



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr P Vergara

**Respondent:** The Hub Exchange Limited

**Heard at:** London Central (by video in public)      **On:** 19 September 2023

**Before:** EJ Isaacson

## Representation

Claimant: In person

Respondent: Ms G Rezaie, counsel

# RESERVED JUDGMENT

1. The claimant's claim for breach of contract is dismissed because the claimant's contract has not yet been terminated and therefore the Tribunal does not have jurisdiction to hear this claim. This does not prevent the claimant from pursuing a breach of contract claim in the future.
2. The claimant's unauthorised deduction from wages claim succeeds. The respondent is ordered to pay to the claimant the net sum of £35,266.01. The respondent is liable to pay any tax and NIC owing on this figure to HMRC.
3. The respondent failed to provide itemised pay statements to the claimant for period August to November 2022, and January 2023 to 4 July 2023. Any missing pay statements must be sent to the claimant.

# REASONS

## Information before the Tribunal

1. The Tribunal was presented with a bundle prepared by the respondent and a written witness statement from Mr Ong, the respondent's Director and CEO. The claimant gave evidence and both witnesses were questioned. Both parties gave oral submissions.

Claims and issues and submissions

2. It was agreed at the beginning of the hearing that the claimant's claim for breach of contract relating to notice pay was premature. That claim is dismissed.
3. The respondent accepted that for the period May 2022 to 9 July 2023 the claimant is due a net amount of £35,266.01 but argues that the claimant agreed that the deferred sum would be capitalised into shares at the next funding round. Therefore, the respondent argues that the claimant's wages claim must fail because it has been mis-characterised as an unlawful deduction of wages claim and that it should be presented as a breach of contract claim. The respondent argues that the Tribunal does not have jurisdiction to provide the appropriate remedy for breach of contract, specific performance of the contract and the conversion of the outstanding sum to shares.
4. The respondent argues that the variation set out in writing dated 10 June 2022 continues to have effect. The variation specifically deletes the old clause 7 relating to salary in the claimant's original contract of employment. If not, the claimant agreed orally to vary his contract to accept deferred payments that would then be converted into shares. This is evidenced in various documents prepared by the claimant. The respondent also argues that the claimant never disputed the deferment of his salary and the conversion into shares until July 2023.
5. The respondent did not argue that the variation clause entitled the respondent to defer 20% of the claimant's salary each year and convert it into shares. The argument is that the claimant agreed to defer all of the outstanding amount which is more than 20%.
6. The claimant argues that he only agreed to a temporary variation to his contract of employment to agree to £24,000 of his annual salary of £120,000 to be satisfied by an issue of shares and the remainder £96,000 to be paid in cash up to the period 30 November 2022. After that the claimant argues his old contractual annual salary of £120,000 continues. The claimant agrees with the respondent that he is owed £35,266.01 as net wages.
7. The claimant argues he always made it clear to Mr Ong that he wanted to keep his contract of employment terms including his salary and 6 months' notice period. Any agreement to defer payments and convert to shares was conditional upon all terms being agreed. This did not happen.
8. Both parties confirmed there was no express variation to the claimant's contract of employment that they could point to other than the letter dated 10 June 2022.
9. The issue before the Tribunal is whether the claimant is entitled to be paid his outstanding salary of £35,266.01 in wages or whether he agreed for the outstanding sum to be deferred and converted into shares. If the latter the Tribunal does not have jurisdiction.

The law

10. The right not to suffer an unauthorised deduction from wages is set out in section 13 of the Employment Rights Act 1996 (ERA). Section 4 ERA states that where a 'section 1 statement' of terms and conditions has been given, any changes to any of those terms and conditions must be notified in writing to the employee within a month of the change.
11. The individual terms of the contract must be sufficiently clear and certain for the Tribunal to be able to give them meaning. There must be consensus between the parties to agree a variation to terms and conditions of employment. Where the change is not to the benefit of the employee the employer must be able to show consent by the employee. The Tribunal would consider what was the intention of the parties.
12. Section 8 ERA requires an employer to give an employee an itemised pay statement in writing which sets out the pay and any deductions. An application can be made to an Employment Tribunal under section 11 ERA to determine provisions that should be included in the pay statement. A Tribunal may order an employer to pay the employee a sum not exceeding the aggregate of the unnotified deductions made.

Findings of fact

13. The claimant was employed as a Chief Operating Officer (COO) for the respondent from 1 January 2017. His contract of employment stated under clause 7 he was entitled to a gross salary of £120,000 per annum and clause 22 set out a 6 months' notice period. The claimant was not a board member.
14. The respondent company lost an anchor client in 2021 and was struggling. In June 2022 the claimant agreed to a variation to his contract which was set out in a letter dated 10 June 2022.

*1. Clause 7.1 shall be deleted in its entirety and replaced with the following:*

*"7.1 The Company will pay you a gross basic salary (which accrues from day to day) of £120,000 per annum, payable as follows*

*(a) subject to the provisions of paragraph (c) below, an amount equal to £96,000 gross per annum payable in cash by monthly instalments in arrears; and*

*(b) an amount equal to £24,000, subject to tax and National Insurance contribution where applicable, shall be satisfied by the issuance of B Shares at a price per share of £0.28209 upon the earliest of (i) 30 November 2022, or (ii) the first occasion that the Company has met its 2022 Budget objectives on a monthly basis for 2 consecutive months; or*

*(c) upon the earliest of (i) 30 November 2022, or (ii) the first occasion that the Company has met its 2022 Budget objectives on a monthly basis for 2 consecutive months and at all times thereafter (subject to clause 7.3), an amount equal to £120,000 gross per annum payable in cash by monthly instalments in arrears.*

*You acknowledge that you shall not be entitled to receive any further remuneration in respect of overtime."*

15. Although the letter above stated that clause 7 was deleted in its entirety it is clear to the Tribunal, from the evidence given by both the claimant and Mr Ong, that both the claimant and Mr Ong intended the amendment to be a temporary amendment to his contract of employment until 30 November 2022 and that his salary of £120,000 remained the foundation of any further amendment.
16. Mr Ong stated in his witness statement that the claimant was paid in accordance with the June 2022 terms. He was hopeful that they would close a big contract and then they would be able to afford to pay the claimant his salary in cash. However, because of a further deterioration of the business and liquidity it was quickly overtaken by further contract variations to enable the company to survive. He alleges that the claimant agreed to convert some deferred salary to be converted into equity as part of a funding round and that the claimant then agreed to an even lower salary to a £3000 net pay per month and a greater proportion of sacrificed salary that would be converted to shares because of cash flow restrictions in business.
17. There were no written variations after June 2022, but Mr Ong alleges that the variations were agreed in discussions between him and the claimant. However, when asked in evidence Mr Ong did not refer to specific conversation he had with the claimant about variations. He agreed that the claimant had raised with him that he wanted to maintain his contractual terms including his salary and 6 months notice clause and when asked by the Tribunal said that it was "pretty much understood by the claimant that his deferred salary would be converted into shares."
18. Mr Ong said, when questioned, that he had not expressly told the claimant in November 2022 that his salary would be converted into shares because he was still hoping to seal a deal.
19. The claimant was involved, in his role as COO in drafting proposed investment heads of terms and in one of those documents it stated that management team salaries would be reduced to a skeleton budget and deferred salaries converted to shares. However, these documents reflect terms being negotiated between the company and the proposed investor but are not binding until agreed and signed.
20. The Tribunal finds that even though the claimant was involved in the drafting of these documents which show the intention of the company that his salary maybe reduced, and part of his salary deferred and converted into shares, the draft documents are not evidence that the claimant had agreed to the terms. The claimant was doing his job drafting the documents and they show he was aware of what was being contemplated. He was not a member of the board who made the decisions. The Tribunal finds that until each variation was expressly discussed with him and agreed there was no further agreement to vary his terms of contract.

21. There was a board meeting on 20 October 2022 when the company agreed that the outstanding salary of the claimant for the period 1 May 2022 to 31 August 2022 was converted to shares. The claimant accepted that it did take place. The claimant referred to this as a temporary tolerance on his part to allow the company to survive.
22. From the evidence of both the claimant and Mr Ong the Tribunal finds that after June 2022 until April 2023 the respondent required the claimant, from time to time, to sacrifice part of his salary in the form of deferred payments on the basis his deferred salary would be converted into shares. However, each time this happened through investors or bridge financing the claimant's agreement to each variation was subject to all the claimant's conditions being met. There was no one variation as set out in the June 2022 letter. That variation was valid up to November 2022. After that the company asked the claimant to vary his contract on a deal by deal basis.
23. Mr Ong told the Tribunal that as late as May 2023 he was in negotiations based on changing from a fixed salary to a variable one based on monthly revenue that could be generated. He said he did expect his and the claimant's contract of employment to change to reflect the terms set out in the proposed Heads of Terms at page 197. He confirmed there was no formal deal completed before the claimant's resignation. He agreed that a draft proposal of terms was not a binding agreement but reflected the terms agreed.
24. In June the claimant was in discussions with Mr Ong regarding further bridging finance. The claimant in his role as COO drafted proposed heads of terms for a new bridge loan in which it was stated that the management teams owed salary, which included the claimant's, would be converted into shares. The Tribunal does not accept the respondent's argument that this is evidence that the claimant had agreed to the conversion of his owed salary into shares. It is evidence of the company negotiating such terms and the claimant being aware of it. He sent a calculation of the gross salaries, net amounts, amount paid, conversion of net wages to shares, advances paid amount outstanding and the gross deferred salary.
25. However, the Tribunal accepts the claimant's evidence that any agreement to the deferment and conversion to the shares was subject to all the terms he required being met. One of those terms was that his deferred salary for April, May and June 2023 be part of the investor's liability. The investor refused. They wanted no further deferred pay to be accrued from April 2023.
26. Mr Ong offered his share options to the claimant, with an equivalent value of the April-June 2023 difference to try to resolve the matter but the claimant declined. This is further evidence that there was no binding agreement to vary the claimant's contract of employment in June 2023 to accept his deferred payments being converted into shares rather than being paid as wages. Terms were still being revised in June 2023 and had not been finalised.
27. Eventually the claimant resigned on 9 July 2023 giving 6 months' notice. He stated:

*Regrettably, the most recent developments with our main shareholder and the lack of respect for the company's contractual obligations (to me and other parties) have evidenced to me that my contribution to the future of the company was no longer valued and that I could no longer support its new direction.*

*I would like on this occasion to remind you that the company owes me £70,000 in unpaid gross salary from last year and up to 30 June 2023, less the £9,000 advance I have received for April, May and June 2023. I would like to get urgent confirmation from you on the expected payment date of these overdue wages.*

*Should you want to discuss a shortening of my notice period and a possible cash settlement in lieu of my full notice, I remain available for discussion.*

28. His letter of resignation is consistent with his evidence that he had not agreed to his deferred salary being converted into shares.
29. The respondent argued that the claimant never objected to his deferred salary being converted into shares. However, there is no evidence from Mr Ong that the claimant had ever indicated he would agree to his April to June salary not being part of any investor's liability. The Tribunal accepts the claimant's evidence that any conversion of his deferred salary into shares was conditional on all his terms being met. Those terms were never fulfilled so there was no binding agreement between the claimant and the respondent to vary his contract of employment so that his deferred salary would be converted into shares.
30. The claimant had agreed variations to his contract of employment between June 2022 until his resignation in July 2023. This included the 20% sacrifice of salary into shares in June 2022 for the year ending April 2022 and further salary deferrals for the period April 2022 to March 2023. This is reflected in the final amount owing for salary agreed between the parties for the period May 2022 to July 2023 of £35266.01. However, the claimant did not agree to his outstanding salary to be converted into shares. His agreement to this was conditional on all his terms being agreed including his salary for April to June being accepted as a liability by the new investors.
31. Drafting up terms of reference are not the same as a clear agreement to vary your terms of salary to your detriment. The June 2022 variation had been agreed and was implemented. Further agreements were reached about salary deferrals but that did not include all his deferred salary being converted into shares. Such an agreement needed to be set out in writing and expressly agreed. The Tribunal accepts the claimant's evidence that no such agreement was reached verbally or in writing.
32. Therefore, the Tribunal declares that the respondent unlawfully deducted from the claimant's wages the net sum of £35,266.01. The net sum should be paid to the claimant and the respondent will pay any tax and NIC owing on the gross amount, which will be calculated by the respondent, directly to HMRC.
33. The respondent is also ordered to send to the claimant his outstanding pay slips. The Tribunal was not provided any further details to declare which items pay statements were missing or calculate any amounts that were not itemised but were deducted other than the claimant's timeline

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document. Based on this document the respondent is ordered to send to the claimant pay slips for period August to November 2022, and January 2023 to 4 July 2023. Any missing pay statements must be sent to the claimant.

Employment Judge Isaacson

19 September 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

20/09/2023

FOR EMPLOYMENT TRIBUNALS