letter contained a statement that a profit related sales incentive bonus scheme will be in place (69). There was no dispute in these proceedings that the result of that statement was that a contractual bonus scheme was in place for the claimant. It was also not in dispute that the offer letter provided the terms which applied to that bonus scheme.

58. The key point of dispute between the parties was in practice relatively straightforward. The claimant contended that the terms which apply to the sales incentive bonus scheme were the provisions contained in the offer letter under the heading "*sales target*" and only the provisions under that specific heading. The respondent said that the contents of three sections of the letter should all be read together as applying to the sales incentive bonus scheme, that is what was said under all three headings: "*sales area*"; "*products and industry sectors*"; and "*sales target*". If the claimant was correct, what the letter said about the sales area and the business had no impact upon the bonus payable and to the targets which applied. If the respondent was correct, the targets which applied to the bonus were limited to the sales areas stated (in terms of geography and new business).

59. In his written submissions, the respondent's representative put the case as follows:

> *"Importantly page 69 sets down the three components that make up the commission scheme. They are specified as the **Sales area**, as I put it where the Claimant will be selling to, the **Products and industry sectors**, what the claimant would be selling and finally the **sales target,** what the Claimant would get for depending on how much he sold. I respectfully advance to the Tribunal that the Sales area is the contractual key to this case. The sales area to which those products being sold to is clearly the UK including Ireland. Further to that the requirement was to develop new business within both existing and new clients in the Waste and Dust Extraction. As such it would appear that to qualify for a sales commission the Claimant would have to sell a new product to either an entirely new customer, or an existing customer based in the UK or Ireland."*

60. I have considered what I have said in the section about the law above, about the interpretation of what is said in the contract. I had to give the words their natural and ordinary meaning and had to identify the parties' intention by reference to what a reasonable person having all the relevant background knowledge would understand what was said to mean.

61. I noted that the relevant paragraphs were all part of the letter sent to the claimant as an offer of employment. The entirety of the document was not addressed to providing details about the bonus scheme. The primary purpose of the letter was to make clear to the claimant what he was being offered as new employment and the terms that applied. In that context, and giving the letter its natural and ordinary meaning, I read the parts of the letter which described the claimant's sales area and products and industry sectors, as doing exactly that. They described, for the benefit of the person being offered the job, what his sales area was expected to be and in what products and industry sectors it was expected he would be working. I did not see that those sections of the letter needed to be, or were intended to be, included in what was said about the sales incentive bonus scheme. I found that the parties' intention when the section under the heading "*sales target*" was agreed, was that it described, as a stand-alone section of the letter, the rules which applied to the sales incentive bonus. I did not agree with the respondent's representative's submission or the respondent's position, that the wording of the two preceding sections of the letter were intended to be (or naturally read as being) incorporated into the section on bonus.

62. As the claimant's representative submitted, it would have been open to the respondent to the have included within the section of the letter which addressed the sales incentive bonus, words which made clear that the targets stated applied only to sales in UK and Ireland and/or only to new business. The respondent did not do so. I also noted that the letter included headings which clearly and definitively separated the parts of the letter on the second page, and I found support for my decision from the fact that the letter writer chose to do so (and therefore to clearly set out what should be read as applying to each section of the letter). As the letter did not include clear and express wording limiting the sales to which the bonus scheme applied, in the section which addressed the sales incentive bonus scheme, I did not find that

any such restrictions as contended by the respondent applied to the targets stated in the letter.

63. In answer to the questions asked within issues 1.4 and 1.5, I found that:

a. the contractual terms as to bonus initially agreed between the parties were those set out in the section of the offer letter of 20 August 2019 under the heading "*sales target*" and only that section (when read alongside section seven of the statement of terms);

b. as a result, the claimant has proved a contractual entitlement to Sales Incentive Bonus on all sales by him, that is the relevant sales are not restricted to new business; and

c. he was not only entitled to bonus on sales in UK and Ireland, he was also entitled to bonus on sales outside that geographic area.

64. When the case management orders were made at the previous preliminary hearing, it was clear that the respondent was to set out in the further particulars, its response to each of the orders upon which the claimant relied and which were set out in the table he provided (60). The respondent, understandably, chose to provide its further particulars in the table it provided (which it described as the Scott Schedule, 61) rather than in a narrative format. On that basis, the only arguments which I have considered for each order which the claimant asserted should form part of the basis for his bonus calculations, are the arguments recorded in the table (61). It was clear from Mr Marginson's evidence, that he would have raised other arguments for some of the entries, as indeed on occasion in his evidence he did. However, where the respondent was given the opportunity to set out its response in advance of the hearing to each of the orders and did so, it is appropriate for those responses only to be considered. I did note that the respondent did appear to have changed the arguments which it put forward in response to the bonus claim over time, perhaps most significantly for these proceedings in the contrast between the detailed grounds of response and the table (61), however for the purposes of the decisions which I needed to reach, the fact that its position had changed was not material.

65. As I have already recorded for 2021, the respondent conceded that the following orders counted towards bonus calculation (on page 61): 2432; 2493; 2542; and 2547. The claimant conceded that the following orders should not be taken into account: 2502; and 2503.

66. In relation to the orders for 2021, in the light of the decision I have made about the terms which applied to the bonus scheme, and the absence of any geographic limitation, or any limitation to it being only for new business, I find that the following orders should be taken into account for bonus calculation: 2443; 2451; 2529; 2544; 2567; 2576; 2577; and 2578. I would add that I understood the distinction which Mr Marginson drew between orders for parts and new orders. Had there been a well-written scheme which defined sales, and which excluded such repeat orders from the orders to be taken into account, I would entirely have understood why that applied. However, in the light of my findings on the meaning of the contract agreed, and therefore the absence of any limitations upon the sales to

be taken into account, that distinction is not one which made any difference to the claimant's entitlement to have the orders factored into the calculation of the bonus due.

67. Whatever the wording which applied to the bonus scheme, I agreed that the claimant is only entitled to bonus on the sales which he made (in some way). Issue 1.6 raised this issue. Whilst even that is not expressly stated in the scheme, I accept that it is implied into a sales bonus scheme that the bonus is only payable on sales made (in some way) by that person. How a sale is to be defined and to whom it is attributed, where there is more than one person involved, can be a challenge when applying any bonus scheme, no matter how well-written or carefully crafted. In his submissions, the respondent's representative placed reliance upon Mr Marginson's agreement in cross-examination that if the claimant put through a sale or had given the quotation, it was attributable to him.

68. I found order 2512 in 2021 was a sale by the claimant based upon the evidence heard (as recorded above at paragraph 38(b)), contrary to the respondent's assertion otherwise. Whilst the claimant did prepare the quotation for 2457, I accept the respondent's contention, and Mr Marginson's evidence, that the sale was in fact one made by Mr Clarkson for which the claimant's name was used for the reasons explained. As a result, I found that 2457 should not have been taken into account.

69. The issue I have found most difficult to determine was whether the claimant was able to take into account for his bonus the multiple orders placed with the various locations of the single client on 6 December 2021. That applied to a significant number of orders. That was all of the orders on 6 December 2021: 2554 to 2565. I have detailed the evidence heard at paragraphs 39 to 41 above. It was clear from the evidence, that the genesis of the orders being made was an enquiry directed to Mr Marginson. The ordering entity (or at least the group to which the entities belonged) was a pre-existing client of the respondent who had made previous orders. Both the claimant and Mr Snelson were involved in ultimately achieving the orders. However, the claimant was the person who prepared the initial quotation sent to the client on 22 October, and he was also the person who prepared the final quotations sent after a revised agreement had been reached. The emails appeared to show Mr Snelson reaching an agreement with the client, after the initial quotations had been sent and prior to the final quotations being prepared (to accord with what had been agreed). On balance, I have found that the claimant was due a bonus payment which took into account all of those transactions. I have made that decision based upon three factors:

a. the claimant was a key part of the process by which orders were made and, in the absence of any express wording addressing what part the claimant needed to play in a sale for it to be taken into account under his sales incentive bonus scheme, I found that to be sufficient for it to be regarded as a sale within that scheme even though Mr Snelson and Mr Marginson were also involved;

b. the claimant in fact prepared the quotations which resulted in the orders, and the preparations of the quotations appeared to be regarded by the parties as the key indicator of the person who made the sale; and

c. Mr Marginson's answer during cross-examination, upon which the claimant's representative relied, that if the claimant had put through the sale or given the quotation it would be attributable to him.

70. For all of the orders made on 6 December 2021 for the reasons given, I have found those to have been orders which should have been taken into account for the claimant's bonus calculation. I have considered the contrast with the decision which I reached on the single order (2451) which I found to have been an order attributable to Mr Clarkson and not the claimant, but that order turned upon the specific circumstances and reason which applied to that order. I acknowledged a point emphasised by Mr Marginson, that the orders stemmed from a long-term relationship between the parties and arose within the context of a relationship which pre-dated the claimant's involvement, but nonetheless I have needed to apply the terms which I found applied to the scheme, and not some concept of fairness.

71. I also found that order 2520 should be taken into account for the calculation of bonus for 2021 as the respondent presented no reason for it not to be included in its response to that order in the further particulars (61) (as it was omitted from the table providing the further particulars entirely).

72. For 2022 the following orders were conceded by the respondent as being relevant: 2586; 2610; 2615; and 2664.

73. In relation to 2022, the decision I made about the precise terms of the scheme meant that the following should be taken into account in the bonus calculation: 2600; 2614; 2615; 2626; 2636; 2667; 2679; 2706; 2709; 2714; and 2729.

74. For the cases where it was contended that someone else was responsible for the order in 2022, I found that in all cases that the claimant was able to have those orders taken into account for his bonus based upon the facts as addressed above. That applied to the following orders: 2639; 2655; and 2723.

75. I did note that there was a difference between the gross profit figures which the claimant attributed to many of the transactions (60) and what was included in the relevant column in the respondent's document which contained the further particulars (61). Those differences could have been material when calculating the bonus due. The claimant was not challenged on the gross profit figures he provided, he was not cross-examined about what he had asserted, and no evidence was led during the hearing which demonstrated (or was proposed to demonstrate) that the gross profit figures upon which he relied were wrong. As a result, I found that his figures should be the ones used for the bonus calculation. It was not sufficient for the respondent to include alternative figures in its table (61) without supporting evidence or genuine challenge to the figures put forward by the claimant as part of his fully particularised claim.

76. In each year, the bonus payable was capped under the terms of the scheme as being fifty percent of the annual salary. As a result of the above orders for 2021, and considering issue 1.2, I found that the total gross profits on the orders which were to be taken into account when calculating bonus, exceeded the sum required for the maximum bonus to be due. A bonus was due to have been paid on 24 January 2022. No bonus was paid, so there was an unauthorised deduction from

wages. The bonus to which the claimant was entitled was £20,400. The unauthorised deduction made from his wages on 24 January 2022 was therefore the gross sum of £20,400.

77. As a result of the above orders, I found that the total pounds gross profit which should have been taken into account for the claimant's bonus payable in January 2023 (but referable to calendar year 2022) was the amount claimed by the claimant (60). That exceeded £144,000 and therefore a bonus was due and there was an unauthorised deduction from the wages due on 24 January 2023. As a result of the gross profit on the orders I found should have been taken into account, the total bonus payable was £20,000, being the sum claimed as due. The respondent made an unauthorised deduction from the claimant's wages on 24 January 2023 of the gross sum of £20,000.

78. Issue one related only to the claim for the bonus for 2021 which the respondent contended was out of time. What the respondent's representative submitted was the following:

> *"we must then consider the sales made for the 2021 period. Respectfully I advance before going into the details of this sale year that the Claimant must find himself out of time in relation to pursuing any claim as to this year. Respectfully I advance to the Tribunal that page 73 of the bundle detailing the salary section shows that any commission would be payable on the 24th of the month in arrears. Respectfully I advance that any sales commission if there ever was any would have been due on the 24th January 2022. The Claimant stated that the first time he formally raised any issue about sales commission due was September 2022. This is some 8 months after the fact. The Claimant took 16 months to raise his complaint before the Tribunal. The Claimant has not given any definitive evidence as to why there was a delay. Respectfully I advance to the Tribunal that there would be no jurisdiction before the Tribunal to hear the specific complaint relating to the 2021 year"*

79. I agreed with the respondent's submission to an extent (but only to an extent). If I had been considering only the unauthorised deduction from wages claim for sales in 2021 (due on 24 January 2022), it would have been entered some considerable time outside the required time period. As the claimant's representative conceded, there would have been no argument that it was not reasonably practicable for the claim to have been entered in time. Without a finding that there had also been an unauthorised deduction as a result of non-payment of the bonus in January 2023 (for calendar year 2022) it would have been out of time, and I would not have had jurisdiction to consider the claim. However, what is described in **Agnew** (the case from which I have quoted in the section on the law) as the series exception (section 23(3)(a) of the Employment Rights Act 1996), changed that position entirely. Applying the ordinary English words and asking whether the failure to pay a bonus due annually in January 2022 and January 2023 is a series of deductions, the answer in my view was that (undoubtedly) it was. Taking account of all the circumstances, what was not paid were two bonuses under the same scheme due one year apart. The two deductions were things of a kind which followed each other in time. The fault which underpinned non-payment (using the wording in **Agnew**) was the respondent's position that no bonus was due based upon the same, or

similar, reasons. The fact that the deductions were a year apart did not stop them from being a series. I found that they were.

80. As I found that the deductions made were a series, when the bonus due was not paid in January 2022 and January 2023, the time for bringing the claim ran from the last in the series. It was not in dispute that the claim was brought in time for the payment due in January 2023 and, therefore as that was the last in the series, I found that the claims (for the deduction of both bonuses) were brought within the time required and I did have jurisdiction to consider the claims.

81. The final issue was that set out as issue 1.7. The argument put forward by the respondent on that issue had no merit whatsoever. I agreed that the facts of this case were unusual, because the claimant did not raise the non-payment of the 2021 bonus when it was due or shortly afterwards. He only raised the non-payment in September 2022, eight months later. That was due to his misunderstanding and erroneous belief that it was the financial year which applied. Nonetheless, I did not accept that in failing to raise the issue of his bonus entitlement when no bonus due was paid at the start of 2022 (for 2021), the claimant somehow acquiesced to his contract of employment being varied to remove his entitlement to a bonus payable under the contract terms. There was in this case nothing about the claimant's conduct which would support such an argument that the contract had implicitly been varied to remove bonus entitlement, as a result of his conduct (or acquiescence). I did not find that his contract was varied to remove the entitlement to a contractual sales incentive bonus as expressly recorded in the contract, because he was not paid a bonus in January 2022 and he did not object to the non-payment of a bonus until eight months later. I did not find that to have been an argument which had merit.

Summary

82. For the reasons explained above, I found that the respondent made unauthorised deductions from the claimant's wages on 24 January 2022 and 24 January 2023 of the sums recorded above. I found both deductions to have been part of series of deductions. As a result, I found the claim was brought within the time required for both deductions, as the relevant time ran from the last deduction made in the series (being the deduction made on 24 January 2023).

Employment Judge Phil Allen
31 January 2024

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

6 February 2024

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions
Judgments 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.

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/

Annex
Complaint and Issues

Since the client remains employed, this is a claim for unlawful deduction from wages only, contrary to section 13 and brought under section 23 of Part II of the Employment Rights Act 1996.

1.1 Jurisdiction: time limits

The respondent acknowledges that the second part of the claimant's claim (2022 Bonus) was presented in time, but contends that the first part (2021 Bonus) is out of time.

The time limit issue is therefore whether there was a series of deductions within section 23(3) ERA such that the first part of the claim (2021 Bonus, payable at the end of January 2022, if the claimant was entitled to receive it) was also in time. Otherwise, this first part of his claim is out of time and will be dismissed (unless he shows it was not reasonably practicable to present it in time but he still presented it within a reasonable further period).

1.2 The central issue is whether the respondent made unlawful deductions from the wages of the claimant in respect of Sales Incentive Bonus at the end of January 2022 for the 2021 financial year and at the end of January 2023 for the 2022 financial year.

1.3 If so, what were the amounts of those unlawful deductions proved by the claimant?

1.4 In particular, has the claimant proved a contractual or some other lawful entitlement to Sales Incentive Bonus on all sales by him (i.e. sales to existing customers as well as new business)? What were the contractual terms as to bonus initially agreed between the parties?

1.5 Was he only entitled to bonus on sales in UK and Ireland or also on sales outside?

1.6 Has the claimant included in his claim for £20,400 (2021) and £20,000 (2022) sales made wholly or partly by others?

1.7 Can the respondent prove acquiescence or an implied variation of the terms for payment to the claimant under his contract of employment, on the basis of the claimant not actively raising issues relating to outstanding sales bonus before 24 January 2023, meaning the claimant cannot rely upon the bonus provision? If so, when did such acquiescence or implied variation take effect?

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990 ARTICLE 12

Case number: **2406220/2023**

Name of case: **Mr S Bowland-Kenyon** v **Integrated Air Systems Ltd**

Interest is payable when an Employment Tribunal makes an award or determination requiring one party to proceedings to pay a sum of money to another party, apart from sums representing costs or expenses.

No interest is payable if the sum is paid in full within 14 days after the date the Tribunal sent the written record of the decision to the parties. The date the Tribunal sent the written record of the decision to the parties is called **the relevant decision day**.

Interest starts to accrue from the day immediately after the relevant decision day. That is called **the calculation day**.

The rate of interest payable is the rate specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as **the stipulated rate of interest**.

The Secretary of the Tribunal is required to give you notice of **the relevant decision day**, **the calculation day**, and **the stipulated rate of interest** in your case. They are as follows:

the relevant decision day in this case is: 6 February 2024

the calculation day in this case is: 7 February 2024

the stipulated rate of interest is: **8% per annum**.

Mr S Artingstall
For the Employment Tribunal Office

GUIDANCE NOTE

1. There is more information about Tribunal judgments here, which you should read with this guidance note: www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

   If you do not have access to the internet, you can ask for a paper copy by telephoning the Tribunal office dealing with the claim.

2. The payment of interest on Employment Tribunal awards is governed by The Employment Tribunals (Interest) Order 1990. Interest is payable on Employment Tribunal awards if they remain wholly or partly unpaid more than 14 days after the **relevant decision day**. Sums in the award that represent costs or expenses are excluded. Interest starts to accrue from the day immediately after the **relevant decision day**, which is called **the calculation day**.

3. The date of the **relevant decision day** in your case is set out in the Notice. If the judgment is paid in full by that date, no interest will be payable. If the judgment is not paid in full by that date, interest will start to accrue from the next day.

4. Requesting written reasons after you have received a written judgment does **not** change the date of the **relevant decision day**.

5. Interest will be calculated as simple interest accruing from day to day on any part of the sum of money awarded by the Tribunal that remains unpaid.

6. If the person paying the Tribunal award is required to pay part of it to a public authority by way of tax or National Insurance, no interest is payable on that part.

7. If the Secretary of State has claimed any part of the sum awarded by the Tribunal in a recoupment notice, no interest is payable on that part.

8. If the sum awarded is varied, either because the Tribunal reconsiders its own judgment, or following an appeal to the Employment Appeal Tribunal or a higher court, interest will still be payable from **the calculation day** but it will be payable on the new sum not the sum originally awarded.

9. The online information explains how Employment Tribunal awards are enforced. The interest element of an award is enforced in the same way.