EMPLOYMENT TRIBUNALS

Claimant: Mr M Prigmore

Respondent: Infor (United Kingdom) Limited

Heard at: Manchester (by CVP) **On:** 6-24 September 2021
13-15 October 2021
(in Chambers)

Before: Employment Judge Phil Allen
Mrs A Jarvis
Dr H Vahramian

REPRESENTATION:

Claimant: Mr A Korn, counsel
Respondent: Ms C Davis, counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The respondent did not make any unlawful deductions from the claimant's wages and the claim for unlawful deduction from wages is dismissed.

2. The claimant was constructively unfairly dismissed and his claim under sections 98 and 111 of the Employment Rights Act 1996 succeeds and is found.

3. The principal reason for the claimant's (constructive) unfair dismissal was not that the claimant made one or more protected disclosures and his claim under section 103A of the Employment Rights Act 1996 is dismissed.

4. The claimant was subjected to detriments by the respondent on the ground that he had made a protected disclosure or disclosures in the email sent to the claimant by Mr East on 27 December 2017 and by the conduct of a meeting by Mr Niesler on 1 June 2018 and his claim in respect of those two matters under sections 47B and 48 of the Employment Rights Act 1996 succeeds and is found.

5. The claimant's other claims under sections 47B and 48 of the Employment Rights Act 1996 (that is that he alleged he was subjected to other detriments on the

ground that he made a protected disclosure or disclosures) do not succeed and are dismissed.

REASONS

Introduction

1. The claimant was employed by the respondent as a senior account manager from 3 August 2015 until 13 July 2018. The claimant resigned on 15 June 2018. The claimant's claim centred upon a contract entered into by the respondent which was signed on 30 January 2018. As a result of that contract, the claimant was entitled to a significant amount of commission, but the amount paid was considerably less than the claimant believed he was entitled to. The claimant contended that the basis upon which he would be paid commission had been agreed in an exchange of emails on 4 September 2017 and he raised his concerns about matters relating to the commission payable during his employment. The claimant raised a grievance and appealed the grievance outcome. The claimant alleged that he made seven protected disclosures from 9 October 2017 up to (and including) his resignation on 15 June 2018. He alleged that he suffered detriments and was constructively dismissed because he had made those protected disclosures. He also claimed ordinary unfair dismissal relying upon an alleged breach of the duty of trust and confidence, and claimed that the failure to pay him the commission which he claimed amounted to an unlawful deduction from wages. The respondent denied all of the claimant's claims.

Claims and Issues

2. At the start of the hearing a list of issues was provided. The document was agreed, albeit it contained a number of issues where the parties had been unable to agree exactly what was/were the issues/questions which the Tribunal needed to determine. Where it could not be agreed, the list of issues identified each party's version of the issue to be determined. It was unfortunate that two professionally represented parties were unable to agree each of the issues, as the failure to do so did not assist in focussing on the issues to be determined. The list of issues is appended to this Judgment.

3. On the first day of the hearing the parties both agreed that the Tribunal should determine liability issues only at this stage and leave remedy issues to be determined at a later hearing (if required). The Tribunal agreed to that approach and accordingly in this Judgment the Tribunal has determined the liability issues only.

4. On the third day of hearing, when responding to the respondent's application regarding witness statements and supplemental witness statements (recorded below), the claimant's counsel confirmed the following:

   a. The claimant did not rely upon section 43B(1)(a) of the Employment Rights Act 1996 (criminal offence) when contending that he had made public interest disclosures;

b. The claimant did not allege fraud. He alleged that there had been an alleged dishonest diversion of funds, but not fraud; and

c. The claimant was not relying upon tax issues or a contention of tax fraud as being a part of the matters relied upon as forming the subject matter of his alleged public interest disclosures.

5. In the written submissions provided by the claimant's counsel it was confirmed that:

a. The claimant was no longer relying upon his resignation letter (580-581) as a protected disclosure for his detriment claims, as the post dismissal detriments alleged were accepted as not being causally connected to the resignation letter. The written submission stated that the letter was relied upon as supporting the claimant's constructive dismissal complaint; and

b. of the matters at paragraph 2.1.1 to 2.1.16 relied upon as being (or forming part of) the breach of the duty of trust and confidence, the following were not also relied upon as constituting a detriment as a result of the alleged protected disclosures (see issue 3.3.4): 2.1.11 (the alleged delay in sending the Claimant his commission statement); and 2.1.12 (the alleged failure to pay the Claimant the full commission due on or around 26 April 2018). The claimant relied upon all the other alleged breaches at 2.1.1-2.1.10 (there being no 2.1.7) and 2.1.13-2.1.16 as also being alleged detriments for having made a protected disclosure or disclosures.

6. In the respondent's closing submissions no reference whatsoever was made to the contention that (if the claimant succeeded in establishing that he was constructively dismissed) the claimant was dismissed for some other substantial reason. It had been pleaded and was recorded as issue 2.4, but no submission was made in support.

Procedure

7. The claimant was represented by Mr Korn, Counsel. Ms Davis, Queen's Counsel, represented the respondent at the hearing.

8. The hearing was conducted by CVP remote video technology with both parties, their representatives, and all witnesses, attending remotely and with all evidence given by remote video technology. The Tribunal members also attended by CVP.

9. This case had a long procedural history with disputes about documents and disclosure. Preliminary hearings were conducted on: 28 November 2018 by Employment Judge Hill; 12 April 2019 by Employment Judge Whittaker; 16 April 2020 by Employment Judge Batten; and 4 June 2020 by Employment Judge Batten. It is not necessary to reproduce in this Judgment the details of much of the procedural history.

10. One order which was referred to during the hearing, was that, following the preliminary hearing on 28 November 2018, Employment Judge Hill ordered the respondent to include in its list of documents any documents which demonstrated the contribution made by Mrs Harb in respect of commission payments made (87). Employment Judge Batten subsequently heard an application for specific disclosure on 4 June 2020, but the order she made does not record any application made regarding documents which demonstrated Mrs Harb's contribution in respect of the commission paid to her.

11. Prior to the hearing, the claimant applied for the length of the hearing to be reduced from fifteen days to eight days. That application stated that the claimant's cross examination of the respondent's witnesses would take two and a half days. The Tribunal refused the application and maintained the full listing. The claimant changed counsel between that application and the final hearing. It is fortunate that the Tribunal did not reduce the length of hearing as a result of the claimant's application, as the full fourteen days listed were required to hear the evidence and did not allow time for either oral submissions or the Tribunal to reach its decision.

12. An agreed bundle of documents was prepared in advance of the hearing. The core bundle ultimately ran to over 3678 pages. In addition, there was a bundle prepared which contained confidential documents, with 478 pages. The bundle was very poorly prepared and was very difficult to navigate. The Tribunal was not referred to a significant proportion of the bundle during the hearing. The Tribunal read only the pages referred to in witness statements or to which it was expressly referred during the hearing. The claimant had objected to the late inclusion in the bundle of some documents, but that objection was not ultimately pursued. A limited number of additional pages and documents were added to the bundle during the hearing. Where numbers are included in this Judgment in brackets, that is a reference to the page number in the main bundle (or the confidential bundle where that is stated). For the respondent's application (see below) the Tribunal was also provided with an additional bundle containing the relevant correspondence regarding that issue.

13. On the first morning, the outstanding preliminary issues were identified. It had been intended that the first two days would be reading only, but the parties were required to attend on the morning of the first day in the light of the outstanding case management issues and the parties' pre-hearing correspondence. The respondent made an application to be able to call two additional witnesses and to rely upon supplemental witness statements for three witnesses, but the Tribunal decided that it needed to read the witness statements (and the documents referred to in them), before the application could be heard and determined. It was (at that time) agreed that the Tribunal would read the statements as originally exchanged (and the documents referred to in them), but would not read the additional witness statements prepared and the supplemental statements. Accordingly, between the adjournment on the first morning and midday on the third day, the Tribunal read those witness statements and the documents referred to.

14. Both parties had prepared an opening note, but the claimant's counsel objected to the length and detail contained in the respondent's counsel's opening note. As a result, the Tribunal confirmed that it would put the opening notes to one side and it would not consider them. The fact that the notes would not be considered was made clear to the parties on the first day of hearing. Whilst there was some

reference to the notes in correspondence on 12 and 13 October 2021, the Tribunal maintained the approach which it made clear it would follow and did not consider their content.

15. In the order of Employment Judge Batten there had been imposed certain restrictions on the claimant regarding the confidential bundle. The claimant's counsel applied for those restrictions to be lifted as they did not enable full instructions to be taken during a hearing conducted remotely. Those restrictions were accordingly lifted on the first day, albeit the Tribunal highlighted to the claimant the importance of only using the content of the confidential bundle for the purposes of his claim and confirmed that the content must not be disclosed to any third party and should be permanently deleted by the claimant once its use in the proceedings had ceased.

The application

16. At midday on the third day of the hearing, the Tribunal heard the respondent's application to be able to call two additional witnesses and to rely upon supplemental witness statements for three witnesses. Submissions were made by the respondent's counsel and the claimant's counsel. The Tribunal reserved its decision and delivered the decision to the parties on the morning of the fourth day. That decision is recorded below, the reasons having been provided to the parties orally.

17. The respondent's application was to be allowed to call: two witnesses for whom statements had not been exchanged at the relevant time (Mr J Harb and Mr C Perry); and to be allowed to rely upon three supplemental statements for witnesses for whom statements had been exchanged at the relevant time (Mr J Jung, Mr C Pearcy and Mrs M Harb).

18. The decision was made under rule 41 of the Employment Tribunal rules of procedure, also applying rule 43. The Tribunal had regard to the overriding objective and, in particular: ensuring the parties were on an equal footing; avoiding unnecessary formality and seeking flexibility in the proceedings; avoiding delay; saving expense; and (most importantly) dealing with cases fairly and justly. The Tribunal also took into account Guidance note 3 of the Employment Tribunals Presidential Guidance on general case management. The Tribunal considered what that said in its entirety, but particularly noted paragraph 20 regarding supplemental witness statements. The respondent's counsel quite correctly highlighted where the word "immediately" was included in the sentence of the Guidance at paragraph 20, that is the immediacy follows the preparation of the statement and not the receipt of the statements. Nonetheless the clear spirit of what was said in the Guidance is that supplemental statements should be provided in response to the receipt of statements and the identification of something which has been left out, that is they should be prepared timeously. The provision of supplemental statements is consistent with the Guidance

19. The Tribunal considered exactly what was said in the orders of Employment Judge Hill (at paragraph 5.2 of the case management order made following the hearing on 28 November 2018 (88)) and Employment Judge Batten (at paragraph 14 of the case management order made following the hearing on 4 June 2020 (197)).

20. Witness statements had been exchanged in January 2021. The application to call the additional witnesses and rely upon the supplemental statements was made on 27 July 2021, six weeks prior to the hearing. There was no genuine explanation as to why the application was not made much earlier. During her application, the respondent's counsel addressed in detail the correspondence preceding and following the 27 July. The claimant was told on 22 July that the application would be made. The claimant strongly opposed the application.

21. The respondent had hoped that the application would be considered and determined prior to the hearing. Unsurprisingly in the context of the Tribunal's current case load, it was not. Prior to the first day of the hearing, the claimant's counsel had not considered the content of the statements and supplemental statements with the claimant as they had not been admitted. During the Tribunal's reading time, he was given the opportunity to do so.

22. The issues addressed in the additional evidence were (at least in broad terms) those which related to the portion of the commission not allocated to the claimant and instead allocated to Mrs Harb. The issue addressed by the evidence to which the application related was one which applied to a number of the issues which needed to be determined. It was also an issue which, in broad terms, the parties were fully aware of from the pleaded case.

23. There was a disagreement between the parties about whether or not the claimant's witness statement introduced new argument or evidence not previously pleaded. The respondent's written application relied upon, in particular, five passages from the claimant's witness statement which it contended involved the claimant for the first time raising fraud and dishonesty by the respondent generally, and from Mr and Mrs Harb in particular, and raising issues of tax fraud. The amended grounds of complaint at paragraph 47 (133) did state that the claimant's contention was that (when making disclosures) the claimant disclosed information which in his reasonable belief tended to show that the respondent was (amongst other things) acting dishonestly in the commission split with Mrs Harb, being Mr Harb's wife. Paragraph 32 (129) alleged that the allocation of commission to Mrs Harb was a gratuitous reallocation to the wife of the sales director. It was clear that the claimant's particulars of claim, as amended, did rely upon an allegation that the apportionment of commission between Mr and Mrs Harb was made dishonestly or inappropriately. That was a case which the respondent knew it needed to respond to when witness statements were originally exchanged. An allegation of fraud was not stated, but the issue of dishonest diversion of funds more generally was clearly raised. The claimant's witness statement did go beyond what was contended in the pleadings. It certainly contained greater detail about how the contention was made than had been originally included in the pleadings.

24. The claimant's counsel made clear that the claimant was not alleging fraud. It was stated that there was an alleged dishonest diversion of funds, but not fraud. He also made clear that the claimant was not relying upon tax issues or a contention of tax fraud as being a part of the matters relied upon. It was agreed with him that the three references to tax issues which had been identified, were able to be deleted from the claimant's witness statement to ensure that it was clear that the matter was not one the Tribunal needed to determine. Accordingly, those parts of the claimant's

witness statement were deleted and the Tribunal confirmed that it would not take them into account.

25. It was agreed during argument that the Tribunal could read the statements and supplemental statements to which the application related, in order to consider relevance. A key issue was whether the evidence was necessary to determine the issues. Also relevant was when the statements were served in the context of the Tribunal's orders. The respondent submitted that delay could not be definitive and the Tribunal agreed, but it must be a relevant factor in the context of orders made in a complex case which were intended to ensure both parties had prepared the case well in advance of the hearing and knew exactly what evidence was to be called many months before the hearing. Dealing with a case fairly and justly and avoiding expense and delay, must involve some consideration of: the way the case is prepared; the Tribunal's orders; and the parties' production of evidence.

26. The claimant said there was prejudice to him, and in particular, he contended that statements being allowed at the late stage was an ambush. He said there was prejudice to him because he would need to reply. The respondent contended that six weeks before the hearing was ample notice and there was no prejudice where the claimant was able to be asked supplemental questions arising as a result.

27. In its application and in submissions the respondent placed emphasis on the length of the additional statements and supplemental statements, being 38 pages in the context of a case with 209 pages of witness evidence. The Tribunal did not share the respondent's view that such evidence was particularly brief.

28. For the three supplemental statements, those were for witnesses from whom the Tribunal would hear in any event. The respondent's position was that the statements provided supplemental evidence which could otherwise have been introduced, with the Tribunal's permission, by way of supplemental evidence in chief. As a result of the provision of supplemental statements, the claimant had been given advance notice of that evidence presented in a way which was clearer and quicker for the Tribunal to consider. The claimant's counsel's position was that shorter supplemental statements might have been agreed to. The Presidential Guidance clearly envisages supplemental statements. These were not provided anything like as early as, ideally, as they could have been. The Tribunal considered the three supplemental statements. Whilst in places those statements might have benefitted from brevity or greater focus, each of them did address evidence given by the claimant in his statement or in the statement of one of his witnesses. In some respects, they provided answers to questions the Tribunal itself might otherwise have asked. As a result, the Tribunal's decision was that each of those supplemental statements should be admitted. The Tribunal concluded that there was no genuine prejudice to the claimant in such supplemental statements being considered. The claimant had had them for several weeks before the hearing. The supplemental statements were therefore accepted as additional evidence from the three witnesses who were due to give evidence in any event.

29. It was confirmed that the claimant would be given the opportunity to respond to questions in chief, for any questions which needed to be asked in the light of the supplemental statements.

30. The Tribunal concluded that the calling of additional witnesses was somewhat different. The respondent had been able to decide who it wished to call when it prepared its original statements. It chose not to call either Mr Harb or Mr Perry. The respondent was effectively asking to be given a second opportunity to decide who it wished to call, many months after exchange of witness statements and long after it had seen the claimant's own evidence. The respondent could have notified the claimant about additional witnesses and provided their statements much earlier in the period between January and July and an application could have been made much earlier, albeit that would not have resolved the problem that the claimant's statement had already been seen. If the application had been made earlier, a hearing could have been arranged at which it could have been determined (six weeks unfortunately being insufficient time for the Tribunal to have done so in the current circumstances).

31. The Tribunal looked at Mr Harb's statement and decided that the evidence which Mr Harb could give was not necessary to be admitted for the issues to be determined, where other witnesses already addressed those matters. Mr Harb's statement addressed four things (broadly following the headings in the statement): Mr Harb's role with the respondent; the origin of the relevant deal; the allocation of the deal to Mrs Harb; and Mrs Harb's involvement in the deal. The origin of the relevant deal was not something which arose from the statements exchanged. Mrs Harb's involvement in the deal and the allocation of it to her was something the Tribunal considered that Mrs Harb was best able to evidence. Mr Harb's role could be evidenced by his manager, Mr Jung. In the light of the decision to allow the supplemental statements of Mrs Harb and Mr Jung (Mr Harb's line manager at the relevant time) the evidence which Mr Harb could give was not necessary to be admitted for the issues to be determined, where the other witnesses already addressed those matters.

32. The Tribunal looked at Mr Perry's statement. Mr Perry's evidence was about the respondent's own investigation into the reporting line of Mr and Mrs Harb, the Board review undertaken, and Mrs Harb's role. The latter was best evidenced by Mrs Harb. The investigation and Board review were already evidenced in documents. The Tribunal concluded that the issues Mr Perry addressed in his statement were events in the respondent's knowledge and which it broadly knew related to what was in dispute when the statements were exchanged. Nothing in his evidence arose from anything genuinely new alleged by the claimant in his statement.

33. If the additional witnesses were allowed to be called it appeared that there was a significant risk of the case not being heard in the fourteen/fifteen days allocated based upon the time estimates of the representatives (as indeed became clear would have been the case). It was very important that, if at all possible, the case was heard in the time allocated and it would be prejudicial to the claimant (and indeed both parties) if it was not (which would lead to additional cost).

34. The Tribunal's decision was that the respondent would not be permitted to call the two additional witnesses: Mr Harb; and Mr Perry. A fair hearing conducted in accordance with the overriding objective was of the utmost importance. Avoiding unnecessary delay is part of the overriding objective, as is ensuring a level playing field. The Tribunal allowed the respondent to rely upon the three supplemental statements produced for the witnesses they were already calling. The Tribunal

reached its decision in accordance with the Tribunal's case management powers and having considered the proposed evidence of the additional witnesses, its relevance to the issues in dispute, and the provision of statements on 19 July 2021 when statements were ordered to be exchanged in December 2020 and were in fact exchanged in January 2021.

35. The Tribunal accordingly put out of its mind the content of the statements for the witnesses which it had determined the respondent would not be allowed to call.

36. The three references to tax issues which were identified in the claimant's witness statement were deleted from it, to ensure that it was clear that the matter was not one the Tribunal needed to determine.

Other procedural issues

37. At the start of the hearing each counsel had provided a broad outline of the length of time which they considered would be required for cross-examination of each witness. At the end of the first week of hearing (that is during the cross-examination of the claimant), the parties were ordered to agree a timetable for the remainder of the hearing and it was made clear that the agreed timetable would then need to be adhered to. The need to allow time for questions from the Tribunal was also emphasised. The representatives did agree a timetable and that was outlined on the sixth day of hearing (the Monday of the second week) and it was then adhered to by both counsel (with amendment to the order of witnesses in the light of availability).

38. The Tribunal did not sit on one of the days which had been allocated for hearing (16 September), because it was a religious/cultural festival. This had been identified as likely to be the case in the case management order made by Employment Judge Batten.

39. On the fourth day of the hearing (after the Tribunal's decision on the respondent's application had been delivered) the claimant provided a supplementary witness statement in response to the respondent's supplementary statements. The Tribunal also read that supplemental statement. The Tribunal heard evidence from the claimant, who was cross examined by the respondent's representative, before being asked questions by the Tribunal. The claimant's evidence was heard between lunchtime on day four and the end of day seven of the hearing.

40. During the claimant's evidence the claimant's counsel challenged the respondent's counsel putting to him questions arising from the terms of his contract (including the commission documents), which he said were matters for submissions and not evidence. It was confirmed to the claimant's counsel that the respondent's counsel was able to put those issues, being a part of the respondent's case which it was necessary to put to him, but it was suggested that in the light of the claimant's counsel's objection she should not spend a significant amount of time in doing so.

41. It was agreed that Mr Pearcy's evidence would be heard before that of the claimant's other witnesses as he needed to complete his evidence by the end of the eighth day of the hearing for personal reasons. Accordingly, he was interposed and his evidence was heard after the claimant, but prior to the evidence of the claimant's

other witnesses. He was cross examined by the claimant's counsel and asked questions by the Tribunal, on the eighth day. Mr Pearcy was the respondent's Director for EMEA Incentive Compensation (having been promoted to Director since the end of the claimant's employment, but having fulfilled the same duties prior to that promotion).

42. The claimant presented a witness statement from Mr Kenny, who had been a senior account manager for the respondent between March 2016 and January 2020. Mr Kenny had himself brought a Tribunal claim against the respondent. The respondent's representative at the start of the hearing explained that, whilst his evidence was not accepted, the respondent did not intend to cross-examine him about the content of his statement because it was not considered by the respondent to assist the Tribunal in determining the claimant's case (and the Tribunal would not wish to hear cross examination about evidence which was being determined as part of separate proceedings). On the sixth day, when timetabling was discussed, the Tribunal confirmed that it did not require Mr Kenny to be sworn in to confirm the truth of the content of his statement, in the light of the fact that the respondent's representative did not intend to ask him any questions. Mr Kenny's statement provided an account of his own case and why he contended that the respondent had not paid him commission which was due.

43. Two other witnesses gave evidence on behalf of the claimant: Mr Steenbakkers, who is employed by the respondent as a Senior Solutions Architect; and Mr East, who had been the claimant's line manager at the respondent, having been employed from July 2016 until July 2018, and whose job title had been Director of Business Innovation and Strategic Accounts. Both witnesses had prepared written statements which were read at the start of the hearing. On the tenth day of the hearing they each gave evidence under oath, were cross-examined by the respondent's representative, and were asked questions by the panel.

44. Each of the following witnesses also gave evidence for the respondent, were cross examined by the claimant and were asked questions by the Tribunal and the panel: Mrs Monika Harb, at the relevant time an Account Executive in the Central European region, and, since 25 June 2020 a Senior Account Manager; Mr Joerg Jung, the Executive Vice President & General Manager of the EMEA region and previously (and at the relevant time) the Managing Director for sales in Central and Eastern Europe; Mr Matthew Reedman, formerly and at the relevant time the Senior Principle Systems Analyst – Business and Education; Mr Andrew Oldroyd, Vice President of Field Operations; and Mr Mark Young, Senior Finance Director. The respondent's witnesses gave evidence between the eleventh and fifteenth days of the hearing, that is during the third week.

45. An interpreter was provided by the Tribunal for the evidence of Mrs Harb. In practice Mrs Harb was able to understand and respond to most questions without the assistance of the interpreter, but interpretation was provided on occasion when she either did not understand the question asked, or required assistance with the answer given.

46. When timetabling was discussed at the start of the second week, submissions were also discussed with the representatives. The agreed timetable did not provide time for submissions to be heard orally within the time allocated. Even had it done

so, the claimant's counsel's position was that he needed time to prepare for submissions for reasons he explained. There was concern about the difficulty in listing the hearing for the parties to return for submissions, particularly in the light of counsels' availability and the importance of avoiding a significant delay between the hearing of the evidence and the Tribunal reaching a decision (in a case involving complex and technical evidence). As a result, it was agreed that both parties would provide written submissions only, with an opportunity being given for each party to respond to the other's submissions in writing.

47. At the end of the hearing (on 24 September), it was agreed that the parties had until 5 pm on Friday 8 October 2021 to provide written submissions to each other and the Tribunal, and until 5 pm on Tuesday 12 October 2021 to provide a written document containing any points in response. It was made clear that these documents should be sent to the Tribunal and the other party by the relevant time. The parties were asked to ensure that their submissions reflected the list of issues which had been agreed and accorded with the order of that document. The claimant's counsel had requested more time for the provision of submissions for reasons he explained, but the Tribunal was unable to provide significantly more time as a result of the dates when the panel would be able to reconvene whilst ensuring that such dates were sufficiently proximate to the hearing. The dates were moved back a little and the panel reconvened later in the relevant week than had been proposed. It was noted that the parties should have been ready and able to deliver submissions within the three weeks allocated, and therefore it was considered to be entirely appropriate for written submissions to be required to be provided within the period of two weeks from the end of the hearing.

48. Each party's counsel provided detailed and lengthy written submissions on 8 October. The claimant's written submissions extended to 105 pages and 232 paragraphs. The respondent's written submissions were 74 pages and 104 paragraphs.

49. In an email of 12 October 2021, the respondent's representatives explained that the respondent's position was that there was no need to present any reply on the law in the light of the claimant's closing submissions. The respondent provided a written reply. Despite the fact that it had been emphasised that any such reply was expected to be brief and focussed, the reply was 23 pages and 73 paragraphs. In their email the claimant's representatives explained that they had declined to send the document to the respondent's representatives. It had been made very clear verbally at the end of the hearing that each party should do so by the time identified by the Tribunal. In an email from the claimant's solicitors of 13 October it was recorded that the claimant's counsel would like the claimant's solicitors to reiterate that they would serve a copy of the reply on the respondent's solicitors if they were directed to do so. In the view of the Tribunal, the claimant's representatives' failure to provide a copy of the reply to the respondent was entirely inappropriate and was a breach of the orders which the Tribunal had made at the end of the hearing. The Tribunal did not need to repeat orders it had already clearly made. Both parties were represented by experienced counsel who would have been expected to act courteously, in accordance with the overring objective (including avoiding unnecessary formality), and in accordance with their duties to the Tribunal. The Tribunal carefully considered whether it should take into account the content of the claimant's written reply at all in the light of his representative's failure to comply with

the order made. The Tribunal decided that it was in the interest of dealing with the case fairly and justly to do so. **If the claimant's representatives have still not complied with the Tribunal's previous order when this Judgment is received, they must immediately provide a copy of the claimant's written reply to the respondent's representative.**

50. The Tribunal reconvened in chambers to reach its decision on 13-15 October 2021. The Tribunal considered both parties' written submissions and the claimant's written reply, before reaching its decision. The Tribunal provides the reserved Judgment and reasons detailed below.

Facts

51. The Tribunal was referred to a significant amount of documentation including a very large number of emails and heard a significant amount of evidence. This Judgment does not record or refer to all of the evidence heard or the documents seen. It focuses upon the most important documents and the key parts of the evidence.

52. The claimant commenced employment with the respondent as a senior account manager on 3 August 2015. The claimant was engaged to sell net new business. The claimant's particular speciality was in the food and beverage sector.

Contract, policies and procedures

53. The Tribunal was provided with the offer letter sent to the claimant on 6 July 2015 (218) and the claimant's contract of employment with the respondent (221). The claimant was paid an annual salary of £85,000 per annum. With regard to commission, the offer letter, which the claimant signed, stated (218):

> "*You will be eligible to participate in the Company's Commission Scheme referable to employees at your level and job title from time to time. The terms of the applicable commission scheme will be notified to you on an annual basis and the content of the scheme. Your target under the current commission scheme for a full 12 month period is £85,000...*"

54. Paragraph 7 of the schedule to part 1 of the claimant's contract of employment (228) said:

> *"You are eligible to participate in the Commissions Plan which the Company operates to reward and incentivise performance. The company reserves the right to change, amend, adjust or revise the Plan, If there are significant material changes to Infor's products, pricing, the competitive environment or other significant factors. No payment will be made under any plan if, on the payment date you have given, or have been given, notice of termination of employment or are no longer employed by the Company. Commission payments are non-pensionable and are subject to PAYE deductions. Your target commission plan earnings for a full 12 month period is £85,000 (pro-rata to complete months worked during the financial year). Details of the current Commission Plan may be obtained from your line manager."*

55. The respondent had a grievance procedure (273). The grievance procedure was a fairly standard procedure and included the following three stages: informal; formal; appeal. As part of the policy principles (274) it said:

> *"All complaints made under this procedure will be treated seriously and with discretion. Proceedings and records of any grievance will be kept as confidential as possible, but employees must appreciate that complaints cannot always be formally investigated on an entirely confidential basis."*

56. For the formal stage of the grievance procedure (275) it provided that a meeting to discuss the grievance would usually be held within five working days of receiving the written complaint, with a decision within seven working days of the meeting. For the appeal (276) it provided that the final decision would be made within ten working days of the meeting. The procedure provided that all timeframes detailed might be extended by mutual agreement.

57. The respondent also had a Code of Ethics and Conduct Policy (282). The claimant's evidence was that he and other sales employees were aware of it because they were required to sign to confirm that they had read it on a regular basis. Within the Code of Ethics and Conduct Policy there was the following statement about conflicts of interest (284):

> *"Infor Representatives are expected to make or participate in business decisions and actions in the course of their relationship with Infor based on the best interests of Infor and not based on personal relationships or benefits. A conflict of interest, which can occur, or appear to occur, in a wide variety of situations, may compromise an Infor Representative's business ethics. Infor requires Infor Representatives to avoid conflicts of interest, or even the appearance of a conflict of interest.*
>
> *Generally speaking, a conflict of interest occurs when the personal interests, obligations, or activities of an Infor Representative, an immediate family member of an Infor Representative or a person with whom an Infor Representative has a close personal relationship interfere with, or have the potential to interfere with, the interests or business of Infor."*

58. The Tribunal was also shown an email to Mr Auriemma (1337) which contained an extract from what was said to be the respondent's US code of conduct about relationships and conduct. Mrs Harb's evidence was that she was not aware of the policy referred to in the email. It was not explicitly referred to in the claimant's contract or other contractual documents. The US code of conduct statement on employment of relatives contained within the email said the following:

> *"The Company permits the employment of qualified relatives of employees as long as such employment does not, in the opinion of the Company, create actual or perceived conflicts of interest. The Company will exercise sound business judgment in the placement of relatives in accordance with the following guidelines: relatives are permitted to work for the Company provided no direct reporting, supervisory, or chain of command relationship exists between relatives."*

59. The respondent operated a number of detailed and complex policies and procedures relating to the payment of commission. There was no dispute that the relevant documents to the issues in this claim were those which applied to the Financial Year 2018 (being the year 1 May 2017 to 30 April 2018).

60. The claimant was issued with a personal bonus and commission plan for FY18 (375) which included the rates which would be applicable to him regarding commission payments, dependent upon the percentage of annual software booked and collected. The claimant's territory was stated to be "*Europe – UK Benelux Nordics – Net New Only*". Commission payment was said to be monthly. The document provided a link to what was described as the "*Plan Terms Document*". It said two things about this: "*which contains all the details for your payments against this plan";* and *"All plan terms and conditions can be found in the Plan Terms Document located on the Sales Portal along with additional documentation to help you in understanding the FY18 Infor Compensation and Bonus Plan".* The acknowledgement, which was to be signed by the recipient stated, "*I acknowledge receipt of the attached plan and understand it is my responsibility to review and understand the Terms and Conditions that govern this plan".*

61. The FY18 Terms and Conditions Governing Commission and Bonus Plans Sales, Services and Support (296) stated that (301):

> *"The following terms and conditions ('Plan Terms') govern and form, along with the individual plan document issued to each Participant ('Plan Specifics' document), the FY'18 Compensation and Bonus Plan (the 'Plan'), as applicable to Infor's Fiscal Year ending April 30, 2018 (FY'18) for all entities, departments, sales organizations and divisions of Infor (the 'Company'). The intention of the Plan is to reward Participants for contributing to the Company's success. Terms used in the document or corresponding Plan Specifics document that are capitalized indicate terms that are defined or explained in Section 1 – Definitions below."*

62. The FY18 Terms document included a detailed set of definitions (301), of which the key relevant ones were as follows:

- "*Booked (and variations such as Bookings, Book, Books, etc) – A Transaction is considered Booked only when all criteria and documentation required by the Company's revenue recognition policies have been satisfied. Products do not need to be shipped to the customer in order for a transaction or sale to be deemed Booked, but do need to be available for shipment. For Products that are Infor Infor Service offerings (M&S fees are addressed below and in Sections 8 and 9), this term refers to the closing of the Transaction i.e., when the Infor Services engagement contract has been signed and accepted by all parties after required Infor contract review and approval.*"

- "*New Logo Customer – A new Customer entity meeting each of the following requirements at the time of the initial transaction with this Customer:*

1. *The new Customer entity has never purchased any Products from the Company previously or has been identified as being off maintenance by the IMB team for a period of 24 months or greater;*

2. *Participant (or, for managers, their staff) was actively involved in closing this initial sale and were primarily responsible for introducing the new Customer entity to the Company's Products.*

3. *The new Customer entity is not a Named Account for another Participant of the Plan*."

- *"Plan Administrator – This term refers to the Company's Chief Executive Officer (CEO) or other designee as approved by the CEO*."

- *"SaaS – "Software as a Service" (something referred to as "on-demand software", or "cloud" applications). A transaction in which the Company hosts software Products it has licensed on a subscription basis, where the Customer <u>has not</u> purchased a perpetual license for the software."*

63. Section 2.1 of the FY18 Terms ended with the following statement (304/305);

"*Any questions regarding whether a Participant is eligible for a Plan Payment under a Plan will be finally determined by the Company's Plan Administrator"*

64. Section 2.10 of the FY18 Terms (307) related to unusually large transactions and applied a cap on the commission payable.

65. Section 2.20 (311) said that, on termination of employment, Plan Payments are only paid for transactions that are closed prior to the effective date of employment termination and (as an exception to this rule) commission payments would be made where the deal was closed prior to termination date and the eligible fees had been collected within 90 days of the Participant's termination date.

66. Section 2.21 (312) related to ethical practices and cross referred to the Company's Code of Ethics and Conduct.

67. Section 2.22 (312) provided:

"Any questions of interpretation of these terms and conditions or a Plan, and any circumstances not covered in this Plan requiring a determination, will be finally determined by the Plan Administrator. All decisions concerning revenue recognition, Bookings, determination of revenue amounts achieved and other financial criteria under the Plans shall be finally determined by the Company's Chief Financial Officer…

For any Transaction the Plan Administrator reserves the right, in his/her sole discretion and on a case-by-case basis, but subject to applicable law, to make adjustments to the Commission Payment. Factors the Plan Administrator may consider in making this determination include the amount of the Commission Payment, the customer, the effort required to secure the sale, and the Participant's involvement in the sale process."

68. The terms also had elements on cash collection (3.2) (314) and currency conversion (2.24) (313).

69. When questioned, the claimant accepted that the Plan Administrator (303) was defined as the Chief Executive Officer or other designee as approved by the CEO, and (305) any questions regarding whether a participant was eligible for a Plan Payment under a Plan would be finally determined by the Company's Plan Administrator. It was contended by the respondent that the designees for the Intersnack deal were Ms Bellavia (Vice President – Global Incentives) and Ms Murphy (Vice President Cloud Sales) and the claimant accepted that he had no reason to challenge that contention.

70. The Tribunal was also provided with a detailed document called the FY18 Rules of Engagement (382). The evidence before the Tribunal was that the document was issued for the financial year, but was amended in September 2017. The version to which the Tribunal was referred was acknowledged as being amended in September 2017. An email outlining the amendment was provided (3411).

71. Considerable time was spent in the Employment Tribunal hearing looking at the Split Policy (400) which was part of those Rules of Engagement. In summary, a split was when commission was divided between different employees and, in particular, between those in different parts of the business. The Tribunal will not reproduce that page in full in this Judgment (but has considered all that it says). Both parties relied upon this part of the policy as clearly supporting their position on the split decision, but in practice the Tribunal found the Split Policy to be poorly written and difficult to follow, and did not find that what it said in a number of respects was clear. The Split Policy stated its objective was to: provide guidance regarding when splits applied; and outline split guidelines and approval processes. In respect of the split determination it said:

> *"Splits should be based on anticipated and relative effort and each Reps contribution to the success of the deal: The number of hours to be invested does not alone drive the split. It should be based on effort and relative contributions to deal success; Leveraging a relationship to make introductions, but not investing time, does not qualify for a split."*

72. The Policy Parameters and Process section of the Split Policy recorded that the total of the splits could not exceed 100%. It also recorded the following:

> *"• Splits must be approved via email by the senior executive for each LOB involved in the split, and forwarded to* [an email address] *for final review and approval before deal closure. …*
>
> • *No payments will be made until there is a resolution, in cases where a split is not approved prior to deal closure or if there is an unresolved dispute.*
>
> • *Splits can only be for individual Opportunities, not for Accounts (unless otherwise specified in this document).*

- *It is highly recommended Sales Reps document interactions and notes in the CRM system (SFDC) as they occur, this will be a record of their participation in the deal.*

- *If it is believed effort and contributions by a split party is not representative of the original agreed-upon split parameters, this must be escalated to senior management for resolution before the deal is closed."*

73. The SaaS compensation rules (403) were also part of the Rules of Engagement. That document contained a detailed explanation of how compensation on a SaaS sale was to be paid, albeit that what was said in the document was not clear or easy to follow. It was certainly not written in plain English. It was headed "*Net New Customers and Net New Sales in the Cloud*". Under notes it provided:

> *"Compensation applies to new bookings and upsell to existing footprint. No Comp on renewals."*

74. There was also a section on the minimum threshold requirement for commission eligibility which stated it applied to perpetual to SaaS conversions including Upgrade X. That stated that:

> *"If the new annual ACV for the same footprint is greater than 115% of the most recent annual maintenance fee, the transaction will be commissionable based on the rules below. If the new annual ACV is 115% or less then the most recent annual maintenance fee the transaction will not be commissionable."*

75. A subsequent section (404) of the document recorded that compensation plans based on SaaS multipliers would be at three times Annual Contract Value for "*Value above the most recent activated maintenance fee*" and where the terms was three years or greater. For terms of less than three years and/or for the "*value of the most recent annual maintenance fee*" the multiplier would be based upon the Annual Contract Value.

76. Also provided to the Tribunal was a document called "*International License Sales Split Policy*" dated September 2014 (208). Unlike the other documents which related to his commission, the claimant's evidence was that he had never seen this document prior to the Tribunal proceedings. Mr Pearcy's evidence was that he believed that the document was available on the same portal as the other commission documents. Mr Oldroyd's evidence was that he did not apply the International Split Policy when he was determining the splits on the Intersnack deal. The policy included: guiding principles (211); and a standard split calculation (214).

77. Three of the relevant principles (211) were as follows:

> *"Compensation for effort: Compensation to individuals or organizations will be based on communicated and documented evidence of the significant sales effort and investment of resources in support of the customer opportunity."*

> *"Transparency: interactions between individuals and organizations must be open, obvious, and well documented."*

> *"Ethical Code of Conduct: Individuals involved in sales split negotiations are expected to conduct themselves with the utmost professionalism and adhere the current GTM Rules of Engagement."*

78. The standard split calculation in the International Split Policy (214) was a diagram which described that the standard split assignment was based on effort as recorded. That recorded that 10% was applicable to a contract signature. 20% was applicable to the created opportunity. 50% was attributable to sales effort to close. 20% was attributable to post sales support.

Previous deal

79. The claimant was the account manager on a deal which was successfully completed prior to the Intersnack contract. It was clear that the previous deal was considered a success. It was in the food and beverage sector. The claimant was paid commission on that deal, albeit he was not happy with the delay in receiving commission which arose in particular from the date upon which the invoice for the deal was raised and paid. As a result of his experience on the previous deal, the claimant ensured that under the terms of the contract agreed, the first invoice was to be raised and paid more quickly for the subsequent Intersnack deal.

The start of the Intersnack deal process

80. On 9 November 2016 Intersnack made an enquiry of the respondent's business development team in Barcelona and the opportunity was passed to Mr Harb in the DACH sales team (via his manager). The DACH region was central and eastern Europe including Germany and Austria. Mr Harb was entered on the respondent's CRM (client relationship management) system as being the account manager when the record was created on 9 November 2016. He was not, in fact, an account manager, but was the sales director for central and eastern Europe. On 16 November 2016 Mr Harb recorded the deal as being a net new deal on the respondent's CRM system (1546). The claimant accepted that he did not create the opportunity with Intersnack. The claimant conceded during cross-examination that Mr Harb was not employed as an account manager (as he had at one stage contended) and that the evidence showed that he had been a sales director since August 2016.

81. There was no dispute that the respondent had an ongoing business relationship with Estrella, a subsidiary company of Intersnack, a relationship which was managed by the respondent's Scandinavian business unit. The respondent provided ERP software to Estrella. Estrella had entered into this arrangement prior to becoming part of the Intersnack Group. The claimant accepted that Estrella and Intersnack were separate business entities.

82. Mrs Harb's evidence was that she was responsible for the completion of the Non-Disclosure Agreement with Intersnack, based upon a template. The initial process for seeking Intersnack's business, was by responding to a Request For Information (RFI) received around 25 November 2016. The RFI was forwarded to a limited number of people by Mr Harb on 25 November 2016 (582) with a covering email in which Mr Harb's footer described himself as Director Sales DACH and which was sent to Mrs Harb as one of five individual named recipients. The completed RFI

was presented by the respondent on 18 January 2017. Mr Harb was part of the team doing the presentation; Mrs Harb was not. An email was sent to the four other presenters by Mr Harb on 19 January 2017 (703) which thanked them for the job they had done. It was also copied to Mrs Harb (as one of four others). In evidence Mrs Harb explained that the respondent agreed to attend the presentation with a small and focussed team in a deliberate attempt to contrast with the likely approach of one of the competitors, who was known to send large numbers of people to such a meeting.

83. On 1 March 2017 Mr Jung started employment with the respondent as the Managing Director for sales in Central and Eastern Europe. He was Mr Harb's line manager and also the line manager of Mrs Harb's line manager at the time. His evidence was that early in his employment he looked at all of the potential deals in his area for the next fiscal year, with the Intersnack deal being the largest. He met with Mr and Mrs Harb, as the two people working on the deal, and they explained to him the deal and the work that had been undertaken on it. He was made aware by Mr and Mrs Harb of the work undertaken to that date, but had not personally been aware of it having not been employed by the respondent. His evidence was that he was told that Mr Harb had always been the sales director on the deal, and Mrs Harb had always been the Account Executive. Mr Jung did not review documents to check the accuracy of what he had been told. Mr Jung's view was that other experience was needed on the deal, in particular in relation to cloud technology.

84. On 4 April 2017 Intersnack invited the respondent to submit a Request For Proposal (RFP). This was initially due to have been submitted by 5 May, but the deadline was extended for all responders to 12 May 2017.

85. In a document prepared by the claimant (summarising the position on the deal as at 19 May 2018) (858), the claimant explained that there had been eight companies sent the RFI in December 2016, four companies had been invited to present in January 2017, and one company had been dropped following the submission of the RFI. Three companies were asked to respond to the RFP.

86. After a request was made by the DACH team who was responsible for the bid, a UK based account executive, Andrew Sutton (a senior account manager), was assigned to work on the Intersnack deal. As he was not part of the DACH team, an agreement was made regarding commission allocation if the deal was successful. He was assigned to the work on 25 April 2017. The split on commission which was agreed was confirmed in an email from Mr Harb to Mr Sutton on 3 May 2017 (1506). Mr Harb's email records the split proposal on the deal (which it was not in dispute was what was agreed) was that Mr Sutton would receive 37.5 percent of the account manager commission available if he supported the DACH region in undertaking the deal. The email recorded:

> "*25% of the deal goes to Sigurd AM Estrella and we share the rest 50/50. That means you receive 37,50% of the initial deal at Intersnack"*

87. There was a significant point of dispute between the parties about what was meant by the wording of this email. The claimant contended that because Mr Harb, as the writer of the email, referred to "*we*" share the rest, that meant it was a personal arrangement by which 50% of the remaining commission was being shared

between Mr Harb and Mr Sutton personally. The respondent's position was that the terminology used in the email did not define a split personal to Mr Harb, but rather the split was between the DACH region (and on the respondent's case Mrs Harb, even though she was not mentioned in the email) and Mr Sutton.

88. The evidence was not entirely consistent about why Mr Sigurd Eiesland was allocated a commission split on the Intersnack deal. Mr Eiesland was a part of the respondent's Nordics team and he had a relationship with Estrella as a result of the work the respondent did with that company prior to this deal. As a result of that relationship, and because he worked with those arranging the deal with his knowledge of Intersnack's ways of working and systems, he was allocated commission on the deal. Save for the issue of PLM, that commission split was not something which was challenged in the Tribunal proceedings. He was to receive 25% of the M3 components of the deal. Some emails from the claimant challenged that split, but ultimately the split was not something which was challenged by the claimant, save only with respect to whether the PLM provision should have been included in the element to which the 25% split was applied, or not.

The start of the claimant's work on the deal

89. Mr Sutton was withdrawn from the deal very shortly after being assigned to it. As a result, that led to the claimant becoming involved. The first email from Mr Sutton which informed the claimant of this, was at 10.38 on 9 May 2017 (772) which referred to Mr Sutton undertaking a "*complete handover with Michael tomorrow*". On 10 May 2017 Mr Sutton emailed Mr Harb and stated, "*Am handing over to Michael Prigmore this morning as requested by James Hannay*". Mr Steenbakkers commenced working on the deal on 25 April 2017. Accordingly, the only evidence heard by the Tribunal about who had worked on the deal prior to late April 2017 and what those people did from those who were actually involved in the deal at the time, was evidence from Mrs Harb and Mr Jung (who had only been aware to the extent described above).

90. The claimant commenced working on the Intersnack deal on 10 May 2017, that is two days before the RFP was submitted. Prior to 10 May he had no involvement whatsoever in procuring or receiving the opportunity, or submitting the RFI. The claimant was involved in the last two days of the preparation of the RFP. It is fair to say that the claimant was not complimentary about the state of the bid at the time at which he became involved. In his evidence to the Tribunal he stated that he was largely responsible for key parts of the RFP, something which the respondent did not accept (pointing in particular to the length of the document submitted and the limited time prior to submission for which the claimant was involved). The RFP was submitted by the claimant on behalf of the respondent on 12 May 2017. He emailed Mr Steenbakkers at 15.56 on 12 May 2017 confirming that the RFP had been submitted (795).

Mrs Harb and her work prior to the claimant's involvement

91. Mrs Harb had worked on the deal prior to the claimant's involvement. The claimant accepted that he had no prior involvement with the deal before 10 May 2017. There was considerable dispute about the nature of her involvement. The claimant's point of view was based upon the documents disclosed and what they

showed about Mrs Harb's work. The respondent's evidence and, in particular, that of Mrs Harb, was that she was the account manager responsible for moving the opportunity to the RFP stage (or at least to the point when Mr Sutton became involved). The claimant was utterly dismissive of her involvement, contending that she only undertook administrative tasks on behalf of her husband (albeit there was ultimately no dispute that she did so while her role was that of an account manager, that is a broadly equivalent but slightly junior role to that held by the claimant).

92. Mrs Harb's evidence was that she had been the account executive responsible for the deal from the outset, until she stopped working on the deal in April or May 2017 (until doing some work in December 2017). Her evidence was that she was responsible for preparing the NDA, submitting the RFI, and a proportion of the work on the RFP.

93. There was certainly a paucity of evidence in the bundle which documented Mrs Harb's work on the deal. In her statement she referred to a number of pages as evidencing the work she had undertaken. She was cross-examined at some length on those documents. One of the pages referred to related to an entirely different deal. Some of the pages were expense claims.

94. What complicated matters were how the responsibilities had been recorded on the respondent's CRM system. That showed Mr Harb as being the opportunity owner and account executive on the deal from the outset, until it was changed to Mrs Harb in August 2017. Mrs Harb's evidence was that this was because of the management responsibilities in Germany and that if she was recorded as being the Account Executive (which she said in evidence was the case), then the Account Director credit would go to her direct line manager Mr Anderson and not Mr Harb, who was the responsible Account Director. When she changed her reporting line to Mr Harb in August 2017, the system was changed as that problem ceased to apply. The claimant's case was that she was not shown on the CRM system as the account executive because she wasn't. When asked about the CRM system, Mrs Harb emphasised the poor quality of the system used and gave that as a reason why the system was not used more regularly. The respondent more generally emphasised that as the CRM system could be amended by anyone, it did not provide a reliable record and that was accordingly how it was treated by those at the respondent.

The claimant's role on the deal

95. Following submission of the RFP, the claimant's role in the deal became more significant. Work continued on the deal throughout the remainder of 2017 and there was no dispute that the claimant (and others) worked very hard on the deal and progressed it to a position where the respondent was ultimately successful in concluding the deal in January 2018. There was no dispute that the deal finally concluded was significantly larger than had been envisaged when the claimant started working upon it.

June 2017

96. A presentation was given to Intersnack on 2 June 2017. Mrs Harb was not involved (875).

97. On 5 June 2017 the claimant emailed his manager, Mr East (sales director – UK and Ireland), copied to Mr East's manager Mr Hannay (Managing Director – UK and Ireland) (879). In the email he addressed the commission split on the Intersnack deal, highlighting that Mrs Harb was recorded on the CRM system as having a split on the deal and asking who she was? The claimant was critical of aspects of the deal's focus and asked "*The contribution of effort therefore needs to be reflected in the correct commission split. Could you please let me know how you would like me to continue on this opportunity and get written agreement on splits together with roles and responsibilities clearly defined".* In his witness statement the claimant referred to him being aware of Mrs Harb on this date.

98. On 6 June 2017 the claimant sent a further email to Mr East describing the deal as "*a disaster waiting to happen*". He described Mr Harb as not being good enough to run a campaign of that size. That led to an email from Mr Hannay to Mr Jung (his counterpart in the DACH region) (878), forwarding the emails from the claimant and adding:

> *"I have spoken to Michael and he really is struggling with working with the lack of experience and quality in your team for this bid. We need to take some big decisions now as Michael is basically giving me the ultimatum that either he leads, and that you communicate it to your team, or he is out. I cannot really afford to have big hitting high end sales guys playing a bit part role in opportunities as they are too good for that type of play. If you feel you can continue without my team then it really is no problem. If not then we need to move forwards as I have suggested if that is ok with you."*

99. The email reflected a dispute between more senior managers about the claimant being lent to the DACH region, and the allocation of commission on the deal at the more senior level between those in the DACH region (where the deal was assigned) and the UK (who had lent the claimant to work on the deal).

August 2017

100. On 9 August 2017 a conversation took place between Mr Oldroyd and Mr Hannay, following an email sent by Mr Jung about the figures to be put forward on the commercial offer to Intersnack. An email of 9 August from Mr Oldroyd to Mr Carreiro of 9 August (931) recorded that he had spoken to Mr Hannay that day and "*He reckons that Michael Prigmore is driving this deal. He told me the German rep (Monika harb) is out of her depth*". Mr Young, in his evidence about what he considered when determining the grievance appeal, placed emphasis on this email as showing that Mr Hannay had been aware of Mrs Harb and her role on the deal as at that date.

101. On 11 August 2017 the claimant sent a lengthy email to Mr Jung (968). He referred to a conversation and set out why he was unhappy with the reward structure which was in place, being the split previously agreed and put in place for Mr Sutton. He recorded the split in place at that time as being 25% to the Nordics, 37.5% to the UK & Ireland and 37.5% to Germany. The claimant's own description of the split in a table he compiled, recorded it against regions and not referable to individuals. He stated that the split had been initially agreed on the firm understanding that the two other sales people would provide the commensurate effort with the claimant, with

him only being expected to do 37.5% of the effort, and he contended that was not the case. The claimant expressly stated that the other sales person had contributed nothing at all and, in a table complied to show the perceived effort put into the campaign, the claimant attributed nothing to the efforts of either the Germany account manager/sales lead and the Nordics account manager/sales lead. The claimant asserted that he had made 100% of the effort and he asked for the compensation model to be reset. He concluded "*please let me know how we could address this imbalance so that my effort is rewarded in line with the actual impact and effort I have made to this opportunity*".

September 2017 and the emails contended to be the agreement

102. On 3 September the claimant re-sent his email of 11 August to Mr Jung and Mr Jung responded that he was working on it (968).

103. On 4 September at 12.26 the claimant sent a further lengthy email. The start of the email addressed deal-related matters, including that the value and breakdown of the potential deals being considered were not accurately reflected on the CRM system. It went on to address the split (966). The claimant provided a detailed table regarding his perception of contributions to the deal and commission split value (which recorded Mrs Harb as receiving a 38% split). He concluded the email by saying (968): "*It may be worth waiting until we are vendor of choice and know which option Intersnack are focussing on to update. However, my experience is to be as accurate as you can be so we should really be reflecting the least value option with correct product mix and term in CRM today. Let me know your thoughts"*.

104. At 13.15 on 4 September Mr Jung responded to the claimant (966). He explained two potential scenarios. He explained his "*current thinking*" was "*I am trying to position you as the key sales rep on this deal and Joachim as the german "sales manager". This way we do not require a split between you and Joachim and your comp could run up to 75% of the entire deal (25% was agreed for the Swedish sales guy). But I can only get this final approved one we know we will win this deal*". The email concluded by saying "*Lot's of: we could, we should, we have to…* [followed by a smiling face emoji] *Let's nail this down once we have concrete feedback from Intersnack today or tomorrow"*

105. At 14.48 on the same day the claimant sent a further email to Mr Jung (965). It began by saying:

> "*Absolutely understand that this is all academic until we know we are vendor of choice and actually contract with Intersnack"*

106. In the 14.48 email the claimant said he agreed with what Mr Jung had proposed and then confirmed this as being that he would receive the split of 100% of edge products and 75% of M3 products. For the latter split he recorded "*The reality is that the Swedish guy has actually done very little but a deal is a deal!*"

107. The claimant's 14.48 email (965) concluded by asking:

"*What do you want to do with the CRM record as it does not reflect the deal we are shaping with Intersnack? Do you want me to update it?"*

108. At 13.50 Mr Jung responded (and what is quoted below is the entirety of the email):

> "*Hey Michael,*
>
> *Yes, let's do it!*
>
> *Best,jj"*

109. The latter email was what the claimant relied upon as creating a binding agreement on the split. When he was asked about whether he was clear that Mr Jung had the authority to make a binding agreement, the claimant explained that he did not know, to be fair. He agreed that Mr Hannay and Mr Jung had to have a conversation to give a split agreement approval. He also accepted that the policy made it clear that each line of business had to send the split agreement to the global corporate team for review and final approval. The claimant referred to Mr Oldroyd's subsequent review as not being a determination but rather a rubber-stamping of what had been agreed. He accepted that the provision in the terms said that the executive team did have to approve the split, but he didn't really think there was more to it than that. He accepted that he always understood that Mr Jung had to have the split signed off by someone else.

110. Mr Jung's evidence was that the comment he was responding to in his final email was the question posed by the claimant as to whether Mr Jung wanted him to update the CRM system, to which the answer was yes. Mr Jung's explanation was that he was doing a lot of things when he read the email and the intention of his reply had been that he wished the claimant to update the CRM system regarding the products and the split of those products. He emphasised that he did not have authority to agree a change in the split, and emphasised that he responded to similar emails on many occasions and did not spell out when responding that he did not have the authority in all the emails.

111. The claimant changed the CRM system so that it recorded him as receiving all of the commission on the deal, once Mr Eisland's split was allocated.

112. On 15 September 2017 the claimant emailed Mr Jung (copied to Mr Harb) and said "*I made the changes as agreed to the Intersnack opportunity in CRM*". He went on to highlight that Mr Harb was no longer identified as the Opportunity Manager on CRM, but that it was now Mrs Harb. He asked why Mr Harb had made the change. Mr Harb responded to the claimant and Mr Jung on 17 September (974) saying "*this happened as you changed the products – we will set up the splits as they were for all productlines. 25% Sigurd, 37% you, 38% Monica*". Mr Jung responded to both the claimant and Mr Harb on 17 September "*don't worry on the splits. This is something that James and I will finalize. Let's focus on winning this deal*".

113. Following on from that exchange of emails, Mr Harb and Mr Jung continued to exchange emails (copied to Mrs Harb) between 17 and 24 September 2017 (961). The claimant was not aware of these emails at the time. In an email of 17 September 2017 (963) Mr Harb said:

> "*Please remember that Moni was the decisive factor is our being invited to the RFP at all. Intersnack is her OPT, only insisted on me since the OPT would otherwise have been with the Safil Team in the Forecast. The RFI response and 1st Demo preparation were primarily driven by Moni. I'm sure you won't allow the UK boys to run rings around us. We'll leave things as they currently are – 100% Michael or should we show the original? (25% Sigurd, 37% Michael, 38% Moni)"*

114. In his responses Mr Jung told Mr Harb to leave everything as it was, highlighting that first the respondent needed to "*win*". Mr Harb queried this. Mr Jung's final instruction to Mr Harb on 24 September (961) was:

> "*Please enter the following: On the M3 share Sweden gets 25%. Everything remaining we do 50/50 between UK and us.*"

115. In his witness statement, Mr Jung stated that by that point he simply wanted to put a stop to the to-ing and fro-ing before it wasted any more time and energy and he wanted all to focus on the sales effort. In an answer during cross-examination he said that he found the claimant badgering him to be rather irritating.

9 October 2017 email (and subsequent emails)

116. At 22.10 on 9 October 2017 the claimant sent an email to Mr Jung (1031). When doing so he forwarded the email trail of the 4 September 2017. His email referred to a conversation between the claimant and Mr Jung "*around a 50/50 split for Monika and me on the deal less €500K for the Nordics sales guy*" and said that was "*not what we discussed and set up in CRM to reflect the sales effort back on 4th September*". The claimant stated that he had written on 15th September

> "*asking why the deal after 9 months had changed from Joachim to Monika as the sales lead in CRM. The percentage split that I was asked to set up in CRM remain but Monika is now on every line item set at 0%. The reality of the situation is that Intersnack have no idea who Monika is, which is no reflection on Monika but just the reality of this deal. Indeed, since I have been involved, for the last 6 months, Monika has not been on any internal Infor or external Intersnack calls or meetings*".

117. After explaining the claimant's view of the deal at the time he started working on it, the claimant went on to say:

> "*This has meant I have been involved 100% not 37.5% in terms of effort…From a sales perspective in driving this deal, there is only one name that has been involved in this campaign in the last 6 months and that is me. I would therefore, really appreciate you resolving this in an equitable and timely manner. Additionally, I think one thing both managements teams in terms of James and Richard together with Joachim and yourself is that we all know this to be the case. So can we please make sure the recognition and reward reflect this*".

118. The 9 October email was the first alleged protected disclosure.

119. Mr Jung replied on 10 October (1030) with a brief response sent only to the claimant:

> "*as discussed, please leave it with me. And as you rightfully mentioned, it is not the right time to discuss these things intensively. We will make sure everything is rightfully considered*"

120. The claimant responded by email to Mr Jung on 10 October (1029). In that email he restated his position and stated that he needed the issue "*to be resolved now and not later*". The claimant referred back to the 4 September conversation and said that Mr Jung had "*instructed me to reflect this in the Intersnack opportunity within Infor CRM*". He re-emphasised his view about the lack of contribution by Mrs Harb and concluded:

> "*In my view the suggestion that the split of commission and therefore the amount of actual effort, that is currently being proposed as 50/50 would be unfair, unjustifiable and not sustainable. I would suggest that both yourself in line with our conversation and subsequent emails on the 4th September, and indeed the wider pursuit teams view would concur with this statement. As we have both said, we don't want to lose focus or time on what I believed was resolved between us based on a fair and equitable split of commission, based on justified effort. Could you please come back to me with a resolution by Thursday 12th October*"

121. The claimant sent a further email to Mr Jung on 11 October (1029). He said:

> "*The facts are that Monika Harb has not been involved in this campaign since the end of April. The only activity which she may have been involved in was the production of the original ERP RFI as she did not attend the half day presentation in January. Joachim Harb indeed was the opportunity owner up until mid-September and Monika Harb has never been seen by the Intersnack team. Monika Harb has not made one update to the CRM record as it has progressed through its lifecycle. For this effort and while you are deliberating how to reward the effort in this deal Monika Harb has been set up to be rewarded with 38% of the M3 element to my 37% and 50% of all the edge products. You can see my concern and reason for wanting this resolved. There seems no business justification for the Monika Harb to be rewarded at this level based on such little effort. Particularly when we had discussed my 100% effort and you had asked me to make the changes to the CRM record to reflect our discussion. If I had known this was going to be altered to such an unjustifiable position in the closing stages of the deal I would have escalated this immediately"*

10 November 2017 email

122. On 10 November 2017 Mr East emailed the claimant asking whether he had sent an update to Mr Wdowiak which had been requested on the Intersnack deal, forwarding the original request. The claimant forwarded the emails to Mr Jung on the same date (1047), explaining that because the CRM record showed the deal being in Mrs Harb's name the email had been sent to her and not the claimant. He went on to say, *"Have you responded to this email below from Sean Wdowiak? This does,*

however, send out the wrong message to the senior management team as Monika is not involved at all in this campaign and yet status reports and updates are being sent to her with no ability to respond as she has never been involved with Intersnack." He concluded the email by asking, *"Not sure how we square the circle but we need to make sure we do not drop the ball".* This was the second alleged protected disclosure.

123. Mr Jung responded to the claimant on 10 November 2017, very shortly after receipt of the claimant's email, "*Absolutely, I will take care of it*".

Other emails in November 2017

124. On 13 November the claimant responded to Mr Jung with another lengthy email about commission splits (1051). His email began "*The splits and commission for the Intersnack deal need to be formally communicated tomorrow, as per our agreement on the 4th September and before we get immersed in the final push for the finish line"*. He went on to question why Mrs Harb was still allocated as the owner and named account executive of the deal which was "*technically and ethically wrong*", but was also resulting in incorrect communication. The claimant asserted that the communication should explain that he was being allocated 100% of the account executive commission on the deal outside of the 25% split on the M3 element to Mr Eiesland. The CRM record had been changed to 50/50 (post Mr Eiesland's split) between the claimant and Mrs Harb and the claimant objected to it.

125. The claimant sent a further email to Mr Jung on 14 November 2017 (1051) again restating his view that the split at account executive level had been "*agreed between ourselves*" as 100% to the claimant.

126. An exchange of emails of 21 November 2017 (1062) appeared to show Mrs Harb adding text to an email which Mr Harb proposed to send to Mr Jung about the claimant. The email chain was not entirely clear and in answer to questions in cross examination Mrs Harb denied that she had made such proposals to Mr Harb and highlighted the fact that the email referred to, appeared to pre-date the draft from Mr Harb.

127. On 27 November 2017 Mr Rodarmel, the Senior Vice President – Digital Sales Europe, emailed the claimant to ask whether the CRM field for Intersnack had been changed to Upgrade X yet (1064). She stated that the relevant field showed the deal as Net New and explained briefly why she thought that was wrong. In the Tribunal hearing, the claimant accepted that the email showed that the deal was not recorded as Upgrade X as at 27 November 2017, being a date two months before the deal was concluded.

128. In an email of 8 December 2017 (1147) the claimant was described as a trusted advisor of Intersnack.

Mr Oldroyd's determination

129. Mr Oldroyd, the Vice President, Field Operations – EMEA and AMAC, was asked to review the facts of the Intersnack deal and make a determination as to who should receive what commission split in practical terms. This was because there was

understood to be a dispute. Mr Oldroyd's evidence was that such decisions were part of his role. Mr Oldroyd had no direct involvement in the Intersnack deal. His evidence was that his role was to understand the terms upon which commission splits had been agreed and to ensure that, in his view, the commission was being split consistently and in a way that was justified and fair.

130. In undertaking his determination, Mr Oldroyd spoke to both Mr Jung and Mr Hannay. There was no written record of the conversations he had, save that Mr Jung summarised what he had said in an email of 21 November and Mr Hannay provided a much briefer email summary on 28 November. The Tribunal did not hear evidence from Mr Hannay.

131. On 21 November 2017 Mr Jung and Mr Oldroyd, spoke and Mr Jung followed the call with an email which confirmed what he had said (1057). Mr Jung's email divided the deal into two phases: the initial phase during which Mrs Harb had been the account executive; and the final closing phase when the claimant had been brought in. Mr Jung recorded that he believed the official split at account executive level had been 25% of M3 to (what he described as) the Swedish account executive and the rest split 50/50 between the claimant and Mrs Harb. He suggested that it would be fair to split the remaining part, after the Nordic element, to be 70% to the claimant and 30% to Mrs Harb, instead of 50/50. He made no reference to any agreement in September 2017 nor did he refer to the position he had proposed to the claimant which he would put forward on 4 September. He did not refer to any possibility of the claimant receiving 100% (after the Nordic portion). Mr Jung's evidence was that he believed what he was proposing to be an increase in the split of commission being allocated to the claimant. Mr Jung accepted in cross-examination that when he made his recommendation to Mr Oldroyd and recommended the 70/30 split, he took into account the emails he had received from the claimant (including the emails of 9 October and 10 November 2017). Mr Oldroyd's evidence was that the only detail Mr Jung told him was that the claimant was trying to negotiate a larger split. The email also addressed the allocation of commission at a more senior level.

132. On 28 November 2017 Mr Hannay sent an email to Mr Oldroyd about the split on the deal and provided a copy of an email of 20 November which he had sent to Mr Jung (1065). His email was brief and recorded "*Please can you document in the system the following: Michael Prigmore – 75% …This is what Joerg has proposed so please can you ensure it is all formalised asap to avoid disappointment*". There was a dispute about and some uncertainty about this email, both because the figure of 75% was not what Mr Jung had proposed, and because it was not clear whether the 75% was intended to apply before or after the Nordic split had been taken into account. The claimant's contention was that the 75% to him was effectively intended to be 100% of the deal after the 25% for Mr Eiesland had been taken into account. The respondent disagreed. Mr Oldroyd's evidence was that he had also spoken to Mr Hannay and he was clear that the email was proposing a 75/25 split between the claimant and Mrs Harb after the element for Mr Eiesland had been paid. In any event, that is how Mr Oldroyd himself read the email, meaning that in practice and in his view the positions taken by Mr Jung and Mr Hannay were only 5% apart.

133. Mr Oldroyd in his evidence to the Tribunal confirmed that he did not speak to the claimant, Mrs Harb or Mr Harb about the determination. He also did not look at

the many emails which formed the evidence before the Tribunal. He did not see any of the alleged protected disclosures relied upon. He did not see the 4 September emails between the claimant and Mr Jung, which the claimant contended contained an agreement. He did not see the email in which the split had previously been agreed with Mr Sutton. He also did not see the emails in which Mr Harb advocated for Mrs Harb.

134. Mr Oldroyd's evidence was that the first step in determining the split was for the relevant managers to reach agreement. As, in this case, Mr Jung and Mr Hannay had not been able to agree, Mr Oldroyd described his role as being the arbitrator whose role it was to reach a decision on their respective positions. He therefore reached a decision based almost entirely upon what he was told by Mr Jung and Mr Hannay (alongside consideration of the relevant policies etc). His evidence was that (at least in his view) Mr Hannay and Mr Jung were only 5% apart in their views of the commission split between the claimant and Mrs Harb. He considered what they had said and decided that a fair split was to give the claimant 70% of the account executive commission after Mr Eisland's split had been taken into account.

135. In his evidence Mr Oldroyd referred to the International Split Policy. His evidence was that he did not apply that policy to his decision on the split. Accordingly, the evidence which he gave about how the International Split Policy worked was not directly applicable to the determination made in the split for the claimant. Nonetheless, he did identify that the International Split Policy, as a broad guide, provided the percentages for the initial stage and the post-deal stage. As the claimant was not involved in either the created opportunity or the post-deal stage, Mr Oldroyd's evidence was that the most he could have received had the International Split policy been applied, would have been 50%.

136. Mr Oldroyd was subsequently informed by Mr Jung of Mr Jung's account of his view of the claimant's absence from the deal and removal from client facing duties from December 2017 (see below). Mr Oldroyd's only knowledge of these matters was what he was informed by Mr Jung. He informed Mr Reedman of what he had been told in the course of Mr Reedman's grievance investigation. Mr Oldroyd accepted during questioning that those events had only occurred after he reached his determination on the split on 13 December 2017 and, therefore, they were not a factor in his decision at all.

137. Mr Oldroyd made the determination. When questioned he confirmed that his determination gave guidance to the Board, but he did not have the ultimate decision-making rights. He was at the same level of seniority as Mr Jung and Mr Hannay. He said that his job was to work with the managers to find a resolution, which in this case he thought he did.

138. On 13 December 2017 Mr Oldroyd emailed Mr Hannay and Mr Jung and provided what he described as "*the final determination*" (1071). As it applied to the claimant he said:

> *"25% of the M3 value will go to the Swedish AE for the valuable contribution provided early in the sales cycle. For the remaining part of the deal, 70% to Michael and 30% to Monica."*

139. Mr Hannay did not dispute the determination. He emailed Mr Oldroyd later on 13 December and asked him to advise who to work with to get the formal paperwork completed, if there was any (1071).

140. The claimant said in evidence that he would not know whether Mr Oldroyd had the authority to make the final decision on the split, but he asserted that he did not have all the facts in front of him when he did so. He asserted that Mr Oldroyd was misled by Mr Jung. His assertion was that Mr Jung had misled Mr Oldroyd about: the allocation being to Mrs Harb; the agreement on 4 September; and what Mr Hannay had agreed to.

The claimant's departure from Dusseldorf and his ongoing work on the deal

141. The claimant suffered a bereavement. He was informed about this whilst eating an evening meal with Mr Steenbakkers on 12 December. He travelled back from Dusseldorf (where the respondent's team working on the completion of the deal was located) early in the morning of 13 December 2017. His evidence was that he informed Mr Jung of this on his arrival in the UK, which was prior to the start of what would normally have been the working day. On 14 December he was unwell, but endeavoured to undertake work from the UK (and did so). At 15.44 the claimant informed Mr Jung in an email that he had been unable to listen to all of a call because he was having bouts of illness (1100), before going on to address other matters relevant to the deal. In an email in response at 15.53 (1099) Mr Jung said "*good to hear you are back*".

142. There was a dispute about the events of 13 and 14 December 2017 and what happened shortly thereafter. Mr Jung clearly felt that the claimant's absence was disruptive at an important time for the deal. At the time the respondent was hoping to conclude the deal with Intersnack in December, but that ultimately did not prove possible and the deal was, in fact, concluded at the end of January 2018.

143. On 14 December 2017 the claimant exchanged emails with Ms Rodarmel in which he offered to set the opportunity to Upgrade X (1101). He accepted in cross examination that the deal was still being classified on CRM as a net new deal at that date.

144. On 14 December 2017 Mrs Harb sent an email to Ms Giani and others (3566) in which she asked that the CRM system be changed to show her as the account executive. Mr Steenbakkers evidence was that Mrs Harb did absolutely nothing on the days when the claimant was in the UK; Mrs Harb's evidence was that she did so. Mrs Harb was cross examined about the emails which she referred to which showed her working on the Intersnack deal from 14 December 2017. Her evidence was that she was told about the claimant's absence from the deal by Mr Jung. She was not aware that the claimant had returned to working on the deal until some point in January 2018. She focussed on working on the deal and trying to get it over the line, responding to those who had emailed her and asked her to undertake the specific work requested. She emphasised this and said she was not focussing on the split of commission (albeit it was clear from the earlier emails that she was by this time fully aware of the dispute about commission).

145. On 15 December the claimant emailed Mr Watters Executive Vice President, General Manager-Europe (1127). The email related to the deal and how products were being sold to Intersnack. In the email the claimant clearly stated that it was his view that the deal had always been classified as net new. He explained his reasons why changing the deal to be an Upgrade X deal may be disadvantageous.

146. The claimant's evidence in his witness statement explained that he continued to answer emails and take calls while ill on 14 December. He did not state whether or when he returned to Dusseldorf from the UK, but his statement did explain that the claimant worked from Euro Disney where he was with his family after 15 December and took calls from Mr Jung.

147. Mr Steenbakkers in his statement stated that he felt the tone of the emails sent to the claimant by Mr Jung on 16 December (a Saturday) were unnecessary and lacking in empathy (1106).

148. Mr Jung's evidence was that the claimant was removed from a client facing role on the deal in December 2017 (albeit he continued to work in the background). The claimant vehemently denied that was the case. There was no written evidence which showed the claimant being told that his role on the deal was being restricted. There was no documentary evidence whatsoever which showed: any request being made to the claimant to cease working with Intersnack by the customer; any instruction to the claimant to do so; or any of him no longer being able to deal with the customer face to face.

149. The claimant's evidence was that he was called by Mr Hannay on 19 December and told that Mr Perry had called Mr Hannay stating the Mr Jung had asked for the claimant to be removed from the Intersnack team, but Mr Hannay said this would not happen. The claimant's evidence was that he was not removed at any time from the deal and in answers to questions he denied that he was removed from customer facing duties.

150. The Tribunal found that the claimant's absence from the deal in December 2017 was very limited and he did not remove himself from working on the deal in the way alleged. The Tribunal also found Mr Jung's evidence about the claimant being removed from the deal to be untrue. The absence of any documentation which corroborated such a significant claim, meant that it was simply untenable. Had the claimant been informed at that time that he must cease working on the deal, there would have been an email or some written instruction to him and there would undoubtedly have been something in writing from him in response, as he was not reluctant to challenge decisions in email when he disagreed with them. In any event, the claimant having been removed from the deal was not consistent with the congratulatory messages sent to the claimant when the deal closed, as shown to the Tribunal.

The claimant's response to Mr Oldroyd's determination

151. The claimant was first provided with the email containing Mr Oldroyd's final determination at 16.51 on Thursday 21 December 2017 in an email from Mr Hannay (1183). Mr East forwarded the email to the claimant at 18.02 on the same day

(1183), albeit that it had already been sent to the claimant. Those emails were sent very shortly before the Christmas break.

152. On 27 December 2017 the claimant emailed Mr East (1182). He said:

> *"I would really appreciate your advice on dealing with the split issue for Intersnack. I have been asking for months to have this resolved. Correspondence with Joerg shows that we discussed me being the AE for the deal and receiving 100% of all products except for M3 component that we would honour the Nordics 25% split with me getting 75% of this element.*
>
> *How can Monika Harb, who has never met or spoken to the client and has not even been on any communications until these last 2 weeks, by allocated 30% of this opportunity?*
>
> *To give you some facts about the campaign which shows the actual situation. For instance the CRM record was set out with Joachim Harb as the opportunity owner and when I got involved, May 2017, Monika Harb did not even work in Joachim Harb's team. The Central and Eastern European team had a reorganisation in August and Monika Harb was then allocated to Joachim Harb's team. At this point at the beginning of September the CRM record was changed and Monika Harb became the Opportunity Owner. At this point she still did not start to join in on any internal or external meetings.*
>
> *Last few weeks after the derailing of the close plan Joerg has started to add her to correspondence. However, she has still not been on any calls that I have been on. Joerg agreed that I was the AE allocated to this deal. How can it be that someone who has had absolutely no involvement in the campaign what so ever can now qualify for 30% of the deal. Which in reality equates to be over 42% of what I am due to be allocated against my target. In contrast I have been instrumental in creating the sales strategy, positioning Infor and our solution, culture, commercial options and contracts during this campaign. All of which can be independently confirmed.*
>
> *Having spent 100% of my time on this campaign as you know I have not been working on any other opportunities. Yet Monika Harb will get over 42% of what has been allocated to me has been free to work on other campaigns for 100% of the time.*
>
> *In addition, as we enter the closing stages in October Joachim Harb had other Q2 and Q3 commitments so Joerg asked me to be the lead negotiator and Joachim was stood down with me being responsible for all communications and commercials with Intersnack.*
>
> *When you add into the mix that Monika Harb is Joachim Harb's wife this really needs to be relooked at.*
>
> *With all the strange things going on with Joerg I am very concerned about how we fix this. I cannot understand how I'm having so much revenue removed and given to someone who had made zero contribution to the campaign.*

> *How do we square this injustice? Your support and advice would be really appreciated."*

153. This was the third alleged protected disclosure. In answers to questions, the claimant confirmed that he was not aware of the email having been seen by or sent to anyone else, but he was not sure if Mr Hannay may have seen it. Mr East's evidence was that he could not recall sharing it with anyone else.

154. In his statement the claimant referred to a suspicion that Mr Harb was seeking to alter the agreements on the sales commission to not only enable Mr Harb to be paid as Account Director on the Intersnack deal, but also to enable Mrs Harb to be paid as account exceutive. The claimant had previously asserted that Mr Harb's role changed during the transaction, albeit during the hearing he accepted that was not the case. The claimant's evidence was that he knew this to be in conflict with the code of ethics and tantamount to a dishonest diversion of funds from Mr Harb to his spouse. In his witness statement the claimant said that he felt when writing that email that it was a wholly unjust practice which could affect other account managers like the claimant.

155. Mr East responded to the claimant's email on 29 December 2017 during the Christmas break. His email (1185) said:

> *"In short I would be careful worrying about what others are being paid and concentrate on your earnings. I strongly recommend you don't write down too many details in case it leaks into email, it can all become very political and you be back fighting for 75%. Let's talk next Wednesday. Happy New Year."*

156. The claimant's evidence was that he took this at face value and for a period thereafter he focussed upon ensuring that he received 75% of the commission rather than arguing for the full 100% to which he believed he was entitled (less Mr Eiesland's split). Mr East's evidence was that he said this because he was worried that the German team would try to reduce the claimant's commission from the 75%.

January 2018

157. On 5 January 2018 the claimant personally changed the categorisation of the Intersnack deal on the respondent's CRM system to be an upgrade X deal (1556).

158. There were a number of emails exchanged between the claimant and Mr Oldroyd about his determination.

159. In late January 2018 arrangements were made for the senior executives of Intersnack and the respondent to attend a meeting to conclude the deal. The claimant's evidence was that towards the end of the negotiations he did not attend the meetings, but was available at the location to support those attending. In his evidence he made clear that he did not expect to attend the final meetings, describing the arrangement as being a two-tier team. As it turned out, it was not possible to conclude the deal at the meeting as envisaged as further negotiations were undertaken. As part of those negotiations the executive team members from the respondent who attended the meeting made concessions to Intersnack regarding price and payment arrangements. The claimant was not consulted about the

concessions before they were made. The claimant was very unhappy about those concessions. His evidence was that he did not believe the concessions on payment arrangements were necessary. The concessions also potentially had a significant impact upon the claimant's commission entitlement. The claimant confirmed in evidence that he was not saying the respondent couldn't do that.

160. In January 2018 Mr Pearcy (Manager, Incentive Compensation) started looking at the deal. He sent an email to Ms Bellavia on 19 January 2018 (1221) which said:

> *"Draft order form attached as an FYI. Looks like upgrade X, but on a Intersnack subsidiary/s as nothing under their customer number on anything, I have contacted Peter C to find out the name of the subsidiary as I can't see any link or name referenced. Payment terms also will likely be an issue as not 75%, and if we make them wait until full ACV paid it will be in year 3 as the 5th payment at the end of year 2 is just under the ACV."*

161. On 27 January Mr Jung sent an email to the claimant and a number of others (1246) in which he said:

> *"What an amazing job. Outstanding performance for a stellar project to be inked on Tuesday!!! This will mark a historic date for Infor as a company globally!!!"*

162. The Intersnack deal successfully closed on 30 January 2018 with the first invoice being issued on 31 January 2018 and paid on 16 March 2018.

163. Mr Watters, the President of EMEA, sent the claimant a message on 30 January 2018 (1251) congratulating the claimant on the deal and describing what he had done as being "*awesome*". He concluded "*The way you managed yourselves and the wider team is first class*". The Tribunal was also shown other congratulatory emails, such as the one from Mr Frohlich to the claimant and Mr Steenbakkers (1254) in which he said, "*You two made this deal*".

February 2018

164. On 1 February the claimant emailed Mr and Mrs Harb stating that he had noticed that they had changed the splits again to 50/50 between Mrs Harb and the claimant (1260). The claimant stated: *"The split was agreed and sent out back in December, see the email below"*. He then asked them to reset the CRM record back to what he described as *"the agreed"*, with 70% to the claimant and 30% to Mrs Harb. He attached the emails sent by Mr Oldroyd and subsequently Mr Hannay in December. The claimant's email concluded by saying:

> *"We agreed not to change this again and yesterday this has been changed. Could you please change this back to the agreement as this deal is now closed and commission calculations will now be calculated against these splits. Could you please confirm when you have reset the record."*

165. On 1 February an email was sent by Mr Watters, the executive Vice President and General Manager for Europe, to the claimant (3011). The email started by

criticising the claimant for asking Mr Hannay to chase Mr Watters on the split. Mr Watters went on to say:

> *"However, I want to confirm that Infor under my leadership will always honour what has been clearly documented. There will be no change to the 70/30 on your split. I have spoken to Joerg and Andy. This is despite the very serious breakdown in communication, behaviour and performance a number of weeks ago when Joerg felt you 'went missing' at a crucial period. But I want to confirm that in my mind you did an outstanding job at the end of the day and it is hugely appreciated. You rallied back onto the team and the team closed out a great deal. Well done, congratulations, and onto the next one – but without the associated drama."*

166. On 2 February 2018 the claimant emailed Mr Watters (1286) in response to his email of the previous day. The claimant said:

> *"It was great to see that you have honored the agreement that was put in writing on the 13th December, thank you very much for your swift intervention to do the right thing."*

167. One exchange of emails shown to the Tribunal was an exchange between Mr Jung and Mr Harb of 1 and 2 February 2018 (3374) in which the claimant was described in the following terms by Mr Harb: *"If Michael Prigmore is in management with us now – I will resign!!!!* [smiling face emoji] *You have the fat Brit instead of our smart Hanoverian in your mail distribution list."* The claimant was not aware of this email exchange at the time. Mr Jung's response did not challenge Mr Harb for the language used, as it should have done.

168. Emails were exchanged between members of the executive team on 21 February 2018 (1327) about Mr and Mrs Harb, their relationship, and their reporting line. The chain began with Ms Bellavia addressing the commission splits on the Intersnack deal generally, with subsequent emails focussing on Mr and Mrs Harb. The view was summarised by Mr Scholl "*How the hell does that happen…insane*". The chain included contributions from Ms Bellavia (VP Global Incentive Compensation), Mr Auriemma, Ms Murphy and Mr Scholl. The claimant was unaware of these emails during his employment.

March 2018

169. From 21 February to March there were a number of emails exchanged between the claimant and Mr Pearcy (1386).

170. On 2 March 2018 the claimant emailed Mr Pearcy (3388) regarding the PLM component and asking that the deal record be changed to show it not as a component of CloudSuite Food & Beverage. After exchanges of emails, the claimant emailed Mr Oldroyd (3386). Mr Oldroyd emailed Ms Cook and asked her to fix this. Ms Cook responded and Mr Pearcy confirmed that if all parties agreed to the change it could be made (whilst also referring to the Board review being undertaken at that time) (3386). The claimant was not copied into the emails exchanged following his email to Mr Oldroyd.

171. There was no dispute that the executive board reviewed the commission on the deal and that review included Ms Bellavia and Mrs Walsh. In terms of the claimant, that review resulted in no change to the position as determined by Mr Oldroyd.

172. In evidence the claimant contended that the executive board was misled by Mr Jung when reaching their decision. He accepted that it was not his case that either the Board or Mr Oldroyd knew that Mrs Harb was not entitled to 30% of the commission on the deal, but rather that Mr Jung misled them when contending that she was. The claimant also alleged that Mr Jung misled them by not explaining the agreement which the claimant said he had reached with Mr Jung on 4 September 2017. The claimant placed some emphasis on what he described as Mr Harb's lobbying on behalf of Mrs Harb which he said be believed was not consistent with the respondent's ethics policy.

173. On 16 March 2018 Mr Pearcy emailed Mr Oldroyd to confirm that he had just had the details on the Intersnack deal as determined by the executive team (1437). He exchanged emails with Mr Oldroyd about how the claimant should be informed. He informed the claimant of the determination in an email at 17.05 (1445).

174. The claimant sent a message following receipt of the email (1445) which said, "*All this waiting just to get screwed*". It appears that this was sent to Mr East.

175. The claimant and Mr Oldroyd exchanged emails on 26 and 27 March 2018 (1490). In the first email Mr Oldroyd said

> "*I understand that having been informed about the company's decision regarding the treatment of the Intersnack deal you are disappointed. I managed to reach Erica Bellavia today to make one last check regarding your compensation on the deal but there is nothing we can add. I think the facts are straight forward. You were invited into a preferred vendor situation and splits were agreed at an early stage*"

176. Mr Oldroyd's email went on to address other matters, including confirming that the contract was not upgrade X. The claimant responded to Mr Oldroyd at some length (1488) raising why he believed Mr Oldroyd was incorrect. Amongst other things, he stated that he was "*absolutely flabbergasted*" that the stage at which it had been described that he became involved was the preferred vendor stage.

177. The claimant was approached about a role at Kinaxis in February 2018. On 28 March 2018 the claimant attended an interview. On 29 March 2018 the claimant was offered a job with Kinaxis. An email was sent to the claimant with the job offer on 4 April 2018 (3301).

Grievance

178. On 3 April 2018 the claimant emailed Mr Perry raising an official grievance (449). The email began "*I would like to submit a grievance as I believe the company has calculated my commissions, regarding Intersnack, incorrectly. This is based, I believe, on misinformation regarding splits, effort and unilaterally unfair and seemingly capricious application of the terms of my incentive plan resulting in a*

significant underpayment of commissions owed." The claimant then raised four areas he would particularly like the grievance to consider: splits; alleged unilateral reclassification of the Intersnack deal; the wrong classification of the PLM elements; and payment being due in April payroll. The claimant requested three types of document be provided. He went on to state "*I wish to be correctly paid according to the clear evidence and witness testimony that I will present at the grievance meeting*". This was the fourth alleged protected disclosure.

179. In cross examination the claimant accepted that in his grievance he did not per se allege that he had been treated less favourably as a result of having made a protected disclosure, but he contended that the inference was there. He explained that because he drew attention to the relationship between Mr and Mrs Harb and because Mrs Harb was Mr Harb's wife, that was what his grievance implied. Mr Reedman's evidence was that he did not read the grievance as making public interest disclosures at all.

180. Mr Reedman was asked to undertake the grievance. He was at the time the respondent's Senior Principal Systems Analyst – Business and Education, based in the UK (he has subsequently left employment with the respondent). His evidence was that he did not interface with the sales team and was completely independent of the Intersnack deal. This was the first grievance he had ever considered. He accepted in questioning that he was junior to Mr Oldroyd, Mr Jung and the executive board. He had not received any grievance training.

181. A grievance meeting was held with the claimant on 17 April 2018. The meeting was conducted by Mr Reedman. The claimant was accompanied by Mr Steenbakkers. Ms Sandhu, an HR Representative also attended and took notes. The Tribunal was provided with typed notes of the meeting (475) and the claimant's amendments to the notes (469). Mr Steenbakkers' evidence was that he made it clear in the meeting that he had never met Mrs Harb. Mr Reedman's evidence was that Mr Steenbakkers said quite a lot during the meeting.

182. Of note is what the claimant explained in the grievance meeting about the ramp up of the deal and when payments would be due. Based upon the notes as amended by the claimant (471), what was said was:

> "*There are two elements that impact my commission payment, one is timing and second single vs multiple payments. We positioned ramp up fees because of the nature of the project. It was a 4-year project to get fully live and only need 100 users in the first year and no production environment. Increasing to 400 live users in 2nd year, ramped up to fully live in year 4 or 5. The view was costs needed to be ramped up to reflect usage. Intersnack did not want to have a flat fee for 10 years based on the project roll out. We discussed this extensively throughout the sales cycle. We kept discount back so that we could fund it and that there would be no cost of finance shown to Intersnack. This approach enabled Infor to position upfront and flat fees (i.e. Infor would collect €5.9 Million is 1st year). We had to build a Dedicated Multi-Tenant solution for them, which required special bottom up pricing, this meant we were working with thin margins. We informed Intersnack in writing that no ramp up was available and that the fees are flat. If you don't get comp. plan 75% average ACV in year one, need to wait for payment to come in, this*

comes to over just 60% of total value. It was viewed that I wouldn't be part of this. I was in the background. The company changed that without considering the impact on me. I had no say. A term put forward, I had not chance to debate and discuss…€3.5 million first year, €4.75 in second year. By the end of the term it would be something like €7.5 million. So works out an average of €5.9 million over 10 years"

183. Following the meeting, the claimant sent Mr Reedman an email highlighting the points he wished to and attaching some (but not all) of the emails which had been exchanged regarding commission. What was sent was collated together in the bundle (2151-2163), albeit those enclosures duplicated documents which were elsewhere in the bundle. What was enclosed included the exchange of emails of 4 September 2017 and the alleged protected disclosure of 10 November 2017 (1047). They did not include either the alleged protected disclosures of 9 October 2017 (1022) or 27 December 2017 (1182), nor did they include Mr East's response to the 27 December email. There was no evidence that those documents were ever brought to Mr Reedman's attention.

184. As part of the grievance process Mr Reedman spoke to Mr Pearcy, Mr Jung, Mr Oldroyd and Ms Steinvell. Notes of the conversations with Mr Jung (460) and Mr Oldroyd (459) were provided. No notes were provided for the conversation with Mr Pearcy, but an exchange of emails confirming what had been discussed and additional information was provided (454), Mr Reedman's evidence being that he did not retain the notes once he had received the email. Mr Reedman's approach to the interviews was to ask a series of questions which were recorded in the notes. He did not challenge the answers given, nor did he appear to have asked supplementary questions. He did not provide the notes and emails to the claimant, nor did he give the claimant any opportunity to respond to what was said, he simply reached his decision based upon what was provided. Mr Reedman did not consider it necessary to investigate the accuracy of what he had been told. He accepted that what he was being told was correct, he said because he had no reason to doubt that it was accurate. Mr Reedman's own personal experience in his work with the respondent also informed his decision.

185. Mr Reedman did not speak to Mrs Harb, as he did not consider it necessary because he believed that her involvement had been verified by Mr Oldroyd and Mr Jung. He did not further interview Mr Steenbakkers.

186. Mr Reedman was provided with a very limited number of documents by Mr Pearcy and Mr Jung, to which he referred in his witness statement. He also reviewed the Rules of Engagement, the order form for the Intersnack deal, the Intersnack RFP, and the terms and conditions governing commission and bonus plans, services and support. In cross examination a number of documents relevant to the proceedings were highlighted to Mr Reedman, which he had not seen.

187. Mr Reedman did seek some information and documentation from others (3403).

188. The grievance outcome was provided in a letter from Mr Reedman to the claimant dated 1 May 2018 (489). The decision letter recorded that Mr Reedman did not uphold the claimant's allegation that his involvement commenced at Pre-RFP

stage. It was clear from Mr Reedman's evidence that he considered the RFP stage to encompass the whole process for submitting the RFP, rather than meaning the actual submission of the RFP itself. That is, he agreed that the claimant had been introduced to working on the deal on 10 May before the RFP was submitted, but did not consider that meant that the claimant had worked pre-RFP stage. The claimant read the grievance decision in a different way and challenged the conclusion on appeal on the basis that he had been involved in the deal prior to the submission of the RFP.

189. In terms of the split, Mr Reedman was very clear in his answers to questions in highlighting that he considered the claimant's contention as being that he should have received 100% of the Account Executive commission on the deal. As a result, when he concluded that the claimant had not undertaken 100% of the account executive work on the deal (having only become involved shortly before submission of the RFP many months after the start of the process), he did not uphold the grievance on that point.

190. The Tribunal did not find Mr Reedman's grievance investigation to have been at all thorough, nor did it consider that the decision reached genuinely addressed all of the claimant's concerns. Mr Reedman appeared to have made little effort to look at the claimant's concerns about Mrs Harb's allocation of commission on the deal. His conclusions in the decision letter (490) particularly demonstrate the absence of any in-depth consideration, referring to Mr and Mrs Harb's heightened involvement in work on the deal in December 2017 when the claimant had flown home, being something which had no impact whatsoever on Mr Oldroyd's decision, occurring, as it did, after his decision had been made. In any event, the impact of the claimant's flight to the UK had been limited. The decision reached on the split in the grievance did not demonstrate a genuine attempt to address the claimant's grievance or to get to the bottom of the issues he had raised regarding the commission split including, in particular: the size of the allocation to Mrs Harb; or the difference between the split which Mr Jung had said he was trying to position in September 2017 and the split he proposed and which was actually made.

Grievance appeal

191. The claimant appealed against the outcome of the grievance on 9 May 2018 (501 and 502). That appeal was contended to be the fifth alleged protected disclosure. The grievance appeal document contained a number of sub-points, but the main grounds of appeal were stated to be: "*1. In reaching his decision, Mr Reedman has (a) failed to address the evidence I submitted to the Investigation and (b) failed to support his findings with evidence*"; "*2. In his response, Mr Reedman insinuates that my absence on bereavement leave in December 2017 occasioned other account managers and directors stepping up their own efforts to make up for mine*"; "*3. The outcome letter omits completely my question concerning the payment period. My position is that a full and single payment should have been made to me in April payroll. This has not happened nor has there been any explanation for this, despite this point having taken up a significant period of time during the grievance meeting*"; and "*4. In conducting the grievance process, Mr Reedman has failed to adhere to the Company's own grievance procedure*". The grievance appeal email focussed on the errors and omissions which the claimant perceived there to be in Mr Reedman's grievance investigation and decision.

192. Mr Young was appointed to hear the grievance appeal. The claimant accepted that Mr Young was independent.

193. The grievance appeal meeting took place on 21 May. It was conducted by Mr Young. Mr Steenbakkers accompanied the claimant. Ms Burford attended as the HR representative. Ms Snape took notes. The typed notes were provided, including the claimant's tracked changes (534).

194. In the grievance appeal meeting the claimant gave an account of his view at that time of Mrs Harb's involvement in the deal (538). He acknowledged that Mrs Harb did respond to an email on 13 December 2017 and did send five emails in December, which he described as her first contribution to the deal.

195. The notes record what the claimant said about PLM in the grievance appeal (incorporating his own amendments to the notes) (541) was:

> "*That agreement was for ERP products only and what they have done is add Product Lifecycle Management (PLM) components into the Nordics 25%. This is incorrect. Intersnack originally wanted to continue with Oracles PLM and SAPs planning tools. They had rolled PLM out to 7 of their 11 divisions, we increased the sales value that was why any edge products not allocated to Nordics only ERP products, so technically when Deal Desk created the Order Form in CRM they rolled it up easier and the PLM modules became part of the cloud suite Food & Beverage ERP solution, internally they rolled the revenue into the ERP and they are therefore getting 25% of the PLM products which was not in the agreement with the Nordics"*

196. Interviews were conducted as part of the grievance appeal process with Mr Oldroyd and Mr Pearcy on 21 May, Mr East on 24 May, and Ms Rodarmel on 29 May. Mr Hannay provided an email. The summary notes of all the interviews were provided (508), as was Mr Hannay's email (532). Mr East denied that what was recorded as having been said by him was an accurate reflection of the conversation which had taken place. Certain documents and emails were also provided to Mr Young, both by the claimant and by others.

197. The claimant and Mr Young exchanged emails about the grievance appeal on 30 and 31 May (571). Mr Young emphasised in his evidence that he understood that he had ten days in which to provide a grievance appeal decision, something which had been emphasised to him by the claimant. Mr Young did not seek an agreement to an extension of time, but he did emphasise that how the investigation was conducted was, in part, dictated by the time constraints.

198. A draft of the appeal decision letter was sent by email by Ms Burford to Mr Young on 31 May. That included an element in red. Regarding the classification of the deal the draft said (561):

> *"Following further investigation, I have to question why this change was made so late in the deal and I have no real evidence as to why this reclassification was made. Due to the lack of evidence and reasoning behind the reclassification I an upholding your appeal and I am recommending that your*

commission is calculated on a 'Perpetual to SaaS basis and the correct multiplier of 3 is used for this calculation."

199. Mr Young's evidence was that he worked closely with Ms Burford in conducting the grievance appeal and they spoke on a number of occasions. He described how he was not a wordsmith, and he relied upon Ms Burford to assist him in drafting documents and recording what he determined. Mr Young's evidence was that the draft letter contained what he thought at the time, but he had not at that point concluded his investigation and consideration of the grievance appeal.

200. Following preparation of the draft outcome letter, Mr Young spoke to Ms Bellavia on 4 June 2018. There were no notes provided which recorded that conversation, but Mr Young explained what was said in his witness statement. Ms Bellavia explained to Mr Young that Ms Romardel was given a SPIFF payment and not a commission payment and explained that the deal had not been classified as net new.

201. As a result, Mr Young reached an alternative outcome to the grievance appeal and did not uphold that element of the claimant's grievance appeal. The claimant was never made aware of Mr Young's conversation with Ms Bellavia, nor was he told that had been said. That is, the person considering the grievance appeal spoke to the original decision-maker about something which was the subject of the grievance about the decision at the very end of the process, and did not tell the claimant, but instead changed his decision to accord with that of the original decision-maker. The claimant was not told that this had occurred in the grievance appeal decision letter.

202. The grievance appeal outcome was provided in a letter from Mr Young of 5 June 2018 (576). The letter was relatively brief, did not address all of the issues raised by the claimant as part of his grievance appeal, and omitted some things which Mr Young explained in evidence he had determined (such as his conclusion on the PLM issue). The letter contained no genuine explanation whatsoever which demonstrated consideration of the issues raised by the claimant and, on the split issue, showed no attempt to engage with or consider the issues the claimant had raised,

203. Mr Young in his evidence emphasised how the split process was about the splits being agreed by the management team and, in this case, the splits were agreed with the management team by Mr Oldroyd after his determination based upon what the management team had submitted to him. The letter said in respect of the split, *"I am satisfied that the splits had already been decided at the time the deal was signed and what percentage would be allocated to you should the deal close. There is also email evidence to show this was 70/30 and when the deal was changed to 50/50 by the DACH team you asked for the deal split to be changed back to the 'agreed' 70/30 split; this therefore confirms that you were aware of the split and had accepted that it was on a 70/30 basis."* The letter did not address Mrs Harb's split allocation, nor did it address the change in the position of Mr Jung between what he had said he was trying to position in September 2017 and the split he proposed to Mr Oldroyd, which was actually made

204. Unlike the draft, in respect to the classification of the deal the decision letter said, *"Following further investigation, I am satisfied that the determination of the deal*

to 'Net New' is correct, I have found that the clear majority of the products are new products and therefore this deal is treated as a 'Net New' not an upgrade deal. I therefore uphold the original decision of your grievance and therefore your grievance appeal has not been upheld."

205. The letter also addressed restructuring of products on deal, albeit that the outcome was difficult to understand. The requirement for revenue recognition before payment of commission was addressed in one line, but the letter did not in any way explain the issue or explain in a clear way why the claimant had not received the commission which he believed to be due.

206. Mr Young's evidence was that he did not see the claimant's emails to Mr Jung of 9 October and 10 November 2017 or his email to Mr East of 27 December 2017, prior to preparing his witness statement for the Tribunal hearing (that is he did not see them during the grievance appeal process and prior to reaching his decision).

207. The claimant's evidence was that it appeared to him from the sheer briefness of the letter that little or no effort had been put into addressing the concerns he had raised.

208. It was put to Mr Young that his decision was simply a rubber-stamping exercise. He disagreed with that and emphasised his investigation. He also emphasised his knowledge and experience based upon his role and his experience of other roles with the respondent. Whilst he emphasised the time constraints when answering questions, he also said the he would not have done a huge amount differently had he had more time. He explained that he treated the appeal as an audit process, drawing from his audit background.

The meeting with Mr Niesler

209. On 1 June 2018 the claimant travelled to London to meet with his new manager, Mr Niesler (who had replaced Mr Hannay as General Manager – Western Europe, starting in June 2018). The claimant's evidence was that he thought he was attending a meeting to put forward his business plan for the new fiscal year. What occurred was a very brief meeting in which Mr Niesler first pressed the claimant as to whether he was committed to the business regardless of the outcome of the grievance, and referred to the grievance having an impact on the claimant's view of the respondent. He then abruptly ended the meeting saying, "*I want to know whether you are committed to the business*" and "*I know 15 sales guys I could bring into this business tomorro*w". The claimant's evidence was that he took what was said as a threat that he could be replaced because of what he had done. The Tribunal was shown a draft text message which the claimant had prepared on 2 June in response to the meeting, but which he had never sent. The Tribunal did not hear any evidence from Mr Niesler and the Tribunal entirely accepts the claimant's account of what occurred in the meeting as being factually correct.

210. The claimant's evidence was that he spoke to Mr East about what had happened at the meeting. He said he did so because Mr East was his line manager. The claimant's evidence was that Mr East told him that he did not think the end of the grievance appeal would be the end of the road. Mr East had no recollection of any conversation with the claimant about his meeting with Mr Niesler.

Mr East's email re PIP

211. On 11 June 2018 Mr East sent the claimant an email which he had intended to send to Mr Niesler (1539). It said:

> "*As I only have 2>1.5 year sales reps in my team and Michael Prigmore is locked in a legal dispute can I serve on him a similar PIP. Please confirm"*

212. PIP referred to a performance improvement plan. The claimant had been recorded as one of the best sales people worldwide by the respondent in the previous fiscal year, the Intersnack deal being the fourth largest deal the respondent had ever entered into. The claimant's evidence was that he understood that a PIP was where someone was given three months to remedy their lack of performance or they would be out. The claimant thought that him being considered for a PIP was unfair. It was a particular concern to the claimant in the context of him having met with Mr Niesler as described.

213. Mr East's evidence was that he was not at any time intending to place the claimant on a PIP of his own free will. The email was sent to the claimant in error. In his evidence during the hearing Mr East explained that the email was drafted in the context of his own dispute with Mr Niesler, Mr East having been put on a PIP by Mr Niesler, although Mr East was keen to emphasise to the Tribunal that there were mitigating circumstances for what had occurred. Mr East's evidence was that Mr Niesler had told him to put all of his team on a PIP within weeks of him starting – the instruction included both the claimant and Mr Sutton (someone who appeared to be generally regarded as a high performing sales person). Mr East's evidence was that he refused to do so. The claimant was not placed on a PIP. Mr East resigned from the respondent at the end of June 2018 and left on 23 July 2018 after a period of garden leave.

The claimant's resignation

214. On 15 June 2018 at 13.01 the claimant emailed Mr East his resignation from his employment with the respondent (578). In the resignation letter he said:

> "*I feel that Infor have treated me very unfairly and unethically…Instead of the correct and timely commission payments and recognition for this achievement, I have been met with what I can only describe as a witch hunt that has seen myself, the sales lead and the solution architect for the Intersnack deal being met with appalling treatment and our reputations being tarnished for simply asking to be paid what we have earned and are owed by Infor pursuant to its contractual commission scheme. This behaviour is in stark contrast to the gratuitous reallocation of a substantial tranche of my bonus entitlement to the wife of the Sales Director for the DACH region, when everybody acknowledges that she contributed no effort throughout the sales cycle. The conduct of Infor by its directors and senior managers have breached both the express terms of my contractual remuneration package and also the implied terms of trust and confidence"*

215. The resignation email went on to list as (a)-(d) what the claimant summarised as the breaches to the remuneration terms. They were described in more detail, but

were in summary (and using the claimant's terminology): changing the commission splits from 100% to 70:30; offering to change the payment terms with the customer; wrongly reclassifying the deal as new customer; and (what was described as "*unjustly*") relying upon provisioning as a reason to delay payment. The letter then described additional eight things which were stated to be a breach of the implied term of trust and confidence. The first was the reasons listed (a)-(d). The other seven were, in summary (and using the claimant's terminology): allotting a share of commission to Mrs Harb; detrimental treatment by the German team; suggesting underperformance; requiring the claimant to travel to London for a one to one with Mr Niesler and then cancelling the meeting at its start for the reason that the claimant had pursued a grievance and appeal; Mr East requesting permission from Mr Niesler to commence a performance improvement plan (described as the final straw); engaging in conduct to penalise the claimant for having raised legitimate concerns; and treating the German/DACH team more favourably without justification.

216. This was the sixth alleged protected disclosure relied upon. Mr East could not remember seeing the letter and explained in evidence that he might not have received it as he didn't see himself as being part of the process going forward.

217. During cross-examination the claimant explained his resignation with particular reference to the fact that he felt that every time he raised his issues with the commission payments he felt that the respondent came back with something different and, after the grievance appeal, he had nowhere else to go. He also referred to the meeting with Mr Niesler and the reference to the PIP in the email from Mr East, which he felt demonstrated that the only thing left for him was to resign. The claimant said, during re-examination, that he decided to resign on 15 June.

218. On 15 June 2018, after his resignation from his employment with the respondent, the claimant accepted a job with Kinaxis. In an exchange of emails with Kinaxis the claimant stated, "*Thanks again for all your patience as I worked on getting commissions paid*" (3043).

Matters post resignation

219. On 28 June 2018 solicitors instructed on behalf of the claimant wrote to the respondent (2187). Only one protected disclosure was referred to, which was the claimant's email to Mr East of 27 December 2017.

220. On 10 July 2018 Mr Pearcy emailed a number of senior managers to confirm that, as the provisioning team had provisioned the majority of the Intersnack products, the decision had been made that the respondent could begin to recognise revenue (3329).

221. The Tribunal heard evidence from Mr Pearcy and others about the requirements for provisioning before revenue could be recognised on a cloud service deal. Commission was not paid until after the revenue was recognised. When he was cross-examined about this, the claimant accepted that section 2.13 of the commission plan terms and conditions (308) said the payment must be recognised in accordance with the revenue recognition procedures for payment to be due. Mr Pearcy in his evidence drew a distinction between cash and revenue and explained why the revenue on a transaction such as this was not recognised until some time

after cash had been received. He explained that whilst the customer had access only to a sandbox environment, that was not sufficient for the payment to be recognised, the customer had to have access to an actual working system. He emphasised that the terms and conditions made clear that the revenue needed to be recognised for payment of commission to be due and explained that the provisioning date was when revenue was recognised. Mr Pearcy in his supplemental statement also made reference to the relevant accounting rules and requirements which he said obligated the respondent to only recognise revenue on a perpetual to SaaS cloud based sale once the client had genuine use of a live system rather than simply having commenced using a trial or sandbox environment. When cross-examined about the documents upon which the respondent relied in relation to revenue recognition and provisioning, the claimant's response was that he had no idea about the details of the document as he was not an accountant. He described it as all being gobbledygook to him.

222. On 10 July 2018 a commission statement on the deal was prepared for, and sent to, the claimant (2979). In a column headed "cash received" it recorded that a little over £3.8 million had been received (2980). The claimant's evidence was that he believed this was the cash received by the respondent once exchange rates were taken into account. Mr Pearcy's evidence was that this was not what it recorded at all. His evidence was that the heading used did not describe what was entered in the column and the figure was one which was amended in order to ensure that the right amount of commission was paid to the claimant once the weighting factors were applied. The Tribunal entirely understood the claimant's confusion about what was recorded, taking account of the entirely misleading heading, but accepted Mr Pearcy's evidence that the amount recorded was not the amount which had been received.

223. The claimant's employment with the respondent terminated on 15 July 2018. He commenced employment with Kinaxis without any gap following the end of his employment with the respondent.

224. On 31 July 2018 the claimant was paid commission on the Intersnack deal of £200,698.47. He contends that he should have been paid £863,483. Mr Oldroyd's unchallenged evidence was that had the claimant remained employed he would have received additional commission payments totalling £191,865.63 (and therefore his total commission on the Intersnack deal would have been £392,564.10).

225. The Tribunal was shown a breakdown of all the commission payments payable as result of the Intersnack deal (1334). Whilst the amounts of the payments are not relevant to the Tribunal's decision and do not need to be re-produced in this Judgment, significant commission payments were recorded for: Mr and Mrs Harb; Mr Jung; Mr East; and Mr Hannay. Mr East's evidence was that, because he resigned, he never actually received any commission as a result of the Intersnack deal.

226. The claimant objected to both the date when he was provided with his commission statement and the date when payment of his commission was made. The people who the claimant said in evidence were paid in relation to the Intersnack deal earlier than he was, were Ms Rodarmel and Mr Steenbakkers. Both were paid bonus payments outside the commission scheme, albeit paid as a result of their work on the Intersnack deal. In answer to a question the claimant said that he did not

know who specifically had made the decision to delay payment, but he asserted that the payments were not made in what he described as a timely manner.

227. The respondent operated a circle of excellence for the highest performers each year. This includes a trip abroad. It was recorded in clause 2.19 of the terms and conditions (310). That stated that the participant must be employed by the respondent at the time of the trip. The claimant had resigned by the time of the trip. He was not invited. Mr Jung's evidence was that this was the reason why the claimant was not entitled to attend the trip and that he most likely would have been selected for the trip had he not resigned. Mr Jung was not challenged on this evidence.

228. In his initial particulars of claim entered on 10 September 2018, the claimant relied upon three alleged protected disclosures, the emails of: 9 October 2017; 10 November 2017; and 27 December 2017 (17). The amended particulars of claim dated 3 May 2018 (124) relied upon all the alleged protected disclosures recorded in the list of issues.

229. In the amended particulars (130), the claimant claimed the balance of £662,784.53 which he alleged remained due, "*or in the alternative such other quantifiable sum as the Employment Tribunal finds the Claimant was entitled to*"

Disclosures

230. From his answers to questions it was clear that the claimant did not understand the legal definitions of a protected disclosure and did not understand how an alleged detriment needed to result from a protected disclosure for his claim to succeed. He emphasised that he was not a lawyer and did not understand the terminology. He emphasised that his view was that the disclosures were to do with the ethics policy.

231. The claimant made clear when giving evidence that his issue was that Ms Bellavia and Ms Murphy reached their decision based upon the input of Mr Jung, he was not alleging that Ms Bellavia and Ms Murphy made their decisions because of the protected disclosures nor did he have any reason to believe that Ms Bellavia and Ms Murphy had seen any of the protected disclosures.

232. The claimant confirmed that he had not sent his protected disclosures to Mr Pearcy or Mr Oldroyd. The only person other than Mr Jung who the claimant thought was aware of his disclosures of 9 October and 10 November 2017 was Mr Hannay.

233. When asked about why the claimant believed that Mr Jung had misled Mr Oldroyd (as he asserted) the claimant explained that he didn't know, but he thought that Mr Jung wanted the German team to be seen as the centre of excellence and he wanted to ensure that the kudos of the deal attached to his team.

Categorisation of the deal

234. The way in which the deal was categorised and why is addressed in more detail below when applying the law to the facts. In terms of the categorisation, the claimant accepted in evidence that this was not something in which he was singled out. When asked about why he believed the respondent had (in his view) changed

the categorisation of the deal, he explained that he genuinely didn't know the reason why it had done that, except it had saved the company an awful lot of money.

235. Mr Pearcy's evidence was that the amount earned in commission from a perpetual to SaaS deal was often lower than from a net new deal. The deal needed to exceed 115% of the value of the licenses sold for commission to be paid at all. For the proportion of the deal for which the perpetual to SaaS licenses sold reflected the previous licenses sold, the commission was paid at one times commission rate. It was only for the higher portion when the amount paid was three times commission. His evidence was that the intention of doing so was to offset the lower commission rate for the initial element. He placed emphasis on compensation of the footprint and how that had been increased, rather than on the value of the deal as a whole. Mr Pearcy's evidence was that he was unable to value how this would have applied to the Instersnack deal because it depended upon the proportion of the licenses used by Estrella, which was not defined and therefore could not be determined. The claimant disputed this explanation, he contended that the three times commission was to incentivise sale of perpetual to SaaS as that fitted with the business needs of the respondent and would be reflected in the respondent's market value.

236. Mr Steenbakkers' evidence was that a deal was always categorised at the start of the deal. Mr Pearcy's evidence was that this was not true and, whilst CRM may record a categorisation of the deal, the decision regarding categorisation would be made by his team based upon the facts after the deal had concluded (or around that time) and, on occasion, that would involve a change in the categorisation which had been in place. Mr Steenbakker's evidence was that the Instersnack deal had always been a perpetual to SaaS deal.

237. Mr East's evidence, in his witness statement, was that it had always been a net new deal, but, when he was shown documents which appeared to record otherwise during the hearing, he emphasised why he believed it should have been a net new deal rather than confirming that it had in fact always been recorded in that way. Indeed, he explained that he had spoken to Mrs Rodarmel on a number of occasions about the classification (and the classification of such deals more generally) because it was not being shown in the CRM system as an upgrade to SaaS deal.

What counted as ERP

238. One issue in dispute was the sale of Product Lifecycle Management Products (PLM) as part of the Intersnack deal. In calculating commission, the respondent included this within the elements of the deal for which commission was paid to Mr Eiesland. The claimant was accordingly paid less commission than he would have been, because of Mr Eiesland's commission split. The claimant's evidence was that what was sold was a stand-alone product and commission should not have been paid to Mr Eiesland (and a greater proportion of the commission should have been paid to the claimant). The respondent categorised the PLM as part of the CloudSuite Food & Beverage package, and included it within M3 for the calculation of commission. M3 is a type of ERP product sold by the respondent. ERP are Enterprise Resource Planning Products.

239. There was no dispute that if PLM was correctly categorised then commission was payable to Mr Eiesland, and if it was not then commission was not payable to him (and a greater amount of commission would have been payable to the claimant). The dispute was about how it should have been categorised.

240. The Tribunal was provided with the contract entered into between the respondent and Intersnack as part of the confidential bundle. That included a table that recorded Infor PLM Optiva as part of the CloudSuite Food & Beverage application (confidential 244). Product training on Infor PLM Optiva was recorded separately in the contract.

241. Mr Pearcy, in his evidence, drew an analogy with a multi pack of crisps. Mr Pearcy's evidence was that the CloudSuite Food & Beverage package was the equivalent of the respondent selling a multi pack, with PLM being one of the packets sold within and as part of the multi pack. Mr Pearcy's evidence was that CloudSuite Food & Beverage was a packaged product which included a suite of different products within one wrapper. CloudSuite Food & Beverage was classed as an M3 product but it could include other products within the wrapper such as PLM. His evidence was that Intersnack purchased PLM as part of the CloudSuite Food & Beverage product/wrapper. The claimant's evidence was that PLM was sold separately and not as part of the multi pack.

The Law

Unfair dismissal (constructive dismissal)

242. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. An unfair dismissal claim can be pursued only if the employee has been dismissed as defined by Section 95. Section 95(1)(c) provides that an employee is dismissed by his employer if:

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

243. The principles behind such a constructive dismissal were set out by the Court of Appeal in **Western Excavating (ECC) Limited v Sharp [1978] ICR 221**. The statutory language incorporates the law of contract, which means that the employee is entitled to treat himself as constructively dismissed only if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.

244. Lord Denning said in that case (at 226B):

> "*the conduct must … be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded to have elected to affirm the contract.*"

245. One term of the contract upon which the claimant relied in this case was the implied term of trust and confidence. In **Malik and Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606** the House of Lords considered the scope of that implied term and the Court approved a formulation which imposed an obligation that the employer shall not:

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

246. It is also apparent from the decision of the House of Lords that the test is an objective one in which the subjective perception of the employee can be relevant but is not determinative. Lord Nicholls put the matter this way:

> *"The conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. That requires one to look at all the circumstances."*

247. The objective test also means that the intention or motive of the employer is not determinative. An employer with good intentions can still commit a repudiatory breach of contract.

248. Not every action by an employer which can properly give rise to complaint by an employee amounts to a breach of trust and confidence. The formulation approved in **Malik** recognises that the conduct must be likely to destroy or seriously damage the relationship of confidence and trust. In **Frenkel Topping Limited v King UKEAT/0106/15** the EAT put the matter this way:

> *"12. We would emphasise that this is a demanding test. It has been held (see, for instance, the case of **BG plc v O'Brien [2001] IRLR 496** at paragraph 27) that simply acting in an unreasonable manner is not sufficient. The word qualifying "damage" is "seriously". This is a word of significant emphasis. The purpose of such a term was identified by Lord Steyn in **Malik v BCCI [1997] UKHL 23** as being:*
>
> > *"… apt to cover the great diversity of situations in which a balance has to be struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited."*
>
> *13. Those last four words are again strong words. Too often we see in this Tribunal a failure to recognise the stringency of the test. The finding of such a breach is inevitably a finding of a breach which is repudiatory: see the analysis of the Appeal Tribunal, presided over by Cox J in **Morrow v Safeway Stores [2002] IRLR 9**.*
>
> *14. The test of what is repudiatory in contract has been expressed in different words at different times. They are, however, to the same effect. In **Woods v W M Car Services (Peterborough) Ltd [1981]***

> ***IRLR 347*** *it was "conduct with which an employee could not be expected to put up". In the more modern formulation, adopted in* ***Tullett Prebon plc v BGC Brokers LP & Ors [2011] IRLR 420****, is that the employer (in that case, but the same applies to an employee) must demonstrate objectively by its behaviour that it is abandoning and altogether refusing to perform the contract. These again are words which indicate the strength of the term."*

249. The claimant's counsel in his submissions emphasised that interference with pay is (or at least can be) a fundamental breach going to the root of the contract, relying upon what was said by Judge LJ in **Cantor Fitzgerald International v Callaghan [1999] IRLR 234**:

> "*In reality, it is difficult to exaggerate the crucial importance of pay in any contract of employment. In simple terms the employee offers his skills and effort in exchange for his pay: that is the understanding at the heart of the contractual arrangement between him and his employer"*

250. An area of dispute between the parties arose from the test to be applied when considering an exercise of discretion by the respondent and applying that to the claimant's constructive dismissal claim.

251. The respondent's counsel in her submissions contended that, in order to determine whether the conduct about which the claimant made complaint amounted to a breach of the implied term of trust and confidence, the Tribunal needed to consider whether there was reasonable and proper cause for the conduct, and, if not, whether viewed objectively the conduct was calculated or likely to destroy or seriously damage trust and confidence. She contended that the burden rested on the claimant to establish that the respondent acted without reasonable and proper cause, relying upon **RDF Media Group Plc v Clements [2008] IRLR 207**. She submitted that the fact that an employee may himself believe that trust and confidence has been undermined was irrelevant. The question was whether the respondent acted without reasonable and proper cause. Her submission was that it was only if that question was answered in the affirmative, that the Tribunal was required to go on to consider whether or not the respondent's conduct was calculated or likely to destroy or seriously damage trust and confidence (considering the circumstances objectively from the perspective of a reasonable person in the claimant's position, for which **Tullett Prebon plc v BGC Brokers LP [2011] IRLR 420** was cited as authority).

252. This submission was further developed with reference to: **Clark v Nomura International Plc [2000] IRLR**; **White v Reflecting Road studs Ltd [1991] ICR 733**; and **IBM United Kingdom Holdings Ltd v Dalgleish [2018] ICR 1681**. The respondent's counsel accepted that the implied term of trust and confidence may be breached in the event that an employer exercised a discretion in a way that was irrational, arbitrary, capricious or perverse. However, she considered that this was a high hurdle when applied to the exercise of discretion, the correct test (in her submission) being **Wednesbury** reasonableness or if the Tribunal found that no reasonable employer could have exercised its discretion in such a way. In **IBM** Sir Timothy Lloyd said the following:

> *"in cases which do involve the exercise of an employer's discretionary powers, whether express (as in many of the bonus cases, and in **Braganza v BP Shipping Ltd [2015] ICR 449**) or implied, then, in our judgment, the effect of the recent case law is that, in order to decide whether the employer's act is or is not in breach of the implied duty, a rationality approach equivalent to the **Wednesbury** test (including both its limbs) should be adopted, taking into account the employment context of the given case. Such an approach is required because the court does not and must not substitute its own decision for that of the decision-maker, in these cases the employer."*

253. She also contended that the burden of proof (at least initially) was on the employee, relying upon **IBM**.

254. In his submissions on constructive dismissal the claimant's counsel relied upon **Goold WA (Pearmark) Ltd v McConnell [1995] IRLR 516** as authority for the contention that where the grievance was not addressed in a proper manner and/or there were no reasonable grounds for rejecting the grievance that could amount to a breach of the duty of trust and confidence. In the reply, he relied upon **Blackburn v Aldi Stores [2013] IRLR 846** as authority for the fact that a failure to properly conduct a grievance appeal may amount to a breach of trust and confidence (albeit it is not clear why this was relied upon in the reply but not the original submission). In **Goold WA (Pearmark) Ltd** the EAT held:

> *"It is clear therefore, that Parliament considered that good industrial relations requires employers to provide their employees with a method of dealing with grievances in a proper and timeous fashion. This is also consistent, of course, with the codes of practice. That being so, the industrial tribunal was entitled, in our judgment, to conclude that there was an implied term in the contract of employment that the employers would reasonably and promptly afford a reasonable opportunity to their employees to obtain redress of any grievance they may have. It was in our judgment rightly conceded at the industrial tribunal that such could be a breach of contract. Further, it seems to* us *that the right to obtain redress against a grievance is fundamental for very obvious reasons."*

255. In **Blackburn** the EAT said:

> *"The implied term of trust and confidence is an implied term of the contract whereby an employer must not (***Malik v BCCI***, per Steyn LJ) "[. . .] without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence between employer and employee". In our judgment failure to adhere to a grievance procedure is capable of amounting to or contributing to such a breach. Whether in any particular case it does so is a matter for the tribunal to assess. Breaches of grievance procedures come in all shapes and sizes. On the one hand, it is not uncommon for grievance procedures to lay down quite short timetables. The fact that such a timetable is not met will not necessarily contribute to, still less amount to, a breach of the term of trust and confidence. On the other hand, there may be a wholesale failure to respond to a grievance. It is not difficult to see that such a breach may amount to or*

> *contribute to a breach of the implied term of trust and confidence. Where such an allegation is made, the tribunal's task is to assess what occurred against the* **Malik** *test. The right to an appeal in respect of a grievance is important both as a feature of the Respondent's own grievance procedure and of the ACAS Code of Practice. It is a significant right in the employment context. It is not easy to see why an organisation the size of the Respondent should have been unable to make provision for an impartial hearing by a manager not previously involved.*

256. In his written reply, the claimant's counsel contended that the Respondent's Counsel's submission that the burden is on the Claimant to prove that the respondent acted 'without reasonable and proper cause' was inconsistent with cases such as **Hilton v Shiner Ltd [2001] IRLR 727**. No passage in that Judgment was highlighted. That is a case in which it was held by the EAT that:

> "*Thus, in order to determine whether there has been a breach of the implied term, two matters have to be determined. The first is whether, ignoring their cause, there have been acts which are likely on the face of them seriously to damage or destroy the relationship of trust and confidence between employer and employee. The second is, whether that act has no reasonable and proper cause. There is an element of artificiality which must be recognised in dividing the test in this way, because it may be that the act is seen by the employee and employer as so bound up with legitimate reasons for doing it that it is unlikely to damage the relationship of trust and confidence between them, or that, conversely, it is certain to do so. It is not, therefore, a test to be applied to any set of facts by rote. Nonetheless, in circumstances such as the present, it is helpful"*

257. The claimant's position in his written reply was that, whilst it is accepted that the burden was on the Claimant to prove constructive dismissal, the 'reasonable and proper cause' relied on by the employer will normally not be within the claimant's knowledge and therefore the burden cannot, he submitted, in a normal case be on the claimant. He contended that the observations in the **RDF Media Group** case were fact specific. He drew a distinction between the **IBM** case and this one. He contended that: none of the respondent's authorities removed the point that where there was an express discretion term it must still be exercised in a manner which does not breach the duty of trust and confidence (relying upon **Commerzbank Ltd v Keen [2007] IRLR 132**); it was clear that **Western Excavating v Sharp** applied to implied terms of the contract as well as express ones; and that the respondent nonetheless contended in each of the alleged components to the breach of the duty of trust and confidence that the respondent acted without reasonable and proper cause.

258. If an individual delays to long in resigning, they will have affirmed the contract and waived the breach. In **W. E. Cox Toner (International) Ltd v Crook [1981] ICR 823** Browne-Wilkinson LJ in his Judgment emphasised that continued performance of the employment contract is evidence of affirmation. He summarised the position by saying:

> *"there must be some limit to the length of time during which an employee can continue to be employed and receive his salary at the same time as keeping open his right to say that the employer has repudiated the contract under which he is being paid"*

Last straw

259. In some cases, the breach of trust and confidence may be established by a succession of events culminating in a "last straw" which triggers the resignation. In such cases the decision of the Court of Appeal in **London Borough of Waltham Forest v Omilaju [2005] ICR 481** demonstrates that the last straw itself need not be a repudiatory breach as long as it adds something to what has gone before, so that when viewed cumulatively a repudiatory breach of contract is established. However, the last straw cannot be an entirely innocuous act or be something which is utterly trivial. Dyson LJ said the following:

> *"The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase 'an act in a series' in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.*
>
> *I see no need to characterise the final straw as 'unreasonable' or 'blameworthy' conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred.*
>
> *If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. …. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle*
>
> *Moreover, an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly,*

> *interprets the act as hurtful and destructive of his trust and confidence in his employer. The test of whether the employee's trust and confidence has been undermined is objective"*

The approach to a constructive dismissal claim

260. Both parties emphasised **Kaur v Leeds Teaching Hospitals NHS Trust [2019] ICR 1**. In **Kaur** Underhill LJ said:

> *"In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:*
>
> *(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?*
>
> *(2) Has he or she affirmed the contract since that act?*
>
> *(3) If not, was that act (or omission) by itself a repudiatory breach of contract?*
>
> *(4) If not, was it nevertheless a part (applying the approach explained in **Omilaju**) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the **Malik** term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reasons given…)*
>
> (5) *Did the employee resign in response (or partly in response) to that breach?"*

261. In **Williams v The Governing Body of Alderman Davies Church in Wales Primary School UKEAT/0108/19** Auerbach HHJ said:

> *"If there has been conduct which crosses the **Malik** threshold, followed by affirmation, but there is then further conduct which does not, by itself, cross that threshold, but would be capable of contributing to a breach of the **Malik** term, can the employee treat that conduct, taken with earlier conduct as terminating the contract of employment? That question appeared to have received different answers from the EAT, but was tackled head on by the Court of Appeal in **Kaur**. Their decision confirms that the answer is "yes"".*

262. The Tribunal is also required to have regard to the ACAS code of practice on disciplinary and grievance procedures.

263. Regarding alternative employment, in his submission the claimant's counsel relied upon **Wright v North Ayrshire Council [2014] IRLR 4.** That is clear authority for the fact that the Tribunal should not try and choose between causes for a resignation to identify which was the predominant one. The breach relied upon does not have to be the sole cause of a resignation. Where there is a combination of

causes (such as in this case new employment and alleged breaches) the question is whether one effective cause of the resignation is the breach.

Public interest disclosures

264. Section 43A of the Employment Rights Act says:

> "*In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.*"

265. Section 43B says (as relevant to this claim):

> *"(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following –*
>
> *(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*
>
> *(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,*
>
> *(f) that information tending to show any matter falling within one of the preceding paragraphs has been, or is likely to be deliberately concealed"*

266. Section 43C provides that a disclosure to a worker's employer is a qualifying disclosure.

267. Section 48(2) provides that for a detriment claim it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

268. The word "*likely*" in section 43B requires more than a possibility or a risk that a person might fail to comply with a legal obligation etc, the information had to show that it was probable or more probable than not, that there would be a breach (**Kraus v Penna PLC [2004] IRLR 260**).

269. The necessary components of a qualifying disclosure were summarised by HHJ Auerbach in **Williams v Michelle Brown AM UKEAT/0044/19/OO**:

> "*It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held. Unless all five conditions are satisfied there will not be a qualifying disclosure.*"

270. The first stage involves a consideration of whether there has been a disclosure of information. The correct approach to the disclosure of information is set

out in the decision of the Court of Appeal in **Kilraine v London Borough of Wandsworth [2018] ICR 1850**, in which Sales LJ held:

> *"I agree with the fundamental point made by Mr Milsom, that the concept of "information" as used in section 43B(1) is capable of covering statements which might also be characterised as allegations. Langstaff J made the same point in the judgment below [2016] IRLR 422, para 30, set out above, and I would respectfully endorse what he says there. Section 43B(1) should not be glossed to introduce into it a rigid dichotomy between "information" on the one hand and "allegations" on the other. Indeed, Ms Belgrave did not suggest that Langstaff J's approach was at all objectionable.*
>
> *On the other hand, although sometimes a statement which can be characterised as an allegation will also constitute "information" and amount to a qualifying disclosure within section 43B(1), not every statement involving an allegation will do so. Whether a particular allegation amounts to a qualifying disclosure under section 43B(1) will depend on whether it falls within the language used in that provision.*
>
> *In my view, Mr Milsom is not correct when he suggests that the Employment Appeal Tribunal in **Cavendish Munro** at para 24 was seeking to introduce a rigid dichotomy of the kind which he criticises. I think, in fact, that all that the appeal tribunal was seeking to say was that a statement which merely took the form, "You are not complying with health and safety requirements", would be so general and devoid of specific factual content that it could not be said to fall within the language of section 43B(1) so as to constitute a qualifying disclosure. It emphasised this by contrasting that with a statement which contained more specific factual content. That this is what the appeal tribunal was seeking to do is borne out by the fact that it itself referred to section 43F, which clearly indicates that some allegations do constitute qualifying disclosures, and by the fact that the statement "The wards have not been cleaned [etc]" could itself be an allegation if the facts were in dispute. It is unfortunate that this aspect of the appeal tribunal's reasoning at para 24 is somewhat obscured in the headnote summary of this part of its decision in [2010] IRLR 38, which can be read as indicating that a rigid distinction is to be drawn between "information" and "allegations".*
>
> *I also reject Mr Milsom's submission that the **Cavendish Munro** case is wrongly decided on this point, in relation to the solicitors' letter set out at para 6. In my view, in agreement with Langstaff J below, the statements made in that letter were devoid of any or any sufficiently specific factual content by reference to which they could be said to come within section 43B(1). I think that the appeal tribunal in **Cavendish Munro** was right so to hold.*
>
> *However, with the benefit of hindsight, I think that it can be said that para 24 in the **Cavendish Munro** case was expressed in a way which has given rise to confusion. The decision of the employment tribunal in the present case illustrates this, because the tribunal seems to have thought that **Cavendish Munro** supported the proposition that a statement was either "information" (and hence within section 43B(1)) or "an allegation" (and hence outside that provision). It accordingly went wrong in law, and Langstaff J in his judgment*

*had to correct this error. The judgment in **Cavendish Munro** also tends to lead to such confusion by speaking in paras 20-26 about "information" and "an allegation" as abstract concepts, without tying its decision more closely to the language used in section 43B(1).*

The question in each case in relation to section 43B(1) (as it stood prior to amendment in 2013) is whether a particular statement or disclosure is a "disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the [matters set out in paragraphs (a) to (f)]". Grammatically, the word "information" has to be read with the qualifying phrase, "which tends to show [etc]" (as, for example, in the present case, information which tends to show "that a person has failed or is likely to fail to comply with any legal obligation to which he is subject"). In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1). The statements in the solicitors' letter in the Cavendish Munro case did not meet that standard.

*Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a tribunal in the light of all the facts of the case. It is a question which is likely to be closely aligned with the other requirement set out in section 43B(1), namely that the worker making the disclosure should have the reasonable belief that the information he discloses does tend to show one of the listed matters. As explained by Underhill LJ in **Chesterton Global Ltd v Nurmohamed [2018] ICR 731**, para 8, this has both a subjective and an objective element. If the worker subjectively believes that the information he discloses does tend to show one of the listed matters and the statement or disclosure he makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief."*

271. In her submissions the claimant's counsel also referred to **Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325** and **Marten v London Borough of Southwark and another EA-202—000432-JOJ** on what was required to be a disclosure of information.

272. In **Twist DX v Armes UKEAT/0030/20/JOJ** Linden J concluded that it is not necessary that a disclosure of information specifies the precise legal basis of the wrongdoing asserted.

273. **Blackbay Ventures Limited v Gahir (trading as Chemistree) [2014] ICR 747** highlighted the need for each disclosure to be identified by date and content and for each alleged failure or likely failure to comply with a legal obligation to be separately identified.

274. It has long been established that it is necessary to consider whether the employee holds the belief that the disclosure tends to show one of the relevant forms of wrongdoing and whether that belief is reasonable. This involves subjective and objective elements. The test of what the claimant believed is a subjective one. Whether or not the employee's belief was reasonably held is an objective test and a

matter for the Tribunal to determine. The test is what the disclosure "tends to show" (**Babula v Waltham Forest College [2007] ICR 1026**) (the claimant relied upon this as authority for the fact that a reasonable belief is sufficient even if it is mistaken).

275. In **Chesterton Global Ltd v Nurmohamed [2018] ICR 731** Underhill LJ held that the same approach, involving both the objective and subjective elements, applies to the requirement that in the reasonable belief of the worker making the disclosure, it is made in the public interest. Underhill LJ considered the situation in which a worker discloses information that relates to his or her own contract of employment and whether that precluded the employee also holding a reasonable belief that the disclosure was made in the public interest:

> "*The statutory criterion of what is "in the public interest" does not lend itself to absolute rules, still less when the decisive question is not what is in fact in the public interest but what could reasonably be believed to be. I am not prepared to rule out the possibility that the disclosure of a breach of a worker's contract of the* ***Parkins v Sodexho*** *kind may nevertheless be in the public interest, or reasonably be so regarded, if a sufficiently large number of other employees share the same interest. I would certainly expect employment tribunals to be cautious about reaching such a conclusion, because the broad intent behind the amendment of section 43B(1) is that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers – even, as I have held, where more than one worker is involved. But I am not prepared to say never. In practice, however, the question may not often arise in that stark form. The larger the number of persons whose interests are engaged by a breach of the contract of employment, the more likely it is that there will be other features of the situation which will engage the public interest.*
>
> *Against that background, in my view the correct approach is as follows. In a whistleblower case where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B(1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker. Mr Reade's example of doctors' hours is particularly obvious, but there may be many other kinds of case where it may reasonably be thought that such a disclosure was in the public interest. The question is one to be answered by the tribunal on a consideration of all the circumstances of the particular case, but Mr Laddie's fourfold classification of relevant factors which I have reproduced at para 34 above may be a useful tool. As he says, the number of employees whose interests the matter disclosed affects may be relevant, but that is subject to the strong note of caution which I have sounded in the previous paragraph.*"

276. The four factors outlined were are as follows:

> *"(a) the numbers in the group whose interests the disclosure served;*

> *(b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;*
>
> *(c) the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;*
>
> *(d) the identity of the alleged wrongdoer – as [counsel for the employee] put it in his skeleton argument, "the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest" – though he goes on to say that this should not be taken too far.*"

277. The mental element required imposes a two stage test: (i) did the clamant have a genuine belief at the time that the disclosure was in the public interest; if so (ii) did he have reasonable grounds for so believing? In relation to motivation, in **Chesterton** Underhill LJ said:

> "*while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it: otherwise….the new sections 49 (6A) and 103 (6A) would have no role. I am inclined to think that the belief does not in fact have to form any part of the worker's motivation – the phrase "in the belief" is not the same as "motivated by the belief"; but it is hard to see that the point will arise in practice, since where a worker believes that a disclosure is in the public interest it would be odd if that did not form at least some part of their motivation in making it"*

278. **Ibrahim v HCA International Ltd [2019] EWCA Civ 2007** highlighted this passage and it was accepted that motive was not the same as belief. Bean LJ explained what should have happened in that case in the light of what had been said in **Chesterton** confirming that the Tribunal should have focussed on the claimant's subjective belief and not his motive (as it had done). He said:

> *"In the light of the judgment of this court in* **Chesterton**, *and with the benefit of hindsight, it is clear to me that the Claimant should have been asked directly by the ET whether at the time he made the disclosures … he believed he was acting in the public interest. If he had answered "yes" he could have been asked for an explanation, and it would no doubt have been put to him in cross-examination that the suggestion was no more than an afterthought. The ET would then have had to evaluate his evidence on the point and make findings about it."*

279. In its commentary on the position of the law on the light of these two cases, Harvey on Industrial Relations and Employment Law states that the necessary reasonable belief in that public interest may (in an atypical case) arise on later contemplation by the employee and need not have been present at the time of making the disclosure (though as an evidential matter, the longer any temporal gap, the more difficult it may be to show the reasonable belief).

280. The structure for determining whether there is a qualifying disclosure involves the Tribunal considering the five potential questions HHJ Auerbach identified in **Williams.** The decision of HHJ James Tayler in **Marten v London Borough of Southwark and another** highlighted the importance of following the five questions and undertaking a structured analysis of the qualifying disclosures, whilst also observing that it did not mean that in every case it is necessary to decide each question (giving the example of a case in which there was no disclosure of information so that it was not necessary to go on and determine the other questions).

281. HHJ Auerbach stated in **Williams**:

> "*Unless all five conditions are satisfied there will be not be a qualifying disclosure. In a given case any one or more of them may be in dispute, but in every case, it is a good idea for the Tribunal to work through all five. That is for two reasons. First, it will identify to the reader unambiguously which, if any, of the five conditions are accepted as having been fulfilled in the given case, and which of them are in dispute. Secondly, it may assist the Tribunal to ensure, and to demonstrate, that it has not confused or elided any of the elements, by addressing each in turn, setting out in turn out its reasoning and conclusions in relation to those which are in dispute.*"

282. Section 47B provides that a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure. Under section 48(2) it is for the employer to show the ground on which any act, or deliberate failure to act, was done (where it is asserted that it was on the ground of having made a public interest disclosure). The employer must prove on the balance of probabilities that the act, or deliberate failure, was not on the grounds that the employee had done the protected act.

283. In determining whether a claimant has suffered a detriment as a result of having made a public interest disclosure, the Tribunal must focus on whether the disclosure had a material influence, that is more than a trivial influence, on the treatment - **NHS Manchester v Fecitt [2012] IRLR 64.**

284. The correct approach is to place the burden of proof on the claimant in the first instance to show that a ground or reason (that is more than trivial) for detrimental treatment is a protected disclosure; then by virtue of 48(2) Employment Rights Act 1996 the respondent must be prepared to show why the detrimental treatment was done and if they do not do so adverse inferences may be drawn against them.

285. In her submissions, the respondent's counsel submitted that, while the threshold of establishing a qualifying disclosure may be relatively low, it was essential that causation was properly considered. In a detriment case, determining

whether a detriment is on the ground that the worker has made a protected disclosure, requires an analysis of the mental processes (conscious or unconscious) of the employer acting as it did (and she relied upon **Chatterjee v Newcastle Upon Tyne Hospitals NHS Trust [2019] 9 WLUK 556**). It is, of course, not sufficient to demonstrate that 'but for' the disclosure, the employer's act or omission would not have taken place. The protected disclosure must have materially influenced the employer's treatment of the worker. She also submitted that in order to establish causation in a detriment case, a claimant must establish that the person who subjected him to a detriment was personally motivated by the protected disclosure. She submitted that another person's knowledge and motivation cannot be imputed, for which she relied upon **Malik v Cenkos Securities Plc (UKEAT/0100/17).** In that decision at paragraph 88 of that Judgment (decided before **Jhuti**) HHJ Choudhury said:

> "*It is in any event not clear how a decision-maker, who did not have personal knowledge of the protected disclosure, could be said to have been materially influenced by it to make the decision under challenge. If a decision-maker in that position were to be fixed with liability it would have to be as a result of importing the knowledge and motivation of another to that decision-maker. However, it seems to me that such importation is not permissible in considering the reason why the decision-maker acted as he or she did*"

286. A worker is subject to a detriment if he is put at a disadvantage, as confirmed in **Jesudason v Alder Hey Children's NHS Foundation Trust [2020] IRLR 374**:

> "*It is now well established that the concept of detriment is very broad and must be judged from the view point of the worker. There is a detriment if a reasonable employee might consider the relevant treatment to constitute a detriment."*

287. For dismissal and section 103A of the Employment Rights Act 1996 the test differs to that which applies for detriment. The question is whether the principal reason for the dismissal is that the claimant made a public interest disclosure? The respondent submitted that the Tribunal must focus on the respondent's motivation and the reason why the respondent acted as it did, rather than the claimant's response (relying upon **Berriman v Delabole State Ltd [1985] ICR 546**).

288. At the very end of the respondent's submissions reference was made to **Royal Mail Group Ltd v Jhuti [2019] UKSC 55**. In the claimant's written submission document no reference whatsoever was made to the case of **Jhuti** nor was any express reliance placed upon it in the pleadings or at any time during the hearing. Nonetheless in the claimant's written reply (to the submissions), some reliance was placed on **Jhuti**. The claimant's counsel submitted that **Jhuti** applied to detriment as well as dismissal claims and, accordingly, the Tribunal was entitled to consider whether others in the 'chain of command' were materially influenced by a protected disclosure in the decisions they made. He also submitted that the burden was on the respondent to show the reason why the detrimental treatment was done and that the alleged protected disclosure played no part in that act and that for each and every alleged detriment he submitted that the claimant had raised a sufficient case for the burden to transfer to the respondent. On dismissal, he submitted that the sole issue was the principal reason for resignation and if those reasons were 'tainted' by the

protected disclosure then it would fall within the scope of Section 103A, relying upon **Jhuti**.

289. If the claimant genuinely wished to place reliance upon **Jhuti** in arguing his case, it would have been expected that the issue would have been raised in the pleadings or, at the least, in the agreed List of Issues. The absence of any reliance being placed upon it even in the claimant's original written submissions, suggests that it was not a significant part of the claimant's claim. A written reply provided following the exchange of written submissions, is not an appropriate way in which to endeavour to raise such a contentious argument into proceedings. The Tribunal has accordingly been very careful in considering this argument. In fact, as a result of the findings made and recorded below, the Tribunal has not been required to consider whether the claimant's arguments were correct. The Tribunal would observe that the Supreme Court in **Jhuti** was considering dismissal rather than constructive dismissal. The narrow and limited circumstances in which the Supreme Court considered that the employer could be attributed with the state of mind of someone other than the decision-maker, do not easily translate to a constructive dismissal claim. In any event, the Supreme Court highlighted that the cases to which **Jhuti** would apply would be unusual observing that "*Instances of decisions to dismiss taken in good faith, not just for a wrong reason but for a reason which the employee's line manager has dishonestly constructed will not be common*". Accordingly, the Tribunal has not found **Jhuti** or the arguments relating to it to be of any assistance to its determination on the facts of this case.

Unlawful deduction from wages

290. The parties strongly disagreed with each other about the law as it applies to unlawful deduction from wages claims.

291. The claim was brought as one for unlawful deductions from wages under section 23 of the Employment Rights Act 1996, relying upon the right not to suffer unauthorised deductions from wages under section 13. Section 13(1) of the Employment Rights Act 1996 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*."

292. Section 13(3) says:

> "*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 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."*

293. Section 14 of the Employment Rights Act 1996 provides that section 13 does not apply to a deduction from a worker's wage made by his employer where the purpose of any deduction is the reimbursement of the employer in respect of an overpayment of wages.

294. Under section 27(1)(a) "*wages*" includes:

> "*any fee, bonus, commission … or other emolument referable to his employment, whether payable under his contract or otherwise*".

295. In her submissions, the respondent's counsel relied upon **New Century Cleaning Co Ltd v Church [2000] IRLR 27** as authority for the fact that there must be a legal entitlement to the sum in question, whilst acknowledging that the legal entitlement did not necessarily need to come from an express term of the contract. She also relied upon **Hellewell v AXA Services (UKEAT/0084/11), [2011] ICR D29** and **Davies v Droylsden Academy (UKEAT/044/16)** on the need for a legal entitlement. A submission was made relying upon **Coors Brewers Ltd v Adcock [2007] IRLR 440** that the claimants' argument in that claim had been that the employer had acted in a manner that was capricious, arbitrary and perverse and its failure properly to implement a share incentive scheme resulted in unlawful deductions from wages, and that argument has been rejected by the Court Of Appeal. The respondent's counsel contended the argument in that case was akin to the claimant's argument in this case. She also cited Wall LJ in **Coors** when he said:

> "*Part II of ERA 1996…is essentially designed for straightforward claims where the employee can point to a quantified loss"*

296. In her submissions, the respondent's counsel also relied upon **Allsop v Christiani & Nielsen Ltd (In Administration) (UKEAT/0241/JOJ**) which she said similarly considered that the particular claim was not one for unlawful deduction from wages but it was instead a damages claim for breach of contract. She particularly relied upon paragraph 75 of the Judgment of Mrs Justice Cox where she stated the following:

> *"First, in considering whether the claims originally pleaded fell within the unlawful deductions regime, the Employment Judge rightly directed himself to the leading case of* ***Coors***. *As the court in that case made clear, [the unlawful deductions from wages] regime is designed for straightforward claims where the employee can show that he has not been paid quantified or quantifiable sums properly due to him under his contract. It cannot be used as the vehicle to advance claims for damages for breach of contract, consequent, for example, upon the non-exercise or allegedly capricious exercise of a contractual discretion."*

297. The respondent's counsel also relied upon **Kingston Upon Hull City Council v Schofield & Ors (UKEAT/0616/11/DM)**, a claim about job evaluations, and **Jandu v Crane Legal Ltd (formerly Balsara and Co Ltd) (UKEAT/0198/13/DA),** a bonus claim.

298. The respondent's counsel also, quite appropriately, acknowledged HHJ Burke QC's comments in **Lucy v British Airways (UKEAT/0033/08)** which is a Judgment

upon which the claimant's counsel relied. That was a claim for allowances which the respondent contended were not capable of being quantified. The Judgment cites at length from the key authority of **Delany v Staples [1992] 1 AC 687**. What was said at paragraphs 35 and 36 of the Judgment in **Lucy** was this (a part of the decision which is technically not the rationale for the decision, but nonetheless is still a clear statement of the law which this Tribunal should appropriately consider and follow):

> *"Employment tribunals are familiar with difficulties of quantification, such as may arise in a number of jurisdictions or contexts, including claims under Part II of the 1996 Act. When an employee who is entitled to commission, in addition to his ordinary wage or salary, claims that commission has not been paid or paid in full, he may not, until after detailed disclosure, be able to specify the amount owing; and there may be complex disputes as to the correct quantification or calculation of commission due, if any, which the tribunal may have to resolve. Such disputes are not restricted to mathematical issues; a tribunal may have to determine, for example, whether the employee played a sufficient role in the obtaining of a particular sale to qualify for commission. The same exercise may have to be carried out by a Tribunal in assessing compensation for unfair dismissal. Similar difficulties may arise in relation to unpaid bonuses and in many other ways. In such circumstances, albeit often with difficulty, the Tribunal has to quantify and does quantify the relevant sum; such claims are quantifiable albeit not necessarily brought for a quantified sum. To this extent I agree with Mr Hogarth's arguments. I can see no reason based on principle or upon the judgment in **Coors** which would prevent a tribunal from considering under Part II a commission-based employee's claim to unpaid commission, even if the employee was not able to put a figure upon the unpaid amount, at least until after disclosure. It surely cannot be the case that there is jurisdiction to hear such a claim if the employee guesses a figure and puts it into his claim form but there is no such jurisdiction if he claims "Whatever commission is found on the evidence to be owing".*
>
> *While I agree with Mr Gilroy that the number of different allowances which the Claimants might have received, had they continued to be rostered for flying duties, and the different criteria which applied as between the various allowances would or might have made the correct calculation of the present claims very difficult, I conclude that such difficulties did not, of themselves, have the effect in law that the Tribunal had no jurisdiction to hear these claims, brought as they are under Part II of the 1996 Act. If they were unquantifiable, save in terms of the loss of a chance, as was the claimed loss in **Coors,** I would of course take a different view; but they are not unquantifiable; they are merely potentially very difficult to quantify"*

299. In his submissions, the claimant's counsel emphasised that he fundamentally disagreed with the respondent's legal interpretation on this issue. In particular he relied upon a lengthy extract from Harvey on Industrial Relations and Employment Law. He also relied upon: **FC Gardner v Beresford [1978] IRLR 63** as authority that the employer should not act in an arbitrary, capricious or inequitable manner in matters of remuneration; **Clark v Nomura 2000 IRLR 763** where it was confirmed that in the context of a discretionary bonus scheme an employer will not act in an

irrational manner; **Horkulak v Cantor Fitzgerald International [2004] IRLR 942** where it is stated that a discretion in contract will be exercised genuinely and rationally and that this is the common intention of the parties; **Agarwal v Cardiff University [2019] IRLR 657**; and **Cleeve Link Ltd v Bryla [2014] IRLR 86**. In his reply, the claimant's counsel submitted that the respondent's argument that laid down a rigid distinction between those claims which should be determined exclusively in the High Court and those which fall within the jurisdiction of the Employment Tribunal is contrary to the approach taken by the Court of Appeal in **Agarwal**.

300. The extracts from Harveys included the following (at paragraph 346):

> *"At first sight the principle in the **New Century Cleaning** case – that to fall within the definition of wages there has to be some legal or other entitlement to the payment in question – would appear to exclude discretionary bonuses from ERA 1996 s27(1)(a) altogether. However, whilst it is undoubtedly the case that the principle does prevent some claims for discretionary bonuses being brought as unlawful deductions claims, it is important not to overlook ERA 1996 s 27(3). This sub-section provides that where a non-contractual bonus is actually paid to the worker, the amount of the payment is to 'be treated as wages' and 'treated as payable to him… on the day [that] … payment is made'."*

301. And after citing the outcome in **Agarwal** at paragraph 354.06:

> "*It is submitted that the Court of Appeal's reasoning in **Agarwal** is compelling and represents the correct approach if the unlawful deductions jurisdiction of the employment tribunals is not to be emasculated. As Judge Hand acknowledged in **Tyne and Wear**, this does mean that employment tribunals will be called upon, from time to time, to deal with some very technical issues of construction. However, he did not regard this as a problem, pointing out that employment tribunals are well used to dealing with complicated issues and it was unlikely that matters of contractual construction would be any more complex than some of the other matters coming before them (issues in equal pay and TUPE cases immediately spring to mind). As he explained (at [83]), the days when wages claims were restricted to 'simple points [to be] investigated in a short period of time' appear to be over"*

302. The claimant's counsel also relied upon **Farrell William & Weir v Hansen [2005] IRLR 160** as a case when a discretionary bonus was declared a wage properly payable. He contended that **Coors Brewers Ltd v Adcock** was clearly distinguishable from this case because there was a claim for an unquantifiable sum, whereas in this case he asserted that all the claims are quantifiable.

303. In his written reply, the claimant's counsel contended that both **New Century Cleaning Co Ltd v Church** and **Hellewell v AXA Services** were distinguishable on their facts (although without identifying the facts) and that **Davies v Droylsden Academy** took the matter no further. He also emphasised that **Allsop** was determined on other issues and bore no resemblance to the current case. He submitted that as a job evaluation case and based upon what was being determined,

the **Kingston Upon Hull City Council** case did not apply, particularly because the sums claimed were not ascertainable whereas (he submitted) in this case the sums were capable of quantification. He also dismissed **Jandu** as not being applicable.

Submissions

304. In this Judgment we have not endeavoured to re-produce all of the arguments put forward by both representatives, which were helpfully recorded in the submission documents prepared. The Tribunal has considered those documents in full prior to reaching its decision (as well as considering the claimant's written reply). As is essential to producing a Judgment of an appropriate length, the fact that a submission has not been expressly referred to does not mean that the submission has not been considered.

Conclusions – applying the Law to the Facts

305. The Tribunal did not consider the issues in the order proposed by the list of issues. The Tribunal first considered the claimant's protected disclosure claims.

Alleged protected disclosures

306. The first question was that recorded as issue 3.1 in the attached list of issues. Did the claimant make a protected disclosure within the meaning of section 43B of the Employment Rights Act 1996? The claimant relied upon six alleged protected disclosures and the Tribunal considered each of those in turn.

307. When considering this issue, the Tribunal considered the issues listed as 3.1 and 3.2. Issue 3.2 recorded that in the case of each alleged protected disclosure, the Claimant alleges that he had a reasonable belief that it was made in the public interest because the claimant was of the belief that the fair and transparent operation of the respondent's commission scheme and its associated Ethics Policy was a matter of public interest, particularly given the size of the respondent, its wider global business and the nature of the alleged wrongdoing (paragraph 48 of the Amended Particulars of Claim)(133). The issues also record how the claimant alleges that the requirements of section 43B are met. Without reproducing all that is said in issue 3.2, the claimant contends that he had a reasonable belief that the information disclosed by him tended to show that: the respondent acted in breach of its legal obligation to pay him a commission in accordance with the terms of its commission scheme; the respondent acted dishonestly or otherwise inappropriately maintaining a basis to unjustly reward the German sales team by splitting the Claimant's commission with the wife of the German opportunity owner (paragraph 47 of the Amended Particulars of Claim)(133); and/or the respondent had failed was failing or was likely to fail to comply with a legal obligation to: deal with his commission payment in accordance with the commission plan which he considered to be an express term of his employment contract; and/or deal with his commission payment by allocating him 100 percent of the sales commission in accordance with the agreement reached with Mr Jung which he considered had created an express contractual agreement; and/or not to breach the implied duty of trust and confidence in the employment contract and/or the implied duty not to treat employees in an arbitrary, capricious or inequitable manner in matters of remuneration.

The first alleged protected disclosure

308. In issue 3.1.1 the claimant relied upon his email to Mr Jung dated 9 October 2017 (1022) as being an alleged protected disclosure and the list of issues referred to paragraph 10 of the Amended Particulars of Claim (125). This is addressed in the findings of fact at paragraphs 116 and 117 above.

309. As part of this question the Tribunal needed to determine (applying the steps in **Williams**):

a. whether the claimant disclosed information (and what that information was) (from **Kilraine** the disclosure must have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed at d);

b. whether the claimant believed that the disclosure was in the public interest;

c. whether that belief was reasonably held;

(that is (b) and (c) are not a consideration of the claimant's motive in making the disclosure, but rather an application of the test both applying a subjective consideration about whether the claimant himself believed the disclosure was in the public interest and an objective element of whether it was);

d. whether the claimant believed that the disclosure tended to show that: there had been, was being, or was going to be, a failure to comply with a legal obligation; a miscarriage of justice had occurred, was occurring, or was going to occur; or that any matter falling within either of those descriptions had been or was likely to be deliberately concealed; and

e. whether that belief was reasonably held.

310. Applying these considerations to the email from the claimant of 9 October 2017, the claimant clearly disclosed information within the email. The information disclosed included: that Mrs Harb was now recorded on the CRM system; that Intersnack had no idea who she was; that she had not been involved in any calls or meetings in the time the claimant had been working on the deal; and that the claimant's view was that the commission split which had previously been agreed was not reflective of the work he had done on the deal (because only one account executive had been involved in the campaign in the last six months and that was the claimant).

311. The Tribunal finds that the information had sufficient factual content and specificity to show that the claimant believed that the disclosure showed that there was going to be a failure to comply with a legal obligation. The claimant's belief was that the respondent was not going to pay the claimant in full compliance with its legal obligation to pay him commission based upon his contribution to the deal.

312. Turning to whether the claimant reasonably believed that the disclosure that he was making was in the public interest, the Tribunal does not find that he did. At

the time that the claimant wrote the email, and looking in particular at the content of the information which he disclosed, the information disclosed was focussed on a personal level and was not information about what was perceived to be a systemic issue. The claimant's motive in writing the email is not the issue to be determined. However, the Tribunal does not find to be true the claimant's assertion in evidence that when he wrote this email he believed that this was an unethical diversion of funds by Mr Harb to Mrs Harb. This is not what the claimant asserted in the text of the email, in contrast to later correspondence from the claimant. As is clear from the text of the email, the claimant's belief at the time was that the contribution allocation was not fair to the claimant as Mrs Harb had not recently been involved in the deal. There was no evidence whatsoever that at that time the claimant believed that was due to an unethical diversion of funds, or that the allocation would have an impact on anyone beyond being a personal issue to the claimant. Accordingly, the Tribunal does not need to go on and decide whether the belief was reasonably held, as the Tribunal has not found that the claimant had the belief at the time.

313. The Tribunal also considered (in respect of both the first and second disclosures) whether what was said at paragraph 279 above and what is said in Harvey on Industrial Relations and Employment Law had any impact upon the decision reached, in the light of what was found in relation to the third to fifth disclosures. That is, whether the decision that the claimant reasonably believed those later disclosures to be in the public interest because of the ethical aspect of Mr and Mrs Harb's involvement in the allocation of commission to Mrs Harb, was sufficient to mean that this was an atypical case where later contemplation by the claimant might have satisfied the requirement for him to have believed disclosure was in the public interest even though it had not been his belief at the time the disclosure was made. The Tribunal's view is that, even if the Editor of Harvey's are right, it will be a rare case in which later identified information transforms a worker's prior absence of belief in the public interest of the disclosure being made, into being a belief that disclosure is in the public interest. In any event, the Tribunal found that what was most important was the information being disclosed, as that was what needed to be considered when deciding whether the claimant believed the information which he was disclosing was in the public interest. The information disclosed by the claimant in both the first and second disclosures was very personal and was person-centric rather than being information which raised a broader issue (or addressed matters which affected broader audience). The information disclosed in the later disclosures was different in that it showed a wider context and raised the spousal relationship. As result, the Tribunal found that the claimant did not believe that the disclosure of the specific information which was disclosed in the first or second alleged disclosure was in the public interest.

314. The Tribunal does find that the claimant believed that the disclosure tended to show that there was going to be a failure to comply with a legal obligation because the claimant's belief was that the respondent was not going to pay the claimant in full compliance with its legal obligation to pay him commission based upon his contribution to the deal.

315. The Tribunal does not find that the claimant believed that a miscarriage of justice had occurred, was occurring, or was going to occur, as there was no evidence whatsoever available that the claimant genuinely believed that there was any issue of what could genuinely be described as a miscarriage of justice. The

issue for the claimant was the potential commission payments and compliance with the rules which related to commission, not justice and whether there had been some miscarriage. There was also no evidence that the claimant believed at that time that any matter (falling within either of the relevant descriptions) had been or was likely to be deliberately concealed. The email addressed what was transparently evident to all about Mrs Harb's involvement in the deal, the information disclosed was not about any concealment of any matter.

316. The Tribunal also finds that the claimant's belief that the disclosure tended to show that there was going to be a failure to comply with a legal obligation of the type described, was a belief reasonably held.

317. Accordingly, the Tribunal did not find that the email of 9 October 2017 was a protected disclosure, because the claimant did not believe that the disclosure that he was making was in the public interest.

The second alleged disclosure

318. The second alleged protected disclosure relied upon (issue 3.1.2) was the claimant's email to Joerg Jung dated 10 November 2017 (1047) and the list of issues refers to paragraph 11 of the Amended Particulars of Claim (126).This is addressed in the findings of fact at 122 above. The issues to be determined are the same as those outlined for issue 3.1.1 above.

319. The content of this email has some superficial similarities to the email of 9 October 2017, but what was said and what was being responded to was somewhat different. In the email the claimant was responding to an enquiry from Mr East about whether he had provided the information sought to Mr Wdowiak. The claimant's email was explaining to Mr Jung that he had not received the email because Mrs Harb's name was on the CRM record and therefore he hadn't responded. He went on to highlight the message this sent to senior management and expressed a wish to avoid dropping the ball.

320. The email does disclose information: the email had not come to the claimant because Mrs Harb was recorded on the CRM record and that is why the claimant hadn't responded.

321. The Tribunal does not find that the claimant believed his disclosure was in the public interest, both for the reasons already given in respect of issue 3.1.1, and also because of the nature of what the claimant was providing which was focussed on administration and communication around the deal, not matters which he could have believed to be in the public interest. Even had he believed the disclosure to have been in the public interest, on the basis of the information he was disclosing that belief would not have been reasonable. For the reasons explained at paragraph 313 above, the Tribunal did not find that even with later contemplation the claimant believed that the disclosure of the specific information in 10 November email was in the public interest

322. The information disclosed in 10 November email was not information which had anything to do with the respondent's compliance with legal obligations, a miscarriage of justice, or deliberate concealment. What the information disclosed

was an issue with the CRM record and its impact on company communications. The Tribunal does not find that the claimant believed that the information disclosed in this email tended to show any of these things (and if he had, the belief would not have been reasonable – based upon the information disclosed in the email).

323. Accordingly, the Tribunal did not find that the email of 10 November 2017 was a protected disclosure as the claimant did not believe that the information disclosed within it tended to show any of the matters required by section 43B of the Employment Rights Act 1996 and, in any event, he did not believe it was made in the public interest.

The third alleged disclosure

324. The third alleged protected disclosure relied upon (issue 3.1.3) was the claimant's email to Richard East dated 27 December 2017 (1182). The list of issues refers to paragraph 13 of the Amended Particulars of Claim (126). This is addressed in the findings of fact at 152 above. The issues to be determined were the same as those outlined for issue 3.1.1 above.

325. The email, which was sent by the claimant shortly after receiving Mr Oldroyd's split determination, clearly discloses information about the campaign and how it was set up and progressed. It particularly focuses upon Mrs Harb, changes to the CRM record, and the question of why she was receiving a share of the account manager commission on the Intersnack deal.

326. Unlike the first two disclosures, the Tribunal does find that the claimant believed that this disclosure was made in the public interest. The third to last paragraph of the email highlighted the issue of the spousal relationship between Mr and Mrs Harb and explained that this needed to be looked at. The respondent operates an ethics policy and that policy was highlighted to employees including the claimant. In a company of the respondent's size and resources, issues of ethical practice clearly have a wider importance. Breaches of ethics self-evidently have a significantly wider impact than just the claimant. The claimant's evidence was that he believed that this had that wider import and the Tribunal accepts his evidence. The information he was disclosing in the email sent to his manager clearly supports the contention that he believed that the information he was providing was of broader interest.

327. The Tribunal also finds that this belief in the public interest of a disclosure about the ethical conduct of other employees of the respondent, and the allocation of commission in the context of a spousal relationship, was reasonable. The importance of ensuring that a large company complies with its ethical obligations and commitments is not purely a personal one, it is one of wider public interest.

328. The Tribunal also finds that the claimant believed that the disclosure tended to show that the respondent had, was, or was going to, fail to comply with a legal obligation. That legal obligation was, in general terms, the obligation to pay commission to the claimant in accordance with its contractual commitments. A claimant is not required to identify precisely how the legal obligation operates, what the information disclosed to Mr East contains is sufficient specificity to be capable of showing that is what the claimant raises (the claimant concluded the email by asking

how to square the injustice). The Tribunal does not find that the claimant believed that the information disclosed tended to show a miscarriage of justice or that such a miscarriage of justice or a breach of contract (or a potential or future breach) was being deliberately concealed for the same reasons given for the previous two disclosures.

329. The Tribunal finds that the claimant's belief that the disclosure tended to show that the respondent had, was, or was going to, fail to comply with a legal obligation, was also reasonably held. He believed that the respondent had not adhered to its own policies on the split of commission and in the context of the limited information provided to him and the respondent's complex commission arrangements, that was a belief reasonably held. He was challenging the payment of account executive commission to another employee who had not previously been recorded on the CRM system as being the account manager on the deal. That record had been changed by her husband at a time when she was not actively involved in the deal. Limited information had been provided to the claimant about her involvement and the basis upon which commission was being paid to her.

330. Accordingly, the Tribunal found that the email of 27 December 2017 to Mr East was a protected disclosure.

The fourth alleged disclosure

331. The fourth alleged protected disclosure relied upon (issue 3.1.4) was the claimant's email to Mr Perry raising his grievance dated 3 April 2018 (449). The list of issues referred to paragraph 23 of the Amended Particulars of Claim (128). This is addressed in the findings of fact at 178 above. The issues to be determined are the same as those outlined for issue 3.1.1 above.

332. The claimant's grievance does disclose information about how the commission on the deal has been determined and why the claimant believes that to be a breach of the respondent's legal obligations.

333. The email containing the grievance concluded by referring to the claimant's previous correspondence with various people from May 2017 to 3 April 2018. The content of the email and the information disclosed needs to be considered in the context of those previous emails and in the light of what has previously been raised. As the email refers to the claimant's previous email to Mr East and other correspondence in which the spousal relationship between Mr and Mrs Harb was raised together with the ethical implications of that relationship, the Tribunal finds that the claimant believed that his disclosure was made in the public interest (for the same reasons as are explained at paragraph 326 in respect to the third alleged disclosure, and despite the fact that this email itself does not explicitly refer to the spousal relationship or the ethics policy). The Tribunal also finds that this belief in the public interest of the disclosure in the context of an email raising a grievance in accordance with the respondent's applicable procedures, was reasonable.

334. The Tribunal also finds that the claimant believed that the disclosure tended to show that the respondent had failed to comply with a legal obligation. That legal obligation was, in general terms, the obligation to pay commission to the claimant in accordance with its contractual commitments. That is expressed in the grievance by

the claimant explaining that, in summary, he believed that the payment of the commission had been incorrectly determined, due to misinformation, and unilateral, unfair and arbitrary misapplication of the terms, without justification. The Tribunal does not find that the claimant believed that the information disclosed tended to show a miscarriage of justice or that a miscarriage or breach of contract (or potential or future breach) was being deliberately concealed for the same reasons given for the previous disclosures. The Tribunal finds that the claimant's belief that the disclosure tended to show that the respondent had failed to comply with a legal obligation, was reasonably held for the reasons explained with regard to the previous disclosure.

The fifth alleged disclosure

335. The fifth alleged protected disclosure relied upon (issue 3.1.5) was the claimant's email to Julie Burford dated 9 May 2018 (502) raising his appeal against the outcome of the grievance. The list of issues refers to paragraph 26 of the Amended Particulars of Claim (128). This is addressed in the findings of fact at paragraph 191 above. The issues to be determined are the same as those outlined for issue 3.1.1 above.

336. The grievance appeal clearly provides information about the commission arrangements and how the commission scheme has been operated and why the claimant believed that his payment was a breach of those legal obligations.

337. The claimant reasonably believed that the disclosure was in the public interest. Whilst the motive of the disclosure is clearly to challenge the outcome of the grievance and the decisions about commission which were personal to the claimant, the motive does not determine whether the claimant reasonably believed what he was disclosing to be in the public interest. As with the grievance, the claimant was contending that Mrs Harb was paid commission in circumstances in which she was not entitled to it and reference is made (502) to Mr Harb as her husband. In his evidence (which the Tribunal finds to be true) the claimant explained that as a result of his complaints over what he considered to be the unethical behaviour of Mr and Mrs Harb, he believed that he had been deliberately targeted and that Mr and Mrs Harb had diverted funds. The claimant believed the information he disclosed was in the public interest. For the same reasons as explained in respect to the third and fourth disclosures, the Tribunal also finds that it was reasonable for him so to believe, where he had a belief in potentially unethical diversion of funds in a large company with a commitment to ethical practices.

338. As with the previous disclosures, the Tribunal also finds that the claimant believed that the disclosure tended to show that the respondent had failed to comply with a legal obligation. That legal obligation was, in general terms, the obligation to pay commission to the claimant in accordance with its contractual commitments and in this appeal was also an assertion that the respondent had failed to adhere to its own grievance procedures or to undertake a fair and objective investigation. The Tribunal does not find that the claimant believed that the information disclosed tended to show a miscarriage of justice or that such a miscarriage or a breach of contract (or potential or future breach) was being deliberately concealed for the same reasons given for the previous disclosures. The Tribunal finds that the claimant's belief that the disclosure tended to show that the respondent had failed to

comply with its legal obligations was reasonable in the light of the matters explained for other disclosures and the conduct of the grievance as explained above and below.

The sixth alleged disclosure

339. The sixth alleged protected disclosure relied upon (issue 3.1.6) was the claimant's resignation email to Richard East dated 15 June 2018 (578). The list of issues referred to paragraph 32 of the Amended Particulars of Claim (129). This is addressed in the findings of fact at 214 above.

340. On the basis of the parties' submissions it was not clear why it was necessary for the Tribunal to determine whether or not this email was a protected disclosure, as it was accepted that none of the alleged detriments occurred as a result of the content of the claimant's resignation and, logically, the claimant cannot have been constructively dismissed by reason of any action by the respondent which was as a result of what he said in the email in which he resigned. Nonetheless, in the light of the content of the resignation, the Tribunal finds: it disclosed information; the claimant believed the disclosure to be in the public interest (he specifically alleged that a share of commission had been allotted to the wife of a director where no substantive contribution had been made and in evidence stated that he had been unethically treated); that belief was reasonable (for the same reasons as have been given relating to the other disclosures); the claimant believed that the disclosure tended to show that the respondent had failed to comply with a legal obligation (but not a miscarriage of justice or a miscarriage or a breach of contract (or potential or future breach) was being deliberately concealed); and that belief was reasonable. Accordingly, the resignation letter was a protected disclosure.

Alleged detriments generally

341. The alleged detriments relied upon were listed specifically as issues 3.3.1-3.3.3, and then more generically at 3.3.4 as being the same matters relied upon at 2.1.1-2.1.16 as alleged fundamental breaches of contract. As already recorded, in the claimant's written submissions, it was accepted that issues 2.1.11 and 2.1.12 were not relied upon as forming a detriment as a result of the alleged protected disclosures (the alleged delay in sending the claimant his commission statement and the alleged failure to pay the claimant the full commission due on or around 26 April 2018). There was no 2.1.7 in the List of Issues

342. In light of the decisions that the Employment Tribunal made about which protected disclosures had been made, and the timing of those alleged disclosures, that significantly reduced which alleged detriments could genuinely be found to have occurred as a result of the protected disclosures found. Three of the protected disclosures found (that was the fourth, fifth and sixth alleged disclosures) occurred on: 3 April 2018; 9 May 2018; and 15 June 2018.

343. The earliest protected disclosure found (the third alleged disclosure) was the email to Richard East dated 27 December 2017. However, the Tribunal found, based upon the evidence heard, that only the claimant and Mr East were aware of or were shown that email. Accordingly, whilst the claimant could have been treated detrimentally from 27 December 2017 on the ground that he had made the third

alleged disclosure, only Mr East (based upon the evidence the Tribunal heard) could have treated the claimant detrimentally on the ground that he had made that disclosure, as he was the only person aware of it.

344. As a result, the position in relation to the detriments relied upon was found to be as follows:

(1) Issue 3.3.1 concerned the allocation of commission to Mrs Harb. That was a decision reached by Mr Oldroyd on 13 December 2017. That decision was subject to executive board review, but the executive board decision appears to have been reached by 16 March 2018 (1437). Accordingly, the decision about the split on the deal and the allocation of commission to Mrs Harb could not have been on the ground that (or have been materially influenced by) the claimant's fourth, fifth or sixth disclosures, because it predated those disclosures. It could not have been made on the ground that (or have been materially influenced by) the third disclosure, as the decision-makers were unaware of the disclosure that the claimant had made to Mr East.

(2) With regard to alleged detriment 3.3.2 regarding the classification of the deal, the position was the same as that explained regarding the allocation of commission. The decision predated the fourth, fifth and sixth disclosures, and the decision-makers were unaware of the third disclosure. Those decisions were not made on the ground that (nor were they materially influenced by) the claimant having made the protected disclosures found.

(3) Alleged detriment 3.3.3 regarded the ramped up pricing concession immediately prior to completion of the Intersnack deal. That is, the claimant alleged that the change to the terms negotiated between the respondent and Intersnack before the deal was concluded, was a detriment to him which occurred because he had made one or more protected disclosures. In practice that decision appears to have been one that was made during negotiations with Intersnack during January 2018. The decision predated the fourth, fifth and sixth disclosures, and the negotiators/decision-makers were unaware of the third disclosure. That decision was not made on the ground that the claimant had made (nor was it materially influenced by) the protected disclosures found.

(4) Alleged detriment 3.3.4/2.1.1 was recorded as being that the respondent: awarded 70% of the commission payable to account managers on the Intersnack deal to the claimant and 30% of the commission deal to Mrs Harb; and/or wrongly classified and/or reclassified the Intersnack deal as a 'net new' and not a perpetual to SaaS deal after the Intersnack deal had been concluded; and/or included Optiva PLM for commission purposes within the MS Cloudsuite Food & Beverage package rather than separating it out; and/or failed to recognise and/or denied that the first year of cash receipts from Intersnack exceeded 75% of the ACV. These alleged detriments to an extent replicate the detriments addressed as issues

3.3.1-3.3.3. In addition, they include the decision about the allocation of the commission on the Optiva PLM product and the decision on the timing of payment of commission. The former was part of the decision made by Mr Oldroyd and confirmed by the executive team and therefore the position is identical to that found for detriment 3.3.1. The timing of the payment was a decision also made at, or around, the same time and which predated the fourth, fifth and sixth disclosures. The decision-maker was unaware of the third disclosure. Those decisions were not made on the grounds that the claimant had made (nor were they materially influenced by) the protected disclosures found.

(5) Alleged detriment 3.3.4/2.1.2 was the contention that the respondent failed to honour and/or reneged on an express agreement reached between the claimant and Mr Jung on 4 September 2017. Whichever date was taken as being the one upon which the respondent allegedly failed to honour the agreement and/or reneged upon it, the last date upon which that decision could have been reached by Mr Oldroyd was 13 December 2017 or as part of the executive team review by 16 March 2018 (1437) (and in practice the decision was made earlier, if such a decision was made). As with detriment 3.3.1 it predates the disclosures found (alleged disclosures four, five and six) and it was a decision made by people unaware of the claimant's disclosure to Mr East (alleged disclosure three). Any such decision could not have been made on the grounds that the claimant had made (nor could it have been materially influenced by) the protected disclosures found.

(6) Alleged detriment 2.1.3/3.3.4 were somewhat non-specific, being the general alleged detriment that the respondent failed to provide a satisfactory response to the claimant's concerns that the commission split did not reflect effort and contribution and it was improper for Mrs Harb's name to have been added to, and to remain on, the CRM record. From its position in the List of Issues and on the assumption that the alleged detriments were listed chronologically, that contention appeared to be an alleged detriment occurring shortly after the email of 4 September 2017, or in any event prior to Mr Oldroyd's determination. In his written submissions, the claimant's counsel (at paragraph 230(iii)) stated that this allegation primarily relied upon the award of commission to Mrs Harb of 30%. On that basis, the Tribunal's findings are the same as have been explained for alleged detriment 3.3.1 and the determination of the split.

(7) Alleged detriment 3.3.4/2.1.4 relied upon the alleged failure to provide a satisfactory response to concerns raised by the claimant in emails dated 9 October 2017 and 10 November 2017. The responses provided, and the alleged failings in those responses, predate the disclosures which have been found. To the extent that they may not have pre-dated the third alleged disclosure to Mr East on 27 December 2017, the alleged failure or inadequacy in response was from persons

other than Mr East (who were unaware of the claimant's disclosure to Mr East).

(8) Alleged detriment 3.3.4/2.1.5 was that the respondent informed the claimant, via an email sent by Mr Oldroyd on 13 December 2017 to Mr Hannay and then forwarded by Mr Hannay to Mr East on 21 December 2017 and from Mr East to the Claimant on 21 December, that the final determination was that commission on the Intersnack deal would be split between the claimant 70:30, with 70 percent being allocated to the claimant and 30 percent to Mrs Harb. As with many of the other alleged detriments this relates to the determination made by Mr Oldroyd on 13 December 2017 and the claimant being informed about that determination. The determination predated all of the disclosures which have been found, as did the claimant being informed about the determination. Any such decision could not have been made on the ground that (nor could it have been materially influenced by) the protected disclosures found.

(9) Alleged detriment 3.3.4/2.1.6 was the content and tone of the email from Mr East to the claimant on 27 December 2017. That email was sent in direct response to the claimant's third disclosure, which has been found to be a public interest disclosure, and accordingly is addressed in more detail below.

(10) Alleged detriment 3.3.4 and 2.1.8 was that the Respondent prevented the Claimant from attending the final meeting with Intersnack prior to the conclusion of the deal during which the Respondent conceded without further challenge, or agreement or consultation with the Claimant, that the Intersnack deal would revert to "ramped up pricing". This allegation is very similar to alleged detriment 3.3.3 and, like that allegation, arises from a decision made during negotiations with Intersnack during January 2018. The decision predated the fourth, fifth and sixth disclosures, and the negotiators/decision-makers were unaware of the third disclosure. That decision was not made on the ground that (nor was it materially influenced by) the protected disclosures found.

(11) Alleged detriment 3.3.4/2.1.9 was that on 16 March 2018 the respondent sent the claimant a commission statement which disclosed to the claimant that the respondent had classified the Intersnack deal (the claimant says wrongly and after closure) from "Perpetual to SaaS" to "Net New". That is, it arises from the claimant being sent a commission statement on 16 March 2018. That predates the disclosures found (alleged disclosures four, five and six) save for the disclosure to Mr East about which only Mr East was aware. That decision was not made on the ground that (nor was it materially influenced by) the protected disclosures found.

(12) Alleged detriment 3.3.4/2.1.10 was the content of an email dated 26 March 2018 from Andrew Oldroyd to the Claimant in which he stated *"I*

think the facts are straightforward. You were invited into a preferred vendor situation and the splits were agreed at an early stage". The email of 26 March 2018 predated the disclosures found (disclosures four, five and six) save for the disclosure to Mr East (disclosure three). Mr Oldroyd was not aware of the disclosure to Mr East. The content of the email was not materially influenced by the protected disclosures found.

(13) Alleged detriments 2.1.13-2.1.16 (being part of alleged detriment 3.3.4) all post-date the disclosures found and accordingly have been considered in more detail below.

Mr East's email of 27 December 2017 (alleged detriment 2.1.6/3.3.4)

345. This email was not in fact dated 27 December 2017, it was 29 December 2017, being the email addressed at paragraph 155 above (1185). In considering this alleged detriment the Tribunal asked itself two questions: was the content of the email a detriment to the claimant; and, if so, was it a detriment which occurred as a result of the claimant having made a public interest disclosure (applying **Fecitt**). Taking account of the date of the email, the only relevant protected disclosure was the disclosure made in the email which the claimant sent to Mr East on 27 December 2017.

346. In the email Mr East said: "*In short, I would be careful about worrying what others are being paid and concentrate on your earnings. I strongly recommend that you don't write down too many details in case it leaks into email, it can all become very political and you could be back fighting for 75 percent."*

347. As recorded in the legal section above, whether the claimant was subject to a detriment required consideration of whether he was put at a disadvantage, which was to be considered in the light of the fact that the concept of detriment is very broad and must be judged from the claimant's point of view. It was a detriment, if a reasonable employee might consider the relevant treatment to constitute a detriment.

348. The Tribunal found that Mr East's email was a detriment for the claimant. Effectively Mr East's email was warning the claimant off raising the issue identified in the claimant's email, that is of Mr and Mrs Harb's ethical responsibilities, alongside the claimant's contentions regarding his commission. The claimant was in practice told by his line manager that he should not raise something which could validly be raised as a grievance, and he was told that the matters were very political. Essentially Mr East told the claimant to keep his head down and stop raising matters. The suggestion being that, if he did not do so, his commission could be reduced. The Tribunal has no doubt that this was not a reasonable response from the claimant's line manager at this time. The claimant was seeking advice about how to raise matters, and his line manager's response was to warn him of potential consequences if he did so. The Tribunal finds that any reasonable employee would consider the content of the email to constitute a detriment.

349. Having found that the content of the email was a detriment, the second part of the question to be determined was whether that detriment occurred as a result of the

claimant having made a public interest disclosure? The focus must be on whether the disclosure had a material influence on the treatment, that is more than a trivial influence. The reason for Mr East's response was precisely because the claimant had sent his email to him, that is the email which contained the public interest disclosure. Mr East's response was very much a warning not to rock the boat, given as a response to the disclosure made. The respondent has not evidenced that the detrimental treatment was for any other reason.

350. As a result, the Tribunal finds that the content of Mr East's email to the claimant of 29 December 2017 was a detriment on the grounds that the claimant had made a protected disclosure.

The grievance and grievance appeal process and outcome (alleged detriments 2.1.3/3.3.4 and 2.1.4/3.3.4)

351. The Tribunal considered together the alleged detriments of the poor conduct of the grievance process and grievance appeal process, and the fact that the claimant's grievance and appeal were rejected.

352. The alleged detriments were: that the respondent failed to conduct a proper and reasonable grievance process and grievance appeal process, failed to interview key witnesses, and failed to give the claimant an opportunity to respond to the information obtained in the course of the grievance investigation; and that the respondent rejected the claimant's grievance on 1 May 2018 and rejected the claimant's appeal on 5 June 2018 when it was contended that it had no reasonable grounds for doing so. As with the previous detriment, the Tribunal needed to consider both whether the process/outcome(s) was a detriment and whether it/they occurred as a result of the claimant having made one or more protected disclosures (applying **Fecitt**).

353. There was a degree of circularity about these allegations because the claimant's contention, based upon the disclosures found, was that the claimant's grievance and grievance appeal were handled inappropriately and/or the outcome was determined on the grounds that the claimant had made the disclosures contained in either his grievance or his grievance appeal. Those who handled his grievance and/or grievance appeal were not aware of the claimant's disclosure to Mr East and the disclosure made in the resignation letter post-dated the grievance and grievance appeal.

354. The Tribunal's view of and findings about the conduct of the grievance and grievance appeal processes are addressed in more detail below in relation to the alleged breach of the duty of trust and confidence. For the reasons explained, the way in which the processes were handled was a detriment for the claimant. In any event, the fact that neither the grievance nor the grievance appeal were upheld must amount to a detriment for the claimant. The Tribunal finds that any reasonable employee would find the rejection of the grievance/appeal and the way they were handled to be detrimental.

355. The Tribunal has significant reservations about the processes followed and the outcomes reached. The claimant's grievance was handled by an inexperienced manager who had never handled a grievance before. His appeal was handled by

someone who, by his own admission, was not someone who felt comfortable writing words and whose decision did not address all of the matters raised. However, having heard the evidence of Mr Reedman and Mr Young, the Tribunal finds as a fact that the way that the grievance and the grievance appeal were conducted, and the outcomes that were reached in each, were not materially influenced by the protected disclosures made by the claimant within the grievance and the appeal. They reflected the approach and decisions which Mr Reedman and Mr Young thought that they should take.

Detriment – the meeting with Simon Niesler on 1 June 2018 (alleged detriment 2.1.15/3.3.4)

356. Alleged detriment 3.3.4/2.1.15 was that on 1 June 2018, instead of allowing the claimant to put forward his business plan for the new fiscal year, Simon Niesler, General Manager – Western Europe, pressed the claimant on whether he was "committed" to the business regardless of the outcome of his grievance and whether the result of the grievance would impact on the claimant's view of the respondent. The claimant alleged that the tone and content of the discussion with Mr Niesler led the claimant to conclude that Mr Niesler intended to replace the claimant if he continued with his grievance.

357. The facts as found about what occurred at the meeting are recorded in paragraph 209 above. This was a meeting about which the only evidence before the Tribunal was that of the claimant, as the Tribunal did not hear any evidence from Mr Niesler about what occurred or why.

358. The Tribunal has no doubt that the way in which the meeting was conducted was a detriment to the claimant. He was asked to travel some distance to attend a meeting which he understood to be about putting forward his business plan for the new fiscal year. His new General Manager (that is someone who line managed his line manager) pressed the claimant on whether he was "committed" to the business. The claimant alleged, and the Tribunal has found, that the tone and content of the discussion led the claimant to believe that Mr Niesler intended to replace the claimant if he continued with his grievance/grievance appeal, with Mr Niesler making reference to the ease with which the claimant could be replaced. On that basis the Tribunal finds that Mr Niesler's conduct of the meeting was a detriment for the claimant. The Tribunal also finds that any reasonable employee would consider the conduct of the meeting to constitute a detriment.

359. The Tribunal found the more difficult issue to be determining whether the conduct was on the ground that the claimant had made a public interest disclosure, that is whether it was materially influenced by one or more disclosures made. Mr Niesler was clearly aware of the grievance as he expressly addressed it in the meeting. It would be expected that he would be aware of what had been raised in such a grievance, as he had ultimate line management responsibility for the claimant (even if not direct line management responsibility). On that basis (and absent any evidence to the contrary from the respondent) it is found that he was aware of at least the disclosure made by the claimant in his grievance.

360. The Tribunal has not heard evidence from Mr Niesler about why he conducted the meeting in the way that he did, nor indeed is there any document available which

records why the events occurred. On that basis, the Tribunal has considered this issue in accordance with the burden of proof. In circumstances where the claimant was treated detrimentally and where Mr Niesler made express reference to the grievance in the meeting (as being part of the reason why he was conducted the meeting in the way that he was), and that grievance contained within it a public interest disclosure (as the Tribunal has found), the Tribunal finds that the claimant has put forward a prima facie case that the reason for the detrimental treatment was his public interest disclosure. Mr Niesler himself explicitly made the connection between his conduct and the document which contained what has been found to contain a public interest disclosure. Having applied the burden of proof and found a prima facie case, the burden turns to the respondent to demonstrate that the disclosure made as part of the grievance did not in any way contribute to the detrimental treatment, that is it was not a material influence on it (with material meaning more than trivial). In the absence of any evidence whatsoever from the respondent as to why the claimant was subjected to the treatment which he was in the meeting on 1 June 2018, the Tribunal finds that this part of the claimant's case succeeds. The question highlighted in **Fecitt** is whether the detriment occurred as a result of the claimant having made a protected disclosure and, applying the burden of proof, the Tribunal found that it did.

Mr East's email of 11 June 2018 (alleged detriment 2.1.16/3.3.4)

361. Alleged detriment 3.3.4/2.1.16 was that on 11 June 2018, the claimant inadvertently received an email sent by Mr East. The email questioned whether Mr East could subject the Claimant to a Performance Improvement Plan if he was *"locked in a legal dispute"*. This allegation related to an email that Mr East had mistakenly sent to the claimant (this was not in dispute). It was intended for Mr Niesler, with whom Mr East himself was in dispute at the time.

362. In terms of whether this amounted to a detriment for the claimant, the Tribunal found that it was. Placing someone on a performance improvement plan is certainly a detriment to them and is a very serious matter. The evidence which the Tribunal heard from witnesses was that, within the respondent, placing someone on a performance improvement plan was a serious matter. Accordingly, the claimant being informed (albeit inadvertently) that there was the possibility that he would be placed on a performance improvement plan was a detriment for him. In the claimant's circumstances, the suggestion was particularly grievous where the claimant had been one of the highest performing sales people throughout the respondent's business worldwide in the previous financial year and there appeared to be no genuine reasonable basis whatsoever for him to be placed on a performance improvement plan.

363. However, as has been recorded for the other detriments, the Tribunal also needed to determine whether the detriment was materially influenced by one or more of the protected disclosures made by the claimant. Mr East had been the recipient of the disclosure made in December 2017. He was aware of the claimant's grievance, but in practice seemed to have been supportive of the claimant's grievance rather than concerned that it had been raised. The question was why Mr East put these words in the email (which was not intended for the claimant but Mr Niesler). They were included as part of Mr East's dispute with the respondent, and Mr Niesler in particular. Mr East was trying to highlight that the demand that the members of his

team be placed on a performance improvement plan was inappropriate. He was using the claimant as an example of why he thought this was incorrect. The reason the email was written by Mr East was not on the grounds that the claimant had made a protected disclosure. It was written because Mr East was endeavouring to illustrate his own standpoint to Mr Niesler (his line manager). The claimant's protected disclosures did not materially influence why that was done. The fact that the email was inadvertently sent to the claimant was unfortunate and detrimental, but the Tribunal did not find that the email was written (or sent) on the ground that the claimant had made one or more protected disclosures.

Protected disclosure and dismissal

364. Issue 3.4 is addressed at the end of this Judgment.

Unlawful deduction from wages

365. The Tribunal then turned to consider the unlawful deduction from wages claims which were included in the List of Issues as issues 1.1 and 1.2.

366. In the legal section above, the Tribunal has set out the law as contended by the parties. The Tribunal would observe that the authorities are not clear, particularly in determining where the dividing line exists between: unlawful deduction from wages claims which are potentially very difficult to quantify (but which are appropriately to be determined as unlawful deduction claims); and the non-straightforward claims in which a deduction from wages claim cannot be used as the vehicle to advance claims for damages for breach of contract. It was also not entirely clear from the parties' representatives' own submissions, what exactly it was being contended the Tribunal could and could not determine in respect of the deduction from wages claim. Accordingly the Tribunal has focussed on the deduction from wages claims in the case and considered what it can and cannot determine of the issues raised.

367. The Tribunal is clear that the claimant's claim for commission generally can be brought and considered as an unlawful deduction from wages claim, even though the subject matter and calculations may be difficult and even where it relies upon implied terms of the contract. The Tribunal also can determine matters such as: whether an agreement was reached between the claimant and Mr Jung which resulted in an obligation on the respondent to make a particular split or payment; and whether the claimant was the only account executive who worked on the Intersnack deal and therefore whether he was entitled to 100% of the commission payable to account executives. The Tribunal can also appropriately determine whether a decision was reached irrationally, arbitrarily or capriciously, in a deduction from wages claim, based as is it is on an implied term of the contract

368. However, it is also clear from **Allsop** and the extract cited above, that there is a limit to what can be determined as part of an unlawful deduction from wages claim. Applying that to the circumstances of this case, the Tribunal has determined that it should not decide whether 70/30 was the appropriate split arrangement or whether an alternative split (such as 80/20) would have been more appropriate based upon an assessment of the contributions of different account exceutives. The Tribunal draws from the authorities that it should not (when determining the unlawful

deduction from wages claim): make a qualitative assessment of the contribution of different account exceutives to the deal and the portion of commission which should fairly have resulted; or determine whether a decision-maker made an appropriate assessment or balance when determining the split (save only for determining whether such a decision was reached irrationally, arbitrarily or capriciously).

369. There was some evidence given and submissions made that appeared to suggest that because the claimant was recorded in his commission plan for 2017/18 (375) as being net new only, he was not (or may not have been) entitled to commission on the Intersnack deal at all. (if it was a net new deal). The scheme similarly records the claimant as having a territory of UK Benelux and the Nordics. The Tribunal finds that once the claimant was asked to undertake work on the Intersnack deal and by being assigned to the Central European region to provide support and management on the deal, that change implicitly varied the terms of the commission plan for that year to provide the claimant with an entitlement to be paid commission on the appropriate basis even for a deal which fell outside his geographic territory and the definition of the products upon which he was entitled to commission. It would be entirely inequitable for the respondent to ask a sales person to commit the time required from the claimant to the deal upon which he worked, but then to contend he was not entitled to commission because the deal fell outside the defined territory (whether geographically or in terms of product).

The carve out (issue 1.1.1)

370. The List of Issues records two different formulations of issue 1.1.1. The formulations are both complex and are recorded in the list which is appended. They relate to the commission for PLM Optiva addressed at paragraphs 238-241 above.

371. There was no dispute that Mr Eiesland was due to be paid some commission on the Intersnack deal out of the account manager commission available. There was some disagreement in the evidence and argument about why exactly he was paid commission, which broadly arose from his prior relationship with Estrella, a subsidiary of Intersnack. The Tribunal found that Mr Eiesland was paid commission predominantly on the basis that he was the sales executive with knowledge of working with a subsidiary of Intersnack and that the commission was paid because of the value of that knowledge to the procurement process followed with Intersnack. The entitlement which was agreed did not reflect the specific quantity or value of the products which he had previously sold to Estrella, but rather reflected his contribution to the deal because of his knowledge. In his submissions, the claimant's counsel submitted that a relevant factor in determining whether or not PLM should have been carved out for Mr Eiesland, was whether he had genuinely merited the commission he received on that product. The Tribunal does not accept that such an argument had any merit, as Mr Eiesland's commission did not genuinely reflect at all whether or not he merited the commission received based upon the products sold, it reflected his having a pre-existing knowledge of Intersnack (and its group companies) and the pre-existing relationship which was in place.

372. As was recorded in the respondent's submissions, the claimant accepted the following in cross examination:

(1) PLM can either be sold as a standalone product or as part of the CloudSuite Food and Beverage package;

(2) As a matter of fact, PLM was sold and provided to Intersnack not as a standalone product, but as part of the CloudSuite Food and Beverage package; and

(3) The CloudSuite Food and Beverage package was classed as an M3 product.

373. The Tribunal understood and accepted Mr Pearcy's evidence that the sale of PLM was akin to the sale of a packet of crisps. It could be sold as a standalone pack/product. It could be sold by the respondent as part of a multipack. If PLM was sold to Intersnack as part of a multipack (that is as part of CloudSuite Food and Beverage), that meant that it fell within the element for which Mr Eiesland was entitled to commission.

374. What is clear is that the first agreement reached for allocation of the split was somewhat sketchy and indeed was not reached with the claimant at all. The agreement with Mr Sutton of 3 May 2017 (1506) recorded that 25% of the deal was allocated to Mr Eiesland. The same figure was recorded in the claimant's own email of 11 August 2017 (933). In the email exchange between Mr Jung and the claimant of 4 September 2017, Mr Jung suggested that he was trying to split only what was described as the original part of the deal with Mr Eiesland, with M3 F&B being recorded as being part of that element (that is CloudSuite Food and Beverage). The determination made by Mr Oldroyd on 13 December 2017 is non-specific recording only that 25% of the M3 value would go to Mr Eiesland. The claimant's own email of 1 February 2018 (1260) to Mr and Mrs Harb recorded his understanding that the 25% split to Mr Eiesland applied to M3 and CloudSuite Food & Beverage. As recorded above, the contract with Intersnack recorded Optiva PLM as being part of Cloudsuite Food & Beverage (confidential 244).

375. In a claim for unlawful deduction from wages, it is for the claimant to establish that there has been an unlawful deduction made. It was for him to prove that he had an entitlement to additional commission because the split for Mr Eiesland should not have been made as it was. The Tribunal finds that it was not entirely clear from the agreements reached and the emails exchanged whether Optiva PLM had to be included within Mr Eiesland's split or not. However, the claimant has not proved that there was an unlawful deduction made from his wages, when the respondent made the determination that Optiva PLM should be included in the elements for which Mr Eiesland was paid a split. It was certainly not irrational, arbitrary or capricious for Optiva PLM to be included in the elements for which Mr Eiesland received a split, for the reasons recorded in the documents cited and evidenced by Mr Pearcy.

376. In any event, the terms and conditions which governed the commission plan contained within them a mechanism for the determination of any disputes about splits where they arose from interpretation of the plan or circumstances not covered by the plan, such as a dispute of this nature. That provided (304 and 312) that any questions of interpretation of the terms and conditions or of the plan were to be finally determined by the Plan Administrator, as was determination of any circumstances not covered in the plan. That meant that the determination of this

interpretation issue, being one which was unclear where the precise circumstances were not otherwise covered, was (according to the definitions and the terms of the plan) a decision for the Chief Executive's designate, which was accepted by the claimant as being Ms Bellavia and Ms Murphy.

377. As part of the executive board review, Ms Bellavia and Ms Murphy decided that the Optiva PLM product fell within the element for which Mr Eiesland was to be paid commission. Such a decision was not irrational, in circumstances where the precise categorisation was not entirely clear and therefore in circumstances not covered by the plan. On that basis, a final decision was made in accordance with the mechanism which applied under the terms of the claimant's contract for any such disputes to be determined, and the decision was that Optiva PLM should be included within the aspect for which Mr Eiesland would be paid commission. In those circumstances, the claimant has not established that there was an unlawful deduction from wages made, when a determination was reached in accordance with sections 2.1 and 2.22 of the terms and conditions which applied (304 and 312).

378. As issue 1.1.2 was a remedy issue it was not one which this Tribunal needed to determine in this Judgment.

The classification of the deal (issues 1.1.3-1.1.6)

379. The classification of the deal is recorded as issues 1.1.3-1.1.6. The parties disagree as to how issue 1.1.3 should be worded. The respondent recorded the issue as being: did the respondent properly classify the Intersnack deal as a "net new" deal rather than a "perpetual to SaaS" deal, or did the respondent wrongly classify the Intersnack deal? The claimant recorded the issue as: was the claimant entitled under the terms and conditions of the commission scheme including the rules of engagement to a multiplier of x3 (perpetual to SaaS multiplier/upgrade X) to be applied, and did the respondent wrongly apply a multiplier of 2.25 (i.e. net new multiplier) causing a substantial deduction of commission to the claimant?

380. Issue 1.1.4 was agreed as being: if the respondent did wrongly classify the Intersnack deal as a Net New deal rather than a Perpetual to SaaS deal, was the wrong classification in breach of the claimant's contract of employment (as set out in the terms of the commission scheme and the Rules of Engagement) or in breach of some other agreement with the claimant?

381. Issue 1.1.5 was: if so, in order to calculate the claimant's commission entitlement, did the X3 commission multiplier apply to the whole Intersnack transaction, or only to the M3 ERP products?

382. In summary, the claimant was entitled to a greater multiplier to be applied to at least some of the commission payable, if the deal was one which fell within the category of being perpetual to SaaS or upgrade X (in the following paragraphs of this Judgment, for ease, the Tribunal will refer to such a category as being Upgrade X). If the deal was categorised as net new, the commission was all payable at the lower multiplier (at which the respondent did pay the relevant commission). The key initial question was therefore whether the deal should have been categorised Upgrade X (in whole or in part).

383. The different classification related to the type of service/product sold to the customer and how that compared to what had been sold to the customer previously (if anything). Perpetual to SaaS meant that the customer had been placed on a contract which provided a cloud based service. The service/product was not owned by the customer (unlike traditional products sold) and the cloud was maintained by the respondent. A fee was payable by the customer (on an ongoing basis) for the use of the cloud system. That was in contrast to a traditional deal where the customer bought products which were then located on the customer's own systems and for which the only ongoing revenue for the respondent was a maintenance fee.

384. The Upgrade X categorisation related to moving an existing customer from a traditional purchased maintenance only arrangement with software operated on the customer's own servers, to a cloud product (with the ongoing service fee as the cloud service was maintained by the respondent). It was defined as an upgrade because the customer was being moved from one to the other. There was no dispute that the change in moving the customer onto a cloud system was commercially important/positive for the respondent and was one which the respondent wished to promote.

385. Upgrading an existing customer was not as lucrative for the respondent as obtaining such income from an entirely new customer, but it was still important and commercially advantageous for the respondent. For the higher rates of commission which were payable for Upgrade X, the scheme provided that the fee payable for the ongoing provision of the SaaS cloud system needed to exceed by a defined percentage the maintenance fees that the respondent would have been in any event due to receive for the software located on the customer's system (that is the move needed to be financially advantageous for the respondent and not result in a reduced or broadly equivalent revenue).

386. There was no dispute that Estrella (a part of the Intersnack group) was a client with whom the respondent had (prior to the deal with Intersnack) had a contractual arrangement under which the respondent had provided Estrella with traditional purchased products and for which a maintenance fee was paid. Mr Eiesland was the sales person who was responsible for that arrangement, hence he was the person with knowledge of working with a company in the Intersnack group and (as has already been addressed) was paid commission on the Intersnack deal. The Intersnack deal effectively ultimately replaced the provisions which had been in place for Estrella. In his email to Mr Watters of 15 December (1127) the claimant asserted that the deal had always been net new, but he addressed whether the deal was now being pursued on the basis that the maintenance fee revenue stream for the respondent was being turned off as part of the deal with Intersnack (and therefore it would be/might be an Upgrade X deal).

387. The dispute between the parties was about both how the deal should have been classified and also exactly what that meant under the commission scheme. The arguments and submissions were complex and have been considered in their entirety, but are summarised for ease. The claimant asserted that the process was straightforward: Estrella as part of the Intersnack group of companies had traditional products; the deal with Intersnack sold a perpetual to SaaS cloud system; the minimum income requirements from the fees on the Intersnack deal exceeded what were required compared to the Estrella maintenance fees; Estrella were able to

access licences on the perpetual to SaaS cloud system sold to Intersnack as part of the deal; and he was therefore entitled to be paid all his commission at a three times rate because the requirements of Upgrade X were met. The respondent disagreed and its position was that: Estrella and Intersnack were different companies and therefore the deal was not an Upgrade X deal at all; as the number of people covered by the Estrella contract was very small when compared to the number of Intersnack licences, it was not genuinely an Upgrade X deal due to the limited size of what was covered; even if it was an Upgrade X deal, the comparison was only undertaken for the footprint being upgraded and not for the entire deal (and because of the way in which the Intersnack deal was agreed it was not clear which of the licences granted were part of the upgrade in any event); the three times multiplier applied only to the footprint upgrade and not the whole deal; the way that the multipliers for Upgrade X operated meant that the impact on commission was broadly cost-neutral and the three times multiplier was primarily intended to offset the reduced commission payable for the first portion of an Upgrade X deal; and, in any event, there was a cap on the commission payable on the deal.

388. Throughout the hearing the claimant's case was presented on the basis that the respondent reclassified the deal as net new, after the claimant had worked on it whilst it had been classified as Upgrade X and with the expectation that was how it would be classified. The word reclassified was used throughout by the claimant and his representative and was also used throughout the claimant's written submissions. The Tribunal has not found that there was genuinely such a reclassification of the deal, at least not in the way in which the case was presented. The deal was recorded on the respondent's CRM system from the outset on 16 November 2016 (1546) as being a net new deal. The CRM record was only changed by the claimant himself personally on 5 January 2018 (1552), that is very late in the deal process. The claimant made the change immediately followed an exchange of emails that he had with Ms Rodarmel (1101). So, technically, when the respondent made its determination (that is when the executive board decided the commissions to be paid and the basis for doing so) the deal was reclassified as an Upgrade X deal from what had been recorded on the CRM system prior to the decision. However, it was only reclassified by the respondent back to how the deal had been classified on the respondent's CRM system throughout most of the duration of the deal, from the change in categorisation which had been made by the claimant himself.

389. When considering the views of the parties at the time, to the extent that they are relevant to the Tribunal's determination, the Tribunal particularly took account of the contemporaneous record of the claimant's own view as expressed on 15 December 20917 (1127). In an email on that date sent to Mr Watters, a very senior manager, the claimant explained in clear and unequivocal terms that the deal had always been classified as a net new deal and not an Upgrade X deal.

390. It is clear that, within the respondent at the time, there was a difference of opinion about how the deal should be categorised. Ms Rodarmel, a manager far more senior that the claimant, is recorded as asserting that the deal should have been classified as Upgrade X and not net new.

391. The Tribunal has considered how the deal should have been categorised, irrespective of the views' of the parties (the parties views not being the determining factor in whether or not there was an unlawful deduction from wages when the

claimant was paid commission based upon the entire deal being net new, rather than on the basis that it was Upgrade X (in whole or in part)). The Tribunal did not find the documentation about the categorisation of such deals (including the terms and conditions and, in particular, the rules of engagement) to be clear at all. The key documents prepared (403 and 3411) distinguish between net new and Upgrade X but without clearly defining when each categorisation applied, or at least without doing so in plain English in a way which could be easily understood. Whilst both parties in their submissions contended that it was clear from the documents that their contended categorisation (and related arguments) was correct, the Tribunal found that the documents did not enable any such clear determination to be made. The use of terms such as footprint within the documents were not clearly defined and how what was recorded was to operate in practice was unclear.

392. What made the arrangement particularly complicated was that the original agreement was with Estrella, a separate legal entity, and the new agreement was with Intersnack, a separate legal entity. Whilst the agreement with the new entity enabled the previous entity to use some of the licences, the new agreement was still not with the company with which the original agreement had been made. Mr Pearcy's evidence was that this was not addressed in the rules. The plan documents and the rules that applied addressed certain circumstances, but they did not cover an arrangement with this degree of complexity where the arrangements were with different companies (albeit ones which were linked). The Tribunal has not been shown any recorded term which addressed the categorisation of a deal where different group companies were involved. The Tribunal does not find that the precise circumstances which applied in the Intersnack deal were addressed in the documents provided.

393. As recorded for the carve out issue, in a claim for unlawful deduction from wages, it is for the claimant to establish that there has been an unlawful deduction made. It was for him to prove that he had an entitlement to be paid additional commission based upon the deal being in fact a deal to which Upgrade X (and the related uplift) applied. The Tribunal found that this was not at all clear from the documents. The claimant has not proved that there was an unlawful deduction made from his wages. The determination made by the respondent in the absence of clear and applicable rules on the categorisation, particularly in the context of two agreements with separate legal entities, was not irrational, arbitrary or capricious.

394. In any event (as recorded for the carve out issue), the terms and conditions which governed the commission plan contained within them a mechanism for the determination of any questions of interpretation of the terms and conditions, including any circumstances not covered by the terms of the agreement. That provided (304 and 312) that any questions of interpretation of the terms and conditions or of the plan were to be finally determined by the Plan Administrator, being the Chief Executive's designate, which was accepted by the claimant as being Ms Bellavia and Ms Murphy.

395. As part of the executive board review, Ms Bellavia and Ms Murphy decided that the deal should be categorised net new (and not Upgrade X), see in particular Ms Bellavia's email of 7 March 2018 (1374) and Ms Murphy's of 13 March 2018 (1384). Accordingly, a final decision was made in accordance with the mechanism which applied under the terms of the claimant's contract for any such issues of

interpretation to be determined. In those circumstances, the claimant has not established that there was an unlawful deduction from wages made as a result of the categorisation of the deal. In the absence of any clear terms of the agreement which addressed the complex situation involving the Intersnack deal, the Tribunal is satisfied that the respondent was able to make such a decision, it was not one which was irrational, and was one that accorded with the terms and conditions as they applied.

396. Agreed issue 1.1.6 was a remedy issue and therefore was not one which this Tribunal needed to determine in this Judgment

The split decision (issues 1.1.7 and 1.1.8)

397. Issues 1.1.7 and 1.1.8 were issues about which the parties could not agree how the issues to be determined should be defined.

398. The claimant contended that issue 1.1.7 was: did the claimant enter into an express agreement with Mr Jung on 4 September 2017 that the claimant would be entitled to 100% of the commission (less Mr Eiesland's 25%)? He contended that issue 1.1.8 should have been: was the respondent entitled to split any of the Account Manager commission on the Intersnack deal awarded to the claimant, as Senior Account Manager for Intersnack with Mrs Harb? If so, was the award of 70% to the claimant and 30% to Mrs Harb a reasonable exercise of discretion or was the decision to do so irrational, arbitrary, capricious or inequitable?

399. In the list of issues, the respondent prefaced issues 1.1.7 and 1.1.8 with a lengthy statement in which it said: the respondent does not agree that a discretionary payment is within the scope of the unlawful deduction from wages provisions of the Employment Rights Act 1996. Further, it was the respondent's position that for the purposes of an unlawful deduction from wages claim it is permissible for a Tribunal to determine whether or not a sum of wages was properly payable pursuant to a legal entitlement (whether contractual or otherwise) but it is not within the scope of the unlawful deduction from wages legislation to determine whether the respondent exercised a discretion in a manner that was equitable and/or rational, non-capricious and non-arbitrary (the statement in the list acknowledged that the claimant disagreed). The respondent then defined issue 1.1.7 as: did the claimant enter into an express agreement with Mr Jung on 4 September 2017 to vary the original agreement that the claimant and Mrs Harb would split the Intersnack commission equally (less the 25% M3 commission promised to Mr Eiesland) to the effect that the claimant would be entitled to 100% of the commission (less Mr Eiesland's 25%) and Mrs Harb would be entitled to no commission? The respondent's version of issue 1.1.8 was: what was the effect of Mr Oldroyd's final determination of 13 December 2017 that the Claimant should receive a split of 70% and Mrs Harb should receive a split of 30%?

400. From the issues raised by both parties, the Tribunal identified the following as the key points which it would determine:

a. whether there was a binding agreement between the respondent and the claimant entitling the claimant to 100% of the account manager

commission, as a result of the emails of 4 September 2017 between the claimant and Mr Jung?

b. Whether the claimant was otherwise entitled to 100% of the account manager commission on the Intersnack deal?

c. Whether Mr Oldroyd's decision (as adopted by the executive board) to provide the claimant with 70% of the account manager commission on the Intersnack deal (less Mr Eiesland's share) was irrational, capricious or arbitrary?

d. Whether the Tribunal could/should otherwise reach a determination about the percentage of the account manager commission due to the claimant and, if so, what that decision should be?

e. Whether the claimant succeeded in his claim for unlawful deduction from wages based upon the decisions reached?

401. The Tribunal carefully considered the full email exchange between the claimant and Mr Jung between 11 August 2017 and 4 September 2017 (970-965). The emails exchanged on 4 September commenced with an email from the claimant which began by stating that the product mix and record on CRM needed to be sorted out that day because it did not represent the deal on the table at that time with Intersnack (967). Whilst much of the rest of the email chain focussed on allocation of account manager commission, when Mr Jung responded in the final email of 4 September with the brief statement "*yes, let's do it*" it was not clear to which element of the emails he was responding and, in particular, whether he was simply agreeing to the need to sort out the mix on the CRM system (as that days emails had started with addressing and as he said in evidence) rather than agreeing a binding commitment as to the account executive split allocation on the deal. The preceding email of 4 September to which Mr Jung was responding (965) concluded by referring to the CRM record and the fact that it did not reflect the deal which was being shaped, asking whether Mr Jung wanted the claimant to update the record. The Tribunal finds that, in this context, the words used by Mr Jung in the brief email which concluded the exchange on 4 September were simply not clear enough, with regard to what he was confirming should be done, to view the emails as a binding commitment entered into by him with the claimant about the commission which the claimant would earn.

402. There were also other matters which the Tribunal found to be inconsistent with a binding agreement. It was accepted by the claimant that Mr Jung did not have the final say about the allocation of splits. As recorded above, the claimant knew that the determination of splits needed to be made by others, or at least any proposal by Mr Jung was subject to the agreement of others. Mr Jung explicitly stated in the email of 13.15 on 4 September 2017 (966) that he needed to get "*this final approved*". This terminology used in the email chain was not indicative of a binding commitment, and the same was clear from other words and phrases used in the exchanges: my current thinking; lot's of we could, we should, we have to; let's nail this down once we have; and (by the claimant) absolutely understand this is all academic. The Tribunal found that the terminology used in the email chain was not consistent with the chain amounting to a binding contractual commitment.

403. Accordingly, and for the reasons explained, the Tribunal found that there was not a binding agreement entered into between the claimant and the respondent as a result of Mr Jung's email of 4 September 2017. In any event, as the claimant knew, under the terms of the commission scheme, Mr Jung was not able to enter into a final binding commitment on the split of commission, even had the exchange of emails been read as evidencing him doing so (which they were not).

404. The Tribunal found that Mrs Harb did work on the Intersnack deal as an account manager prior to the claimant working on the deal (and despite the fact that she was not recorded on the CRM system as the account manager). The only evidence which the Tribunal heard from individuals actively involved in the deal prior to late April 2017 was the evidence of Mrs Harb. It was not in dispute (at least by the time of the hearing) that Mr Harb was not employed as an account manager at the time the deal was in progress; and Mrs Harb was employed as an account manager. Mrs Harb's evidence was that (prior to the claimant's involvement in the deal) she worked on the deal as an account manager, irrespective of what was recorded on the CRM system. The claimant disputed this, but the Tribunal heard no evidence which contradicted that of Mrs Harb from anyone who had involvement in the deal at the time prior to late April 2017. Accordingly, the Tribunal accepted Mrs Harb's evidence and finds that she therefore did some work on the deal as an account manager, whatever view was taken of the quality of that work or whether the tasks undertaken were largely administrative in nature.

405. The claimant first started working on the deal two days before the FRP was submitted. Irrespective of the importance of the claimant's input into the FRP itself, he had not worked on the deal as the account manager for the first six months after the respondent was notified by Intersnack, nor had he worked on it at the RFI stage or for much of the time during which the FRP was being prepared. The submission of the RFI was a part of the process undertaken to obtain the deal.

406. Accordingly and without assessing the quality or value which should have been allocated to each person's contribution: both Mrs Harb and the claimant had worked as account manager on the deal for some period of time during its progress; the claimant had not worked on the deal for 100% of the time during which it had progressed; and the claimant had not undertaken all of the work on the deal undertaken by an account manager. It was clear to the Tribunal that the claimant had not undertaken 100% of the account manager work on the deal.

407. The Tribunal has not taken into account in identifying these key findings anything about the work undertaken on the deal in mid to late December 2018 or January 2019, in particular by Mrs Harb. The determination undertaken by Mr Oldroyd had already been reached prior to that date and therefore any work undertaken by Mrs Harb (or the lack thereof) was not a relevant factor in the decision actually reached by the respondent at the time (irrespective of what was said in the decision reached in the claimant's grievance or what was said during the investigation of the grievance and appeal).

408. The determination was one reached by Mr Oldroyd on 13 December 2017. He based his determination upon what he was told by Mr Jung and Mr Hannay (or at least in respect to the latter, what he believed he had been told). Mr Jung's position was that the claimant should receive 70% of the account manager commission on

the deal. Mr Hannay's position (or at least Mr Oldroyd's understanding of his position) was that the claimant should receive 75% of the account manager commission on the deal (after Mr Eiesland's split). Mr Oldroyd determined that the claimant should receive 70% of the account manager commission (after Mr Eiesland's split), that is he made a decision based on one of the two percentage figures presented to him (where those figures were considered by him to be apart by 5%). The decision to do so was not irrational, capricious or arbitrary.

409. Having reached those determinations (which the Tribunal has found it is able to do as part of a deduction from wages claim), the Tribunal has then considered and applied the law as addressed at paragraph 366-368 above, and the fact that there is a limit to what can be determined as part of an unlawful deduction from wages claim as made clear in **Allsop**. The Tribunal has found that it should not (when determining the unlawful deduction from wages claim): make a qualitative assessment of the contribution of different account executives to the deal and the portion of commission which should fairly have resulted; or determine whether a decision-maker made an appropriate assessment or balance when determining the split (save only for deciding that the decision reached was not irrational, arbitrary or capricious). Accordingly, having made the decisions that the Tribunal has upon the split, it has found that it should not go on to scrutinise the split on a qualitative basis to, for example, determine what split it is the Tribunal itself would have made had it been the respondent's decision-maker.

410. The Tribunal can fully understand why the claimant challenged the apportionment of commission between himself and Mrs Harb, both based upon his own knowledge of her involvement in the deal at the time and subsequently based upon the documentation provided to the Tribunal which evidenced the work that she did upon the deal. On the documents seen by the Tribunal there did appear to have been a substantial qualitative difference in the value of work undertaken by Mrs Harb on the deal and that subsequently undertaken by the claimant. The Tribunal had some sympathy with the claimant's belief that there was something irregular about the arrangements in place between Mr and Mrs Harb and the spousal relationship issue (which led to some investigation once identified by the respondent's executive board). However, in a deduction from wages claim and for the reasons explained, the Tribunal has not stepped into the respondent's shoes and endeavoured to determine whether 70/30 was the appropriate split arrangement or whether an alternative split would have been more appropriate based upon an assessment of the contributions of the claimant and Mrs Harb, the different account executives, or the value of their work (or their effectiveness in the role). That is not the Tribunal's role in a deduction from wages claim, nor is it appropriate for the Tribunal to do so in determining such a claim.

411. As a result of the decisions explained above, the Tribunal has found that the claimant has not established that there was an unlawful deduction made from his wages as a result of the split decision. However, had it been necessary, the Tribunal would also have found, as has been addressed for the preceding alleged deductions, that the contractual terms included a resolution mechanism where contentious issues arose and that mechanism was operated and applied. Mr Oldroyd's decision, as considered and confirmed by the executive board (and Ms Bellavia and Ms Murphy as the Plan Administrators in particular), was one which the respondent was

able to reach under the agreement's terms, the plan having in place a mechanism for determining contentious issues, which was operated and applied by the respondent.

Issue 1.1.9, revenue recognition, provisioning and exchange rates

412. Issue 1.1.9 was also an issue about which the parties were unable to agree how it should be formulated for the list of issues. The claimant's position was that the issue to be determined was: did the respondent wrongly apply its cash collection rule which states that in the event that the cash collected was not at least 75% of the ACV then the respondent would delay commission on a pro-rata basis until 100 percent of the ACV was collected. Did the cash collected in the first year meet the 75% requirement and therefore the respondent was not entitled to delay commission. Was the respondent then in breach of the cash collection rule when it delayed the payment, resulting in a reduced payment of £191,865.63. In the list of issues, the respondent's view of the claimant's identification of the issue was recorded as follows: the respondent considers the claimant's formulation of issue 1.1.9 unclear and repetitive and does not consider that it accurately summarises the respondent's cash collection rule as set out at clause 3.2 of its commission scheme terms and conditions. The respondent identified the issue as being: did the first year of cash receipts from Intersnack exceed a minimum of 75% of the ACV such that the respondent was obliged to pay the claimant's commission in full and it was not entitled to delay the claimant's commission payment on a prorated basis until 100% of the ACV amount had been collected from Intersnack?

413. In summary, there were three issues which were in fact raised about the timing of payment and, the amount payable as a result. These were:

a. The claimant contended that he should have been paid his commission in March 2018 rather than in July 2018, which turns on when revenue was recognised (and therefore commission was payable under the terms) (308);

b. Whether or not the cash collected in the first year of the deal exceeded 75% of the Annual Contract Value of the deal. If it did, the claimant was entitled to have been paid 100% of his commission on the deal. If it did not, the claimant was only entitled to the pro rata payment which the respondent had paid (and was not entitled to any further commission as a result of him having left the respondent's employment before any further commission was due); and

c. In relation to the 75% rule, whether in fact the respondent did receive more than the required sum because of the operation of exchange rates and/or the respondent's approach to hedging.

414. The Tribunal finds that the terms of the commission scheme required that the revenue had to be recognised before commission was due to be paid. Accordingly the fact that the customer had been invoiced and paid the first instalment on the contract, did not trigger the claimant's entitlement to commission, where the revenue was not recognised. The Tribunal can understand why the claimant did not

understand this requirement or the accountancy conventions which applied to and were operated by the respondent. Nonetheless the Tribunal accepts the evidence from the respondent's witnesses about when revenue was recognised and accordingly finds that the claimant was paid commission when it was due. He was not entitled to payment earlier as the revenue had not been recognised, and accordingly there was no unlawful deduction from wages. The Tribunal would add that it was unfortunate that nowhere in the extensive documentation which applied to commission was revenue recognition explained (at least not in clear and easy to understands terms) and it would have been beneficial if it had been, as that might have averted the claimant's misunderstanding.

415. The respondent's representative outlined in her submissions precisely why the respondent submitted that the 75% threshold was not met. The Tribunal entirely accepts the figures provided and accordingly finds that the cash collected in the first year did not in fact exceed 75% of the Annual Contract Value. Accordingly, the Tribunal does not find that the claimant was entitled to receive the full commission in the first year and there was no unlawful deduction made as a result.

416. The exchange rate argument was something which was only raised by the claimant during cross-examination. It was not raised by the claimant with the respondent internally or as part of the grievance process. It was not pleaded, was not identified in the list of issues, and was not referred to by the claimant in his witness statements. As recorded in the previous paragraph, the Tribunal did not find that the respondent received 75% of the Annual Contract Value in the first year, and that finding was not affected by the claimant's assertions about exchange rates or money received. However, the Tribunal would observe that the label used and sum included on the commission statement (2979) did raise genuine and appropriate questions from the claimant. The explanation that a figure was given an inaccurate label, was an example of the respondent's failure to make clear to the claimant (and employees in general) exactly how commission was calculated and to explain clearly what that entitlement was and why.

Constructive dismissal

417. The constructive dismissal claim was recorded at issues 2.1 to 2.3, for which the agreed overriding question recorded in issue 2.1 was: did the respondent, without reasonable and proper cause, conduct itself in a manner that was calculated or likely to destroy or seriously damage the implied duty of trust and confidence? The List of Issues recorded fifteen matters relied upon by the claimant as forming part of the respondent's breach of the duty of trust and confidence (numbered 2.1.1-2.1.16, there being no 2.1.7). The Tribunal accordingly considered separately each of the matters upon which the claimant relied and then, collectively, considered whether what had been determined amounted to a fundamental breach of contract.

418. In their submissions both parties emphasised the five steps in **Kaur**, which are the questions the Tribunal needed to ask, which addressed issues 2.1-2.3:

a. What was the most recent act (or omission) on the part of the respondent which the claimant says caused, or triggered, his resignation?

b. Had he affirmed the contract since that act?

c. If not, was that act (or omission) by itself a repudiatory breach of contract?

d. If not, was it nevertheless a part (applying the approach explained in **Omilaju**) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the **Malik** term? (If it was, there is no need for any separate consideration of a possible previous affirmation)

e. Did the employee resign in response (or partly in response) to that breach?

419. Those steps cover what was recorded in the List of Issues as issues 2.2 and 2.3. The List of Issues recorded issue 2.3 as being, if the respondent was in fundamental breach of contract, did the claimant resign in response to that breach or did he resign for unrelated reasons. The List of Issues also recorded the parties contentions regarding the reason for the claimant's resignation. Issue 2.3.1 stated that the respondent contended that those reasons included (i) 'an unjustified sense of grievance' (as set out in paragraph 44 of the Amended Grounds of Resistance) and/or (ii) that the Claimant resigned in order to take up alternative employment that was offered to him. It went on to say that: if so, did the respondent's conduct play a part in his resignation. Issue 2.3.2 recorded the claimant's contentions in response, being: that he did not have an unjustified sense of grievance but, on the contrary, had a legitimate grievance based on the respondent's conduct which is said to amount to a breach of trust and confidence; and that the respondent's fundamental breach played a part in the reasons for his resignation.

Issue 2.1.1

420. Issue 2.1.1 was recorded as being that the respondent: awarded 70% of the commission payable to account managers on the Intersnack deal to the claimant and 30% of the commission deal to Mrs Harb; and/or wrongly classified and/or reclassified the Intersnack deal as a 'net new' and not a perpetual to SaaS deal after the Intersnack deal had been concluded; and/or included Optiva PLM for commission purposes within the MS Cloudsuite Food & Beverage package rather than separating it out; and/or failed to recognise and/or denied that the first year of cash receipts from Intersnack exceeded 75% of the ACV. These are the matters addressed as claims for unlawful deductions from wages above.

421. In his submissions the claimant's counsel recorded that if the Tribunal found in favour of the claimant in relation to any of those points, the respondent's behaviour would have amounted to a breach of the duty of trust and confidence. It was also submitted that even if the claims were not upheld, the claimant contended that the respondent acted in breach of the duty of trust and confidence for a list of reasons which can be summarised as being that at no stage was the claimant given a clear and comprehensive explanation for the decisions made, nor did anyone sit down with the claimant and seek to explain to him the decisions made. The respondent's counsel in her submissions emphasised the overlap between a number

of the matters recorded as being part of the alleged breach of the duty of trust and confidence.

422. In considering issue 2.1.1 the Tribunal focussed on what exactly is recorded in the List of Issues as being the issue to be determined. For the reasons already explained in respect to the deduction from wages claims, the Tribunal does not find that the respondent's decisions in respect of any of the matters recorded in issue 2.1.1 did amount to a breach of the claimant's contract. The Tribunal also did not find that the way in which the decisions were made amounted to a breach of the duty of trust and confidence. The other matters emphasised by the claimant's counsel in his submissions regarding the explanations provided, were more appropriately considered as they applied to the other matters alleged to form part of the breach of the duty of trust and confidence (addressed below).

Issue 2.1.2 (the 4 September 2017 email and Mr Jung)

423. Issue 2.1.2 was that the claimant contended that the respondent failed to honour and/or reneged on an express agreement reached between the claimant and Mr Jung on 4 September 2017 that the Claimant would receive 100% of the commission payable to an Account Manager (less Mr Eiesland's 25%). As addressed in the deduction from wages findings above, the Tribunal did not find that the emails exchanged between Mr Jung and the claimant in September 2017 amounted to a legally binding agreement that the claimant would be paid 100% of the account manager commission on the agreement.

424. In his written submissions, the claimant's counsel contended that even if the Tribunal did not find the agreement to be binding, it was submitted that Mr Jung behaved in a duplicitous manner having given the claimant the impression that he had agreed to award him 100% of the commission, whilst at the same time responding to Mr Harb in different terms (without informing the claimant that he had changed his mind).

425. As is recorded in the emails, Mr Jung had told the claimant that he was trying to position him as the key sales rep (966), whilst shortly afterwards informing Mr Harb that everything after Mr Eiesland's split was 50/50 between the UK and "us" (971) (in an email notably not copied to the claimant. Mr Jung's explanation is recorded at paragraph 115 above. The Tribunal notes that the claimant was quite clearly attempting to itemise and articulate what he had done on the deal and does not therefore see why Mr Jung should have found his approaches to be badgering in the context of a large company with a sales team operating under a detailed scheme with a clear expectation that matters such as splits would be clearly evidenced, explained and defined. It is accepted that Mr Jung found himself in a difficult position because any increase in the percentage of commission paid to the claimant in practice meant taking commission away from someone else (as was evidenced by Mrs Harb, whatever the claimant's contentions about her portion).

426. The Tribunal finds that Mr Jung was presenting the position differently to the claimant and Mr Harb in the emails exchanged and finds that he showed a lack of honesty in his exchanges with the claimant. The Tribunal agrees with the claimant's counsel's submission that Mr Jung was acting in a duplicitous manner. Whilst as we have found, Mr Jung was not agreeing to 100%, his email was clear in saying that Mr

Jung was trying to position the deal in a way which would lead to the claimant receiving 100% of the commission (after Mr Eiesland's element). What he subsequently said to Mr Harb was entirely different. On its own that exchange would not have constituted a fundamental breach of the duty of trust and confidence, but it is a relevant factor to be taken into account when considering whether the matters alleged collectively constituted such a breach.

Issue 2.1.3

427. Issue 2.1.3 was that the respondent failed to provide a satisfactory response to the claimant's concerns that the commission split did not reflect effort and contribution and it was improper for Mrs Harb's name to have been added to, and to remain on, the CRM record. In his submissions the claimant's counsel highlighted that at no time did Mr Jung ever explain to the claimant his proposal to award 30% of the account manager commission to Mrs Harb (and therefore 70% to the claimant), nor did he ever even advise the claimant of his recommendation.

428. As is recorded above, the commission scheme made clear that the split allocation should be about contribution and should be transparent. The International Split Policy explained that the respondent's guiding principles on splits (which must apply in all circumstances whether or not Mr Oldroyd placed any reliance upon it) included: compensation for effort; and transparency. The policy emphasises documented interactions and notes. The Tribunal finds that at no stage was a satisfactory explanation ever provided to the claimant for the basis upon which the split decision was made, or for the basis upon which Mr Jung made his recommendation about the split (on which the decision was partially based). Whilst Mr Jung told the claimant his emails about commission were not sent at the right time and that focus should be on the deal, no explanation was ever provided at any time by Mr Jung of the recommendation on splits which he made (without informing the claimant). The absence of any satisfactory and detailed explanation to the claimant about such a significant decision undoubtedly would have had an impact upon his trust and confidence.

Issue 2.1.4

429. Issue 2.1.4 was that the respondent failed to provide a satisfactory response to the concerns raised by the claimant in emails dated 9 October 2017 and 10 November 2017 that there was no basis for a commission split with Mrs Harb.

430. In his email of 9 October 2017 (1031) the claimant raised with Mr Jung questions about Mrs Harb's involvement in the Intersnack deal and the changes to the sales lead on the CRM system, including highlighting that in the time during which he had been working on the deal he did not believe that Mrs Harb had been involved. He questioned the commission split. In his brief response, Mr Jung did not address what the claimant had raised at all (1030). His statement was that everything would be rightfully considered, that is that the matters would be addressed at some stage. That commitment did not happen, at least in terms of responding to the claimant and addressing his concerns. The claimant sent further emails to Mr Jung on 10 October and 11 October (1029) to which no response was provided.

431. The evidence which the Tribunal heard from the respondent's witnesses was that agreeing the commission split early in a deal was critical. The claimant was at the time of the emails working in Germany and working full time on the deal as the only account manager actively involved in the deal at that time. The original split agreement was not one which had been reached with the claimant or in respect of him. The claimant was entitled to expect to have clarity about the split allocation and, in particular, on the basis that Mrs Harb was receiving a significant allocation of the commission (when he could not see any visible contribution from her). The responses provided show a surprising lack of clarity on such a significant deal (with such significant implications for the claimant). The absence of any response to the issues raised was a relevant factor to be taken into account when considering whether the matters alleged collectively constituted a breach of the duty of trust and confidence.

432. The email of 10 November (1047) was an email responding to an enquiry which had not been sent to the claimant and which addressed the practical implications of the claimant not being recorded as the sales lead on the system. Mr Jung's response of the same date confirmed that he would take care of the enquiry. The response to that email and the absence of further explanation did not have any impact upon the duty of trust and confidence.

Issue 2.1.5

433. Issue 2.1.5 was stated to be that the respondent informed the claimant, via an email sent by Mr Oldroyd on 13 December 2017 to Mr Hannay and then forwarded by Mr Hannay to Mr East on 21 December 2017 and from Mr East to the claimant on 21 December, that the final determination was that commission on the Intersnack deal would be split between the claimant 70:30, with 70 percent being allocated to the claimant and 30 percent to Mrs Harb. The claimant alleged that Mr Oldroyd's determination was in breach of the agreement reached with Mr Jung of 4 September 2017 and/or it amounted to an arbitrary, irrational and inequitable split of the commission.

434. There was a notable and unexplained delay in the claimant being informed about Mr Oldroyd's determination. He was not informed until 21 December 2017, eight days after the determination, albeit he was informed by Mr Hannay forwarding the email to him (1183) (Mr East's email was sent after Mr Hannay had already emailed the claimant).

435. The Tribunal has already addressed Mr Oldroyd's decision on the split, which did not of itself constitute a breach of the duty of trust and confidence.

436. In his submissions on this issue, the claimant's counsel focused on Mr Jung's input into the process and both the fact that he did not bring to Mr Oldroyd's attention the emails of 4 September and that he allegedly made false and damaging allegations about the claimant.

437. The Tribunal finds that Mr Jung should have explained to Mr Oldroyd, and provided him with, the emails exchanged on 4 September (albeit not because they constituted a binding agreement). The failure to do so was part of the broader issues of communication and absence of explanation, considered when all the alleged parts

of the breach of the duty of trust and confidence are considered together. Mr Oldroyd's email notably provided no genuine explanation to the claimant about the basis for his decision and neither Mr Jung, Mr Hannay nor Mr East, appear to have made any attempt to explain the decision to the claimant.

438. With regard to the events of December 2017, in terms of the decisions reached on the split and in particular Mr Oldroyd's decision, this issue had no impact whatsoever. Mr Oldroyd had already reached his determination prior to the claimant returning to the UK in December and prior to Mr Jung providing his incorrect version of events to anyone else. The determination on the split was not (and could not have been) a breach of the duty of trust and confidence (or part of it) because of Mr Jung's false evidence about what occurred in late December 2017 and January 2018.

Issue 2.1.6

439. Issue 2.1.6 was the content and tone of the email from Richard East to the Claimant dated 29 December 2017 (although the issue recorded it as being 27 December).

440. As the Tribunal has found the content of this email was a detriment as a result of the claimant making a public interest disclosure, it also follows that the content was a breach of the duty of trust and confidence on its own. When taken with other findings, it certainly could collectively be part of such a breach. In any event for the reasons explained above, the Tribunal also found Mr East's response to the claimant's request for advice from his line manager to be a breach of trust and confidence. The Tribunal agrees with the claimant's counsel's submission that every employee should have the right to raise a grievance and should not be deterred from doing so by their line manager, at least they should not be deterred for the reasons given by Mr East.

Issue 2.1.8

441. Issue 2.1.8 was that the respondent prevented the claimant from attending the final meeting with Intersnack prior to the conclusion of the deal during which the respondent conceded without further challenge, or agreement or consultation with the claimant that the Intersnack deal would revert to *"ramped up pricing".* There was no evidence that the claimant was prevented from attending the final meeting with Intersnack.

442. The claimant's own evidence was that he did not expect to attend as it was intended to be a sign off meeting between senior executives. The stated acknowledgement in the claimant's counsel's submission that the claimant "*rather downplayed this in cross examination*" is simply incorrect. The claimant accepted in evidence that he was not prevented from attending at all.

443. The Tribunal also does not find that any agreement reached at such a meeting could (or did) amount to a breach of any duty to the claimant. The claimant had no right to be consulted about any changes agreed as part of the commercial negotiations and the Tribunal agrees with the claimant's counsel's submission that (using the Tribunal's words) it was entirely unsustainable to suggest that the respondent was under any obligation to consult or agree with the claimant what

commercial terms should be agreed with Intersnack, irrespective of whether or not those terms might impact on his (or any other employee's) commission.

Issue 2.1.9

444. Issue 2.1.9 was that on 16 March 2018 the Respondent sent the Claimant a commission statement which disclosed to the Claimant that the Respondent had classified the Intersnack deal (the claimant says wrongly and after closure) from *"Perpetual to SaaS"* to *"Net New"*. This allegation adds nothing to those already addressed regarding the classification of the deal and the decision reached (it being simply a statement which confirmed that decision).

Issue 2.1.10

445. Issue 2.1.10 was that by an email dated 26 March 2018 from Mr Oldroyd to the claimant, which stated *"I think the facts are straightforward. You were invited into a preferred vendor situation and the splits were agreed at an early stage"*, the respondent demonstrated that the respondent misunderstood the role of the claimant in the Intersnack deal and the facts of the matter, which among other factors led the claimant to raise a formal grievance.

446. The statement included in Mr Oldroyd's email of 26 March 2018 and cited in the list of issues, was factually incorrect. At the point at which the claimant commenced working on the deal the respondent was not at preferred vendor stage. The terminology used by Mr Oldroyd was wrong. The Tribunal does not find that this was a particularly significant issue in the context of all of the alleged issues raised as constituting a breach of contract, but it was nonetheless part of the general picture of the issues raised by the claimant not being fully investigated and him not being given an answer to the issues which he had raised (or at least accurate answers).

Issue 2.1.11

447. Issue 2.1.11 was the contention that the respondent delayed sending the claimant his commission statement that was due at the end of February 2018. The claimant alleged that the respondent sent commission statements to others involved in the Intersnack deal earlier than it sent the commission statement to him. The issue stated that the claimant was told that this was Mr Steenbakkers and the Cloud Team including the management of the Cloud Team for example Mrs Rodarmel.

448. There was no evidence that any individual received a commission statement on the Intersnack deal before the claimant received his commission statement. Mr Pearcy's evidence, which the Tribunal accepts, was that all commission statements were delayed as a result of the number and complexity of the claims on the very large Intersnack deal. Once the deal was provisioned, commission statements were sent to all.

449. Mr Steenbakkers, Ms Rodarmel and the cloud team, were all in a different position to the claimant (and all others entitled to commission on the deal). They were all paid SPIFFS (recorded on the terminology document as being Sales Performance Incentive Fund Formula, but in practice being bonuses paid which fell outside the commission scheme for payments on the deal). The fact that others paid

exceptional bonuses might have been notified prior to the claimant, was not a breach of the duty of trust and confidence. There was no evidence that anyone entitled to commission on the deal received a commission statement before the claimant, and the timing of the provision of the statement was not a breach of the duty fo trust and confidence.

Issue 2.1.12

450. Issue 2.1.12 was the contention that the respondent failed to pay to the claimant on or around 26 April 2018 the full commission that was properly payable to him. This issue has already been addressed as part of the decision reached in the unlawful deduction from wages claim.

Issue 2.1.13 and 2.1.14

451. The Tribunal considered together issues 2.1.13 and 2.1.14 as they raised the conduct and outcome of the grievance and grievance appeal. Issue 2.1.13 was that the respondent failed to conduct a proper and reasonable grievance process and grievance appeal process, failed to interview key witnesses, and failed to give the claimant an opportunity to respond to the information obtained in the course of the grievance investigation. Issue 2.1.14 was that the respondent rejected the claimant's grievance on 1 May 2018 and rejected the claimant's appeal on 5 June 2018 when it had no reasonable grounds for doing so.

452. The Tribunal did not find the respondent's approach to, or handling of, the grievance or the grievance appeal, to be of the standard expected under a fair and appropriate policy operated by a large company. The claimant's counsel submitted that Mr Reedman (who heard the grievance) and Mr Young (who heard the grievance appeal) rubber-stamped the decisions which had been made. The Tribunal did not find that they rubber-stamped the decisions made. However, the respondent is a large company with a significant Human Resources function and the way in which the process was followed fell a long way short of what would be expected. Mr Reedman's evidence was that this was the first grievance which he had ever investigated, and that inexperience was evident from the way it was conducted. Mr Young was very honest in explaining that he was not someone comfortable with words, something evident in the grievance appeal decision letter. Whilst the involvement of people with little experience or without the skills necessary to look into a grievance may have been understandable in a small business, it was not in the context of a company of the respondent's size.

453. The claimant's counsel submitted that it is a fundamental principle of a grievance process that the individual who raises the grievance is given the opportunity to comment on the statements received by the investigator. Whilst good practice to do so, the Tribunal does not agree that it is a fundamental principle, noting in particular that no such obligation is spelt out in the ACAS code of practice. However, what is important is that there should be a full and transparent investigation. The grievance investigation was certainly not transparent, and it did not investigate in any detail many of the issues raised by the claimant. The investigation undertaken at the grievance appeal stage did not rectify those failings and was not transparent at all.

454. One example was the lack of investigation undertaken into exactly what involvement Mrs Harb had in the deal and what work she had undertaken on it. The claimant specifically asked that Mr and Mrs Harb be interviewed as part of his grievance and grievance appeal, but they weren't. Whilst neither Mr Reedman nor Mr Young were obliged to interview those requested by the claimant, the absence of any investigation of the real input of Mrs Harb beyond speaking to senior managers, represented an approach to the grievance (and appeal) which lacked any real attempt to get to the bottom of the issues which the claimant had raised.

455. The key failing of both the grievance and the grievance appeal, which was clear and evident to the claimant, was that at neither stage was there any genuine explanation provided to the claimant of the basis for the split decision nor was there any evidence provided of what had had formed the basis for the proposals made and the decisions reached. In the context of the claimant raising issues and requesting information, highlighted in respect of other allegations, the grievance and the grievance appeal failed to genuinely provide the claimant with any explanation for the decisions made. At neither stage was the opportunity taken to sit down and explain the split decision to the claimant face to face, in both cases the only thing provided to the claimant following the initial meeting was the outcome letter. As explained, the outcome letters are somewhat lacking in genuine explanation or response to the issues raised by the claimant.

456. In the key response in the grievance outcome letter (490) Mr Reedman reached the conclusion that other Account Managers had been involved in the deal which he said explained the split decision. He provided no accurate explanation of when Mrs Harb had worked on the deal as an account manager, nor did he explain what she had done as an account manager earlier in the deal. His conclusions were explained purely with reference to December 2017. That explanation was partly based on the information provided by Mr Jung, however the paucity of genuine consideration given was evidenced by this reliance on matters which occurred after Mr Oldham had made his decision on the split and therefore could not have played any part in the split decision reached (which had resulted in the grievance).

457. The grievance appeal outcome letter (576) was extremely brief and provided no real explanation for the decisions reached on the key issues. It did not address the PLM Optiva issue at all, even though that had been raised as part of the appeal. The split decision did not address Mrs Harb's involvement or work undertaken as an account manager at all. The reclassification decision provides no genuine explanation, nor did it address why or where the Rules of Engagement provided that if the majority of products were new products that meant the deal was not an upgrade X deal.

458. The most significant procedural failing in the conduct of the grievance appeal, was the conversation between Mr Young and Ms Bellavia. The conversation took place after the investigation into the matters raised had been undertaken and when a draft outcome letter had already been prepared (561) (finding for the claimant on the categorisation of the deal). In the conversation, Mr Young spoke to the person who had made the decision on the categorisation of the deal (or at least been a key part of it) who was more senior than he was, and changed his mind about the decision. The conversation was not noted or recorded in any document, nor was the claimant informed that it had occurred. Such an approach to determining a grievance appeal,

where the earlier decision-maker is consulted and able to change the outcome in a way which is unrecorded, is entirely contrary to a fair and transparent process. However, crucially for the claimant's constructive dismissal claim, the claimant was entirely unaware of the conversation between Mr Young and Ms Bellavia and therefore the fact that it took place and/or the influence that it had on the grievance appeal outcome could not (and did not) form any part of the breach of the duty of trust and confidence which resulted in the claimant resigning or the Tribunal's decision about whether such a breach had resulted in the claimant's resignation and in his claim for constructive dismissal.

459. The notes compiled to show the grievance appeal investigation (508) do not evidence a full and thorough investigation. However, as the claimant was not provided with the notes at the time, he would have been unaware of them and therefore they also could not have formed part of the breach of duty of trust and confidence relied upon.

460. For the reasons explained, the Tribunal does find that the absence of genuine explanation to the claimant of the basis for the commission split, in both the grievance and grievance appeal processes and outcomes, was something which formed part of a breach of the duty of trust and confidence when considered in the context of the other failings to provide the claimant with a genuine explanation for the proposed split and the decisions reached. The other failings in the procedures were not part of a breach of the duty (or at least those of which the claimant were aware were not), but in practice at neither stage of the grievance did those with conduct of the process provide any genuine and full response to the claimant in response to the issues he was raising (primarily about the split), partly because at neither stage was there a sufficiently detailed investigation to enable such an explanation to be provided.

Issue 2.1.15

461. Issue 2.1.15 was the conduct of the meeting on 1 June 2018 by Simon Niesler which has been found to be a detriment on the grounds that the claimant had made a public interest disclosure. As the Tribunal has found the conduct of the meeting to have been a detriment as a result of the claimant making a public interest disclosure, it also follows that the conduct of the meeting was a breach of the duty of trust and confidence on its own, and when taken with other findings certainly could collectively be part of such a breach. In any event for the reasons explained above, the Tribunal found the conduct of the meeting to constitute a breach of the duty of trust and confidence. The claimant's manager's manager conducting a meeting with him in such a way clearly contributed to such a breach when considered together with the Tribunal's other findings.

Issue 2.1.16

462. Issue 2.1.16, which was contended to be the last straw, was the 11 June 2018 email Mr East inadvertently sent to the claimant, which had been intended for Niesler. The email questioned whether Mr East could subject the Claimant to a Performance Improvement Plan.

463. As recorded above in considering whether the email was a detriment, proposing to place someone on a formal performance improvement plan is certainly a serious matter for them. The claimant was a high performing sales person who had been one of the highest performing sales people throughout the respondent's business worldwide in the previous financial year. There was no genuine reasonable basis whatsoever for him to be placed on a performance improvement plan. For the claimant to receive such an email, particularly following as it did the threats made by Mr Neilser to the claimant in the meeting on 1 June 2018, was certainly something which contributed to a breach of the implied term of trust and confidence and could amount to a final straw in the way identified in **Omilaju**.

*Constructive dismissal and **Kaur***

464. Taking together the findings explained above in relation to the issues, the Tribunal finds that the matters found collectively amounted to a breach of the duty of trust and confidence. The most recent act on the part of the respondent which the claimant says caused, or triggered, his resignation was receipt of the email of 11 June 2018 from Mr East (intended for Mr Niesler). The claimant resigned on 15 June 2018, four days after receipt of that email, and therefore did not affirm the contract after that act. That act on its own was not by itself a repudiatory breach of contract. Nevertheless it was a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of trust and confidence.

465. The final question in the test laid down in **Kaur** is whether the claimant resigned in response, or partly in response, to that breach. That reflects the matters raised by the parties in their alternative contentions regarding issue 2.3. For the reasons explained, the Tribunal has not found that the claimant resigned because he had an unjustified sense of grievance as the respondent pleaded. As has been identified, the matters found collectively amounted to a breach of the duty of trust and confidence. The claimant did take up alternative employment immediately after resigning and he had clearly explored alternative employment some time before he resigned. However, the Tribunal accepts the claimant's evidence that the decision to resign was only made at the time of his resignation. The Tribunal has particularly considered what is said at paragraph 263 above; it did not need to identify what was the sole cause of the resignation. Clearly there was a combination of causes of the claimant's resignation: the respondent's conduct; and the alternative job which the claimant had obtained. The Tribunal finds that the respondent's conduct and the breach of the duty of trust and confidence as cumulatively found, was one effective cause of the resignation.

Issue 2.4 and SOSR

466. Issue 2.4 in the List of Issue was whether any dismissal was fair by reason of some other substantial reason. As already recorded, whilst it was pleaded and was recorded as issue 2.4, there was no argument put forward in support of it by the respondent nor was there any reference made in the respondent's counsel's closing submissions to the fairness of the dismissal for that reason. Accordingly, as the onus is on the respondent to prove that the claimant was dismissed for the fair reason identified, the respondent cannot succeed in proving that the dismissal was fair. In the list of issues the some other substantial reason was recorded as having been

that the claimant acted in an unreasonable and aggressive manner in correspondence, and adopted an unreasonable and aggressive position on his commission, which led to him being unnecessarily rude and aggressive to a number of members of senior management and to perform below the standard required and expected of him, such as to undermine the Respondent's trust and confidence in him. The Tribunal does not, in any event, find that to have been the case.

Protected disclosure and dismissal – issue 3.4

467. Issue 3.4 asked, was the reason or principal reason for the claimant's dismissal that the claimant had made one or more of the protected disclosures identified with the result that the Claimant was automatically unfairly dismissed? As this question required determination of whether one or more of the protected disclosures found was the principal reason for the constructive dismissal (that is for the employer committing the alleged fundamental breach of the employee's contract of employment that precipitated the resignation), the Tribunal determined it would consider this issue last, following the other issues.

468. The Tribunal has been particularly mindful that the causation test for dismissal and public interest disclosures differs from that which has been applied for detriment. For dismissal, the question is whether the principal reason for the dismissal was that the claimant made a public interest disclosure (not the test in **Fecitt** of whether the disclosure was a material/more than trivial influence). As a result, the Tribunal needed to determine the principal reason for the constructive dismissal of the claimant.

469. The Tribunal has particularly focussed upon the claimant's resignation letter (578) and the reasons he himself gave at the time of resigning for why he was doing so. He listed four matters which he said breached the remuneration terms, all relating to the commission payments and when they were paid. He also listed eight matters which additionally he described as being a breach of the implied term of trust and confidence (albeit one of those eight is a reference to the four reasons previously given). Importantly no reference was made in those lists (or in the resignation at all) to Mr East's email to the claimant of 29 December 2017 or to the way in which he responded to the disclosures the claimant had made. The Tribunal accordingly does not find that Mr East's email to the claimant was a significant factor in the claimant's resignation at all (even though it formed part, collectively, of the breach of the duty of trust and confidence found).

470. Mr Niesler's conduct towards the claimant at the meeting on 1 June 2018, which the Tribunal has found to have been detrimental treatment due to the claimant having made a public interest disclosure, does form the subject matter of two of the eight reasons given in the resignation letter as amounting to a breach of the duty of trust and confidence. It has also been found to be part of the respondent's conduct which collectively breached the duty of trust and confidence. The Tribunal has considered whether Mr Niesler's conduct towards the claimant was therefore the principal reason for the claimant's dismissal. Statistically, it forms only two out of eleven/twelve reasons give for resignation (when the two lists are added together) and it is only one part of a number of findings which collectively amounted to a breach of the duty of trust and confidence. The Tribunal has determined that it is appropriate to make a qualitative assessment of what it was that caused the claimant

to resign. Whilst Mr Niesler's conduct towards the claimant on 1 June 2018 was part of the cumulative reasons for the claimant's resignation, it was only one part of a much more substantial whole. The Tribunal does not find that Mr Niesler's conduct (in response to the claimant's public interest disclosures) was the principal reason why the claimant resigned or was dismissed. In his skeleton argument the claimant's counsel submitted that the principal reasons were the non-payment of commission, the split and the reasons set out in his grievance and grievance appeal. The last straw was the email from Mr East of 11 June 2018. The Tribunal finds that the principal reason for the resignation was not the actions of Mr Niesler.

471. Accordingly, whilst two component parts of the breach of the duty of trust and confidence found occurred as a result of the claimant having made public interest disclosures, in the circumstances found and considering all of the matters found to constitute a part of the collective breach of the duty, the Tribunal has found that the principal reason for the claimant's (constructive) dismissal was not that he had made one or more protected disclosures.

Summary

472. For the reasons explained above, the Tribunal finds that the claimant was unfairly (constructively) dismissed, but not that the principal reason was because he had made public interest disclosures. The claimant was treated detrimentally on the ground that he had made a protected disclosure or disclosures in the email sent to the claimant by Mr East on 27 December 2017 and by the conduct of a meeting by Mr Niesler on 1 June 2018 and his claim in respect of these two matters under sections 47B and 48 of the Employment Rights Act 1996 succeeds. His other claims for detriment did not succeed, nor did the Tribunal find that the respondent had made unlawful deductions from the claimant's wages as alleged.

Remedy

473. The Tribunal intends to list the case for a remedy hearing, time estimate two days, to be attended by the parties by CVP remote video technology, to be listed no earlier than 10 weeks after the date when this Judgment has been sent to the parties. By no later than **14 days** after the date when this Judgment is sent to the parties, each party shall:

a. Provide the Tribunal with any dates to avoid for the remedy hearing in 2022;

b. Confirm whether or not they agree that two days is an appropriate time estimate and, if not, provide the alternative time estimate and their explanation for it (ideally after having liaised with the other party); and

c. If they believe the hearing should not (or cannot) be conducted by CVP, an explanation of why that is the case.

474. No later than 21 days after the date when this Judgment has been sent to the parties, the claimant shall provide to the respondent a revised schedule of loss recording exactly what sums it is that the claimant is seeking to recover for the matters found, and how those sums have been calculated.

475. No later than 28 days after the date when this Judgment has been sent to the parties, the respondent shall provide to the claimant a counter-schedule recording (as precisely as possible) what elements of the schedule of loss are agreed, which are in dispute and why those elements are in dispute.

476. In the event that either party wishes to rely upon any additional documents which are not already included in the bundle, or they have any other documents in their possession or control relevant to the remedy issues, they must send a list of and copies of those documents to the other party by no later than 6 weeks after the date when this Judgment has been sent to the parties.

477. The respondent is responsible for putting together a file containing those documents disclosed by the parties and required at the final hearing (the "remedy hearing bundle"). The parties must cooperate with each other in assembling and agreeing the remedy hearing bundle contents and index to the bundle. The remedy bundle must be provided to the Tribunal as a pdf at least seven days prior to the date of the remedy hearing.

478. By no later than 9 weeks after the date when this Judgment has been sent to the parties, if either party intends to call any additional evidence or witnesses for the remedy hearing, it must have provided to the other a written statement from every person that it is proposed will give evidence at the remedy hearing (including the claimant). Each party must provide a pdf of any statements upon which they are relying to the Tribunal at least seven days prior to the date of the remedy hearing.

Employment Judge Phil Allen
25 November 2021

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
29 November 2021

FOR THE TRIBUNAL OFFICE

List of issues as agreed between the parties

1. **UNLAWFUL DEDUCTION FROM WAGES:**
(Paragraphs 20, 23, 33, 37, 39 of the Amended Particulars of Claim)

1.1 What was the total amount of wages properly payable by the Respondent to the Claimant on or around 28 April 2018 within the meaning of s.13(1) of the Employment Rights Act 1996 ("ERA 1996")?

In particular:-

The Claimant's formulation of issue 1.1.1:

1.1.1 Did the Respondent wrongly apply the carve out to the ACV revenue. Should the "Carve-out" of Optiva (Product Life Management) have been limited to ERP only? Did the Respondent wrongly carve-out the value of ERP and an optional third party element, Optiva PLM (Product Lifecycle Management) for the purposes of calculating the Claimant's commission?

The Respondent's formulation of issue 1.1.1 and explanation:

The Respondent considers the Claimant's formulation of the issue at 1.1.1 to be unclear and proposes the following based on a reading of pargaraphs 37 and 39(c) of the Amended Particulars of Claim.

1.1.1 In calculating the amount of deal revenue to be carved out and allocated to the Nordics Account Executive, Sigurd Eiesland, did the Respondent wrongly include Optiva PLM in the carve out? The Claimant contends that the carve out was limited to ERP products only.

1.1.2 If so what additional sum was properly payable to the Claimant?

Paragraphs 37 and 39(c) of the Amended Particulars of Claim

The Respondent's formulation of issue 1.1.3

1.1.3 Did the Respondent properly classify the Intersnack deal as a 'Net New' deal rather than a 'Perpetual to SaaS' deal or did the Respondent wrongly classify the Intersnack deal?

The Claimant's formulation of issue 1.1.3

1.1.3 Was the Claimant entitled under the terms and conditions of the Commission Scheme including the rules of engagement

to a multiplier of x 3 (Perpetual to SaaS multiplier/Upgrade X) to be applied and did the Respondent wrongly apply a multiplier of 2.25 (i.e. net new multiplier) causing a substantial deduction of commission to the Claimant?

1.1.4 If the Respondent did wrongly classify the Intersnack deal as a Net New deal rather than a Perpetual to SaaS deal, was the wrong classification in breach of the Claimant's contract of employment (as set out in the terms of the commission scheme and the Rules of Engagement) or in breach of some other agreement with the Claimant? [Agreed formulation]

1.1.5 If so, in order to calculate the Claimant's commission entitlement, did the X3 commission multiplier apply to the whole Intersnack transaction, or only to the M3 ERP products? [Agreed formulation]

1.1.6 What additional sum was properly payable to the Claimant? [Agreed formulation]

Paragraphs 20, 37 and 39(a) of the Amended Particulars of Claim

The Claimant's formulation of issues 1.1.7 and 1.1.8:

1.1.7 Did the Claimant enter into an express agreement with Joerg Jung on 4 September 2017 that the Claimant would be entitled to 100% of the commission (less Mr Eiesland's 25%)?

1.1.8 Was the Respondent entitled to split any of the Account Manager commission on the Intersnack deal awarded to the Claimant, as Senior Account Managr for Intersnack with Monika Harb? If so, was the award of 70% of the Claimant and 30% to Monika Harb a reasonable exercise of discretion or was the decision to do so irrational, arbitrary, capricious or inequitable?

The Respondent's formulation of issues 1.1.7 and 1.1.8 and explanation:

The Respondent does not agree that a discretionary payment is within the scope of the unlawful deduction from wages provisions of the Employment Rights Act 1996. Further, it is the Respondent's position that for the purposes of an unlawful deduction from wages claim it is permissible for a Tribunal to determine whether or not a sum of wages was properly payable pursuant to a legal entitlement (whether contractual or otherwise) but it is not within the scope of the unlawful deduction from wages legislation to determine whether the Respondent exercised a discretion in a manner that was equitable

and/or rational, non-capricious and non-arbitrary. The Claimant disagrees:

1.1.7 Did the Claimant enter into an express agreement with Joerg Jung on 4 September 2017 to vary the original agreement that the Claimant and Monika Harb would split the Intersnack commission equally (less the 25% M3 commission promised to Sigurd Eiesland) to the effect that the Claimant would be entitled to 100% of the commission (less Mr Eiesland's 25%) and Monika Harb would be entitled to no commission?

1.1.8 What was the effect of Andrew Oldroyd's final determination of 13 December 2017 that the Claimant should receive a split of 70% and Monika Harb should receive a split of 30%?

Paragraph 12 and 39(b) of the Amended Particulars of Claim

The Claimant's formulation of issue 1.1.9:

1.1.9 Did the Respondent wrongly apply its cash collection rule which states that in the event that the cash collected was not at least 75% of the ACV then the Respondent would delay commission on a pro-rata basis until 100 percent of the ACV was collected. Did the cash collected in the first year meet the 75% requirement and therefore the Respondent was not entitled to delay commission. Was the Respondent then in breach of the cash collection rule when it delayed the payment, resulting in a reduced payment of £191,865.63.

The Respondent's formulation of issue 1.1.9 and explanation:

The Respondent considers the Claimant's formulation of issue 1.1.9 unclear and repetitive and does not consider that it accurately summarises the Respondent's cash collection rule as set out at clause 3.2 of its commission scheme terms and conditions. The Respondent proposes the following:

1.1.9 Did the first year of cash receipts from Intersnack exceed a minimum of 75% of the ACV such that the Respondent was obliged to pay the Claimant's commission in full and it was not entitled to delay the Claimant's commission payment on a prorated basis until 100% of the ACV amount had been collected from Intersnack?

Paragraph 39(d) of the Amended Particulars of Claim

The Claimant's Position:

The Claimant contends that in relation to each of the above matters, the Respondent acted without reasonable and proper cause and/or in a manner which in all the circumstances was capricious, arbitrary, wholly irrational and/or inequitable.

The Respondent's Position:

The Respondent does not agree that a discretionary payment is within the scope of the unlawful deduction from wages provisions of the Employment Rights Act 1996. Further, it is the Respondent's position that for the purposes of an unlawful deduction from wages claim it is permissible for a Tribunal to determine whether or not a sum of wages was properly payable pursuant to a legal entitlement (whether contractual or otherwise) but it is not within the scope of the unlawful deduction from wages legislation to determine whether the Respondent exercised a discretion in a manner that was equitable and/or rational, non-capricious and non-arbitrary.

Paragraph 23 of the Amended Particulars of Claim.

1.2 Was the total amount of wages paid by the Respondent to the Claimant on or around 15 July 2018 less than the total amount that was properly payable? In particular, the Claimant alleges that on or around 28 April 2018 he was entitled to a commission payment of £863,483 and the payment by the Respondent of the sum of £200,698.47 on 31 July 2018 was an unlawful deduction from wages in that it was £662,784.52 less than the sum that was properly payable to the Claimant. In the alternative, the Claimant alleges that he was entitled to *"such other quantifiable sum"* once the issues in this case are resolved, as the Tribunal finds.

2. **CONSTRUCTIVE UNFAIR DISMISSAL:**
(Paragraphs 40 to 45 of the Amended Particulars of Claim)

2.1 Did the Respondent, without reasonable and proper cause, conduct itself in a manner that was calculated or likely to destroy or seriously damage the implied duty of trust and confidence. In particular, the Claimant relies on the following allegations individually and/or cumulatively:

2.1.1 The Respondent awarding 70% of the commission payable to account managers on the Intersnack deal to the Claimant and 30% of the commission deal to Monica Harb; and/or wrongly classifying and/or reclassifying the Intersnack deal as a 'net new' and not a perpetual to Saas deal after the Intersnack deal had been concluded; and/or by including Optiva PLM for commission purposes within the MS Cloudsuite Food & Beverage package rather than separating it out; and/or in failing to recognise and/or

denying that the first year of cash receipts from Intersnack exceeded 75% of the ACV.
Paragraph 7, 10 and 11 of the Amended Particulars of Claim and the issues raised at 1.1 above

2.1.2 The Respondent failing to honour and/or reneging on an express agreement reached between the Claimant and Joerg Jung that the Claimant on 4th September 2017 that the Claimant would receive a commission of 100% Commission as Account Manager (less Mr Eiesland's 25%).
Paragraph 9 of the Amended Particulars of Claim

2.1.3 The Respondent failed to provide a satisfactory response to the Claimant's concerns that the commission split did not reflect effort and contribution and it was improper for Monika Harb's name to have been added to, and to remain on, the CRM record.
Paragraph 41 (a) and (b) of the Amended Particulars of Claim

2.1.4 The Respondent failed to provide a satisfactory response to the concerns raised by the Claimant in emails dated 9 October 2017 and 10 November 2017 that there was no basis for a commission split with Monika Harb.
Paragraphs 10 and 11 of the Amended Particulars of Claim.

2.1.5 The Respondent informed the Claimant, via an email sent by Andrew Oldroyd on 13 December 2017 to James Hannay and then forwarded by Mr Hannay to Richard East on 21 December 2017 and from Mr East to the Claimant on 21 December, that the final determination was that commission on the Intersnack deal would be split between the Claimant 70:30, with 70 percent being allocated to the Claimant and 30 percent to Monika Harb. The Claimant alleges that Mr Oldroyd's determination was in breach of the agreement reached with Joerg Jung of 4 September 20117 referred to as issue 2.1.2 above and/or it amounted to an arbitrary, irrational and inequitable split of the commission as reflected in the Claimant's formulation of issue 1.1.8 above?
Paragraph 12 of the Amended Particulars of Claim.

2.1.6 The content and tone of the email from Richard East to the Claimant dated 27 December 2017 in which Mr East wrote: "*In short, I would be careful about worrying what others are being paid and concentrate on your earnings. I strongly recommend that you don't write down too many*

details in case it leaks into email, it can all become very political and you could be back fighting for 75 percent."
Paragraph 14 of the Amended Particulars of Claim.

2.1.8 The Respondent prevented the Claimant from attending the final meeting with Intersnack prior to the conclusion of the deal during which the Respondent conceded without further challenge, or agreement or consultation with the Claimant that the Intersnack deal would revert to *"ramped up pricing".*
Paragraph 16 of the Amended Particulars of Claim.

2.1.9 On 16 March 2018 the Respondent sent the Claimant a commission statement which disclosed to the Claimant that the Respondent had classified the Intersnack deal wrongly after closure from *"Perpetual to SaaS"* to *"Net New"*.
Paragraph 20 of the Amended Particulars of Claim.

2.1.10 By an email dated 26 March 2018 from Andrew Oldroyd to the Claimant, which stated: *"I think the facts are straightforward. You were invited into a preferred vendor situation and the splits were agreed at an early stage"*, the Respondent demonstrated that the Respondent misunderstood the role of the Claimant in the Intersnack deal and the facts of the matter, which among other factors led the Claimant to raise a formal grievance.
Paragraph 22 of the Amended Particulars of Claim.

2.1.11 The Respondent delayed sending the Claimant his commission statement that was due at the end of February 2018. The Claimant alleges that the Respondent sent commission statements to others involved in the Intersnack deal to others earlier than it sent the commission statement to him. The Claimant was told that this was Jan Willem and the Cloud Team including the management of the Cloud team for example Peg Rodarmel
The Respondent awaits confirmation of precisely who the Claimant alleges received a commission statement at an earlier date to him and when the Claimant asserts those earlier commission statements were received.
Paragraph 19 of the Amended Particulars of Claim.

2.1.12 The Respondent failed to pay to the Claimant on or around 26 April 2018 the full commission that was properly payable to him.
Paragraph 41(i) of the Amended Particulars of Claim.

2.1.13 The Respondent failed to conduct a proper and reasonable grievance process and grievance appeal process; failed to interview key witnesses and failed to give the Claimant an opportunity to respond to the information obtained in the course of the grievance investigation.
Paragraphs 25 and 30 of the Amended Particulars of Claim.

2.1.14. The Respondent rejected the Claimant's grievance on 1 May 2018 and rejected the Claimant's appeal on 5 June 2018 when it had no reasonable grounds for doing so.
Paragraph 25 and 30 of the Amended Ground of Claim

2.1.15 On 1 June 2018, instead of allowing the Claimant to put forward his business plan for the new fiscal year, Simon Niesler, General Manager – Western Europe, pressed the Claimant on whether he was *"committed"* to the business regardless of the outcome of his grievance and whether the result of the grievance would impact on the Claimant's view of the Respondent. The tone and content of the discussion with Mr Niesler led the Claimant to conclude that Mr Niesler intended to replace the Claimant if he continued with his grievance.
Paragraph 29 of the Amended Particulars of Claim.

2.1.16 On 11 June 2018, the Claimant inadvertently received an email sent by Mr East and destined to Mr Niesler. The email questioned whether Mr East could subject the Claimant to a Performance Improvement Program if he was *"locked in a legal dispute"*. The Claimant alleges that Mr East's conduct among other things (as set out above) amounted to a *"last straw"*.
Paragraphs 31 and 42 of the Amended Particulars of Claim.

2.2 If the Respondent was in fundamental breach of contract, did the Claimant affirm the breach by continuing to work for many months following the alleged breaches prior to resigning?

2.3 Further, if the Respondent was in fundamental breach of contract, did the Claimant resign in response to that breach or did he resign for unrelated reasons:

2.3.1 The Respondent contends that those reasons included (i) 'an unjustified sense of grievance' (as set out in paragraph 44 of the Amended Grounds of Resistance) and/or (ii) that the Claimant resigned in order to take up alternative employment that was offered to him. If so, did the Respondent conduct play a part in his resignation.

2.3.2 In relation to (i), the Claimant contends that he did not have an unjustified sense of grievance but, on the contrary, had a legitimate grievance based on the Respondent's conduct which is said to amount to a breach of trust and confidence. In relation to (ii), the Claimant contends that the Respondent's fundamental breach, if it is so found, played a part in the reasons for his resignation.

2.4 If the Claimant succeeds in establishing that he was dismissed within the meaning of section 95(1)(c) of ERA 1996, was he dismissed for 'some other substantial reason' namely that the Claimant acted in an unreasonable and aggressive manner in correspondence, and adopted an unreasonable and aggressive position on his commission, which led to him being unnecessarily rude and aggressive to a number of members of senior management and to perform below the standard required and expected of him, such as to undermine the Respondent's trust and confidence in the Claimant as set out in paragraph 55 of the Amended Grounds of Resistance.

3. **PROTECTED DISCLOSURE AND DETRIMENTS:**

(Paragraphs 46 to 55 of the Amended Particulars of Claim)

Detriment

3.1 Did the Claimant make protected disclosures within the meaning of s.43B ERA 1996? In particular, the Claimant alleges that the following amounted to protected disclosures:

3.1.1 his email to Joerg Jung dated 9 October 2017 [**paragraph 10 of the Amended Particulars of Claim**];

3.1.2 his email to Joerg Jung dated 10 November 2017 [**paragraph 11 of the Amended Particulars of Claim**];

3.1.3 his email to Richard East dated 27 December 2017 [**paragraph 13 of the Amended Particulars of Claim**];

3.1.4 his grievance email dated 3 April 2018 [**paragraph 23 of the Amended Particulars of Claim**];

3.1.5 his grievance appeal email dated 9 May 2018 [**paragraph 26 of the Amended Particulars of Claim**]; and

3.1.6 his email of resignation dated 15 June 2018 [**paragraph 32 of the Amended Particulars of Claim**].

3.2 In the case of each alleged protected disclosure, the Claimant alleges that:

3.2.1 he had a reasonable belief that it was made in the public interest because the Claimant was of the belief that the fair and transparent operation of the Respondent's commission scheme and its associated Ethics Policy was a matter of public interest, particularly given the size of the Respondent, its wider global business and the nature of the alleged wrongdoing [**paragraph 48 of the Amended Particulars of Claim**];

3.2.1 he had a reasonable belief that the information disclosed by him tended to show that:

a. the Respondent acted in breach of its legal obligation to pay him a commission in accordance with the terms of its commission scheme;

b. the Respondent acted dishonestly or otherwise inappropriately maintaining a basis to unjustly reward the German sales team by splitting the Claimant's commission with the wife of the German opportunity owner **[paragraph 47 of the Amended Particulars of Claim]**;

b. the Respondent had failed was failing or was likely to fail to comply with a legal obligation to:

i. deal with his commission payment in accordance with the commission plan which he considered to be an express term of his employment contract; and/or

ii. deal with his commission payment by allocating him 100 percent of the sales commission in accordance with the agreement reached with Mr Jung which he considered had created an express contractual agreement; and/or

iii. not to breach the implied duty of trust and confidence in the employment contract and/or the implied duty not to treat employees in an arbitrary, capricious or inequitable manner in matters of remuneration;

or, in each case, the Claimant was, or was likely deliberately to conceal each of those matters [**paragraph 49 of the Amended Particulars of Claim]**.

c. a miscarriage of justice had occurred, was occurring or was likely to occur (or that those matters had been or were likely to be deliberately concealed) because Mrs Harb or the German sales team would dishonestly or otherwise inappropriately benefit from the commission split, which the Claimant believed was improper and unjust [**paragraph 50 of the Amended Particulars of Claim**].

3.3 Did the Claimant suffer a detriment as a result of the alleged protected disclosures? The Claimant relies on the following alleged matters [**paragraph 51 of the Amended Particulars of Claim**]:

3.3.1 the allocation of 30 percent commission to Monika Harb;

3.3.2 the retrospective reclassification of the Intersnack deal from Perpetual to SaaS to Net New;

3.3.3 the ramped up pricing concession immediately prior to completion of the Intersnack deal;

3.3.4 each of the matters set out at paragraph 2.1.1 to 2.1.16 above.

Dismissal

3.4 Was the reason or principal reason for the Claimant's dismissal that the Claimant had made one or more of the protected disclosures identified at sub-paragraph 3.1 above with the result that the Claimant was automatically unfairly dismissed?