EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101352/2022

Held in Glasgow on 30, 31 August and 4 October 2022

Employment Judge Mr P McMahon

Mr Iain Merrick Kerr	**Claimant** **Represented by:** **Ms MacDonald - Solicitor**
Energy Vault SA	**Respondent** **Represented by:** **Ms Bennie - Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claimant's claim under Section 13 of the Employment Rights Act 1996 is unsuccessful and is dismissed.

REASONS

Introduction

1. The claimant presented a claim to the Tribunal on 28 February 2022. The claimant claimed unlawful deduction from wages in terms of Section 13 of the Employment Rights Act 1996 in relation to salary and holiday pay.

2. The respondent defended the claim, asserting that there had been no unlawful deduction from wages in terms of Section 13 of the Employment Rights Act 1996 in relation to both salary and holiday pay.

3. The case was heard on 30, 31 August and 4 October 2022. Both parties exchanged and submitted detailed written submissions and made oral submissions based on these on the last day of hearing.

4. The claimant was represented by Ms MacDonald, Solicitor, and the respondent was represented by Ms Bennie, Advocate.

5. A Joint Bundle was provided. Not all documents were referred to in evidence.

6. Evidence was heard on oath or affirmation from all witnesses. For the claimant, evidence was heard from the claimant and from Mr Simon Colver, Product Manager of the respondent. For the respondent, evidence was heard from Mr Robert Piconi, Chairman and Chief Executive Officer of the respondent, and Ms Gonca Icoren, Chief People Officer of the respondent.

7. **Issues**

The issues to be determined by the tribunal were as follows:-

7.1. Had there been an unlawful deduction from the claimant's wages contrary to section 13(1) of the ERA and, if so, should the respondent be ordered to pay the claimant the amount of any such deduction in accordance with section 24(1) of the ERA.

7.2. It was a matter of agreement between the parties that there had been a valid oral variation to the claimant's contract of employment in respect of his salary on a telephone call between the claimant and Mr Robert Piconi in March 2020.

7.3. The key dispute was whether the terms of that contractual variation were only that the claimant's salary would be reduced, or whether there was also an intrinsic condition that, whilst the claimant's salary would be reduced, when funding was received his salary would be reinstated to its original level as at March 2020 and any sums not paid to the claimant as a result of that reduction would be repaid to him.

Findings in fact

8. The tribunal considered the following material facts to be admitted or proved:

9. The claimant was employed by the respondent as its Chief Commercial Officer from March 2018 to November 2021. The claimant was a senior and

experienced professional in the commercial sector and, as the respondent's Chief Commercial Officer and one the respondent's most senior employees, the claimant was aware of the financial position of the respondent on an ongoing basis throughout the period of his employment and was involved in the respondent's investment fundraising efforts. The claimant was highly regarded by the respondent and, although he was not a founder of the respondent company, he was one of the very first employees employed by the respondent after it had been founded.

10. The claimant's starting salary was £150,000 per annum, which was increased to £300,000 per annum with effect from August 2019.

11. The claimant's salary was reduced to £150,000 per annum with effect from April 2020 until November 2020 and was increased to £200,000 per annum with effect from December 2020 until the claimant's resignation in November 2021. The amount not paid to the claimant as salary in the period from April 2020 until the termination of the claimant's employment in November 2021 as a result of the salary reduction in April 2020, taking into account the subsequent increase in December 2020, was £200,0000.

12. The claimant received a payment in lieu of 17 days' annual leave on termination of employment. It was calculated based on the claimant's salary of £200,000 per annum as at the termination of employment rather than his salary of £300,000 per annum as at March 2020.

13. The respondent's business relates to energy storage. On or around February and March 2020 the respondent's Chief Executive Officer, Mr Piconi, had discussions with the respondent's board of directors in relation to the impact of the COVID-19 pandemic on the business.

14. At this time the respondent was in the process of building a prototype, the Commercial Demonstration Unit (the "CDU"), to show that its technology was commercially viable. This was being built in Ticino, Switzerland. The work on building the CDU had to stop due to the imposition of lockdown measures taken in response to outbreak of the COVID-19 pandemic, which meant that

the completion of the CDU was going to be delayed and the respondent did not know at that time when it would be able to complete the CDU.

15. The next phase of the company's funding (circa $45 million) from an investor (the "CDU funding") was contingent on the successful completion of the CDU, which meant successful mechanical completion as well as successful achievement of certain performance parameters of the CDU.

16. The respondent was concerned that the respondent's then current levels of spending would lead to the company running out of money before further funding could be received.

17. The respondent decided to take measures to attempt to reduce the spending which included reducing all discretionary spending, reducing travel, and reducing salaries (but without reducing employee numbers).

18. Mr Piconi telephoned the claimant around 19 March 2020 (the "March 2020 call"). Mr Piconi discussed the challenges being caused to the respondent's business as a result of the COVID-19 pandemic, which the Claimant was aware of.

19. Mr Piconi proceeded to ask the claimant to accept a 50% reduction in salary, explaining that he was asking his direct reports (one of whom was the claimant) to accept this, that he himself was accepting this and that the respondent's more junior employees would be asked to accept varying lower percentage salary reductions to make up an overall saving on salaries.

20. He went on to explain that the expectation was that the reductions in salary would be temporary and that all salaries would return to their original levels as at March 2020 at some point in the future, either at once or in stages, depending on the completion of the CDU and receipt of the CDU funding or other funding mechanism or event that got money into the company.

21. He further advised that depending on successful completion of the CDU and receipt of the CDU funding or other funding and financial performance more broadly, they would look at or consider discretionary bonuses that could

partially, or potentially fully, offset the sums lost due to the reductions in salary.

22. The claimant agreed to this reduction in salary.

23. On this call Mr Piconi did not give a commitment or guarantee to the claimant that when funding was received the claimant's salary would be reinstated to its original level as at March 2020 and that any sums not paid to the claimant as a result of the reduction would be repaid to him, or words to that effect (a "Repayment Commitment").

24. Further on this call Mr Piconi advised the claimant that, in relation to his direct report, Mr Simon Colver, Product Manager of the respondent and who was one of the respondent's more junior employees, he would be asked to accept a lower percentage salary reduction in the region of 15% which had not yet been finalised and once this was, this would be confirmed to the claimant along with a communication that he would be asked to discuss that with Mr Colver as his direct report. The claimant asked Mr Piconi if the reduction of Mr Colver's salary would be on the same basis as the reduction of the claimant's salary and Mr Piconi said that it would be.

25. The claimant was not asked to discuss this with Mr Colver at this time (i.e. as at the time of the March 2020 call) but he was not explicitly instructed not to do so either.

26. After this call the claimant told his wife that Mr Piconi had given him the Repayment Commitment and called Mr Colver the following day and advised him that, due to the pandemic, his salary would be cut by 15%, that his salary would then be increased back to its original level and that then any loss because of the period of unpaid salary reduction would also be made up to him.

27. Mr Piconi sent the claimant an email at 00:59 on 8 April 2020 (a copy of which was produced at pages 97 to 99 of the Joint Bundle) (the "Simon Colver email"). The subject of the email was "Simon Colver" and it was in two parts. The first part was in a standard text format. The second part was a series of

six bullet points headed "Main talking points as follows:" (the "Talking Points"). The first part related specifically to Mr Colver's reduction in salary and related arrangements while the Talking Points contained information regarding the respondent's approach to the salary reductions and related arrangements across the company in relation to employees generally, including but not limited to Mr Colver.

28. The first part of the email read as follows:

"Merrick,

For the temporary salary reductions that we are implementing for April payroll, for Simon we have allocated a 15% reduction in pay. Please see the main talking points below for your discussion with him. Samantha will update the payroll execution for April salaries accordingly. Pending CDU progress, I expect we can go back to normalized salaries later in the summer and/or when we progress commercial activities to ensure adequate cash. As noted below, I will attempt to use a discretionary bonus for 2020 pending (1) the timing of completion of the CDU and (2) broader commercial progress. For Simon specifically, I have already proposed to the Board to approve 7,500 shares in RSU's that I will be formally communicating to you to share with him once the Board approves them this quarter. You can share with him that we are proposing him for RSU allocation now to the Board in line with his time of being here 6 months and good performance, and will be communicating back to him once approved.

Let me know if you have any question, but otherwise please do communicate this at your earliest convenience."

29. The Talking Points contained a bullet point which read:

"The bulk of the salary reduction will be born by the Executive Management teams, at ~50% levels, with smaller % reductions at the broader employee levels. We expect this reduction to be temporary in nature and that we should return back to normal salaries upon completion of the CDU. Pending that milestone as well as broader commercial progress in 2H 2020, we will

consider a discretionary annual bonus that could partially or fully offset the gap in annual salary caused by the temporary salary reduction."

30. On 8 April 2020, Mr Piconi also sent the respondent's HR consultant an email at 07:26 (a copy of which was produced at pages 100 to 103 of the Joint Bundle). This email contained the Talking Points. It also contained a bullet point which read:

"For Europe, I already communicated 3-4 weeks ago to Merrick in taking is salary back to the start-up level, 50% reduced from prior. I also told Lutz he would have a 20% cut as represented in the file attached. I asked Merrick to communicate to Simon Colver, also UK, a 20% reduction."

and a further sentence which read:

"Sam and Mattia - I already communicated this to Merrick, Lutz and Merrick to Simon."

31. At some point between the claimant receiving the Simon Colver email and the claimant sending Mr Piconi an email in response, referred to at paragraph 32 below, the claimant read the Simon Colver email, including the Talking Points, telephoned Mr Colver and communicated to him that he was being proposed for a restricted stock unit (RSU) allocation, which was a type of share in the respondent's company. On this call the claimant did not communicate to Mr Colver any of the other information in the Simon Colver email, either in the first part of the email or the Talking Points.

32. The claimant responded to the Simon Colver email by email at 10:43 on 8 April 2020 (a copy of which was produced at page 96 of the Joint Bundle). This email read:

"Hi Rob,

Done. He was very understanding and appreciative of the frank discussion and the potential RSU's."

33. Further on 8 April 2020, the respondent's HR consultant sent an email to both the claimant and Mr Piconi at 14:14 (a copy of which was produced at page

96 of the Joint Bundle) confirming that the respondent's payroll service provider had been instructed to reduce the claimant's salary by 50% and Mr Colver's salary by 15% with effect from 1 April 2020 until further notice.

34. The CDU funding was never received and a different funding pathway was taken by the respondent.

35. In the period from April 2020 to the end of the year the respondent sought out other sources of funding, which it was successful in doing. This resulted in additional funding being secured in late 2020 (circa $25m).

36. Discussions had also begun in relation to taking the respondent's company public and the respondent's intention to do this was announced prior to the claimant's resignation in November 2021.

37. In December 2020 Mr Piconi called the claimant to advise him that his salary was being increased to £200,000 per annum and Mr Colver's salary was being increased back to the level it was at before the salary reductions in April 2020. On this call Mr Piconi explained to the claimant that the respondent could not afford to put his salary all the way back up to £300,000 yet.

38. By April or May 2021 the respondent had secured a further $5m of funding and had started the process of securing further substantial funding (circa $100m), most of which was secured by August 2021.

39. The claimant received a discretionary bonus of £22,000 in June 2021. The respondent's employees were told at that time that this was a discretionary bonus in thanks for their efforts for the company during the period.

40. The claimant had a telephone call with Mr Piconi in July 2021 in relation to the claimant selling some of his shares in the respondent company as the period during which he could not do this (the "lockup period") had come to an end.

41. On this call the claimant and Mr Piconi also discussed salaries. By this time significant progress had been made in relation to the financing of the respondent's business and the process of the respondent becoming a public company was at an advanced stage. Mr Piconi told the claimant that the

respondent was going to engage Ernst & Young do a full review of salaries of all the senior team, including the both of them, to make sure that they were being competitively paid for when the respondent became a public company, with the clear implication being that the senior team's salaries would be increased.

42. In September 2021 the Claimant gave notice of his resignation, having decided to pursue a new opportunity, and his employment with the respondent terminated on 28 November 2021.

43. During his notice period, the claimant sent an email to Ms Gonca Icoren, Chief People Officer of the respondent, at 04:03 on 24 October 2021 (a copy of which was produced at page 125 of the Joint Bundle). The email raised a number of issues relating to termination of the claimant's employment and financial matters. One of these matters raised by the claimant was the reduction of the claimant's salary and repayment of the amount of salary which had been reduced. The numbered paragraph relating to this read:

> *"1. I am due back pay from April 2020 through my last day. In March 2020 at he beginning of the pandemic, Rob called me and asked if I would accept a lower monthly payment as our raising would be delayed. It was agreed that any amounts under paid would be paid back when funding was received. My monthly pay was reduced from my contractual amount of £25,000 per month to £12,500 per month from April 2020 through November 2020. This equates to £100,000. My monthly pay was then increased slightly to £16,667 per month from December 2020 to date. By the time I leave at the end of November this will equate to another £100,000 for a total back pay to put us back in compliance with my contract of £200,000."*

44. The claimant had a Zoom meeting with Ms Icoren and Mr Piconi in November 2021 prior to the termination of his employment to discuss his email referred to at paragraph 43 above, during which meeting the claimant reiterated his position, as set out in the email, i.e. that it had been agreed with Mr Piconi in March 2020 that any amounts underpaid as a result of the claimant accepting

a lower monthly salary would be paid back to him when funding was received and that the claimant was now seeking payment of this. In response Mr Piconi said that it had never been agreed that these amounts would be repaid.

45. At the meeting the claimant indicated that the reason he was seeking repayment now (i.e. at that time, rather than later) was because he was leaving. The claimant also indicated that him raising at least some of the matters in his email of 24 October 2021 referred to at paragraph 43 above was linked to him having found out that in 2020 shares, which were of a substantial value, had been issued to Mr Piconi and the respondent's Chief Technical Officer and not to him, which the claimant considered was unfair.

46. Subsequent to this meeting, Mr Piconi sent an email to the respondent's board at 09:48 on 22 November 2021 (a copy of which was produced at page 132 to 134 of the Joint Bundle) forwarding the claimant's email of 24 October 2021, referred to at paragraph 43 above, and setting out his suggested approach to the matters raised by the claimant in that email. One of the paragraphs, relating specifically to the reduction of the claimant's salary and repayment of the amount of salary which had been reduced, read:

"Salary make-up from COVID pay cuts: Merrick is asserting that he should have all of his salary made up from the 8 months where we reduced Exec salaries by 50%, and salary differential from his employment letter through 2021 as well - that it is a contractual obligation we have to pay. Merrick had never raised this earlier until after his resignation. [redacted section in Joint Bundle] During the call, I communicated to Merrick that this was not a contractual obligation, and that he chose to resign his position in any event and was not forced by the Company. Note no other employee has raised this as there was never a commitment to do a "salary make-up" and most all people with some exceptions were returned to their full salary pre-salary cuts. This would also set a potentially dangerous precedent if we were to agree to pay this or recognize any portion, for any other employee that would for whatever reason choose to do the same, hence I do not recommend we do this."

47. Mr Colver had a conversation with Ms Icoren in December 2021 regarding reimbursement of reduced salary. Mr Colver said that he had thought that he would be reimbursed in respect of reduced salary and was told by Ms Icoren that that was not what the agreement was and that that would not be happening.

48. By February 2022 the process of taking the respondent company public and receiving further funding in this respect was complete.

49. The respondent's board approved the reduction of salaries and the respondent's approach to those reductions in accordance with the Talking Points. They did not approve a Repayment Commitment being given by Mr Piconi to the claimant or anyone else.

50. One of the respondent's employees, Pino Lovaglio, the respondent's Construction Manager, was not subject to the salary reduction. This was because he required to stay to work in Switzerland, living away from his family home in Italy at the time of the outbreak of the COVID-19 pandemic.

51. After the outbreak of the COVID-19 pandemic the respondent's Chief Product Officer, Mr Marco Terezine gave up a contractual entitlement to a $100,000 payment from the respondent in return for shares in the respondent company. Around the time Mr Terezine took up employment with the respondent in October 2019 the respondent had agreed that it would make a payment to him of $200,000 due to him giving up a bonus of $200,000 from his previous employer in order to take up employment with the respondent. The respondent had already paid $100,000 of this prior to the outbreak of the COVID-19 pandemic and was due to make the second payment of $100,000 of this $200,000 payment after the outbreak of the COVD-19 pandemic. As part of its attempts to reduce spending after the outbreak of the COVID-19 pandemic, the respondent offered Mr Terezine shares in the respondent's company in lieu of the second $100,000 which had become due, which Mr Terezine agreed to. He was still subject to the salary reductions.

52. None of the respondent's other employees was given a Repayment Commitment by the respondent, either verbally or in writing. Other than as

detailed elsewhere in the Findings in fact section the claimant never mentioned, either verbally or in writing, the subject of such a Repayment Commitment having been given to him or anyone else. Other than as detailed elsewhere in the Findings in fact section the respondent never mentioned, either verbally or in writing, the subject of such a Repayment Commitment having been given to the claimant or anyone else.

Observations on the evidence

53. Most of the tribunal's findings in fact were based on matters that were agreed or on evidence that was given by either the claimant's or respondent's witnesses that was not challenged or disputed and which the tribunal accepted as being sufficiently credible and reliable.

54. There were some areas in the case where there was a direct conflict of evidence on essential matters and where the tribunal preferred the evidence of some witnesses over that of others, or where the tribunal was not convinced by explanations provided by the witnesses, and these specific areas are detailed below, as are the reasons why the tribunal reached the conclusions that it did on key factual issues.

55. In coming to its conclusions in relation to these key factual issues, the tribunal took into account and considered the evidence, its assessment of the credibility and reliability of witnesses, its other findings in facts and the submissions made on behalf of both parties.

56. The tribunal applied the civil standard of proof, being "on the balance of probabilities" as noted below under the Relevant law section, and with reference to the explanation of Lord Denning on the civil standard proof (then Mr Justice Denning in Miller v Minister of Pensions 1947 2 All ER 372, KBD), referred to under the Relevant law section, the tribunal considered whether the evidence was such that it could say "we think it more probable than not" in respect of each key factual issue it required to determine.

57. Submissions were made on behalf of both parties asking the tribunal to prefer the evidence of their side's witnesses as being more credible and reliable than

the evidence of the other side's witnesses. The tribunal considered Mr Colver's and Mr Piconi's evidence to be generally credible and reliable. It was not improbable and was generally consistent (or not inconsistent) with the documentary evidence available and with the weight of other evidence in respect of matters they gave evidence about. The tribunal considered that Ms Icoren's evidence was also generally credible but was not entirely reliable as she had limited contemporaneous or first-hand knowledge of the key events, having begun employment in late 2021 and her recollection of her conversation with Mr Colver in December 2021 was limited. The tribunal considered that the credibility of the claimant's evidence was undermined in relation to his assertion that he did not read the Talking Points and his explanations for this and in relation to his explanations for not having mentioned the subject of the Repayment Commitment until October 2021, referred to below.

58. There was no dispute that the March 2020 call took place and that the claimant agreed the reduction in salary of 50% on that call referred to in the Findings in fact section. The key factual dispute being, whether or not as part of that agreed reduction in salary, Mr Piconi also gave the claimant a commitment on this call that when funding was received the claimant's salary would be reinstated to its original level as at March 2020 and any sums not paid to the claimant as a result of that reduction would be repaid to him, or words to that effect, and the tribunal's consideration of this key factual dispute is set out below.

59. There was also a dispute as to what was said on the March 2020 call in relation to Mr Colver and the reduction of his salary.

60. Both Mr Piconi and the claimant were clear in their evidence as to what was said on the March 2020 call, except in relation to their evidence regarding what was said on the call about the reduction of Mr Colver's salary.

61. Mr Piconi said he didn't give a definitive figure for the percentage reduction to be applied to Mr Colver's salary but told the claimant that it would be a lot less than the claimant was being asked to agree to, that it had not been finalised

as financial modelling required to be carried out with the respondent's Finance and HR teams to finalise the specific reductions for the different junior staff, but he may have given the claimant an indication of what it would be and may have said something from 10 to 25%.

62. The claimant, for his part, was also not entirely clear on this point. He said that there was some confusion and that Mr Piconi either told him the reduction for Mr Colver would be 15% or 20% and he then either told Mr Colver it would 15% or 20% on the call with him the following day.

63. Mr Colver was clearer about what the claimant told him, he said the claimant told him the percentage reduction in respect of his salary would be 15%. The fact that Mr Colver's evidence was clearer on this point than both Mr Piconi's and the claimant's, led the tribunal to the conclusion that it was more likely than not that Mr Piconi indicated to the claimant that the percentage reduction to Mr Colver's salary would be 15%, and the claimant then told Mr Colver that was the figure his salary was to be reduced by.

64. Mr Piconi said he didn't remember saying to the claimant that the reduction of Mr Colver's salary would be on the same basis as the claimant's (albeit the percentage figures would be different) but that was in line with what the respondent says was the position for employees generally. Also, the claimant was clear that he did ask this question and got this response and the tribunal considered this was a natural and credible thing to ask and be told in the circumstances.

65. The tribunal accepted that it was more likely than not that Mr Piconi told the claimant that the level of the percentage reduction in respect of Mr Colver's salary had not been finalised, that the claimant would be advised once this had been and the claimant would be asked to discuss it with Mr Colver once that was done, and that Mr Piconi did not ask the claimant to discuss it with Mr Colver at that stage (i.e. as at the time of the March 2020 call). The reasons for the tribunal reaching this conclusion were as follows:

66. The lack of certainty on the March 2020 call about the exact level of the percentage reduction in respect of Mr Colver's salary is consistent with Mr Piconi's evidence that there was not a finalised decision on this yet;

67. The tribunal also thought it credible in the circumstances at the time, when many businesses where seeking to respond rapidly to the developing implications of the COVID-19 pandemic, that the respondent would have decided to seek reductions in salary of the definitive amounts for the respondent's most senior employees (i.e. 50%) before having calculated the exact amounts by which to seek reductions to the junior employees' salaries, and for Mr Piconi to inform the most senior employees of the situation as soon as possible, and before the exact amounts by which to seek reductions to the junior employees' salaries had been finalised;

68. The tribunal also considered it credible that Mr Piconi did not ask the claimant to discuss the matter with Mr Colver at that time because he would not want to Mr Colver to be told a percentage figure which the respondent intended to reduce his salary by that may be different from a final figure calculated later;

69. The tribunal also noted that in the Simon Colver email, sent some weeks after the March 2020 call and in which there was a request for the claimant to discuss the reduction in salary with Mr Colver, there was no reference to the claimant having been asked to do this previously and the tribunal considered that this was more consistent with the claimant not having been asked to do this previously than the claimant having been asked to do so;

70. The tribunal heard evidence that the respondent thought highly of Mr Colver, as it did of the claimant, and that Mr Piconi was sensitive as to what Mr Colver's response to the proposal to reduce salaries would be. There was no suggestion that in the period between the March 2020 call and when the Simon Colver email was sent on 8 April 2020 that Mr Piconi asked the claimant or that the claimant told Mr Piconi what Mr Colver's response was to the news that the respondent intended to reduce his salary. The tribunal considered this was also more consistent with the claimant not having been

asked to discuss the reduction in salary with Mr Colver as at the time of the March 2020 call;

71. The finding that the claimant did actually have the conversation with Mr Colver in relation to reduction of his salary the day after the March 2020 call was consistent with the claimant's position that Mr Piconi asked the claimant to do so at that time, but the tribunal also did not consider it improbable that the claimant would do so anyway at this time of increasing uncertainty and concern and in the absence of an explicit instruction not to do so, despite not being asked to and being told he would be asked to do so at a later date; and

72. The tribunal also considered the email sent by Mr Piconi to the respondent's HR consultant, referred to in the Findings in fact section at paragraph 30 above, and noted that the wording of that email could indicate that Mr Piconi asked the claimant to discuss the reduction in salary for Mr Colver with him 3 to 4 weeks before 8 April 2020. However, like the wording of the claimant's email in response to the Simon Colver email, referred to in the Findings in fact section at paragraph 32 above, and as referred to at paragraph 73 below, the wording of this email was not entirely clear in relation to the timing of matters referred to in it, and it did not preclude an interpretation consistent with Mr Piconi's evidence that he had asked the claimant to discuss the reduction in salary with Mr Colver in the Simon Colver email sent earlier that day, rather than on the March 2020 call.

73. The tribunal considered that the wording of the claimant's email in response to the Simon Colver email, referred to in the Findings in fact section at paragraph 32 above, could indicate that he had had the discussion with Mr Colver in relation to the reduction in his salary after the claimant had received the Simon Colver email. However, the wording of the email was not entirely clear as regards the timing of matters referred to in it and it did not preclude an interpretation consistent with the claimant's evidence that he had the discussion with Mr Colver in relation to the reduction in his salary the day after the March 2020 call, rather than after the Simon Colver email was sent in the hours previous.

74. The tribunal considered that it was more likely than not that the claimant had the conversation with Mr Colver in relation to the reduction of his salary before 8 April and on the day after the March 2020 call on the following basis:

75. The claimant was clear in his evidence that the call with Mr Colver in relation to the deduction in his salary took place the day after the March 2020 call;

76. Mr Colver's evidence was neutral as to the timing of the discussion taking place around the time of the March 2020 call or around the time that the Simon Colver email as sent. He said he was in France at the time but his evidence was that he was in France both around the time of the March 2020 call and around the time that the Simon Colver email as sent;

77. Both the claimant and Mr Cover said that they had a conversation in relation to the reduction of Mr Colver's salary and that allocation of RSU's to Mr Colver was not discussed during that conversation, and that they then had a later conversation in relation to the allocation of RSU's to Mr Colver and the reduction of salaries was not discussed during that conversation;

78. The Simon Colver email included the information in relation to the allocation of RSU's to Mr Colver and there did not appear to be any particular reason why the claimant would not tell Mr Colver about the allocation of RSU's until a later date; and

79. The claimant's email in response to the Simon Colver email, referred to in the Findings in fact section at at paragraph 32 above, indicated that the claimant had discussed the allocation of RSU's with Mr Colver by that point in time.

80. The tribunal concluded that the claimant told Mr Colver that, due to pandemic, his salary would be reduced by 15%, that his salary would then be increased back to its original level and that then any loss because of the period of unpaid salary reduction would also be made up to him. This, or words to this effect, was the evidence of both Mr Colver and the claimant, being the only parties to the conversation. Mr Colver also raised the matter of repayment of reduced salary with Ms Icoren in December 2021, and that was consistent with Mr

Colver's and the claimant's evidence that the claimant had told Mr Colver that that his reduced salary would be made up to him.

81. The claimant's evidence was that he received the Simon Colver email and that he read the first part of it but he did not read the Talking Points. The tribunal considered that it was more probable than not that the claimant read the whole email, including the Talking Points, and concluded that this was the case and that the claimant's evidence was not credible in this respect on the following basis:

82. It was pointed out on behalf of the claimant, and the tribunal did note, that the email indicated that it related specifically to Mr Colver but the tribunal did not consider it likely that a senior and experienced professional such as the claimant who was the respondent's Chief Commercial Officer would read only part of an email and not the rest of it in relation to such a serious matter for his direct report that he was being asked to discuss with him at such a time of uncertainty and concern;

83. The tribunal also considered that the claimant having been told that the reduction of Mr Colver's salary was to be on the same basis as the reduction of his own salary, and when he himself had received nothing in writing from the respondent, would make it more likely than not that the claimant would read the whole email;

84. The tribunal did not consider it was likely that the claimant would respond in the way that he did, saying "done", indicating that he had done what had been requested of him in the Simon Colver email (which was to communicate the information in the email to Mr Colver at his earliest convenience) without reading the whole email;

85. The claimant did give an explanation for not reading the Talking Points in his evidence, which was that he had already had the conversation with Mr Colver in relation to his salary reduction and said that he was not concerned that the Talking Points in the second part of the email would be different to what he had already discussed with Mr Colver because the first part was consistent

with what he had discussed with Mr Colver (other than the RSU's which he did proceed to communicate to him);

86. However, although the tribunal concluded that the claimant had had the conversation with Mr Colver in relation to the salary reduction before receipt of this email, the tribunal did not find the claimant's explanation credible. Whilst there were some aspects of the first part of the email which were consistent with what the claimant had discussed with Mr Colver, the first part of the email did not make any mention of any loss because of the period of unpaid salary reduction being paid back or words to that effect (which the claimant had discussed with Mr Colver), and did make specific reference to the respondent attempting to use a discretionary bonus pending the timing of completion of the CDU and broader commercial progress (and there was no mention from the claimant or Mr Colver to indicate that bonus was discussed by them at all). The first part of the email also refers to the information in relation to bonus being "noted below" and it seemed unlikely to the tribunal in all the circumstances that the claimant would still not have read the information he was being referred to in the same email in this respect; and

87. The tribunal did not consider the claimant's evidence that, not only did he not read the Talking Points at the time, but that he never read them throughout the rest of his employment (during which time he was experiencing a significant ongoing reduction in his salary, and near the point of resignation actually sought payment of the sums deducted and this was refused), and the first time that he read them was when they were included in the Joint Bundle for these proceedings, was credible.

88. The claimant was clear in his evidence that, at the Zoom meeting with Ms Icoren and Mr Piconi in November 2021, referred to in the Findings in fact section at paragraph 44 above, when he said he was only seeking repayment now, he was saying it was now rather than later (rather than not at all). Ms Icoren appeared to accept this in cross examination and Mr Piconi just said the claimant said that he was seeking payment now because he was leaving and did not expand on that.

89. At that meeting the claimant also indicated that him raising at least some of the matters in his email of 24 October 2021 referred to in the Findings in fact section at paragraph 43 above was linked to him having found out that in 2020 shares, which were of substantial value, had been issued to Mr Piconi and the respondent's Chief Technical Officer and not to him, which he felt was unfair. Ms Icoren said the claimant expressed upset about this but didn't say the claimant said that was a motivation for raising these matters. The claimant said he was angry about this but was clear that his anger about that only related to two of the points in his email, which did not include the point in relation to reduction of the claimant's salary and repayment of the amount of salary which had been reduced. Mr Piconi said the claimant was angry about this and didn't make a distinction about that relating to him raising some of the issues in the email but not others. The evidence was that the context of this matter being raised was the part of the meeting after discussing points 4 and 5 of the claimant's email (which did not include the point in relation to reduction of the claimant's salary and repayment of the amount of salary which had been reduced) and was in response to a question the claimant was asked at the meeting as to why the claimant thought the respondent should grant his requests. Accordingly, the tribunal considered that it was more likely than not that the claimant thought he was being asked a question about points 4 and 5 in his email and answered accordingly and the respondent thought that the claimant was answering a general question.

90. Mr Colver was clear about his conversation with Ms Icoren, that when he met her in December 2021 he said that he had thought that he would reimbursed in respect of reduced salary and was told by Ms Icoren that that was not what the agreement was and that that would not be happening. Ms Icoren said that she did recall a conversation with Mr Colver at this time and that her recollection was that this related to taxation and where he was domiciled and she didn't recall a discussion of repayment of the salary reductions. However, she did say that whilst she didn't remember this, it could have happened. Given that Mr Colver's recollection of this conversation was clearer than that of Ms Icoren, the tribunal accepted his evidence in this respect.

91. Mr Piconi's evidence was clear in relation to what the respondent's board had and had not approved in relation to the reduction of salaries and related arrangements, i.e. that this was in accordance with the Talking Points, and they did not approve a Repayment Commitment being given by Mr Piconi to the claimant or anyone else. This appeared credible to the tribunal in that the Talking Points (which, as referred to below, did not contain a Repayment Commitment) contained information regarding the respondent's approach to the salary reductions and related arrangements across the company in relation to employees generally and it would have been more likely than not that this information was consistent with what the board had approved and there was no evidence otherwise, either in the evidence of any of the other witnesses or the documentation before the tribunal.

92. Mr Piconi was also clear in his evidence that none of the respondent's other employees (other than the claimant and Mr Colver) were given a Repayment Commitment, and there was no evidence otherwise, either in the evidence of any of the other witnesses or the documentation before the tribunal. This was also consistent with the contents of the Talking Points not containing such a commitment regarding the respondent's approach to the salary reductions and related arrangements across the company in relation to employees generally, and with the finding that the respondent's board had not approved such a commitment being given. This evidence was also consistent with the contents of Mr Piconi's email to the board on 22 November 2022, referred to in the Findings in fact section at paragraph 46 above**,** in that this email stated that *"…no other employee has raised this as there was never a commitment to do a "salary make-up"…",* and referred to paying back to the claimant amounts reduced would *"set a potentially dangerous precedent".*

93. The tribunal concluded that it was more probable than not that on the March 2020 call Mr Piconi did not give a commitment to the claimant that when funding was received the claimant's salary would be reinstated to its original level as at March 2020 and any sums not paid to the claimant as a result of that reduction would be repaid to him or words to that effect, and instead concluded that it was more probable than not that what Mr Piconi did say in

this respect is as set out at paragraphs 20 and 21 of the Findings in fact section and that no such commitment was given for the following reasons:

94. There was a direct conflict of evidence between Mr Piconi and the claimant in respect of this matter;

95. The claimant was adamant and clear that, when discussing the 50% salary reduction for him on the March 2202 call, Mr Piconi gave a commitment that when was funding raised, his salary would go back to the full amount and any amounts lost would be made whole at that point*;*

96. Mr Piconi was equally adamant and clear that, when discussing the 50% salary reduction for him on the March 2202 call, he gave no such commitment and that what he did say in this respect is as set out at paragraphs 20 and 21 of the Findings in fact section, i.e. that the increase of salaries back to normal levels was only an expectation rather than a commitment and that, rather than a commitment being given to repay sums not paid as a result of the salary reductions, only consideration would be given to a discretionary bonus that could partially or fully offset this;

97. For the reasons set out below and in light of the credibility of the claimant's evidence having being undermined as set out elsewhere in this Observations on the evidence section, the tribunal preferred Mr Piconi's version of the discussion on the March 2020 call in this respect;

98. The written communications the tribunal was referred to, apart from the claimant's email to Ms Icoren of 24 October 2021 referred to in the Findings in fact section at paragraph 43 and the email from the respondent's HR consultant to the claimant and Mr Piconi on 8 April 2020, referred to at paragraph 33 above, were all consistent with Mr Piconi's version of the March 2020 call rather than the claimant's;

99. The tribunal considered that the email from the respondent's HR consultant to the claimant and Mr Piconi on 8 April 2020 was neutral evidence in this respect as one wouldn't necessarily expect to see any and all conditions agreed in relation to the salary reductions reflected in that;

100. The tribunal considered that the contents of the Simon Colver email was an indicator that what Mr Piconi said in relation to the salary reductions was as set out at paragraphs 20 and 21 of the Findings in fact section and that the Repayment Commitment the claimant asserted he was given was not given for the following reasons:

101. There was no reference in either the first part of the Simon Colver email or the Talking Points in the second part of it to a Repayment Commitment.

102. The bullet point contained within the Talking Points, as set out at paragraph 29 above in the Findings in fact section, indicated that the increase of salaries back to normal levels was only an expectation rather than a commitment or guarantee and that, rather than a commitment being given to repay sums not paid as a result of the salary reductions, only consideration would be given to a discretionary bonus that could partially or fully offset this and this was consistent with what Mr Piconi claimed he said to the claimant in this respect on the March 2020 call;

103. For the claimant it was pointed out that the Simon Colver email related specifically to Mr Colver's reduction in salary and related arrangements so was not an indicator of what was agreed with the claimant. That was true of the first part of the email. However, because the Talking Points contained information regarding the respondent's approach to the salary reductions and related arrangements across the company in relation to employees generally, including but not limited to Mr Colver, as well as the finding that the claimant asked Mr Piconi if the reduction of Mr Colver's salary would be on the same basis as the reduction of the claimant's salary and Mr Piconi said that it would be, the tribunal considered that this was an indicator as to what was agreed with the claimant on the March 2020 call too; and

104. The tribunal considered that the fact that there was no reference and no acknowledgement from Mr Piconi in the Simon Colver email that it represented such a different approach to the Repayment Commitment that the claimant asserted Mr Piconi had given him on the March 2020 call was also an indicator that that commitment was not given on the March 2020 call;

105. There was no reference in the email sent by Mr Piconi to the respondent's HR consultant, referred in the Findings in fact section at paragraph 30 above, to a Repayment Commitment, and it contained the same Talking Points referred to at paragraphs 101 to 103 above;

106. In Mr Piconi's email to the board on 22 November 2021, referred to in the Findings in fact section at paragraph 46 above, in relation to the claimant's assertion that Mr Piconi had given him a Repayment Commitment, Mr Piconi stated that such a commitment was never given;

107. The finding that the respondent's board approved the reduction of salaries and the respondent's approach to those reductions in accordance with the Talking Points and did not approve a Repayment Commitment being given by Mr Piconi to the claimant or anyone else was consistent with Mr Piconi's version of the conversation with the claimant on the March 2020 call and that he did not give such a commitment to the claimant on that call. The tribunal considered Mr Piconi's evidence, that he would not depart from what the board had authorised by giving such a commitment to the claimant, was entirely credible;

108. The tribunal also considered that the finding that no Repayment Commitment was given by the respondent to any of the respondent's other employees was consistent with Mr Piconi's version of the conversation that no such commitment was given to the claimant on the March 2020 call;

109. The evidence did not lead to a conclusion that the claimant and Mr Colver were in any special circumstances that may have been a reason to treat them differently to anyone else by giving them a Repayment Commitment in relation to the salary reductions. There was evidence that the claimant and Mr Colver were highly thought of and important to retain, but the evidence was also that that was true of all the respondent's employees, being a small team. It was also true that the claimant was one of the very first employees employed by the respondent and was also very senior, but that was also true of other employees who were subject to the salary reductions and were not given a Repayment Commitment.

110. The claimant said that it was not unheard of for some executives to be treated differently from others. He gave the example of the respondent's Chief Product Officer, Mr Marco Terezine being offered shares in return for giving up an entitlement to a $100,000 payment from the respondent. There was also the example of the respondent's Construction Manager Pino Lovaglio who was not subject to the salary reduction at all as he required to stay to work in Switzerland during the COVID-19 pandemic, living away from his family home in Italy. The tribunal considered that the circumstances surrounding these examples were exceptional and did not relate to a commitment to repay salary reductions and did not suggest that the respondent would have taken a different approach to the salary reductions for the claimant and Mr Colver to all other employees who were subject to the salary reductions;

111. It was submitted on behalf of the claimant that if the agreement to the salary reduction for the claimant had been absolute and not conditional on a Repayment Commitment, he would have been more likely to have raised this earlier than October 2021, rather if the Repayment Commitment had been given. The tribunal did not agree. The tribunal considered that if a Repayment Commitment had been given to the claimant by Mr Piconi on the March 2020 call, this would have been likely to have been documented or referred to in writing or mentioned verbally in some way at some stage by either the claimant or respondent and the fact that it wasn't, until the claimant sent the email to Ms Icoren of 24 October 2021 (except by the claimant to Mr Colver) was also an indicator that such a commitment was not given on the March 2020 call in light of the following:

112. The claimant's position was that, apart from one telephone call with Mr Piconi in March 2020, the Repayment Commitment was never mentioned to him again;

113. The claimant did not know what any other employees had been told in relation to whether such a commitment had been given to them;

114. The claimant appeared to be a robust and confident individual and suggested in his own evidence that he would have queried matters with the respondent if he felt he had reason to;

115. There appeared to be several points in time when it would have been natural for the Repayment Commitment to have been mentioned, being:

116. When the Simon Colver email was sent to and read by the claimant, this appeared to be a natural point for the Repayment Commitment to have been mentioned in the circumstances that, as noted above, the content of this email was an indicator that there was no such commitment, either for Mr Colver or generally;

117. When the claimant received the discretionary bonus this also appeared to be a natural point for the Repayment Commitment to have been mentioned. The reasoning given for payment of the discretionary bonus at the time was as what could be described as a general "thank you" to staff and this being a possible mechanism to partially or fully offset the reduction in salaries was not mentioned at the time. The claimant's evidence was that he regarded it as such a general "thank you" and not to partially or fully offset the reduction in salaries. However, having made a finding that the claimant read the Talking Points, which contained an indication that discretionary bonus would be considered as a mechanism to partially or fully offset the reduction in salaries generally, the tribunal considered that this, coupled with the fact that a discretionary bonus had just been paid to the claimant which did not come close to offsetting the reduction in his own salary, would have meant that if a Repayment Commitment had been given, it would have been a natural point for the claimant to have checked that that was not intended to be the mechanism to partially or fully offset the reduction in his salary;

118. When the claimant had the conversations with Mr Piconi in relation to salaries in December 2020 and July 2021, these appeared to be natural points for the Repayment Commitment to have been mentioned in light of the fact that the respondent was in an improving financial position (by the time of the July 2021

conversation the claimant said the respondent was in a “tremendous” financial position);

119. When the respondent decided to take a different funding pathway, this appeared to be a natural point for the Repayment Commitment to have been mentioned in light of the fact that, at the time of the March 2020 call, the claimant’s position was that the trigger for repayment as part of the commitment was anticipated to be the receipt of the CDU funding, which was not received. The tribunal did not accept the respondent’s contention that the trigger for repayment as part of the commitment, if given, could *only* be the receipt of the CDU funding rather than funding generally, but did consider that if the commitment had been given, it would have been natural for the claimant to have wondered if the respondent would still have intended to apply the receipt of funding trigger for repayment to other sources of funding when the funding pathway changed;

120. The claimant did provide an explanation for not raising the subject of the Repayment Commitment at any time up to the claimant’s email to Ms Icoren of 24 October 2021. He said that he assumed that he would get the money back on the completion of funding on the completion of the process of the respondent becoming a public company, which subsequently happened in February 2022, so had no reason to raise the subject before that (until the crystalising event of him resigning). The tribunal did not find this explanation credible.

121. The tribunal did not consider that an assumption that the trigger for repayment was the completion of funding on the completion of the process of the respondent becoming a public company would explain the commitment never being mentioned by the claimant until his email to Ms Icoren of 24 October 2021, and him not at least seeking some comfort that this was to happen for the reasons set out paragraphs 112 to 119 above.

122. The claimant said that he assumed that the trigger for repayment was the completion of funding on the completion of the process of the respondent becoming a public company from the use of the word “yet” by Mr Piconi on

the December 2020 call. The claimant also said that he assumed this from the words he said were used by Mr Piconi on the July 2021 call in relation to the salary review, which were that he should not worry about the current situation because everything would be taken care of at the end of the Ernst and Young salary review and that he would be very happy with the outcome. However, it was not clear to the tribunal why the claimant would have assumed this based on these statements during the December 2020 and July 2021 conversations and in light of the significantly improving financial position of the respondent and taking into account that, at the time the claimant asserted the commitment was given, it was anticipated that it would be the CDU funding (of circa $45m) that would the repayment trigger.

123. It was argued on behalf of the respondent that the use of different terminology and vocabulary by the claimant to describe the Repayment Commitment was indicative that such a commitment had not been given. The tribunal did not agree, in the tribunal's view the terminology and vocabulary used by the claimant in evidence and the pleadings in this respect was generally consistent in overall meaning.

124. It was also argued on behalf of the respondent that the vague nature of what the claimant asserted was the trigger for repayment as part of the commitment was indicative that the commitment had not been given, or if it had been it was too vague to be enforceable. Again, the tribunal did not agree. The tribunal noted that the trigger for repayment was general but did not consider it was so vague as to not be ascertainable and enforceable.

125. It was further suggested that indications given by the claimant at the meeting in November 2021 referred to in the Findings in fact section at paragraph 45 above that he was seeking repayment now because he was resigning and that he was angry at being omitted from the issuing of shares in 2020 were indicative that the Repayment Commitment wasn't given. The tribunal accepted that the claimant was not expressing or admitting that he did not really think he was entitled to repayment for the reasons set out above i.e. the tribunal did not consider that the claimant was indicating that he was only seeking payment *at all* because he was resigning and did not accept that the

claimant was expressing or admitting that he did not think he was entitled to repayment and the only reason he was seeking it was because he was angry about something else.

126. The claimant said in evidence that he would not have agreed to a reduction in salary without a Repayment Commitment and it was argued on behalf of the claimant that it would be unlikely that the claimant would have agreed to a reduction in salary without a Repayment Commitment and this was indicative that such a commitment had been given. The tribunal did not think this was a particularly strong indicator that the commitment was given as the tribunal did not consider it all improbable that employees were being asked to accept, and did accept, reductions in wages without any commitment that the shortfalls would be repaid at the time in question, being during the escalation of the COVID-19 pandemic in February and March 2020.

127. The tribunal did also the note that the claimant's position was that the commitment was conditional on the respondent being in a better financially position, and accepted that that was more plausible than an unconditional commitment, but did not think that was a particularly strong indicator either for the reason referred to in the paragraph above i.e. the tribunal did not consider it all improbable that employees were being asked to accept, and did accept, reductions in wages without any commitment that the shortfalls would be repaid at the time in question (conditional or not).

128. In the claimant's email to Ms Icoren of 24 October 2021 the claimant raised the assertion that Mr Piconi had given him a commitment that when funding was received his salary would be reinstated to its original level as at March 2020 and that any sums not paid to him as a result of the salary reduction would be repaid to him on the March 2020 call, or words to that effect, and repeated that assertion at the subsequent meeting with Ms Icoren and Mr Piconi in November 2021. This is consistent with the claimant's position in relation to the commitment having been given but the tribunal did not consider it a strong indicator in the circumstances that it was so long after the event and that the claimant had not done so before this, and his explanations for this referred to above. The tribunal also noted that when the claimant did raise

the issue of a Repayment Commitment having given to him at this time it was denied by the respondent in as clear and unequivocal terms as the assertion was made.

129. The tribunal considered that the claimant telling Mr Colver that his salary would be increased back to its original level and that then any loss because of the period of unpaid salary reduction would also be made up to him was an indicator that a Repayment Commitment had been given to the claimant by Mr Piconi on the March 2020 call.

130. The tribunal did not accept the argument on behalf of the respondent that this evidence was neutral. As was submitted on behalf of the claimant, it was not clear why the claimant would have said this to Mr Colver if Mr Piconi had not given the claimant such a commitment (it also having been accepted that Mr Piconi told the claimant that the reduction of Mr Colver's salary was to be on the same basis as the reduction of his own salary). For the claimant it was argued that the only logical explanation was that the Repayment Commitment had been given to the claimant by Mr Piconi as the only other explanation involved accepting that the claimant had a "long game" plan and was seeking to set up a claim or "plant evidence" to support a claim for repayment at later date (which the tribunal agreed would have been unlikely).

131. The tribunal did not agree that this was the only logical explanation. There was no suggestion that the claimant misunderstood or misinterpreted what Mr Piconi had said. The claimant's position was that what Mr Piconi had said was clear and stated that what Mr Piconi was claiming he said and what the claimant was asserting he said were very different.

132. However, another possible explanation was that, based on what the tribunal found Mr Piconi did say, the claimant was confident that Mr Colver's salary would be increased back to its original level and that then any loss because of the period of unpaid salary reduction would also be made up to him and was reporting what he *thought* would happen rather than what he had been *told* would happen, or simply exaggerated or overstated the level of certainty of this to Mr Colver. Another possibility is that the claimant didn't want to worry

Mr Colver at such a time of increasing uncertainty and concern, or he was keen to the retain Mr Colver (as was suggested may be a reason why Mr Piconi had given the Repayment Commitment to the claimant).

133. So, whilst the finding that the claimant told Mr Colver that his salary would be increased back to its original level and that then any loss because of the period of unpaid salary reduction would also be made up to him was an indicator that a Repayment Commitment had been given to the claimant by Mr Piconi on the March 2020 call, it was not sufficient to lead to the conclusion on the balance of probabilities that this did happen in light of the other possible explanations for this and the weight of others indicators in the evidence that the Repayment Commitment was not given, as detailed above.

134. Similarly, the tribunal also considered that the claimant telling his wife that Mr Piconi gave a Repayment Commitment to him on the March 2020 call was an indicator that the commitment was given for similar reasons as set out above in relation to the finding that the claimant told Mr Colver his salary would be increased back to its original level and that then any loss because of the period of unpaid salary reduction would also be made up to him. However, again the tribunal did not consider that the only logical explanation for this was that the Repayment Commitment had been given to the claimant by Mr Piconi, there were other possible explanations including that, based on what the tribunal found Mr Piconi did say, the claimant was confident that his salary would be reinstated to its original level as at March 2020 and that any sums not paid to him as a result of the reduction would be repaid to him and he was reporting what he *thought* would happen rather than what he had been *told* would happen, or simply exaggerated or overstated the level of certainty of this to his wife, or that the claimant didn't want to worry his wife at such time of increasing uncertainty and concern. Again, the claimant telling someone that the Repayment Commitment had been given was not sufficient to lead to the conclusion on the balance of probabilities that this did happen in light of other possible explanations for this and the weight of others indicators in the evidence that the Repayment Commitment was not given, as detailed above.

135. The tribunal also considered that Mr Colver having raised with Ms Icoren in late 2021 that he had thought that he would reimbursed in respect of reduced salary was consistent with the claimant having been given a Repayment Commitment by Mr Piconi but it was not a strong indicator as the only source of Mr Colver thinking this was the claimant telling him this on their call in March 2020, referred to above. Again, it was also noted that when Mr Colver did raise this it was denied in clear and unequivocal terms by the respondent.

136. There was some evidence led relating to a non-disclosure agreement entered into by the claimant which the tribunal did not consider was relevant to the proceedings or the determination that required to be made.

Relevant law

137. In dealing with this case the tribunal had regard to the overriding objective set out in Rule 2 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

138. It is the tribunal's task to determine the case 'on the balance of probabilities', which is the civil standard of proof applied in employment tribunal cases. Mr Justice Denning in **Miller v Minister of Pensions 1947 2 All ER 372, KBD**, explained the civil standard of proof in these terms:

139. *"[The degree of cogency] is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say "we think it more probable than not", the burden is discharged, but if the probabilities are equal, it is not.'*

140. Part II of the Employment Rights Act 1996 (ERA) sets out the statutory prohibition on deductions from wages.

141. Section 13(1) contains the general prohibition as follows:

"(1) An employer shall not make a deduction from wages of a worker employed by him…"

142. Section 13(3) of the ERA provides a deduction from wages occurs 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….."

143. Section 13(3) of the ERA also makes clear that:

"…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."

144. There are certain exceptions and qualifications to the general prohibition on deductions from wages.

145. As well as containing the general prohibition, Section 13(1) of the ERA also provides that the prohibition does not apply where:

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

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

146. The words '*a relevant provision of the worker's contract'* contained within the second limb of S.13(1)(a) of the ERA are defined in S.13(2) as:

147. "… a provision of the contract comprised-

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

(b) in one or more terms of the contract (whether express or implied 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"

148. A reduction in pay can constitute a deduction. There is no valid distinction to be drawn between a deduction from wages and a reduction in wages. The issue is simply whether the worker receives less than the amount properly

payable (see **Bruce and ors v Wiggins Teape (Stationery) Ltd 1994 IRLR 536, EAT**).

Submissions

149. Both parties were expertly professionally legally represented and spoke to their comprehensive written submissions.

150. Reference is made to the tribunal's position on the parties' submissions in the Observations on the evidence section above where relevant.

151. Further reference is made to the tribunal's position on the parties' submissions in the 'Deliberations and decision' section below where relevant.

Deliberations and decision

152. The issue for the Tribunal to determine was:

- Had there been an unlawful deduction from the claimant's wages contrary to section 13(1) of the ERA and, if so, should the respondent be ordered to pay the claimant the amount of any such deduction in accordance with section 24(1) of the ERA.

153. In reaching its decision the tribunal considered its findings in fact, which it reached applying the civil standard of proof, being "on the balance of probabilities" and in accordance with the explanation of Lord Denning on the civil standard proof (then Mr Justice Denning in **Miller v Minister of Pensions 1947 2 All ER 372, KBD**), all as noted under the Relevant law section above. The tribunal applied the relevant law, as noted under the Relevant law section above, and considered the submissions made on behalf of both parties.

154. As noted above, it was a matter of agreement between the parties that there had been a valid oral variation to the claimant's contract of employment in respect of his salary on a telephone call between the claimant and Mr Robert Piconi in March 2020 and the tribunal accepted that there had been such a variation to the claimant's contract of employment. That was clear from the submissions made on behalf of the parties, and also the evidence from both the claimant and Mr Piconi at the hearing.

155. The key dispute was whether the terms of that contractual variation were only that the claimant's salary would be reduced, or whether there was also an intrinsic condition that, whilst the claimant's salary would be reduced, when funding was received his salary would be reinstated to its original level as at March 2020 and any sums not paid to the claimant as a result of the reduction would be repaid to him.

156. The claimant's primary position was that the contractual variation was that the claimant's salary would be reduced, but that an intrinsic condition was that when funding was received his salary would be reinstated to its original level as at March 2020 and any sums not paid to the claimant as a result of that reduction would be repaid to him, and that that condition arose from Mr Piconi giving the claimant a commitment on the March 2020 call that that is what would happen and was the basis for the claimant's agreement to the reduction.

157. The respondent's primary position was that the contractual variation was only that the claimant's salary would be reduced, that Mr Piconi did not give the claimant a commitment on the March 2020 call that when funding was received his salary would be reinstated to its original level as at March 2020 and that any sums not paid to the claimant as a result of the reduction would be repaid to him, and so there was no such condition.

158. The respondent took a secondary position which was to the effect that, if the tribunal concluded that Mr Piconi had given the claimant a commitment that any sums not paid to the claimant as a result of the reduction would be repaid to him, the terms of that commitment were too uncertain or vague to be enforceable. The claimant's secondary position in response to that was, if that was the case, that tainted the whole agreement to vary the contract, i.e. the agreement to reduce the claimant's salary at all.

159. The claimant's representative confirmed that the claimant did not contend that a valid variation to the claimant's contract of employment did not take place due to it having been agreed orally rather than in writing.

160. Having found that on the 20 March call the claimant agreed to the salary reduction and that Mr Piconi did not give the claimant a commitment that when funding was received his salary would be reinstated to its original level as at March 2020 and that any sums not paid to the claimant as a result of the reduction would be repaid to him or words to that effect, the tribunal found that the oral variation to the claimant's contract of employment in respect of his salary on the 20 March call was only that the claimant's salary would be reduced, without any condition that when funding was received the claimant's salary would be reinstated to its original level as at March 2020 and that any sums not paid to the claimant as a result of the reduction would be repaid to him.

161. With reference to the terms of Section 13 of the ERA, and in particular Section 13(3), as detailed in Relevant law section above, a deduction from wages occurs when on any occasion a worker receives less than the total amount of the wages "*properly payable*" on that occasion.

162. Tribunals must decide, on the ordinary principles of common law and contract, the total amount of wages that was properly payable to the employee on each relevant occasion. It flows from that, that where there has been an agreed variation of contract to reduce wages, the wages '*properly payable'* on each occasion will be the reduced wages due under the varied contract and, provided this is the amount the employee receives, there will have been no deduction from wages.

163. Given that there had been an agreed variation to the claimant's contract of employment to reduce the claimants' salary (and the finding that that did not include a condition that when funding was received the claimant's salary would be reinstated to its original level as at March 2020 and any sums not paid to the claimant as a result of that reduction would be repaid to him), the amount paid to the claimant as salary on each occasion with effect from April 2020 was never less than was '*properly payable*' on any occasion. For the same reason, the amount paid to the claimant as a payment in lieu of annual leave on termination of employment was not less than was '*properly payable*'

on that occasion. Accordingly, the tribunal concluded that there had not been a deduction from wages in terms of Section 13 of the ERA.

164. Therefore, the tribunal did not consider that the general prohibition in Section 13(1) of the ERA was engaged as there had not been a deduction from wages. However, even if had been engaged, the tribunal considered that the oral variation to the claimant's contract of employment on the March 2020 call to reduce the claimant's salary, which was then confirmed in the email from the respondent's HR consultant sent to both the claimant and Mr Piconi on 8 April 2020 referred to at paragraph 33 above, would have authorised the reduction in the claimant's salary as it would have amounted to '*a relevant provision of the worker's contract'* for the purposes of Section 13(1)(a) of the ERA, as defined in Section 13(2)(b) of the ERA.

165. A number of submissions were made on behalf of both the claimant and the respondent contingent upon circumstances in which the tribunal had made a finding in fact that Mr Piconi gave the claimant a commitment that when funding was received his salary would be reinstated to its original level as at March 2020 and that any sums not paid to the claimant as a result of the reduction would be repaid to him, or words to that effect. As the tribunal did not make such a finding in fact, the tribunal did not consider it necessary to go on to consider these arguments in detail. Likewise, having concluded that the claimant's claim was not successful, the tribunal did not consider it necessary to go on to determine the question of remedy.

166. It was clear to the tribunal that the claimant was genuinely of the opinion that the respondent *should* have repaid him the sums not paid to him as a result of the salary reduction and the tribunal could understand the claimant forming that opinion as the financial position of the respondent's company appeared to significantly improve over time. However, that did not mean that the respondent *required* to do so and that not doing so amounted to an unlawful deduction from wages.

167. For the reasons stated above, the Judgment of the tribunal is that the claimant's claim for unlawful deduction from wages in respect of salary and

holiday pay under Section 13 of the Employment Rights Act 1996 is unsuccessful and is dismissed.

Employment Judge: **P McMahon**
Date of Judgment: **29 December 2022**
Entered in register: **4 January 2023**
and copied to parties