EMPLOYMENT TRIBUNAS (SCOTLAND)

Case No: 4103322/2020 (A)

Held on 3, 4, 5 and 6 November 2020 (CVP)

Employment Judge: J D Young

Mr Daniel Johnston	**Claimant** **Represented by:** **Mr K McGuire - Advocate**
Veritas Technologies (UK) Limited	**Respondent** **Represented by:** **Mr H Olson - Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant received the wages properly payable to him from the respondent when he received payment of wages on 28 February 2020 and there was no deduction from the wages of the claimant under s13 of the Employment Rights Act; and the claim does not succeed.

REASONS

Introduction

1. In this case the claimant presented a claim to the Employment Tribunal complaining of an unlawful deduction from his wages due on 28 February 2020 in the sum of £273,584.83 in contravention of section 13 of the Employment Rights Act 1996 (ERA). Payment was claimed to be due by way of commission which is included as "wages" under section 27 of ERA.

2. In their response the respondent denied that any commission was due to the claimant beyond the sum already paid on 28 February 2020. They referred

to their "FY20 Incentive Compensation General Terms and Conditions" and maintained that the proper entitlement to commission of the claimant was in the paid amount of £232,015.95.

3. The essential issue for the Tribunal was whether the total amount of wages paid by the respondent to the claimant was less than the total amount of wages "properly payable" by the respondent on 28 February 2020.

The Hearing

Documentation

4. The parties had helpfully liaised in preparing a Joint Inventory of Productions numbered 1 – 37 (paginated 4 – 194). Reference to documents in this Judgment are to the paginated numbers.

Evidence

5. Evidence was given by:-

   (i) The claimant who adopted as true and accurate his witness statement extending to 10 pages.

   (ii) Louise Ford, Senior Director, Sales Operations for the respondent since December 2018. She adopted as true and accurate her witness statement dated 2 November 2020 extending to 7 pages.

   (iii) Mark Nutt, Senior Vice President of International Sales for the respondent since October 2020 and prior to that time for a period of 4 years, Senior Vice President of Europe, Middle East, Africa (EMEA) Sales with the respondent. He adopted as true and accurate his witness statement dated 2 November 2020 extending to 6 pages.

   Each witness answered supplementary questions and questions in cross-examination.

6. From the relevant evidence led, admissions made and documents produced I was able to make findings in fact on the issue.

Findings in Fact

7. The respondent is part of Veritas Technologies LLC which is a data management company headquartered in Santa Clara, California providing data management solutions on security storage and systems management as well as associated maintenance.

8. The claimant had continuous service with the respondent in the period between 1 August 2017 until his resignation with effect from 11 September 2020.

Contractual documents

9. He was employed under a contract of employment dated 11 June 2017 (J38/47) as "*Enterprise Customer Success Manager 4 Grade SO6".* In that role he became responsible for the European components of the accounts of HSBC and Bank of America and for the global account of RBS. The respondents had appointed a global account manager based in Glasgow for the HSBC account and a global account manager based in New York for the Bank of America account. The claimant also had responsibilities for trade with IAG. His role was to lead of the overall engagement within the respective regions of the accounts and to sell software and services to those companies.

10. His base salary at termination of employment ran at the rate of £125,758.00 per annum. In terms of Clause 4 of his contract of employment he was entitled to participate in the respondent's *"Sales and Services Compensation Programme (Plan)".* Essentially that plan provided the claimant with commission payment which was a significant element of his remuneration package. Clause 4 of the contract stated:-

> "4. ***Participation in Commission Scheme***
>
> 4.1 *You are eligible to participate in the Company's Sales and Services Compensation Program (Plan) on the terms and conditions of the Plan as in force from time to time. The Plan will be provided to you by your manager.*

*4.2 Under this Plan your potential commissions earnings at 100% of performance will be **£80,000 per year**. Accordingly your potential on target earnings will be **£200,000** which is comprised of your annual base salary as set out above plus your commission earnings.*

4.3 The company reserves the right to vary the terms of the Plan, terminate the Plan, or replace it with another Plan in its sole absolute discretion. You will be informed of any changes to the Plan in which you may participate (including for the avoidance of doubt, its removal or replacement) either in writing or by electronic mail." (J39)

11. The claimant's entitlement to commission under the Plan for the fiscal year 30 March 2019 to 3 April 2020 was stated (J59) to consist of (1) the FY20 Incentive Compensation General Terms and Conditions (FY20 T&Cs) (J52/89) including relevant Policies and (2) an individualized Compensation plan document (J140/141).

12. The Policies produced as part of the FY20 T&Cs were (i) FY20 Global Management Review of Attainment >250% Annual OTC Governance (J90/94) and (ii) FY20 Quota and /or Coverage Process Governance (J95/99)

13. In terms of the individualized plan the claimant's "On Target Commission" (OTC) amounted to £83,839.00 and that together with his salary would give him "On Target Earnings" (OTE) of £209,597.00.

14. There were certain performance measures which required to be attained in order to receive OTC being titled "Performance Measure 1" and "Performance Measure 2" and were weighted 70% and 30% respectively. (Measure 1 and Measure 2). The Measure weight reflected the application and significance of the Measure.

15. Measure 1 related *to "New licence + New appliance"* being fresh licences or new appliances sold. Measure 2 related to *"Renew licence + Renew*

appliance + renew BSC + Renew 1st year support on licence/appliance + New 1st year support on licence/appliance."

16. In terms of the individualized plan when set the "Quota" or sales target to be reached by the claimant on Measure 1 and Measure 2 were $4,445,412 and $9,667,767 respectively. If the claimant hit those quota targets he would receive OTC. If he exceeded the quota targets within Measure 1 and Measure 2 then an accelerator would apply in order to calculate the commission earnings. If either Measure were exceeded then accelerators would apply in the band 100% - 200% of target (x5) and in excess of 200% of target (x2) to calculate the appropriate commission payable.

17. The FY20 T&C's contain various provisions giving discretion to the respondent on commission issues. Under that section headed *"Interpretation of the Plan/Changes to the Plan"* it is stated:-

> *"**To the extent permitted by applicable local laws** the company has complete authority and sole discretion to determine the appropriate resolution of any alleged or actual inconsistences, issues (administrative or otherwise) or ambiguities arising under the Plan. Furthermore the Company reserves the right in its sole discretion to modify all aspects of the Plan, including but not limited to these FY20 Incentive Compensation General Terms and Conditions, Individualised Compensation Plans (as well as specific Plan Elements), Individual Goal Sheets, Plan assignments, territories and accounts and territory/account assignments, Sales quotas the sales Compensation Policy and FY20 Sales Compensation Governance Approval Matrix (the "Approval Matrix"). No modifications will be effective unless in writing and approved in accordance with the published FY20 Sales Compensation Governance Approval Matrix and/or the terms of this Plan. The approval process need not be complete before a modification becomes effective – approval can be given retroactively.*

As set forth above, the company reserves the right in its sole discretion to modify and/or all *(sic)* ***aspects of the plan in accordance with local legal requirements".***

18. The clause then proceeds (so far as relevant) in the following manner:-

"Some of the circumstances in which various aspects of the Plan and/or Plan Participant's credit or compensation may be modified include, but are not limited to the following:

1. ***Quotas –*** *may be increased or decreased prospectively in situations, including but not limited to, where quotas were not set to reflect sales not anticipated or where sales were not reasonably certain at the time Sales Quotas are established or where errors are made in quota setting. Retroactive changes to sales quotas will be reviewed on a case by case basis and determinations will be made subject to applicable local law. The Company reserves the right to adjust quotas at any time (prospectively or retroactively) at the Company's sole discretion with or without prior written notice, subject to applicable local law.*

…….

Changes to quotas will require review and approval by Sales Management (refer to FY20 Sales Governance Approval Matrix), EVP of WW Field Operations and /or his/her designee(s) and/or EVP Customer Success.

…..

9. ***"Windfall" provision -*** *Subject to applicable local law, the Company reserves the right to manage a Plan Participant's commission earnings where a "windfall" occurs. A "windfall" is defined as a situation where a participant's earnings far exceeds the Participant's annual On Target Commission (OTC) due to unanticipated large transaction(s) not included in quota setting, or a large transaction(s) during a plan year which requires unusual or*

*significant management involvement. These are some examples (but not an exclusive list) of "windfalls" where Credit, Sales Goal/Quota Retirement (*sic*) and/or incentive compensation will often be modified subject always to applicable local law.*

When a Plan Participant's commission earnings exceed 250% of his or her OTC, the EVP of WW Field Operations and/or his/her designee(s) and the EVP, Customer Success will review the Plan Participant's attainment to determine whether a windfall has occurred. If a windfall occurs, the company reserves the right to limit a Plan Participant's commission earnings based on the EVP of WW Field operations and/or his/her designee(s) and the EVP, Customer Success evaluation of the plan participant's efforts towards exceeding the target or quota. In the case of a windfall, a Plan Participant may earn a lower commission than the amount provided for in the Plan Participant's Plan Acknowledgement Form, subject to applicable local law. Earnings above 250% threshold will require approval of the EVP. Worldwide Field Operations and/or his/her designee(s), EVP, Customer Success, VP of Worldwide Field Finance and/or his/her designee(s)., VP human resources and/or his/her designee(s).

The above are only examples of some of the circumstances in which modifications to aspects of the Plan may be made by the Company. The Company will attempt to inform a Plan Participant of modifications prior to carrying them out but cannot guarantee that it will do so in every instance, subject to applicable local law.

Due to the nature of the Company's sales, sales process, technologies and incentive compensation administration, any modifications undertaken in this section are likely not to be made until after the transaction has been booked and sometimes not until after the end of the fiscal year as that is when the Company is likely to become aware of the extent of the windfall. Accordingly, the Company retains the right subject to applicable local law, to

> *make appropriate modifications at any time during the fiscal year and until final year end closing and reconciliation of the Plan Participants Individualised Compensation Plan/s.*
>
> *The Sales Finance team may at any time undertake an audit to ensure all payments under the Plan are made in accordance with the same Plan. They may also identify payments that may be the result of administrative errors and/or unanticipated circumstances including payments which fail to reflect a reasonable evaluation of the plan participants contribution toward any transaction and earnings potential which is beyond that reasonably contemplated by the company." ….* (J60/63).

19. A further example of the discretion held by the respondent under the FY20 T&Cs is:-

> ***"Subject to applicable laws*** *the Company reserves the right to amend the FY20 Incentive Compensation and General Terms and Conditions and related policies and procedures including but not limited to Quota, Compensation Bookings Credit, and Draws/Advances prospectively or retroactively, with or without prior written notice at its complete discretion and any modification/s and exception/s to this FY20 Incentive Compensation General Terms and Conditions, Crediting Policy, and Individualized Compensation Plan must receive approval from the Compensation Exception Committee (CEC****). All approvals that may have been given outside of the authorisation of CEC are null and void and do not constitute approval to pay.*** *The CEC members may include the EVP Worldwide Field Operations and/or his/her designee(s), EVP, Customer Success and/or his/her designee, SVP Global Business Operations, VP Sales Finance, VP of HR and the Sr Director, Global Sales Compensation Operations"* (J63)

20. It is also stated under a section dealing with *"Territory, Product or Services and Account Assignment"* and the sub head *"Compensation Bookings Credit & Extraordinary Deals"* :-

- *"Credit for Extraordinary Deals. As part of deal validation management reserves the right to adjust territory credit of the annual quota for extraordinary deals. Extraordinary deals include:-*

  a. *Deals where the sales people involved were not fully responsible for the deal pursuit or close as evidenced through opportunity management records within CRM.*

  b. *Extremely large deals (e.g. a deal greater than a Plan Participant has been assigned, annual Quota)*

- *Adjustment could include modifying the impacted sales people's territory credit or increasing their annual quota. The type and amount of adjustment will be at management discretion."*

HSBC Deal

21. The claimant agreed his quota in Measure 1 and Measure 2 (J140/141) in April 2019. He was not advised of the breakdown of the quota figures amongst the customers in his territory. He knew that FY20 was a potential renewal year for one of the customers in his territory namely HSBC. They had signed an Enterprise Licence Agreement (ELA or E-flex) in 2017 which ran for three years. If a new agreement was reached in 2020 that would be a high value deal which was going to be extremely significant for the business. The value of that deal would go to achieving his Measure 1 quota.

22. If HSBC did not commit to the respondent in 2020 then in common with such licence agreements the respondent would have continued to deal with HSBC on a "support only" basis known as a "grey year". That provides a customer with twelve months of maintenance at a previously agreed discounted rate so that they have time to move from the respondent platform. Had HSBC

pursued a “grey year” that would have resulted in no credit to the Measure 1 quota for the claimant in FY20.

23. The claimant’s evidence was to the effect that completion of a deal with HSBC in FY20 was no certainty. There had been some issues arising out of a contract with an HSBC subsidiary in Germany and he was aware that had the potential to sour relations. In his contact with the customer he had sought to smooth relations. The evidence from Mark Nutt was that this issue had no bearing on the ELA contract with HSBC. There had been an issue with hardware supplied to an HSBC subsidiary in Germany and a refund had been made to the company. The potential new ELA contract with HSBC coming in FY20 was for software and there had been no issues between the companies in that respect. He had dealt with HSBC and had no hint that the relationship between the respondent and HSBC had been affected by any difficulties in the provision of hardware to the HSBC subsidiary in Germany.

24. From the evidence I could make no finding that there was any serious risk of the ELA contract with HSBC not being agreed as a result of events in Germany. At the same time there was no guarantee that such a contract would be agreed.

25. Given the significance of the contract value to the respondent it was of no surprise that considerable effort was made to ensure that a deal was struck in FY20. There was some tension between the claimant and Mr Nutt as to respective contributions. The claimant spent over 2 years working on the HSBC deal and indicated he was a “key member of the team responsible for securing that deal”. He advised that the HSBC team with whom he engaged included their Global account manager; Global technical account manager and technical account manager. His efforts included leading the UK portion in engagement with the client which entailed regular briefings with key stakeholders in HSBC engineering to widen their adoption of the respondent’s technologies. That included setting up and leading a pilot in Sheffield and being able to make inroads into the HSBC operations in Jersey and Guernsey with sales of hardware. He considered those relationships ensured smooth day to day running of the account which meant customer satisfaction was

maintained. He also led services propositions into HSBC. That could be evidenced by an email from the respondent Director of Professional Services of 11 June 2019 (J184) which thanked the claimant for "a great Q1 from you on Services – firstly RBS and now HSBC".

26. Since resignation the claimant been unable to access his online work calendar but he produced extracts from his diary showing calls and meetings with HSBC between 3 May and 12 December 2019 (J146/180). He had summarised those meetings in a document (J180/183). He had also been very involved with HSBC key personnel in the respondent's "vision event" in London on 12 November 2019.

27. The claimant also referred to the email from the respondent UK managing director (J114) which extended thanks to the claimant on his departure from the company for *"outstanding contribution to the UK and overall Veritas business".* He made reference to the claimant's achievements in creating long term customer relationships and a very high level of performance and that his success culminated in being part of the "HSBC team that last year signed the largest ever deal in Veritas's history". Additional reference was made to the award made to the claimant for "Win of the Year" in recognition of the HSBC deal and his membership of the team as winners of the award (J194). Reference was also made to the email from the UK&I Managing Director of 6 January 2020 (J188) referring to closure of the deal with HSBC saying "*Chris Butcher/Danny Johnston/Nigel Judd/David Rollinson – Team HSBC with "support" from Mark and at the end stage from Gregg too managed to wrestle the deal over the line in 2019 with a few days to spare…"* and which was heralded as an "*awesome result".*

28. Mr Nutt by contrast indicated that over more than a 12 month period he had spent a significant number of hours each week structuring progress and ultimately closing the HSBC E-flex contract. He advised that the respondent CEO also spent a significant amount of time on the account in order to secure the contract. He considered it was unusual management involvement. By way of example he held weekly "core team calls" to ensure that actions were driven with speed and urgency. He advised that the claimant was not part

of that core team. Given that the potential contract with HSBC would be the largest software deal that the respondent had completed it had high visibility within the respondent business. The effort of the claimant within his team was "not visible" to Mr Nutt and he indicated he was aware of all significant meetings but not those listed by the claimant in his summary of interaction with HSBC over May/December 2019.

29. It was somewhat surprising that Mr Nutt indicated the claimant had "no visibility" in relation to this contract given the award and recognition from the UK Managing Director of his part. However, it would also be surprising were there not to be engagement at various levels within the respondent organisation and that of the American parent given that this was a very significant contract. It would be unusual were there not to be a good deal of effort expended at all levels in securing such a deal. I accepted each would be doing their utmost within their own spheres and levels of contact to ensure a deal was struck. From the evidence I accepted that there was significant effort and attention to this matter given by the claimant and Mr Nutt and that they would have the support and involvement of technical teams. A deal of this size would inevitably have executive and board level attention and executive involvement. It would be expected that all would use their best endeavour to secure this contract.

30. In December 2019 the respondent closed the contract with HSBC for a new 3 year-flex. The contract value for this transaction attributed to the UK was $12.6m which was the agreed "split" for the UK intended to reflect the level of effort expended by each region (UK at 70%, US being 10% and Asia 20%). After excluding the "maintenance" element within the contract value the sum of approx. $11.2m was reflected within the claimant's quota for Measure 1.

31. That value along with other sales figures for the claimant meant that his commission earnings would be calculated at £505,564.78 as demonstrated on a screen shot of "compensation data" for the claimant within the respondent's systems for the year ending 31 December 2019 (J143). Part of that sum namely £232,015.95 was paid to the claimant by February 2020. The remaining balance of £273,548.83 plus a small "opening balance" of

£9.60 gave a total starting balance in February 2020 of commission of £273,558.43 but that sum was not paid to the claimant in his pay slip of 28 February 2020. That formed the sum claimed by the claimant as a "deduction" from his wages.

Review

32. This level of commission payable exceeded 250% of the claimant's OTC which triggered a review in line with the FY20T&Cs. which stated that if commission earnings exceed 250% of OTC then a review would be carried out to determine whether a "windfall" had occurred (J62). The claimant's year to date commission was 680% of OTC.

33. That review determined that the full value of the previous FY17 E-flex transaction with HSBC had not been considered at the time of setting the HSBC quota for FY20. While the claimant had been advised of a "global quota figure" for Measure 1 at $4,445.412 the amount attributed to the HSBC account was put at *"$2.9m for new business at sales representative level ($2.3 million US dollars for software and $0.6million for appliances)".* (Louise Ford witness statement para 6). This quota was set by the "*local sales leadership around March/April 2019"*

34. Louise Ford explained that typically quotas were set by:-

    a. reviewing a minimum average of 3 years' booking history along with pipeline information about future opportunities at the account level.

    b. applying a growth rate (for FY20 the appropriate growth rate for an account of this nature was 5%) and

    c. depending on the type of account applying a regional split.

35. From files recovered the review noted that for FY17 the HSBC account showed a $6.3m bookings value including a transaction for $5m (being the E-flex transaction). However, the quota template spreadsheet returned by the local UK leadership in setting the FY20 quota for the claimant contained only the FY18 and FY19 UK booking values for HSBC which were far lower

than the FY17 e-flex figure. That was due to the fact that following the 3 year contract concluded in FY17 the customer purchased limited products outside of the contract. It therefore appeared that the significant value of $5m in respect of the FY17 E-flex contract was not factored into the setting of the HSBC quota for FY20.

36. Given that FY20 was a "renewal year" this was significant. Louise Ford explained that it would be expected that the FY17 historic bookings figure to have been used as a base from which to model the anticipated value of FY20 new business with HSBC for UK sales representatives.

37. Given that the FY17 E-flex contract was a global transaction with input from various geographies sales credit was split between those contributors. It was expected that a similar split would have occurred to estimate the value to the UK of the FY20 contract amount. That information suggested that the quota was set too low.

38. Additionally, in the review consideration was given to the comparative size of the quota set for the respondent Global Account Manager (GAM) and Global Technical Account Manager (GTAM) for HSBC being for FY20 Chris Butcher and Nigel Judd respectively. Those targets had been set by Mark Nutt and reflected the bookings value that he and the business predicted HSBC would pay for the FY20 E-flex contract. The GAM target for HSBC new business was set at $11.5m for FY20 and the UK split at $8.1m. Those targets were accepted by Christ Butcher in July 2019 and thereafter by Nigel Judd after some hesitation. Essentially it was concluded that there had been an error in the deployment of the FY20 quota across the UK sales representative team because it did not include the UK high share of the FY17 global E-flex contract with HSBC.

39. Albeit when the GAM and GTAM targets were set it should have been clearer to the UK Sales operation that the quota for the claimant (and other sales representatives involved in HSBC) was materially incorrect, no steps were taken to correct the matter at that stage.

40. In the review exercise Louise Ford engaged with various individuals as well as the claimant's second line manager, Simon Fisk. She reviewed the original quota and proposed revised quota with Beth Kilgour (SVP Global Business Operations who also exercised delegated decision-making powers from Scott Genereux the EVP, Worldwide Field Operations) and David O'Connor (Director, Sales Operations). Paul Donald (Senior Director EMEA Sales) was also part of the review team along with Mark Nutt (SVP of International Sales EMEA).

41. Prior to intimating the result of the review to the claimant approval was received from Scott Genereux and Gregg Whitney (Global Finance Manager). (J102/104).

42. Prior to intimation to the claimant the revised quota was put before an EMEA Commissions Executive Review meeting of 12 February 2020. At that time Beth Kilgo on behalf of the Compensation Exception Committee (CEC) approved the review based on the spreadsheet produced (J190/193). The spreadsheet had been sent previously to David O'Connor (Global Compensation) and Odesh Lyman (Compensation EMEA).

43. That spreadsheet showed that the revised quota for the HSBC account was to be $8.1m ($7.4m for new licence and $0.7m for new appliance) in place of $2.9m which meant that the claimant's total Measure 1 quota now stood at $8.7m in place of $4.4m. The Measure 2 quota was put at $10.6m. The spreadsheet identified the calculations to get to the proposed new quota.

44. The outcome was communicated verbally to the claimant by Simon Fisk in the first instance and then by email from Louise Ford of 12 February 2020 (J105/106). That email referred to the "windfall provision" within the FY20 T &C's. In particular reference was made to the ability to review matters where OTC exceeded 250%. The email indicated that it had been determined *"there was an error in the deployment of the FY20 quota for HSBC across the UK I team"* which was "*set incorrectly at the beginning of the year as it did not include the EMEA share of the global E-Flex".* As a result "*corrective action as permitted by the FY20 T & C's was being taken to set the quota accurately"*

and "*in line with the windfall provision in the FY 20 T&Cs we have corrected the quota*" resulting in the HSBC quota being reset at $8.1m in respect of Measure 1. It was stated that the next payment to the claimant would be based on the revised figure.

45. Ms Ford confirmed that prior to the new quota being agreed and intimated to the claimant she had not spoken with any of those who had set the original quota around February 2019. She advised that the leader of the team who allocated the original quota had left the business. Her position was that it was clear from an examination of the records that an error had occurred in the setting of the quota and there was an entitlement in terms of the "windfall provisions" of the FY20 T &C's to review and set a new quota. While the transaction with HSBC may not have been "unanticipated" that was not the only example where quota might be reviewed under the "windfall provisions". The terms indicated that the examples given were not exhaustive and it was legitimate to review on grounds of error.

46. Partially redacted documents had been provided to the claimant following a request which had been made. An exchange of email (names redacted) on 16/24 January 2020 which advised on the quota review indicated:-

> *"Having spent a lot of time reviewing this please note that the file we used for planning did include 2017 revenue bookings and as highlighted in the attached, the E-Flex was $5m booking and $1.3m PS, at that time the booking value included PS which was excluded from quota in FY20. I have highlighted that below and again the source data file is attached.*
>
> *Overall my view that the target was set incorrectly to that variance is not correct, please consider the content and advise. I would like to ensure we communicate early next week and currently I think there is not a sufficiently clear justification…."* (J100/101)

47. A separate email (names redacted) of 10 March 2020 advised:-

> "*I think it's important that you are clear that the HSBC ELA was known about and discussed during planning and an estimated value was made*

and incorporated into the setting of quotas. I will add more background and detail to this when we speak later on." (J107)

48. An email chain (names redacted) of 13 May 2020 advising that the principles of calculation of the quota on a *"rewind of the clock back to what we knew 14 months ago"* seem to "*make sense"* however a cautionary note was struck by the author of the email indicating that "*we need to be sure this is how the UK would have calculated the quota for HSBC and for Daniel Johnston in April 2019. If not (this is a formula not familiar to the DM etc) then although we are saying we are not aligning to the GAM number we are aligning to a formula not used or applied at the time (hope that makes sense)."* It also advised:-

> *"How do we consider other aspects that may have formed a level of negotiation – (redacted) mentioned that they reduced the number at the time as a risk/reward factor due to a potential grey year and challenges in the account with appliances etc at the time."*

49. A further email (names redacted) of 7 May 2020 took issue with the *"split"* of 70% for the UK agreed *"a few months before the deal booking".* The point made in the email was what split might have been envisaged when the quota was set around February 2019 rather than using the split set in October/November 2019 only a month before the HSBC deal was booked. (J108)

50. In so far as consistency of "split" of the HSBC value amongst regions was concerned the quota set for the claimant around February 2020 was stated to be in line with what would have been the "split" if considered in early 2019. Louise Ford advised that she had circulated a spreadsheet in February 2019 confirming the current FY19 global and strategic accounts splits. That confirmed that the FY19 EMEA split for HSBC was 70% (all of which would be assigned to UKI region). In support she advised of an email exchange with Simon Fisk confirming and acknowledging that the EMEA/UK element of the HSBC split would remain at 70% for FY20.

Grievance

51. The claimant intimated a grievance in respect of the review of quota on 19 February 2020 (J117/118). That made a number of points regarding the review of quota being in essence:-

(i) The windfall provision in the FY20T&C's related to "unanticipated deals" and the HSBC deal was not "unanticipated".

(ii) He signed his "*territory goal sheet"* as approved by the respondent in April 2019 but pointed out that:-

(a) the global number attributed to HSBC was not set until August 2019.

(b) Global split confirmations on global accounts were not confirmed until October 2019.

(c) the deal was booked on 31 December 2019.

(d changing the plan after the deal had been booked and at that late stage of the year reduced earnings ability.

(e) no policies or precedent existed for tying numbers to GAM accounts. The HSBC deal had been unfairly singled out.

(f) in line with the FY20 Global Quota and/or Coverage Change Process Governance Policy evidence was required of approvals for the quota change from first line management, second line management, GEO Finance leader, GEO Ops leader and GEO SVP.

(g) any error and resultant liability rested with the respondent

(h) the claimant did not believe the goal was set incorrectly.

(iii) The FY20 T&Cs stated in the policy link (FY20 Global Quota and/or Coverage Process Governance) that there will be no quota or

coverage changes in Q4. This change had taken place in Q4 contrary to that policy.

52. The FY20 policy document (J95/99) relied upon by the claimant in his grievance statement indicated that:-

- *"During the FY, Quota or Coverage change might be necessary to reflect the business strategy or local conditions. Please note that it is expected that there will be limited changes during the year and no changes in Q4.*

- *Any change in Quota and/or Coverage will require the approval of the EVP of WW Field Operations and/or his/her designee(s) for new business and EVP Customer Success for renewals"* (J96).

53. In the event that "*such cases were identified"* then they required to be *"submitted via the FY20 Global Quota and /or Coverage Change Template"* and that:-

> *"Sales Ops will seek approvals from:*
>
> - *First Line Sales Managers*
> - *Second Line Sales Managers*
> - *GEO Finance Leader*
> - *Geo Ops Leader*
> - *GEO SVP "*

54. As regards this Policy it was explained by Mr Nutt that the Policy was intended to cover change in "coverage" where an individual's "territory" might be enlarged or not as the result of an employee departing or the business strategy changing to move away from a product or the like. The essence of the document was to pay employees fairly by using this policy to effect change in quota as a result of alterations in coverage. It was simply anticipated that it would be unlikely that that process would be used in Q4. It was in his view not a relevant policy in this situation.

55. The grievance raised by the claimant took was heard on 11 March 2020 by Ian Wood, Head of Business Practice EMEA. He stated that he had examined various documents and interviewed several individuals to understand the reasoning behind the decision to review the claimant's quota. He had met with Louise Ford; Rob Cullen, Senior Principal Sales Operations Analyst; David O'Connor, Director Sales Operations; and Simon Fisk, Regional Sales Leader.

56. The outcome of the grievance was intimated to the claimant on 20 April 2020 (J119/122). The outcome stated that *"all individuals interviewed who were originally part of the UK planning process knew about the fact that FY20 was an anniversary year for the Enterprise Licence Agreement originally signed with HSBC in FY17 (3year)"* but that "*the planning workbook issued in March 2019 did not show numbers from FY17 for HSBC"* and *"although during the investigation a few individuals stated the ELA was taken into consideration and set to balance the potential of a grey year… I agree with the sales operation leadership team that the plan number was still considerably lower than what I would expect to see for HSBC".* He concluded that the over achievement on quota was "*disproportionate due to the original target not reflecting the true value of the upcoming ELA renewal"* and so the grievance in that respect was not upheld.

57. He considered that it was reasonable to correct what the business believed was an error in setting the quota in 2019 but had established that there was no policy or documented process to *"guide sales operations to align local quotas with global account targets in FY20 in the planning process, and therefore I have had to conclude based on the facts that each actions are taken in resetting the quota to align to the global "quota", with 70% allocation for the UK split HSBC were not appropriate."* Therefore, that aspect of the grievance was upheld and the recommendation that management *"re-assess or re-calculate how the revised quota should be set and when doing so recommend that those setting the quota take into account my decision to uphold this aspect of the grievance on the basis that the HSBC quota should not be aligned to the global quota because it was set later on in the year."*

58. He went on to make several additional recommendations for the company to consider implementing to ensure *"such a situation could be avoided in the future".*

59. By letter of 15 May 2020 the claimant was advised of the result of the review of the quota taking into account the partly upheld grievance. Mark Nutt wrote to the claimant by letter of 15 May 2020 (J123/127) explaining the outcome of that review. Essentially the view was taken that *"the appropriate way to decide this point would be to wind back the clock to 14 months ago and adjust the original target of $2.9m to a target on the basis of what the company knew at the time and to consider the standard practice used for setting quota for similar accounts at the time."*

60. It was reiterated that the documentation uncovered when setting the FY20 quota should have taken into account the FY17 UK E-Flex value ($5m) and was only calculated on the bookings for FY18 and FY19 UK values which were far lower. It was acknowledged that there was a "*clear expectation of an e-flex for FY20*" and on that basis the quota should have taken into account the previous FY17 E-Flex booking and not only the two previous annual years of booking. That was stated to be *"regrettable".*

61. He explained that the practice "*at Veritas when setting quota is typically to use historic bookings and to apply growth"* and that growth would *"vary depending on country and Company growth targets".*

62. He also made the point that "windfall" event was not covered under the Policy identified by the claimant in his grievance which was there to protect employees and ensure that *"deliberate coverage and quota changes are not made with the intention of depriving them of commission to which they are genuinely entitled".* He maintained that the change in this case was due to "windfall" and the FY20 T&Cs allowed the quota change.

63. In reference to "split" it was indicated that while the split for FY20 was *"not confirmed at planning stage it was already 70% for software at EMEA level and 50% hardware at EMEA in FY19. This was widely communicated by email on 1 February 2019 to EMEA sales leadership….. "Given* that there

was communication on the split in February 2019 and that the split for EMEA was already 70% in FY19 there was reason to believe that the split for FY20 would have been calculated at 70%.

64. After a calculation set out (J126) it was confirmed that the total UK HSBC FY20 quota was the same figure as the revised quota which had been previously set on review. It was explained that that was *because "the global number was used as a starting point for both calculations*"

Appeal

65. The claimant was advised that he had the right of appeal against the final grievance decision which included the calculation made. He made that appeal by letter of 26 May 2020 (J128/132). He maintained:-

1) That there had been a failure to take into account the FY20 Global Quota and/or Coverage Change Process Governance Policy by Ian Wood when he dealt with the original grievance. The follow up letter from Mark Nutt made reference to that policy document but stated that its purpose was to protect employees and ensure that *"deliberate coverage and quota changes are not made with the intention of depriving them of commission to which they are genuinely entitled".* In the claimant's view that was what had occurred in this situation.

   He also indicated that the company procedure had not been used to approve a quota change within that same document.

2) He challenged that there was any mistake in the original quota set when so many senior individuals who were in the business were fully aware of the potential of the FY20 deal with HSBC. He maintained there was still risk associated with securing that deal and that the quota set would take that into account.

3) He noted that the business value for HSBC for FY18 was $0.11m and for FY19 was $1.6m and so it made no sense for his total Measure 1 quota for FY20 to be set at $4.5m unless the potential ELA deal with HSBC was taken into account for FY20. Similarly, his Measure 2 quota

of $9.6m (re-evaluated and increased to $10.6m in January 2020) would not have been achieved without the ELA deal being taken into account. He would not have signed the revised quota in April 2019 had that deal not been possible. At the time the quota was set there was no deal concluded with HSBC or knowledge of what the ultimate value would be.

4) He did not consider that the commission payable to him was a "windfall event" as defined. The HSBC transaction was not "*unanticipated*" and neither did he consider that windfall provisions allowed the company to correct any alleged error in quota setting.

5) He made the point that no specific target was ever given to him for HSBC and that his Measure 1 goal was "*blended over four accounts*".

6) He advised that he was responsible for the Bank of America account being a similar global account. However, the advised method used for the HSBC quota was not used for that account and he was not aware of any other account dealt with in this way.

7) He considered that even if the respondent believed there to be an error (which he did not accept) then the company should be liable and it was not reasonable to retrospectively change a quota with such a significant financial impact. He again stated that the policy document indicated there would be no quota or coverage changes in Q4 and/or that approval in terms of that policy had not been sought.

66. The appeal was taken by Brian Ross, Appeal Manager, Global Director, Veritas Licensing Services and he intimated his decision in a letter to the claimant of 15 July 2020 (J133/136). He did not allow the appeal and upheld the revised quota.

67. He pointed out that the windfall provision within the FY20 T&Cs gave examples which were "*not exhaustive*" and he believed it was reasonable to apply the clause to the HSBC situation. He also believed that the compensation plan could be modified at any time *"as defined within Page 10"*

of the FY20 T&Cs and that the sales finance team could undertake an audit to ensure payments were made in accordance with the plan and could also identify payments that may be the result of administrative errors or unanticipated circumstances.

68. In relation to the appropriate approvals he stated that he was satisfied that "*an appropriate and correct approval cycle was followed for the quota changes".* In this case those "*who were directly impacted or could be potentially be perceived to be biased could not participate in the approval cycle"* and "*in your case the 1st line manager and 2nd line manager were not able to participate in the approval cycle and were replaced in the process by the SVP of Global Operations and EVP of Worldwide Field Operations."*

69. He acknowledged the points made by the claimant in his appeal but was satisfied that the original quota set while including an element for HSBC was set lower than the business would have expected. He emphasised that there was *"clear visibility of the potential and desired size of an HSBC deal at all levels in the Sales organisations at the end of FY19 and into FY20 (sic)"* but the size of the quota could not be realistic as:-

a) The value of the FY17 UK portion of $5m for this customer was bigger than the Measure 1 FY20 quota for the claimant and given the anticipated renewal of this account it was clear there was an error.

b) HSBC had consistently done deals on 3 year anniversaries and the "grey year" option was never contemplated as a true option for HSBC.

c) The quota difference between the claimant and GAM pointed to a mistake in the claimant's quota (J134/135).

d) He also agreed that 70% split for UK would have been applied at the time the quota was set and that an expected split would be used for global accounts as a factor in quota setting.

69. The claimant resigned from the employment with the respondent with effect from 11 September 2020 over this issue (J187).

Submissions

70. I was grateful for the written and oral submissions made on conclusion of the evidence. No discourtesy is intended in making a summary of those submissions.

For the Claimant

71. It was submitted that there was no real dispute on the key facts in this case but that the dispute was over interpretation.

72. By the original quota set the claimant was due £505,564.79 by way of commission. The outstanding the sum of £273,548.83 was the sum claimed. Reliance was placed on sections 13, 23 and 27 of the Employment Rights 1996 (ERA). Commission was included within the definition of "wages" The claim was that there had been an unauthorised deduction from wages due.

73. Relevant to the proceedings were the FY20 T&Cs (J52/88) and Policies produced (J90/99)

74. In *British Overseas Bank Nominees Ltd and Others v Stewart Milne Group Ltd [2019] CSIH 47* the Inner House explained the correct approach that should be adopted when courts are required to interpret the meaning of contractual clauses. Particular reference was made to paragraph 7 and 8 of that decision which indicated that the exercise of construction should be both purposive and contextual. *"Purposive interpretation means that the court should attempt to give effect to the primary purposes that, objectively, the parties intended at the time of the contract. Determining those purposes will obviously depend on the wording used, but that wording must be considered in such a way as to give effect to the primary objectives of the contract rather than giving undue influence to minor provisions or niceties of wording".* So far as contextual construction was concerned it was stated that meant that the "*wording used in the contract must be construed against the background known to the parties at the time*".

75. Reference was also made to *John Eric Daniels and Another v Lloyds Bank Plc and Another [2018] EWHC 660 (Comm).* which dealt with unilateral variation clauses in contracts of employment and a claim based on the terms and conditions of a Long-Term Incentive Plan. The claimants in that case said that they had met certain targets and so relevant shares should be invested in them. The Bank denied it was liable to transfer the shares in reliance on the rule which stated "*except as described in the rest of this Rule 17, the committee may at any time change the Plan in any way*".

76. In the Judgment it was stated that in such cases and if a discretion exists the courts had a limited role to play. Save in exceptional cases (such as . *Braganza v BP Shipping [2015] UKSC 17)* the court's intervention will only be justified in cases where the discretion has been exercised arbitrarily, capriciously or irrationally. *"That limited scope of review however means that one must look carefully first at whether the discretion relied upon exists – just as one would look carefully at the purpose for which the discretion is said to be exercised. Further the question of purpose forms a part of the exercise of contractual construction when determining whether the discretion contended for exists".* It was also noted that on context a court would be entitled to consider the nature of the relationship "*and the fact that a party is an employee vis a vis his contractual counterparty will tend to increase the court's vigilance when considering words and the commercial context. This is natural when one considers the imbalance of power which is often inherent in such a relationship".*

77. In *Braganza* it was noted that the court would seek to ensure that a discretionary power should only be exercised in good faith and also without being arbitrary, capricious or irrational in the sense in which that term was used when reviewing the decision of public authorities. It followed that such a decision could be impugned not only where it was one that no reasonable decision maker could have reached but also where the decision-making process had failed to exclude extraneous considerations or to take account of all obviously relevant ones.

78. In respect of the particular clauses in the scheme it was submitted that those clauses which sought to reserve the right to modify the scheme did not include the situation where commission had been earned and calculated. If it was to upset that position then very clear words would require to be used. There was no provision in the scheme to say that the company could alter commission already earned.

79. In relation to that paragraph which referred to "Quotas" being *"increased or decreased…"* there was no reference to compensation but only to quotas. In any event the respondent had identified "windfall" as being the particular provision upon which they relied. While the respondent indicated that they had a general discretion it was submitted that did not apply to compensation. That was only referable to the "windfall" provisions within the scheme.

80. There had been discussion within the hearing on the relative contributions made by the claimant and management in securing the HSBC deal. It was significant that no reliance had been placed on that matter within the documents which set the revised quota; the grievance hearing; or subsequent appeal hearing.

81. In any event were reliance to be placed on the "windfall" or indeed any other provision which indicated that a quota could be altered because of exceptional management time the evidence of the claimant should be accepted being that his contribution was equally significant.

82. It was clear that the HSBC was not a deal which was "*unanticipated*". The clause concerned a transaction which was *"not included in quota setting"* but this transaction had been included albeit not to the extent the respondent now say it should have been. On that basis alone the windfall provision could not be relied upon. It was necessary to follow the terms of the clause and it was not for the respondent to "come up with what they say is a windfall".

83. Even if the windfall provision was engaged then the respondent did not seek to adjust the commission using the method provided. If a windfall occurred the respondent reserved the right to limit a participant's commission earnings based on the "*EVP of WW Field Operation and the EVP Customer Success*

Evaluation of the plan participant's efforts towards exceeding the target or quota". There was no evidence whatsoever that this was the approach followed by the respondent. If the respondent wished to reduce commission under the "windfall provisions" they should have followed the approach set out in that provision.

84. The windfall provision was defined as a particular set of circumstances so it could not be said that a wider definition was acceptable.

85. The respondent did not have a discretion to modify commission but only to modify the plan and there were no clear words to say that they were able to modify commission once earned. (*Daniels v Lloyds Bank*).

86. If discretion does exist then it requires to be operated in terms of the *Braganza* case. However, it was necessary in the first instance to decide whether an error was made. No spreadsheet had been produced which showed how it was that an error was made in the first instance. That was at the heart of the case for the respondent. The best evidence had not been produced. Only parole evidence showing an individual's interpretation of what had happened. It was submitted it was startling that the respondent's case pointed to matters which were not included in the original calculation of quota but they cannot produce the documents. It was submitted that negative inferences should be made. It is not a matter of credibility but simply that no one had had sight of the document upon which reliance was made.

87. In Louise Ford's statement (paragraph 8) information was provided of those who set the quota originally but Ms Ford did not speak to anyone involved in that exercise. It was stated that the leader of the team., Melanie White had left the company but it was not clear whether any attempt had been made to contact her or make enquiry of others. The redacted emails produced suggested that the FY17 position had been taken into account in so far as HSBC was concerned. Those responsible for setting the quota were provided with the relevant information and there was no mistake made.

88. If there was a discretion to make a unilateral alteration to the quota and reduce the amount of commission payable then that discretion required to be

exercised in good faith and in a way that was not arbitrary, capricious or irrational in the sense in which that term is used when reviewing the decision of public authorities. There was clear visibility of the HSBC deal for FY20. There was no suggestion that that was not the anniversary of this particular contract and it was known to those who set the goals. Given that they had the information and included within the quota for the claimant an amount in respect of the HSBC deal it would be irrational to alter the quota with the result that commission was reduced.

89. However, one only got to that position if there is a discretion to modify aspects of the commission once earned and it was submitted that position was not reached in terms of the scheme.

90. Thus, a declaration should be made that the claimant's claim of unauthorised deduction from wages was well founded and an order should be made that the respondent pay him the sum of £273,548.83.

For the Respondent

91. The respondent agreed that the main issue for the Tribunal was whether or not the claimant should be paid the sum claimed. It was emphasised that there would only be an unauthorised deduction from wages if the amount payable was less than the wages "properly payable" by the respondent.

92. The respondent's primary argument was that they exercised a discretion contained in the Incentive Scheme under the "windfall provision" and the following paragraphs of that scheme.

93. Essentially the case was about an exercise of discretion by the respondent and that brought in the "Wednesbury test". The respondent had not failed that test. They had exercised their discretion properly and not taken account of irrelevant facts.

94. The respondent in their investigation had determined than an error had occurred in setting the FY20 quota at a level which was too low; that a windfall had occurred; and that after carrying out a manual calculation based on the updated quota for the claimant his commission earnings were limited.

95. As a result of that exercise the total amount of wages "properly payable" to the claimant on 28 February 2020 was the sum that was paid and there was no deduction. The only sums paid in connection with his employment were the sums that were paid. There were no sums due to him beyond that amount.

96. Essentially the claimant was maintaining that due to the error made by the respondent he should get an extra £273,558.83 not because he had worked harder but because his quota was more generous than it should have been. Receiving that large sum because of an error instead of it being a reward for effort is a "windfall". Any reasonable man asked if that met the definition of "windfall" would agree.

97. The relevant clause in this scheme did not provide an exhaustive definition of "windfall" but only gave examples and the scheme specifically indicated that an unanticipated transaction or large transaction which required unusual or significant management involvement were only examples of where a windfall could occur. The respondent was not limited to those examples. Effectively the claimant was indicating that one could ignore the last sentence of the clause. However, it needs to be given some meaning.

98. The clause needed to be construed as a whole and the true interpretation should be that examples of "windfall" were given but these were not exhaustive.

99. The clear evidence of Louise Ford and Mark Nutt was that an error had been made in not identifying the value of the E-Flex contract in FY17. The claimant's position seemed to be that he did not believe the spreadsheet evidence for quota setting for FY20. The spreadsheet was identified in the grievance procedure as part of the documentation examined. It was never suggested to either Louise Ford or Mark Nutt that this spreadsheet did not exist but simply that it had not been seen.

100. In essence the correct information had been sent to the team for setting the quota namely a spreadsheet containing information for FY17, FY18 and FY19. When this spreadsheet was sent back after the quota had been sent information for FY17 was not included. Louise Ford gave evidence that the

value of FY17 E-Flex was $5m. The HSBC account was attributed a value of $2.9m for new business at the claimant's level. It was accepted that the respondent anticipated HSBC would sign a new 3 year E-Flex deal in FY20. Given those facts the respondent concluded that the value of $2.9m was too low. The amount was cross-checked against the quota set for the GAM for FY20 of $11.5m and found to be too low.

101. There was rationale behind the decision that if an error had occurred in setting FY20 quota at too low a level the claimant had received a windfall as a consequence. The claimant was not the only one whose commission and quota were changed. Five other employees were affected.

102. It was submitted that the Tribunal could not find in favour of the claimant unless it were to find that the respondent's decision was irrational namely that no employer in the respondent's position could have reached that decision. The Tribunal must not substitute its own decision for that of the respondent that an error had occurred in setting the FY20 at too a low level; that a windfall had occurred and that the respondent would limit commission by carrying out a manual calculation. The claimant had not been able to establish that these decisions were irrational.

103. Commission earnings over 250% only became "properly payable" if the FY20 T&Cs were fulfilled. Earnings over 250% of OTC required approval after a review into whether there had been a windfall. The claimant's projected total commission earnings at 680% of OTC were far in excess of the trigger for review.

104. As was stated by Mark Nutt in his evidence the claimant was not a member of the core team driving the HSBC deal. The claimant's role was important in supporting that team. It was reasonably concluded that the reason the claimant had overachieved to such an extent was not due to his efforts but due to the claimant's quota being wrong and the appropriate way to recognise that was to limit compensation by adjusting the quota. The respondent does not dispute the claimant's efforts deserve recognition which is why the amount authorised as commission payment was 350% of OTC.

105. A complaint had been made that Louise Ford had not spoken to the decision makers in relation to the original quota. However, it was submitted the issue was whether the respondent was entitled to reach the view that they did namely that an error had been made.

106. It could of course just be that the quota was at the lower range of the Measure rather than a mistake. The respondent considered the quota figure an error because the data indicated that the FY17 figure had been omitted. There was no rational explanation for the original quota figure in respect of FY20. There was no rational explanation as to why the figure for HSBC was put at $2.9m when the FY17 deal figure for HSBC was $5m.

107. This decision was clear from the outcome letters to the claimant on his grievance and appeal. He could be in no doubt from the terms of those letters as to the reasoning which had been employed.

108. In the submission made for the claimant it was indicated that there was a method to determine commission earnings if there was a windfall by evaluation of the claimant's efforts towards exceeding the target or quota. It had never been suggested that this was to be an issue and neither had it been suggested to any witness. It was now too late to raise this matter as an issue. That would have brought about a very different Tribunal hearing if that had been the position of the claimant.

109. The windfall provision was not about deducting money but an argument that earning more than 250% of OTC required the agreement of various people. A positive step of approval was required for payment of commission over 250% of OTC. Nothing was said about what was to be done if below 250%.

110. In so far as the Policy document at J95/99 was concerned it was submitted that Mr Nutt's evidence should be adopted namely that it deals with changes in the employment position over the year and that there was no categoric assurance of "no changes" in Q4 as regards commission.

111. It was submitted that the following propositions were relevant to this case as drawn from the cases of *Keen v Commerzbank AG [2007] ICR 623; and IBM*

United Kingdom Holdings v Dalgleish [2018] ICR 1681 following the decision of *Braganza v BP Shipping Ltd [2015] ICR 449:-*

(i) The burden of proving that there was a unlawful deduction rests on the claimant.

(ii) Where an employer exercises a discretion in making a decision the ET can only interfere if it finds that the decision was "Wednesbury irrational".

(iii) Where the court is reviewing contractual decisions on commission (by analogy with performance related bonuses) the employee is entitled to a *bona fide* rational exercise by the employer of its discretion. The courts were charged with enforcing that entitlement but there is little scope for intensive scrutiny of the decision-making process.

(iv) The decision of the employer is not a judicial determination and the ET cannot expect judicial reasoning.

(v) The ET should not substitute its own decision for that of the decision maker.

(vi) As the respondent had produced evidence of why there was thought to be a windfall the burden is on the claimant to establish that the decision was irrational in the Wednesbury sense.

(vii) The onus of establishing that the respondent had acted in a way that was irrational was "a very high one". A significant amount of commission had been paid. It would require overwhelming evidence to persuade the ET to find the decision irrational or perverse where so much discretion was left with the respondent.

112. As an alternative argument to there being a "windfall" it was submitted there were other examples of discretion within the scheme. Those related to:-

(1) At J63 reference to the company performing an audit which may identify payments "*that may be the result of administrative errors…".*

In this case an audit was commenced in January 2020 and that identified an error.

(2) There were further provisions at J63 which allowed adjustment

(3) The provisions on the ability of the Compensation Exceptions Committee to make adjustments was relevant (J63)

(4) If there was no "windfall" then the respondent was entitled to increase the quota under that section which related to "Quotas" at J61

(5) The respondent had the right to adjust the quota for "extraordinary deals" in respect of the paragraph at J77. The HSBC was "extraordinary" as the largest deal the respondent had achieved to that date.

Discussion

The relevant law

113. The provisions regarding protection of wages are in Part II of the Employment Rights Act 1996 (ERA).

114. Section 13 of that Act states that:-

(i) An employer shall not make a deduction from wages of a worker employed by him unless –

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

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

(ii) In this section "relevant provision" in relation to a worker's contract means a provision of the contract comprised:-

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

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

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

115. Section 27(1)(a) of ERA advises that "wages" in relation to a worker "means any sum payable to the worker in connection with his employment including:-

"Any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise".

116. Section 23 of ERA gives jurisdiction to the Employment Tribunal on claims that an employer has made a deduction from wages contrary to Section 13. If a Tribunal finds a complaint under Section 23 well founded it shall make a declaration to that effect and order payment of the amount of any deduction.

117. The claimant was a "worker" as that is defined and so issue in this case is whether in terms of Section 13(3) the claimant received less by commission than the total amount "*properly payable*" to him. If not it is to be treated as a deduction and so recoverable.

118. The determination of what is "*properly payable*" on any given occasion involves Tribunals in the resolution of disputes over what the worker is contractually entitled to receive - *Greg May (Carpet Fitters and Contractors) Ltd v Dring 990 ICR 188.* Tribunals must decide on the ordinary principles of

common law and contract the total amount of wages that was properly payable to a worker on the relevant occasion. If an employer is contractually entitled to reduce a worker's wage – either because there has been an agreed variation of a contract or because there is a flexibility clause giving the employer the right to do so – the wages properly payable will be the reduced wages due under the flexibility clause. Provided that this is the amount the worker receives there will be no unlawful deduction. If, however the flexibility clause or agreement does not cover the purported variation the amount properly payable will be the original amount due and any deduction will be unauthorised. In short if what was paid by an employer to a worker on the relevant occasion was less than the amount properly payable, applying common law and contractual principles, then there has been a deduction for the purposes of Section 13(3) of ERA.

119. Consideration of the relevant terms of a contract of employment would include express and implied terms.

120. When a discretionary payment is truly *ex gratia* and not contractual then arguments have ensued as to whether these are wages "*properly payable".* It would seem that it was necessary to show that there was some legal entitlement to the payment of a discretionary bonus or the like to be able to make a claim that there was an unlawful deduction of wages. Usually that would be on reliance of the contract of employment.

121. If a flexibility or discretionary clause does give rise to a legal entitlement then it was common ground in this case that such discretion should be operated by the employer in good faith and not in any way which is irrational or perverse. In relation to commission of course the parties will normally have reached an express agreement as to the basis upon which a commission is calculated. That would govern the claim.

The Contract

122. The terms regarding payment of commission at issue in this case were the FY20 T&Cs and the two produced Policies (see paras. 11 and 12). Allied to the FY20 T&Cs and the Policies was the individualised compensation plan

which sets the sales targets and the Measures which would determine the payment of commission(J140/141). Those documents formed the "*Incentive Compensation Plan (the Plan)"* (J59).

123. The FY20 T&Cs were to describe the *"generally applicable provisions of the Plan*" with the Policies setting *"more specific terms and conditions …"* (J59*)*

124. The FY20 T&Cs sets out a general clause (J60) headed *"Interpretation of the Plan/Changes to the Plan"*. That introductory clause operates to retain the respondent's discretion in matters of administration and interpretation of the Plan. Certain designated individuals are authorised to carry out the scope of the responsibility provided for in the administration and interpretation of the Plan. No reliance was placed on that introductory term.

125. The clause goes on to indicate that:-

> *"**To the extent permitted by applicable local laws**, the Company has complete authority and sole responsibility to determine the appropriate resolution of any alleged or actual inconsistencies, issues (administrative or otherwise) or ambiguities arising under the Plan. Furthermore, the Company reserves the right in its sole discretion to modify all aspects of the plan, including but not limited to these FY20 Incentive Compensation General Terms and Conditions, Individualised Compensation Plans (as well as specific Plan Elements), individual Goal Sheets, Plan assignments, territories and accounts and territory/account assignments, Sales quotas and the sales compensation policy and FY20 Sales Compensation Governance Approval Matrix (the "Approval Matrix"). No modification will be effective unless in writing and approved in accordance with published FY20 Sales Compensation Governance Approval Matrix and/or the terms of this Plan. The approval process need not be complete before a modification becomes effective – approval can be given retroactively."*

126. So while there was a general discretion in the respondent to modify the Plan and the "*Sales quotas*" and "*individual goal sheets*" no modification would be effective unless in writing and *"approved in accordance with the published*

FY20 Sales Compensation Governance Approval Matrix and/or the terms of this Plan". There was no evidence that there was any modification of the Plan or Plan elements operated under that Approval Matrix listed as a separate Policy in the FY20 T7Cs (J89). The Approval Matrix was not produced or spoken to.

127. Modification *"of Sales quotas"* and *"individual Goal sheets"* required then to be made under the *"terms of this Plan"* as distinct from any general discretion reserved to the company for modification of the terms of the Plan generally.

128. The clause then goes on to identify *"Some of the circumstances in which various aspects of the plan and/or plan participants credit or compensation may be modified…".*(J61) These are stated to include *"but are not limited to…"* circumstances described in paragraph 1-9 of the clause (J61/62). One of those circumstances is the *"windfall provision"* at paragraph 9 (J62). That paragraph states that the company reserves the right to manage commission earnings where a "*windfall*" occurs. It then goes on to state that a *"windfall*" is *"defined"* as a situation where earnings "*far exceeds"* annual OTC due to "*unanticipated large transaction(s) not included in quota setting, or a large transaction(s) during a plan year which requires unusual or significant management involvement".* The clause then indicates that these are "*some examples (but not an exclusive list) of "windfalls" where credit, Sales Goal/Quota Retirement, and/or incentive compensation will often be modified subject always to applicable law".* Albeit the words "*Quota Retirement*" are used it seems obvious that is a misprint for "*Quota Requirement*"

129. In the first instance I do not find that there was an "*unanticipated large transaction*" which was not included in quota setting. The HSBC transaction in FY20 was certainly not unanticipated and it was, at least to some extent, included in quota setting. $2.9m was allocated to HSBC for the year in the original quota setting. The respondent's position was that this was an "error" rather than that there being no quota included. The evidence showed it was common knowledge that a new contract with HSBC would in play in FY20. The evidence of Mr Nutt was that this was a transaction of which he was well aware and had been working on for some time. The grievance appeal

outcome letter concludes that there was *"clear visibility of the potential and desired size of an HSBC deal at all levels in the organisation at the end of FY19 and into FY20".* Albeit reference is to FY19/FY20 in that statement it would seem clear this was an error for *"FY2018 and into FY 2019".* Even if it is not an error the evidence of the claimant and Mark Nutt was confirmatory that the deal with HSBC was not *"unanticipated"*

130. Neither was I able to make a finding (if one was sought) that this was a large transaction which required *"unusual or significant management involvement".* As indicated involvement of management on a deal of this nature would be expected and not unusual. I could make no finding that there was any "*significant*" management involvement beyond that to be expected which would mean that the claimant received a "*windfall".* Part of management's duties is to ensure as far as possible such deals take place. In any event there was no hint that the respondent relied on any *"unusual or significant management involvement"* in their dealings with the claimant. Their position was consistent namely that the original quota had been set in error rather than commission requiring to be adjusted as a result of *"unusual or significant management involvement*".

131. However the last sentence of the paragraph founded upon by the respondent indicates:- *"These are some examples (but not an exclusive list) of "windfalls"*. Thus there was a "catch-all" which allowed the respondent to modify commission if it can be shown there was a "*windfall*". The clause is odd in the sense that it seeks to define "*windfall"* and then seeks to defeat that definition by including any other circumstance which might be construed as *"windfall*". However, I do not think that element of the clause is meaningless and that it can be fairly interpreted to mean that examples are given of "windfall" but that there could be other circumstances of a "windfall".

132. The terms then indicate that where a Plan participant's commission earnings exceed *"250% of his or her OTC"* (the case here) then there will be a review of that participant's attainment to determine whether a "*windfall*" has occurred. If so the respondent reserves the right to limit a participant's commission earnings:-

"based on the EVP of WW Field Operations and/or his/her designee(s) and the EVP, Customer Success evaluation of the Plan Participant's efforts towards exceeding the target or quota".

133. This is the paragraph which was utilised by the respondent in respect of the claimant's commission earnings. The statements of Louise Ford and Mark Nutt refer to the claimant's commission earnings coming to the attention of the respondent in January 2020. It was noted that the claimant's commission calculation was flagged as 680% of OTC and specific reference is made to the FY20 T&Cs requiring a review be undertaken. It was concluded as a result of that review that the claimant was "*gaining a windfall from his low quota"* (Mark Nutt's statement paragraph 14). Additionally, in the grievance outcome letter of 15 May 2020 (J123/127) it is stated that a *"windfall was triggered after the booking of HSBC in FY20 because your attainment appears in one of the monthly reports which the compensation team runs when attainment is (greater than) 250%."* The appeal outcome letter also indicates that it was *"reasonable to apply"* the windfall provision.

134. Because of the way the paragraphs on "windfall provisions" and "commission earnings" exceeding 250% of OTC are formatted (J62) the issue arises as to whether these are stand alone and separate terms or whether they should be read together as part of "windfall" I take the view that they should be read together. Paragraph 9 indicates that there is a *"windfall"* where earnings *"far exceeds*" OTC and it appears that to be more precise the succeeding paragraph identifies the trigger point (>250%) when the issue of windfall is to be determined. Also given there is no separate definition of "*windfall*" in that succeeding paragraph it would seem reasonable to read it along with paragraph 9 rather than as a separate term. The respondent viewed the matter in that way (letter by Louise Ford of 12 February 2020 at J105/106; letter by Mr Nutt dated 15 May 2020 at J123/125).

135. I consider the combined effect of paragraph 9 and the succeeding paragraph is that where commission earnings are in excess of 250% of OTC then there will be a review; if that review determines there has been a "*windfall*" (however that might have occurred) then any modification of commission is to be

conducted by an "*evaluation of the Plan Participant's efforts..*" conducted by those in the named roles. That is the confirmed in the Policy document (J90/94) which governs the Review of Attainment >250% of Annual OTC. That document follows the FY20 T&Cs in stating that where a review determines there has been a "windfall" then commission can be limited *"based on evaluation of the Plan Participants efforts towards exceeding the target or quota"* and outlines a process and template to be followed.

136. It is clear that the method of resolution adopted in this case was not to have the EVP of WW Field Operations and/or EVP Customers Success evaluate effort. A manual calculation was conducted which considered what would have been the appropriate quota taking account of the value of the HSBC deal rather than an assessment of the claimant's efforts towards exceeding the target or quota. (J105/J106 and J123/125)

137. I did consider that the circumstances here could mean a "*windfall"* for the claimant in the event of error in quota setting. If that were that case then he would receive a benefit which could be described as an unexpected event of good fortune and "*windfall".* However, I did not then consider that the respondent had made out their contention that there was lawful deduction from commission as the claimant had received a *"windfall*" because they had not operated the clause. Even if there was a "windfall" the respondent had not operated the provision for resolution in terms of the FY20T&Cs and Policy. That would mean there was no lawful deduction and so the wages properly payable would be the full amount of the commission.

138. I consider that there would be a fair construction of the document in line with *British Overseas Bank Nominees Ltd v Stewart Milne Group Ltd*. This Plan was set to govern the provision of commission to the respondent's employees. Commission earnings are a very important part of the wage/work bargain. The purpose of commission is to encourage employees to meet sales targets. The respondent's purpose is that they would wish individuals to reach their targets so that the business is profitable and employees are encouraged with their earnings. It is of course reasonable to consider whether a participant might benefit by a windfall advantage which is not to do with his/her efforts

but where that advantage "falls into his/her lap". However, while there is a review where earnings are likely to be greater than 250% of OTC to determine whether a windfall has occurred and that is determined as having occurred then evaluation of the participant's efforts is the way of resolving the matter. That is the process which the respondents have decided will determine the amount of commission is appropriate. That is what the employee is entitled to expect in terms of the Plan and that is not what took place.

139. There would be discretion in the evaluation of efforts and that may be challengeable as to whether or not it was conducted in bad faith or the outcome irrational or perverse but there would not appear to be any discretion as to the mechanism by which the commission earnings may be modified.

140. It was suggested in submission that the onus being on the claimant to show that the commission claimed was *"properly payable*" that reliance could not be placed on this term regarding evaluation of effort as the claimant had not raised that matter before, it had not been put to witnesses in cross examination and it was not part of his case. If it had then that would have occasioned a very "different Tribunal". While the issue was put to Louise Ford in cross examination when she confirmed that "effort" had not played any part in the assessment; and the ET1 claim form does carry the general statement that deduction was *"not required or authorised by a provision of the claimant's contract*"; that is not the reason I would not agree with the submission. I consider that it is up to the respondent to operate the FY20 T&Cs in accord with its terms to make a deduction of "wages" and cannot deduct if they are not entitled to do so by non operation of the provisions in their terms. The respondent set out its case on the basis that they were entitled to exercise a review on earnings > 250% of OTC; they conducted a review; they determined a windfall had occurred; but did not then follow their own provisions in resolving the matter; and so were not entitled to make the deduction. Not being entitled to make the deduction means that the wages properly payable include the commission claimed. However, I do not consider that is an end to the matter.

Was there an error?

141. Whether there was an error in the FY20 quota set for the claimant is relevant as (a) the position of the claimant was that there had been no error in the quota set for him and so there could be no *"windfall*" in any event and (b) it was submitted that the respondent, if unable to rely on the *"windfall provisions"* for deduction, were able to rely on other provisions where error in quota was a feature.

142. On this issue I considered that it was reasonable for the respondent to conclude in its review of quota that an error had been made in the FY20 quota set for the claimant.

143. I accepted the evidence that in the documentation that was reviewed the UK split of the HSBC figure of $5m for FY17 was not within the information returned by those setting the quota for FY20 (total deal value $10m). There did appear the FY18 and FY19 lower figures to reflect continuing after sales/maintenance as opposed to the deal figure of FY17. The quota should have been set with regard to the $5m split achieved in the FY17 deal and quota set only having regard to the lower figures would be error. It would be expected that the FY20 deal figure would be considerably greater and the UK split far higher than the $5m achieved in FY17. It turned out that the value of the contract was far greater than that achieved in 2017. The $2.9m million figure allocated to the claimant for HSBC was more consistent with the split value of the HSBC deal in FY17 not being properly recognised in the quota set for FY20. It was more consistent as being based on FY18/F19 figures. The redacted emails do not specify just what value was attributed for the FY17 HSBC deal and so what potential value was attributed to such a deal for FY20 to come to a view as to the appropriate quota. The e mail (J107) advises that *"an estimate of value was made"* but without stating on what figures that estimate was based.

144. It was maintained by the claimant that because of the possibility of (a) a "grey year" and (b) failure to re-negotiate a deal with HSBC that the full value of a deal in FY20 would have been recognised but his quota reduced to take

account of those possibilities. I accept that there may have been difficulties in Germany with certain parts of the operation but I accepted the evidence of Mr Nutt that there was no indication from HSBC that a "grey year" was a real possibility and that this contract was a very real opportunity. Clearly it would require diligence and application for a favourable outcome but I did not consider that the evidence suggested the respondent would require to overcome considerable performance difficulties in the past to achieve that result. There did appear to be a track record of renewal of contracts with this particular customer. (letter of 15 July 20 by appeal manager at J133/136)

145. I could not accept the claimant's account that his original quota figure would have included a full value for an HSBC deal. IN FY18 the Measure 1 value for HSBC was $0.119m and for FY19 was $1.6m (J100). For those looking at the position at the time it might have seem reasonable to increase the Measure 1 quota to $2.9m for FY20 based on those figures. But setting a quota far less than the original split value in FY17 of $5m was indicative of an error in not taking into account that figure when considering the position for a renewed deal in FY20.

146. It was maintained in submission that there were two failures by the respondent to establish that an error had been made being (1) there was no evidence that anyone in the original team who set the quota had ever been questioned about how they had come to that quota and (2) that the spreadsheet showing the failure to identify the FY17 figure had not been produced.

147. However, I was able to accept the oral evidence from Louise Ford who had led the review that the spreadsheet had been examined and there had been a failure to identify the FY17 figure within the returns made by the team who set the quota. The relevant material was also referred to in the Grievance outcome letter as being considered. (J119/122). Certainly, the evidence of those involved would have been helpful but I did not consider it essential in accepting there had been a failure to recognise the FY17 figure.

148. There were other indicators that the quota had not been set correctly. The claimant's commission level on the quota set was 680% of OTC. While I

accepted that the respondent would on occasion pay high amounts by way of commission (there was some suggestion that could be 400% of OTC) the amount here was clearly so out of step to suggest something had gone amiss. I accepted that the reason that was the case was that there had been an error made in the quota set at $2.9 million for HSBC. Also I did consider it significant that the quotas for GAM and GTAM had been set independently at a much higher level as another indicator which supported the review conclusion.

Other provisions

149. The submission for the respondent was that if unable to rely on the *"windfall provisions*" then reliance could be placed on other provisions of the FY20 T&Cs which contains various discretionary provisions.

150. The original consideration by Louise Ford was dealt with under the "windfall provisions" (J105/106). The grievance held on 11 March 2020 reviewed that original decision. The outcome letter (J119/122) does not specify the particular term being utilised in the review other than to state that the claimant's "*earnings projections triggered a review"* and that the "*Veritas commission plan reserves the right to review such cases".*(J120*)* However no reference was made to a term which enabled a review on that trigger to adjust quota independently of a finding that there had been a "*windfall*" which as indicated necessitated a particular form of resolution. Neither was I directed to such a provision. In any event the grievance in this case was partially upheld and the subsequent follow up letter from Mr Nutt indicated that the original grievance concluded that "*the company did have the right to review the quota under the FY20 terms and conditions as a windfall occurred".* That follow up letter (J123/127) clearly fixed the review on the "*windfall provisions".*

151. The grievance appeal considered that it was reasonable to apply the "windfall" clause to the matter (J133/136) but also considered that there were additional terms in the FY20T&Cs where the respondent had the right to alter quota (J133/136). One provision relied one comes subsequent to the particular examples (J62/63) where it is stated:-

"*The above are only examples of some of the circumstances in which modifications to aspects of the Plan may be made by the company. The Company will attempt to inform a Plan Participant of modifications prior to carrying them out but cannot guarantee that it will do so in every instance, subject to applicable law.*

Due to the nature of the company sales, sales process, technologies and incentive compensation administration, any modifications undertaken in this section are likely not to be made until after the transaction has been booked and sometimes not until after the end of the fiscal year as that is when the company is likely to become aware of the extent of the windfall. Accordingly the company retains the right subject to applicable local law, to make appropriate modifications at any time during the fiscal year and until final year end closing and reconciliation of Plan Participants individualised compensation plan/s".

152. This provision would appear to relate to *"windfall*" as it is specifically mentioned that the modification might not take place until after the transaction has been booked or "*end of the fiscal year as that is when the company is likely to become aware of the extent of the windfall".* Thus it would not appear to be a stand-alone clause which entitles modification but tied to "*windfall"*. As indicated the respondent did not resolve that matter in the way in which "*windfall*" provisions were to be resolved.

153. The further clause (J63) stated to be relevant by the appeal is that which followed (J63) namely:-

"*The Sales Finance Team may, at any time, undertake an audit to ensure all payments under the Plan are made in accordance with the same Plan. They may also identify payments that may be the result of administrative errors and/or unanticipated circumstances including payments which fail to reflect a reasonable evaluation of the Plan Participant's contribution toward any transactions and earnings potential which is beyond that reasonably contemplated by the company".*

154. I considered this clause to be apt for the circumstances. Although the clause does have overtones of *"windfall*" when it indicates that there might be identified payments which fail to reflect *"a reasonable evaluation."* of contribution it bears no specific reference to "*windfall*" and is not tied to that circumstance. In any event an audit to "*ensure all payments under the Plan are made in accordance with the same Plan".* is not the relevant part as that would seem to relate to "governance" of the Plan in the sense of ensuring payments are not outside the terms and "belong" to the Plan and are not untoward. That is not the case here. Payment of commission is within the contemplation of the Plan.

155. However the clause indicates that the Sales Finance Team "*may also identify payments that may be the result of administrative errors and/or unanticipated circumstances…".* It is arguable that "*administrative error"* does not cover the error here and is to refer to errors as a result of mis-posting an entry, overpayments by mistake, arithmetical errors in calculation or the like. After all the appeal letter describes this situation arising as a result of "*operational error."* (J136). However equally it could be described as an "*administrative error"* being an error in the administration involved in quota setting. Also I consider the circumstances could be covered by the phrase "*unanticipated circumstances"* being that it would not be anticipated that an error would occur in the setting of the quota by the apparent lack of acknowledgement of the FY17 figure as a base for the potential FY20 deal.

156. Here there was a review or *"audit"* conducted by the *"Sales Operation Team (with input from the Finance Team")* (Louise Ford statement para 5) which would seem to satisfy the clause and which identified the error or unanticipated circumstance. There is no provision made as to how matters might be regularised in those circumstances. But it must be a reasonable inference that steps would be taken to regularise matters. That leaves the respondent with a discretion as to how to proceed. In this case the process was to return to the position as it would have been when the original quota was set for the claimant and identify the quota taking account of the FY17 figure for HSBC. The method finally set out in the letter from Mr Nutt

(J123/125) did not suggest an arbitrary, irrational or perverse approach but took into account the relevant circumstances. In this respect therefor the deduction was lawful and the commission received was the amount "properly payable".

Quota provision

157. Within the clause which deals with circumstances where a Plan Participant's compensation might be modified there is included a provision on quotas (J61).

158. That states that quotas:-

> *"may be increased or decreased prospectively in situations including but not limited to, where quotas were not set to reflect sales not anticipated or where sales were not reasonably certain at the time sales quotas are established or where errors are made in quota setting. Retroactive changes to Sales Quotas will be reviewed on a case to case basis and determinations will be made subject to applicable local law. The Company reserves the right to adjust Quotas at any time (prospectively or retroactively) at the Company's sole discretion with or without prior notice, subject to applicable local law……"*

159. This paragraph was not founded on by the respondent when considering the claimant's commission earnings but as an alternative provision in the submission made. Notwithstanding that reliance was not placed upon this paragraph by the respondent as matters with the claimant developed I did not consider that was a bar to consideration of its terms. The issue was whether wages were "properly payable" which depends on a review of the contractual terms. Given the reference to "*errors …made in quota setting"* it would seem an apposite term. It is not concerned with "*administrative errors"* but deals directly with errors in quota setting and gives the respondent discretion to make retroactive changes to sales quota. As indicated it was claimed that there was an error made in quota setting and I accept that was a legitimate conclusion.

160. The clause concludes by stating:-

"*Changes to quotas will require review and approval by Sales Management (refer to FY20 Sales Compensation Governance Approval Matrix), EVP of WW Field Operations and/or his/her designee and/or EVP Customer Success."*

161. This is in slightly different terms to the clause discussed previously (paras 125/6) in that it gives greater specification as to the approval process. So while the particular Policy was not produced and so, in my view, defeated reliance on the previous clause, it would appear that provided there was review and approval from "*Sales management*" as well as "*EVP of WW Field Operations*" or designee "*and/or EVP Customer Success"* a change could be made to quota. The words "*refer to"* the Policy would not, again in my view, disturb that position. Accordingly, there is a specific way in which changes to quotas require approval as part of the FY20 T&Cs.

162. For "Sales Management" the evidence was that approval was given by Mark Nutt, SVP International Sales for EMEA; Paul Donald Senior Director EMEA Sales; David O'Connor Director Sales Operations. Simon Fisk UK&I Managing Director was present at meetings and communicated the decision verbally to the claimant but there was no evidence of formal approval from him. There appeared sufficient approval from Sales Management. There was also approval from Scott Genereux as EVP of WW Field Operations to satisfy approval from either one of him or "*EVP Customer Success"*.

163. That would mean there was compliance with this particular term which would enable the quota to be adjusted. As indicated the process was not one which could be described as irrational or perverse. It was submitted that reliance could not be placed on a term which referred only to adjustment of "Quota" rather than "compensation" as the clearest words would be necessary to disturb compensation in commission already earned and calculated. However, quota and commission are inextricably linked in this Plan. Alteration of quota inevitably affects commission. Either party to these terms would understand the connection and know that change to quota (up or down) would affect commission payment. There was a power to adjust quota "*retroactively*" which would affect commission already earned.

164. Reference was also made to the *"FY20 Global Quota and/or Coverage Change Process Governance"* and that section which indicated that quota changes would not take place "*in Q4*". I accepted that this Policy was intended for different circumstance of change as explained by Mr Nutt and in the Grievance proceedings. It did not feature as part of the particular terms discussed on "windfall" or otherwise and did appear disconnected.

165. It was submitted that a further clause in the FY20 T&Cs entitled the respondent to review and modify quota being the term on Extraordinary deals (J77 as narrated in paragraph 20).

166. The respondent did not find on this clause in their dealings with the claimant and there was no evidence of examination of CRM records or records produced. The annual quota for the claimant over Measures 1 and 2 totalled $14,113,179 and the HSBC deal value was £12.6m. Neither parts a or b of the clause seemed to be fulfilled. While the HSBC contract was the largest deal for the respondent to that date I did not consider that made it "Extraordinary". Neither it would appear did the respondent as they did not find on the clause.

167. Other clauses indicated as relevant (apart from those discussed) were:-

a. A paragraph which allowed "*Performance metrics"* to be modified during the Plan term. (J68) There was no definition of "*Performance metrics"* or evidence as to what that might cover and given the respondent had not utilised this term was not able to give it meaning.

b. A paragraph which concerned the *"Compensation Exceptions Committee"* being able to amend, amongst other things, Quota. (J63 as narrated at para 19). There was evidence that Beth Kilgo *"on behalf of the Compensation Exception Committee approved the proposed adjustments to the claimants quota"* (Louise Ford statement para 14(d). A necessary part of that process was for the committee to provide *"a final written decision to any request*" brought before the Committee for exceptions. Louise Ford may have understood that to be the case but stronger

evidence would have to have been provided to be satisfied of the Committee's actings in terms of that provision.

c. While reference was made to the "second full paragraph on page 63 "of the FY20 T&Cs it did not appear of relevance as it dealt with an audit allowing the withholding of commission in the event of some untoward actings by a participant which is clearly not the case here.

Decision

168. In essence I found that the company had sought to operate the *"windfall provisions*" within the FY20 T&Cs but failed to operate the terms correctly in that they did not follow the procedure for modifying quota by evaluating contribution. It is not known what result that would have had achieved but it was not the method that was used by the respondent.

169. However as specified there were alternative terms which were capable of meeting the circumstances and allowed modification of the claimant's quota. The discretion within those terms was not exercised in a manner which was arbitrary, irrational or perverse, Given that entitlement to lawfully modify quota there was no deduction and the claimant has received the "wages" which are "properly payable".

170. In those circumstances the claim does not succeed.

Employment Judge: Jim Young
Date of Judgment: 20 January 2021
Entered in register: 29 January 2021
and copied to parties