EMPLOYMENT TRIBUNALS

Claimant: Mr B Mendy

Respondent: Manchester City Football Club Ltd

Heard at: Manchester Employment Tribunal (by CVP videolink)

On: 14 and 15 October 2024

Before: Employment Judge Dunlop

Representation

Claimant: Mr N De Marco KC
Respondent: Mr S Jones KC

JUDGMENT

1. The claimant's claim of unauthorised deductions from wages in contravention of s.13 Employment Rights Act 1996 succeeds in part. Specifically:

    1.1 Deductions made of wages which would otherwise have been payable in respect of the periods 8 January 2022 to 29 December 2022 and 18 January 2023 to 30 June 2023 were made in contravention of s.13. The claimant is entitled to payment of the amounts deducted.

    1.2 Deductions made of wages which would otherwise have been payable in respect of the periods 1 September 2021 to 7 January 2022 and 30 December 2022 to 17 January 2023 were not made in contravention of s.13. The claimant is not entitlement to payment for those periods.

    1.3 The claimant withdrew his claim in respect of the period after 30 June 2023 in the course of the hearing.

REASONS

Introduction and Summary Conclusion

1. In many ways, this Judgment needs no introduction. The broad facts giving rise to Mr Mendy's claim are common knowledge.

2. The respondent, Manchester City Football Club Limited ("Manchester City"/"the Club") is a well-known and very successful football club and Mr Mendy is a professional football player, who signed to play for (and became an employee of) the Club in 2017. In late August 2021, Mr Mendy was remanded in custody following a number of allegations of serious sexual offences. At the end of September, the Club informed him it would stop paying his wages. That situation subsisted until the expiry of his contract at the end of June 2023, when he transferred to French club, FC Lorient.

3. Ultimately, Mr Mendy was cleared of all criminal charges. He brings this claim to seek repayment of the wages which were withheld from him throughout the latter years of his contract with Manchester City.

4. I doubt that quite so much legal expertise and endeavour has ever before been expended in the prosecution and defence of a wages claim brought by a single claimant. But then, I am also fairly sure that no other single claimant has ever alleged that sums in the region of £11 million have been deducted from his wages.

5. For the reasons fully set out below, I have concluded that Mr Mendy is entitled to recover some, but not all, of the sums claimed.

6. The overall period covered by the claim included two periods when Mr Mendy was remanded in custody – from 1 September 2021 to 7 January 2022 and, again, from 30 December 2022 to 17 January 2023. Outside these periods, he was prevented from fulfilling his contractual obligations (including training and playing) by the fact he was suspended by the Football Association (FA) and by his bail conditions. I found that Mr Mendy was "ready and willing" to work during the non-custody periods, and was prevented from doing so by impediments (the FA suspension and bail conditions) which were unavoidable or involuntary on his part. In those circumstances, and absent any authorisation in the contract for the employer to withhold pay, he was entitled to be paid. In contrast, during the periods when he was remanded in custody, his inability to perform the contract was, in part, due to his own culpable actions in breaching his bail conditions. In those circumstances, I have found that the Club was entitled to withhold pay for those periods.

The Hearing

7. The hearing was conducted at Manchester Employment Tribunal over two days by CVP (Cloud Video Platform).

8. The use of CVP was agreed in advance by the parties. There were (inevitably) some technical difficulties. However, I consider the use of CVP

facilitated open justice as it enabled the attendance of around 15-20 journalists from a variety of locations. It also reduced the pressure on the Tribunal's resources in accommodating such a high-profile hearing, as against holding it in person, and it will have saved the parties some expense (albeit probably only to a minimal level, when set against the overall amounts doubtless expended).

9. At the outset of the hearing the following preliminary matters were discussed:
   9.1 **Access to documents for observers**. Arrangements were made for observers to have access electronic versions of both bundles of documents (which included witness statements) during the course of the hearing. The "public bundle" contained a small number of redactions in addition to those contained in the bundle I had. Those related to pieces of personal information which were irrelevant to the matters in issue (e.g. lawyers' direct-dial phone numbers appearing in email footers). In addition, observers were provided with an email address which they could contact to request copies of skeleton arguments, the agreed statement of facts and witness statements (once the statements had been admitted as evidence). Those copies could be retained during the overnight adjournment, and after the hearing, to facilitate accurate reporting. I am grateful to the representatives for facilitating these arrangements.
   9.2 **Confirmation of no concurrent High Court proceedings.** I sought, and obtained, confirmation from the parties that there are no subsisting High Court proceedings. The Court of Appeal's decision in **Halstead v Paymentshield Group Holdings Ltd 2012 IRLR 586, CA** makes it clear that there is no requirement to stay Tribunal proceedings in circumstances where High Court proceedings have been evinced, but not actually commenced, as that would potentially deprive a claimant of a remedy which he is entitled to by statute. Neither party (both represented by leading counsel) sought a stay, and both confirmed their view that it was appropriate for the claims to proceed in this forum.
   9.3 **Timetabling.** There were particular issues around the attendance of the respondent's witness, Mr Omar Berrada. Ultimately, these were satisfactorily resolved and the two-day timetable was sufficient to allow all the evidence to be heard and provide ample time for submissions.

10. I was provided with an electronic bundle of around 1400 pages together with a supplemental bundle of around 150 pages. These included the witness statements and a detailed and helpful agreed statement of facts. I read those documents, the pleadings, and the underlying documents insofar as they were referred to in cross examination or in closing submissions. I did not necessarily read pages that I was not expressly referred to.

11. I was separately provided with skeleton arguments from both parties and a number of authorities (the majority of which appeared in the supplementary bundle).

12. I heard evidence from the following individuals on behalf of Mr Mendy:
    12.1 Mr Benjamin Mendy himself;
    12.2 Mr Meissa N'Diaye, Mr Mendy' agent; and

12.3 Miss Jenny Wiltshire, Mr Mendy's solicitor for the purposes of the criminal proceedings.

13. On behalf of Manchester City, I heard evidence from Mr Omar Berrada who was Manchester City's Chief Football Operations Officer at the material time and is now Chief Executive Officer of Manchester United Football Club Limited. Mr Berrada's evidence was interposed, prior to the evidence of Miss Wiltshire, due to difficulties with his availability.

14. Following completion of the evidence, I heard submissions from Mr Jones and Mr De Marco, as more fully set out below. I reserved my decision to be provided in writing.

Findings of Fact

15. These findings are drawn almost entirely from a statement of agreed facts provided by the parties.

16. Mr Mendy commenced employment with Manchester City as a professional football player on 24 July 2017. His terms and conditions of employment were contained in a written contract of the same date. That contract is the product of a collective agreement. Whilst some terms – such as the amount of wages and bonuses payable, and the length of the contract term – will vary to player to player, the framework of the agreement is, I understand, common to all clubs and players in the Premier League.

17. In Mr Mendy's case, the contract was for a fixed minimum and maximum term due to expire on 30 June 2023.The contract entitled him to a "basic wage" of £6,000,000 a year, payable monthly.

18. The contract also provided for various significant bonuses to be payable related to the number of matches that Mr Mendy might appear in, and competitions that the respondent might win, as well as payments for image rights. I do not set out the details of those terms here, as those payments did not form part of the claim before this Tribunal.

19. There was also a clause providing for the club to pay Mr Mendy a post-termination payment equivalent to one month's wages, minus any sum received in wages from a new club which was referrable to the first month post-termination. (As I will come to, Mr Mendy did sign for a new club within that period, but at a much lower salary.)

20. Section 3 of the contract sets out the "Duties and Obligations" on the player. These included obligations:

20.1 not to "knowingly or recklessly do … anything … or omit to do anything which is likely to bring the Club or the game of football into disrepute …" ("the Disrepute Obligation");

20.2 "except to the extent prevented by injury or illness …[to] maintain a high standard of physical fitness at all times and not … indulge in any activity sport or practice which might endanger such fitness or inhibit his mental or

physical ability to play practice or train" ("the Fitness Obligation")

21. The club's right to terminate the contract is governed by Clause 10. That permits termination (subject to 14 days' notice) on only three grounds:
    21.1 gross misconduct
    21.2 failure to heed any final written warning given under the disciplinary procedure;
    21.3 criminal conviction resulting in a sentence of imprisonment of three months of more (which is not suspended).

22. "Gross Misconduct" is defined in the Interpretation provisions of the contract as:
    serious or persistent conduct behaviour activity or omission by the Player involving one or more of the following:

    (a) theft or fraud;
    (b) deliberate and serious damage to the Club's property;
    (c) use or possession of or trafficking in a Prohibited Substance;
    (d) incapacity through alcohol affecting the Player's performance as a player;
    (e) breach of or failure to comply with of any of the terms of this contract

    or such other similar or equivalent serious or persistent conduct behaviour activity or omission by the Player which the Board reasonably considers to amount to gross misconduct.

23. Although this is not a dismissal case, those provisions are set out because they are necessary to understand the contractual disciplinary procedure, which forms Schedule 1 to the Employment Contract.

24. Part 1 of Schedule 1 of the Employment Contract states:
    The disciplinary procedure aims to ensure that the Club behaves fairly in investigating and dealing with allegations of unacceptable conduct with a view to helping and encouraging all employees of the Club to achieve and maintain appropriate standards of conduct and performance. The Club nevertheless reserves the right to depart from the precise requirements of the disciplinary procedure where the Club considers it expedient to do so and where the Player's resulting treatment is no less fair.

25. Unsurprisingly, given the context, the disciplinary procedure sets out a detailed and self-contained code governing both the disciplinary sanctions available to the club, and the procedural steps and safeguards which apply. This involves a disciplinary hearing and right to appeal. Where the sanction is anything more serious than an oral warning (the lowest level of sanction) the player has a right of appeal to the League.

26. Aside from warnings (oral and written) the disciplinary procedure empowers the Club to impose financial fines on the player. The fines provided for are up to two weeks' wages for a first offence and up to four weeks for subsequent offences. The Club may also require the player to stay away from Club premises, but only for a maximum period of four

weeks.

27. The most serious disciplinary sanction – dismissal – is not actually provided for in the disciplinary policy. Grounds for dismissal are set out in clause 10 of the main contract, as discussed above. Clause 4.1.4 of the disciplinary procedure, however, provides that if a disciplinary allegation is proved to the Club's satisfaction, the Club may:

    in any circumstances which would entitle the Club to dismiss the Player pursuant to any of the provision of clause 10 of this contract dismiss the Player or impose such other disciplinary action (including suspension of the Player and/ or fine of all part of the amount of the Player's basic wage for a period not exceeding six weeks)

    This means that, in circumstances where the Club would be entitled to dismiss the player, the Club can elect, instead, to suspend the player for up to six weeks, or fine him the equivalent amount of wages.

28. In addition to suspension by way of sanction, the disciplinary procedure also provides for a suspension to facilitate investigation. However, such a suspension is limited to a maximum of 14 days, and must be with pay. There are no other provisions within the contract to enable the club to either suspend the player, or to stop paying him, whilst the contract remains in force between the parties.

The events leading to the claim

29. When Mr Mendy joined Manchester City he was 23 years old. As a professional footballer in France he had developed a taste and habit for 'partying', a euphemistic term which, in Mr Mendy's case included having frequent casual sexual encounters with different women, often women whom he had only just met. In 2017, the same year as he joined Manchester City, he also made his debut for the French senior team. As his fame and earnings increased, opportunities for partying, and casual sex, similarly increased.

30. Prior to October 2020, I find that his lifestyle had had no significant consequences on his playing career, nor did it bring him into any contact with the police (or at least not significant contact).

31. During 2020, of course, the country was subject to various and varying restrictions introduced in response to the covid pandemic. Mr Mendy continued to 'party' regardless of those restrictions.

32. In particular, on 10 October 2020 Mr Mendy held a party at his home in Cheshire, contravening the 'Rule of Six' that was then in force. The Police attended although no further action was taken at that point.

33. Mr Mendy hosted a further party on 11 October 2020. On 11 November, Mr Mendy was arrested as a result of an allegation of rape, in relation to activities allegedly occurring during the party on 11 October 2020. He was

initially released under investigation i.e. he was not charged and no bail conditions applied.

34. On 31 December 2020, Cheshire East (the location of Mr Mendy's home) was placed in Tier 4, which, among other restrictions, required people to "stay at home" and not to host or attend gatherings, including in particular that people from different households were not allowed to mix indoors, and people could only meet a maximum of one person from another household outdoors at any given time.

35. That night, Mr Mendy hosted a New Year's Eve party at his home. On 1 January 2021, Mr Mendy hosted another party, which lasted until at least 04:00 on 2 January 2021.

36. On 5 January 2021, Mr Mendy was arrested for a second time, following allegations made by a different complainant, in relation to alleged activities occurring during the party on 1-2 January 2021.

37. Mr Mendy was released on conditional bail. The conditions included that he was to reside at his home address overnight unless travelling for work; that he was not to have any people in his home (subject to certain specific exemptions), and that he must not contact any complainant. The bail conditions did not prevent him from working for Manchester City. They did (if adhered to) prevent him from partying.

38. Manchester City were not aware of the bail conditions at this time, and Mr Mendy continued to be selected as either a starting player or a substitute player in all but one match through to the end of the season at the end of May 2021.

39. On 6 January 2021, Mr Mendy was disciplined in accordance with Manchester City's disciplinary procedure in respect of such breaches of the Covid regulations as the Club was at that point aware. The Club fined Mr Mendy one week's wages for breaches on or around 11 November 2020 and 31 December 2020.

40. On 7 January 2021, Mr Mendy hosted a party at his home, breaching his bail conditions.

41. In March 2021, Mr Mendy attended a party in central Manchester, in breach of both Covid restrictions and bail restrictions (including the condition that he must live and sleep at his home address each night).

42. On 19 July 2021, most Covid restrictions were lifted. Mr Mendy remained subject to his bail conditions. Although there had been variations made on 23 June 2021, the effect of the conditions was still to seriously limit the number of people permitted to be at his address. The effect of the conditions (if adhered to) was that Mr Mendy could not host parties at that address.

43. Notwithstanding the bail conditions, it was agreed between the parties that Mr Mendy hosted parties on at least six occasions between 23 July and 23 August, and on at least one further occasion a party took place at his property in his absence.

44. Mr Mendy was arrested again on 25 August 2021 and held for questioning for 36 hours in relation to an allegation of rape arising from the party on 23 August 2021.

45. On 26 August 2021, Mr Mendy was charged with multiple offences and held in police custody. Manchester City suspended Mr Mendy on the same day.

46. On 27 August 2021, Mr Mendy sought and was refused bail in an application before District Judge McGarva.

47. The formal record of that decision is contained in a Notice that Bail has been Refused, which I understand forms part of the court record in the criminal proceedings. It states:

> **The court has considered bail in accordance with the provisions of the Bail Act 1976.**
>
> **The court has refused you bail due to:**
> **Likely to offend**
>
> **This was because: Nature and seriousness of offence, Strength of case, Broken bail conditions**

48. I note that not all of the 'parties' which were noted in the agreed statement of facts, and agreed to have occurred in breach of bail conditions were known to the police at the time. Not all the incidents, therefore, would have been before District Judge McGarva. Further, I understand that no formal admission or finding of bail breach was made as part of that hearing.

49. An informal note has been produced of the 27 August 2021 hearing, taken by solicitors appointed to attend the hearing by Manchester City. No one has sought to challenge the accuracy of the note, and it appears to provide a reasonably full account of the District Judge's reasoning in deciding to remand Mr Mendy into custody. I reproduce the relevant part in full:

> **I considered question of bail- I preface my remarks that every defendant is innocent until proven guilty. Not my job to decide today if innocent or guilty. Part of the process is considering strength of evidence. In this case, there are 3 separate women, capable of supporting each other. Also allegations of disclosures after to people close to victims after incidents.**
>
> **Next, every defendant is entitled to bail unless prosecution establish an exception to that right. The prosecution say substantial likelihood of further offences. Based on premise 3 allegations in October, [released under investigation], then accused in January of sexual assault. Then on police bail; with conditions deemed necessary to prevent offences.**
>
> **On 23 August, there is a further accusation of rape. Whilst on police bail. You had a condition not to hold house parties. Evidence is that you had significant number of people at house. In breach of condition. There is good evidence against you in this case. I have no confidence with your willingness to comply with bail conditions. If granted bail, I find there is a likelihood you would commit further offences. Based on failure to comply with police bail and strength**

of evidence in case. Remanded into custody.

50. I depart slightly from the chronology here to record that a few days later, on 6 September 2021, another individual, Louis Saha Matturie, was remanded in custody. Mr Matturie was an associate of Mr Mendy and had been charged with four counts of rape in relation to incidents occurring at Mr Mendy's parties. He would later appear as a co-defendant in Mr Mendy's first trial. (Ultimately, it is important to record, Mr Matturie was also cleared on all criminal charges.)

51. According to evidence given by Miss Wiltshire, which Manchester City did not challenge, Mr Matturie had been on police bail since 9 April 2021 following earlier allegations, and the grounds for remanding him in custody on 6 September were due to the nature and seriousness of the alleged offences, and the strength of the case but not, according to the records accessed by Miss Wiltshire, any breach of bail conditions.

52. Returning to the chronology, another critical event took place on 27 August 2021. Mr Mendy was suspended by The Football Association ("the FA"). The suspension was initially on an interim basis, to remain in force for a minimum of six months. It had the effect that he was prevented from taking part in "any football-related activity". Two facts about this suspension are key. Firstly, the basis for the suspension arose from the FA's role in safeguarding young people. It was common ground between the parties that the suspension had been put in place due to the fact that one of the complainants in the criminal case was aged 17 at the time of the alleged offences. Secondly, the suspension was precautionary. There were no findings of fact by the FA, whether on the civil burden of proof, or criminal burden of proof, or on any other basis, as to what Mr Mendy had or had not done. As it transpired, the suspension was to remain in place until the expiration of the Employment Contract's fixed term on 30 June 2023. It was ultimately to be discontinued by a decision of the Safeguarding Review Panel on 2 November 2023.

53. On 27 August 2021, Manchester City wrote to Mr Mendy to advise him of a disciplinary investigation and suspension on full pay for a period of 14 days.

54. On 10 September 2021, Manchester City wrote to Mr Mendy to suspend Mr Mendy for a further 28 days stating that Mr Mendy would continue to receive his salary and other benefits in accordance with the Employment Contract.

55. On 20 September 2021, Mr Berrada and Mr N'Diaye had a telephone call and exchanged Whatsapp messages. Mr Berrada informed Mr N'Diaye that the Club were considering stopping payments of Mr Mendy's wages. Mr N'Diaye says that he was given reassurances, at that time and later, that retrospective payments would be made in the event that Mr Mendy was ultimately acquitted. Mr Berrada denies this. In any event, despite numerous attempts by Mr D'Niaye and Mr Mendy to obtain confirmation of the alleged assurance, nothing of that nature was ever forthcoming from Manchester City.

56. On 28 September 2021, Manchester City suspended the payment of salary to Mr Mendy. The relevant part of the letter communicating the decision stated:

> **I am writing to confirm that the Club has, after careful and anxious consideration, suspended the payment of salary to you. You will not receive the payment that would otherwise have fallen due at the end of September 2021. Nor will you receive any further payment until you are ready and able to perform your obligations under the contract of employment.**
>
> **You are not presently ready and able to perform duties, of course, because you have been remanded in custody and, separately, because The FA has suspended you from engaging in any football-related activity. Our understanding is that District Judge Garva remanded you in custody because of your conduct whilst already on bail. Remand was, therefore, an avoidable impediment to your being able to perform your duties. We understand that a subsequent second request to be released on bail was refused. In those circumstances, the Club is no longer obliged to continue to pay you.**

57. On 10 October 2021, Manchester City sent to Mr Mendy (via his representative) a letter in relation to the Club's own disciplinary process stating that *"Insofar as the investigation may in any way relate to the substantive issues which are the subject of the current criminal charges relating to you, the investigation should not proceed at this time and it should be adjourned until the criminal process has been concluded, whether that is at the completion of a criminal trial or otherwise"*. In effect, the Club's disciplinary process went into abeyance and no further action was taken under it. The investigative suspension period, which had been extended by 28 days by the letter dated 10 September 2021, lapsed in due course.

58. On 17 November 2021 and 17 December 2021, there were further Magistrates' Court hearings regarding new allegations against Mr Mendy. No application for bail was made by Mr Mendy on either occasion and he remained in custody.

59. On Miss Wiltshire's unchallenged evidence, the trial was fixed for 24 January 2022. However, on 7 January 2022, Mr Mendy's case was considered before Chester Crown Court and the trial fixture was broken. This meant that the prosecution had to apply to extend custody time limits (there being different time limits in place due to the range of charge dates). The prosecution application was refused, and Mr Mendy was released from custody and placed on bail.

60. Mr Mendy's bail was subject to conditions which included him being required to report to Macclesfield police station each day between 12:00 to 14:00. He was also under an obligation to surrender his passport and ordered not to enter the County of Greater Manchester unless for pre-arranged employment.

61. On 9 January 2022 Miss Wiltshire emailed Manchester City's Deputy General Counsel, Nick Carter, attaching bail conditions and stated '*If Mendy was in a position to train again we would apply to lift his reporting*

conditions and ensure that the condition in terms of gatherings was varied so that it did not apply to his work."

62. On 11 January 2022, Miss Wiltshire emailed Mr Carter again, in response to an offer from Manchester City to provide counselling support to Mr Mendy, and stated, at the request of Mr Mendy, "*What would really help him would be to get back to training if that was to become possible*".

63. For clarity, it was simply not in the gift of Manchester City to permit Mr Mendy to return to training at this point, due to the FA Suspension. That was the position irrespective of the effect of any bail conditions.

64. An application to vary Mr Mendy's bail was made and the conditions were varied on 2 February 2022 to clarify that the restriction as to gatherings would not apply in relation to entering the County of Greater Manchester for any pre-arranged employment, legal or court appearance, subject to the same condition to report to Macclesfield police station each day between 12:00 to 14:00.

65. On 23 May 2022, Mr Mendy's bail conditions were varied to require Mr Mendy to report to Macclesfield Police Station between Monday - Thursday 08:00-12:00 and to observe a curfew between 20:00-07:00. The variation also allowed Mr Mendy's girlfriend and her mother to stay at the address.

66. Mr Mendy's first criminal trial commenced on 10 August 2022. His bail conditions were varied to allow him to attend the trial without being in breach of those conditions. The trial would ultimately last until 13 January 2023.

67. On 17 August 2022, Mr Mendy received a Notice of Interim Suspension from All Football including Playing from The FA following a decision of the Safeguarding Review Panel. This effectively continued the suspension that had been in place since 27 August 2021.

68. In December 2022, it was anticipated by lawyers acting for both parties that there was a good prospect of the criminal proceedings concluding in January, and of Mr Mendy being acquitted. By this time, Manchester City did not want Mr Mendy to return to work, and there were some conversations about an agreed termination. No such agreement came to fruition. I make no findings as to whether, or (if so) when, the Club formed the view that they did not want Mr Mendy to return, prior to December 2022.

69. On 30 December 2022, during a break in the Crown Court trial, Mr Mendy was arrested on suspicion of new offences and granted unconditional police bail in relation to these. Whilst at the police station, he was further arrested in relation to breaching his bail conditions regarding gatherings and he was held in police custody until 2 January 2023 when he appeared before the Magistrates' Court, formally admitted breaching his bail conditions, and

was remanded in custody for a second time. Mr Mendy was not charged with any of the new alleged offences and that case was ultimately closed.

70. On 13 January 2023, Mr Mendy was found not guilty of 7 charges (including charges in relation to a 17-year old complainant). There was to be a re-trial of 2 further charges.

71. On 17 January 2023, Mr Mendy was again granted bail. The conditions included not entering the County of Greater Manchester within the area surrounded by the M60 motorway, which would include Manchester City's stadium and training facilities. Mr Mendy was bailed to live at the home of Jodie Deakin (former first team support manager for Manchester City).

72. On 27 January 2023, The FA wrote to Mr Mendy notifying him that the Interim Suspension remained in place, however he could be permitted to return as a player under supervised circumstances (including the imposition of a Supervision Deed) subject to a formal decision by The FA's Safeguarding Review Panel. A final risk assessment was to be conducted following the conclusion of Mr Mendy's criminal trial which was expected to be heard in June 2023.

73. On 10 February 2023 Fletcher Sports Law wrote on behalf of Mr Mendy to The FA to invite The FA to withdraw the child safeguarding conditions in order that Mr Mendy could return to training with Manchester City free of any child safeguarding conditions.

74. On 20 June 2023, in response to an email from The FA regarding a proposed Supervision Deed, and the question:

    Would the Club support the recommendation of a Supervision Deed to be implemented before Mr Mendy's trial, and indeed would the Club be willing and able to provide Mr Mendy with the opportunity to take part in a Supervision Deed with the Club at this stage?

    Ryan Greenhalgh of Manchester City wrote to Billy Kellman of The FA and stated:-

    The Club would have a range of factors to consider in relation to Mr Mendy's wish to train at City Football Academy, one of which would be the existence of a Supervision Deed. Once the Club knows the precise scope of a Supervision Deed, it will be able to consider the matter in full, but without prejudging the factors the Club's board may consider and how each such factor would be weighed- the mere existence of a Supervision Deed may not be enough in itself for the Club to permit Mr Mendy to attend the site to train.

75. On 23 June 2023, The FA wrote to Mr Mendy to confirm that the Interim Suspension from All Football including Playing was maintained against Mr Mendy.

76. Mr Mendy's contract of employment with Manchester City terminated by

effluxion of time on 30 June 2023.

77. On 14 July 2023 Mr Mendy was found not guilty of the remaining 2 charges.

78. On 19 July 2023 Mr Mendy signed for French team FC Lorient as he was free to do so following Manchester City not offering Mr Mendy an extension of the Employment Contract.

The Issues

79. The single issue in this case is whether, by stopping Mr Mendy's wages in the period September 2021 to June 2023, Manchester City made unauthorised deductions to those wages within s.13 Employment Rights Act 1996.

80. How to approach, and answer, that question in the unusual circumstances of this case is a little less straightforward. The definition of the issues and, in particular, the definition of causation issues in this case, is key to the decision I have ultimately reached. For that reason, I will explain further below what I considered to be the necessary issues to resolve, and why, as well as explaining how I have resolved them.

The Legal Framework

81. Before describing the submissions made by the parties, it is helpful to set out the basic propositions of law, on which the parties were agreed.

82. Section 13 Employment Rights Act 1996 ("ERA") provides:

> **13 Right not to suffer unauthorised deductions**
>
> **(1) An employer shall not make a deduction from wages of a worker employed by him unless—**
>
> **(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or**
>
> **(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.**
>
> **(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.**

83. There are two alternative potential starting points to approach the question. Mr Jones, in his skeleton argument, puts the question in terms of s.13(3) as being whether wages are "properly payable". If they are not properly payable in the first place, then no question of deduction arises. I find that formulation sensible and attractive, particularly in a case, such as this, involving a decision to stop wages entirely. I acknowledge it departs somewhat (in style if not in substance) from the approach mandated by the Court of Appeal in **Gregg v North West Anglia NHS Foundation Trust [2019] EWCA Civ 387**.

84. In **Gregg**, Coulson LJ states (paragraph 54 in the IRLR report ([2019] IRLR 570)):

> **I consider that the starting point for any analysis of the Trust's attempt to deduct Dr Gregg's pay must be the contract itself (*Walker, Knowles, Paterson*). Was a decision to deduct pay for the period of suspension in accordance with the express or the implied terms of the contract? If the contract did not permit deduction, then, as envisaged by Lord Templeman in *Miles v Wakefield*, the related question is whether the decision to deduct pay for the period of suspension was in accordance with custom and practice. If the answer to both these questions is in the negative, then the common law principle – the 'ready, willing and able' analysis … falls to be considered.**

85. Setting aside the question of the precise interface between the statutory provision and the common law principles (and therefore the distinction between the 'properly payable' starting point and the 'is deduction permitted' starting point), the parties agree that the approach to be adopted, *per* **Gregg**, is as follows:
    85.1 Do the express terms of the contract permit the employer to stop paying wages?
    85.2 If not, is there an implied term of the contract which would permit the employer to stop paying wages? (This would include a term implied through custom and practice, as mentioned in **Gregg**, although the parties agree that that does not arise in this case).
    85.3 If not, then the employer may, nonetheless be entitled to stop paying wages to an employee who is not "ready, willing and able" to work during the period in respect of which wages would otherwise be due.

86. Coulson LJ, in **Gregg**, drew together the following principles to be applied when the "ready, willing and able" question arises, which he considered to be uncontroversial and which both parties before me relied upon (paragraph 52):

> **(a) If an employee does not work, he or she has to show that they were ready, willing and able to perform that work if they wish to avoid a deduction to their pay (*Petrie*).**
> **(b) If he or she was ready and willing to work, and the inability to work was the result of a third-party decision or external constraint, any deduction of pay may be unlawful. It will depend on the circumstances.**
> **(c) An inability to work due to a lawful suspension imposed by way of sanction will permit the lawful deduction of pay (*Wallwork v Fielding*).**
> **(d) By contrast, an inability to work due to an 'unavoidable impediment' (Lord Brightman in *Miles v Wakefield*) or which was 'involuntary' (Lord Oliver in *Miles v Wakefield*) may render the deduction of pay unlawful.**
> **(e) Where the employee is accused of criminal offences, the issue cannot be determined by reference to the employee's ultimate guilt or innocence (*Harris, Burns*), nor simply by reference to whether he or she was granted bail or not (see the comments in *Knowles* about the decision in *Burns*, with which I agree)."**

Submissions

87. I had the advantage of receiving written skeleton arguments from both representatives in advance of the hearing, and of hearing detailed oral submissions at the conclusion of the case. It goes without saying that these were of the highest quality.

88. I note here that neither party sought to draw a distinction in their submissions between the concept of an "unavoidable impediment" and and "involuntary impediment", and both terms were used during the hearing. I have chosen to use the term "unavoidable impediment" (and, in contrast, "avoidable impediment") throughout, for clarity and consistency.

89. In summary, Mr De Marco's position was as follows:
    89.1 There is no express term permitting deductions or stoppage. The terms of the contract presented Manchester City with a binary choice – to follow the dismissal procedure (which would, if a dismissal resulted, have freed Mr Mendy to contract with another club) or to keep him under contract and continue paying him. There was no legitimate mechanism to keep him under contract whilst refusing to pay him.
    89.2 The is no room for an implied term. The contract contains express and stringent provisions as to both suspension from duty and suspension of pay. Neither the "business efficacy" test, nor the "officious bystander test" support the proposition that a term should be implied.
    89.3 Generally, in relation to the interim suspension, the periods in custody, and the bail conditions, (except, Mr De Marco acknowledged, arguably the second custody period) none of those restraints on Mr Mendy's ability to perform his contract would have been in place had it not been for the underlying allegations. As the underlying allegations were not made out, these were all unavoidable impediments (to the extent that they were impediments at all).
    89.4 Turning to the detail of the different factors preventing Mr Mendy from performing, Mr De Marco accepted that the FA suspension was at all material times a complete impediment to Mr Mendy performing his contractual obligations. It was, however, an unavoidable impediment which ought to be considered as being "on all fours with" the interim suspension imposed by the Medical Practitioners' Tribunal in **Gregg**.
    89.5 That unavoidable impediment was the effective and underlying cause of Mr Mendy's inability to play throughout the entirety of the period for which his wages were stopped, and Manchester City's reliance on other matters (particularly bail conditions) was unsustainable in the face of that underlying impediment.
    89.6 Alternatively, in relation to the periods during which Mr Mendy was on bail, the bail conditions could have been varied to enable him to work had the suspension not been in place. Further, even if certain conditions could not have been varied, the key requirement of his role was to attend training, and I could be confident that they could have been varied to that extent. Players may be unavailable for matches or other commitments for extended periods for various reasons and that does not mean they are not performing their contract.
    89.7 I should take account of the fact that Manchester City had chosen to keep Mr Mendy under contract (see above) and had "strung him along" by making assurances that he would be paid in the event of acquittal

and then reneging on those assurances. Mr De Marco also appeared to suggest that if the club had been supportive of Mr Mendy's return, then a different approach may have ben taken, for example in relation to their communications with the FA around the possibility of Mr Mendy returning to training under supervision. This point particularly applied to the latter period, after the first criminal trial. He said that Manchester City itself was therefore responsible, at least in part, for the impediment to Mr Mendy's return.

89.8 Manchester City had failed to call witness evidence on relevant matters, including in relation to reasons for the decision to stop pay, and why that decision was maintained. I should draw inferences against the Club due to that failure.

90. In summary, Mr Jones said:

90.1 He agreed with Mr De Marco that there was no express term permitting the Club to withhold payment in these circumstances.

90.2 He submitted that there may be an implied term to permit the employer to stop paying wages "in such circumstances".

90.3 He accepted that Mr Mendy was "ready and willing" to perform his contract at all times.

90.4 He submitted that the FA suspension, Mr Mendy being in custody, and Mr Mendy's bail terms in the relevant periods each clearly amounted to a full impediment to Mr Mendy being able to perform his contract.

90.5 In considering whether those impediments were avoidable or unavoidable, Manchester City did not rely on the underlying criminal allegations. Rather, reliance was placed on Mr Mendy's culpable behaviour which had given rise to the impediments. In the face of repeated warnings of increasing seriousness, Mr Mendy simply "kept partying" and by his conduct he "was asking to be locked up".

90.6 Specifically in relation to the FA Interim suspension, Mr Jones disagreed that this was "on all fours" with the suspension in **Gregg**. Although Mr Jones accepted that the suspension came about because one of the complainants was 17 years old, and that complaint, like the others, did not result in any conviction, he nonetheless submitted that the suspension was avoidable because Mr Mendy's practice of having sex with women who were effectively strangers, and finding out little or nothing about them, meant that he was running a risk of sleeping with someone who turned out to be younger than he believed.

90.7 In relation to the custody periods, Mr Jones submitted that District Judge McGarva's reasons for denying Mr Mendy bail were clear, and expressly included his breach of bail conditions, which was admitted by Mr Mendy now (even if not formally admitted during the criminal proceedings). Mr Mendy could not avoid that fact, and it would be an error to speculate as to whether remand would have been an inevitability regardless of those breaches. As to the second custody period, it was entirely the result of breach of bail conditions.

90.8 In respect of the bail terms, they were also an impediment as it was clear on the face of the terms that they were incompatible with performing the contract. Speculation as to whether they might have been varied in different circumstances was irrelevant. Further, to the extent that Mr Mendy might, in theory, have been able to offer part-performance (e.g. by attending training), the Club was under no

obligation to accept such part performance and, in any event, part performance would not entitle Mr Mendy to any remedy under a statutory deductions claim (**Miles v Wakefield [1987] ICR 368**, **Coors v Adcock [2007] EWCA Civ 440** and **Abellio East Midlands v Thomas [2022] EAT 202**).

90.9 Mr Mendy was culpable in terms of the bail conditions as they were drawn to prevent him from engaging in the partying activity which had given rise to the allegations. Further, the history of the case revealed an incremental tightening of the bail conditions (with a commensurate effect on Mr Mendy's inability to perform the contract). Mr Jones suggested it was an "obvious inference" that the bail conditions were set so as to take account of risks, including the breaches of earlier, more lenient conditions.

90.10 In terms of causation, it was sufficient that Mr Mendy's conduct had been "in part" the cause of the impediment for the impediment to be deemed to be avoidable (**Burns v Santander UK plc [2011] IRLR 639**).

90.11 Mr Jones submitted that Mr De Marco's submissions included "a barrel of red herrings". Specifically, any action Manchester City took (or did not take) in response to 'partying' by other players was irrelevant – no other player had been remanded in custody or otherwise put himself in a position where he was unable to train and play. The views and actions of Mr Berrada, or the Club generally, in relation to Mr Mendy's potential return were also irrelevant. No assurances about backpay in the event of acquittal were made, but even if they had been, they were irrelevant. The fact that Mr Matturie was remanded in custody following the August 2021 allegations seemingly without breach of bail playing a part in the decision was irrelevant. Finally, there club could not be criticised for failure to call more witnesses as there was no relevant evidence for them to give.

90.12 Generally, Mr Jones argued that the effect of Mr De Marco's submission was that the contract creates, in economic terms, a "moral hazard" where irresponsible behaviour, even if it is profound and repeated, has no contractual consequences for the individual involved. That could not be right.

Discussion and conclusions

Preliminaries

91. To a degree, both sides presented arguments which went to the question of whether or not Mr Mendy *deserves* to be paid the wages that Manchester City chose to withhold from him. Mr Mendy's position is that he is an innocent man whose career has been ruined, and life blighted, by false sexual allegations and that the football club which brought him to this country effectively abandoned him in his hour of need. Manchester City's position is that Mr Mendy largely brought his troubles upon himself and ignored sensible advice and warning after warning in his self-destructive pursuit of his chosen lifestyle. Both these narratives have validity, and there is no one cause of the chain of events which unfolded in this case.

92. The question of whether Mr Mendy deserves to be paid, however, is one for the commentators and comments sections. The only question for me is

whether Manchester City was legally entitled to withhold that pay, within the terms of s.13 ERA.

93. There was one key dispute of fact emerging from the evidence. That was whether Mr Berrada had provided assurances to Mr N'Diaye that retrospective payments would be made in the event Mr Mendy was acquitted. I asked Mr De Marco to help me to understand why such a finding was necessary for me to reach a conclusion in this case, given the claim did not assert any collateral agreement, or variation to the contract. His answer was that it would lead to the conclusion that Manchester City were indeed seeking to "string along" Mr Mendy. I am afraid that even if I did reach that conclusion, I still fail to see how it would assist me in determining the claim. The key questions, as emerge from the Legal Framework set out above, are (1) what was the impediment, or impediments, preventing Mr Mendy from working and (2) can that impediment/those impediments be properly viewed as being avoidable by Mr Mendy?

94. It may well be that if the impediments at the heart of this case had been removed before the expiry of Mr Mendy's contract, there would have been an additional impediment (unavoidable by Mr Mendy) in the form of Manchester City's reluctance to have Mr Mendy back. However, that was not Mr Mendy's pleaded case and, even if it had been, I consider it too remote, on the facts of this case as they were, rather than the facts as they might have been, to properly have any bearing on my decision.

95. It is not necessary, nor helpful, for me to make the finding of fact which Mr De Marco asks me to, as to whether or not assurances were given about retrospective payments, and in those circumstances I consider it would be wrong to make a finding which does not assist me in deciding the issues in the case.

96. More broadly, I did not accept Mr De Marco's submission that there were relevant matters which Manchester City could have been expected to give evidence on but did not. All the matters suggested were either matters which were irrelevant to the claim (as with the dispute between Mr N'Diaye and Mr Berrada) or they were matters about which Manchester City could not sensibly have given witness evidence (e.g. the possibility of changing bail conditions).

Contractual position

97. In line with the approach mandated by **Gregg**, and agreed by both parties, I start by considering the contractual position.

98. The parties agree that there is no express contractual authority for the non-payment of Mr Mendy's wages.

99. I reject Mr Jones's submission (not strongly pushed) that there is a relevant implied term. He did not set out precisely what the term was said to be, other than that it would permit non-payment "in these circumstances". That is not sufficiently certain. Further, this is an employment contract which is the result of an unusual degree of equality in bargaining power, and which deals expressly and comprehensively with the duties and obligations of both

sides, including around suspension of payment/fines for limited periods and in specific circumstances. I do not consider that either the "business efficacy" test, nor the "officious bystander" test would require the implication of an additional term of the sort Mr Jones contends for.

Ready, willing and able

100. The burden rests on Mr Mendy to show that he was ready, willing and able to work, and therefore to show that any impediment he found himself under was unavoidable.

101. At all material times Mr Mendy was subject to an FA suspension. It is agreed that it amounted to a complete impediment to his ability to perform his contractual obligations.

102. The suspension arose as a result of criminal allegations made by a complainant who was not underage in terms of criminal law but was nevertheless young enough to engage FA safeguarding regime. I accept there may be circumstances, aside from the underlying allegation, in which an individual's behaviour could be said to have contributed to a suspension being imposed on safeguarding grounds, albeit that the suspension is a precautionary measure and not a sanction.

103. The most that Mr Jones can say as to the circumstances in this case is that I should take judicial notice of the fact that some young girls dress up, present as older than they actually are, and go out to nightclubs, and that by indiscriminately having sex with women who were effectively strangers, Mr Mendy was leaving himself open to the risk that some of them would be under 18. Mr De Marco says that that is a dangerous submission, which verges on victim-blaming.

104. The connection between Mr Mendy's conduct and the imposition of the suspension must be more than a simple "but for" causal link. It must, in my view (and I don't understand either counsel to disagree) involve some degree of relevant culpability on the part of Mr Mendy. Plainly, a star defender who eschewed casual sex and parties and chose to spend his evenings playing board games at home with his family would not have found himself in the circumstances which gave rise to Mr Mendy's FA suspension. That does not mean that Mr Mendy only has himself to blame.

105. The fact that Mr Mendy was continually having parties, initially in breach of covid restrictions and latterly in breach of bail conditions is certainly culpable, but that culpability is not relevant, other than in a bald "but-for" sense, to allegations of rape or sexual assault being raised against him by a 17-year-old. To return to Coulson LJ in **Gregg** (paragraph 53):

> **More difficult is the correctness of the repeated assertion, most recently seen in Paterson, that 'unavoidability' (and therefore the unavoidable or involuntary nature of the third-party decision or external event) is 'to be construed narrowly' and should be taken to mean an Act of God, or some other form of 'accident'. The basis for this is unclear. In some of the cases it seems to have led to the conclusion that, if the employee's actions have led to a suspension from work or the bringing of criminal charges, then the suspension or the consequences of the criminal charges are automatically 'avoidable' or 'voluntary'. This is uncomfortably close to an assumption of guilt and seems to me to be wrong in principle. This case is perhaps a good example**

of the problem. Can it really be said that Dr Gregg's suspension was 'avoidable' without, of necessity, assuming that he was guilty of the allegations made?

and continuing at paragraphs 66-69:

What we are concerned with here is the happening of an independent event (the temporary suspension of Dr Gregg's registration and the concomitant withdrawal of his licence) which meant that he could not perform the services envisaged by his contract. This was not because he was not ready to work or not willing to work (thereby distinguishing him from the claimant in *Miles v Wakefield*); it was because the decision of a third-party tribunal had – against his will – removed his registration/licence to do so.

That decision was designed to protect the public and to retain public confidence in the running of the NHS: no more and no less. It was very similar to, and had the same effect as, the 'temporary expedient' of exclusion and the 'precautionary measure' of suspension, as expressly set out in the contract. In the ordinary run of such cases, therefore, I am clear that the imposition of such a suspension, which is not voluntary and might be regarded as the unavoidable consequence of s 47, should not lead to a finding that a doctor who is subject to the suspension is not 'ready willing or able to work', and/or to justify the deduction of the doctor's pay for the period of the interim suspension.

In most cases, as here, the circumstances giving rise to the allegations will be challenged by the doctor concerned. Dr Gregg has had to accept that he will be the subject of an interim suspension, with all the personal anxiety and concern that such a process undoubtedly carries with it, because that is what the Act requires. But it is involuntary. He doubtless retains the belief that, ultimately, when the issues are addressed, he will be fairly heard and exonerated. In those circumstances, it requires something more, something out of the ordinary, to justify the additional burden of deduction of pay for the period of the temporary suspension.

Thus, although wary of giving a black and white answer to this last element of the question raised in Issue 1, I consider that, in a situation where the contract does not address the issue of pay deduction during suspension, the default position should be that, in the ordinary case, an interim, non-terminatory suspension should not attract the deduction of pay. There may be exceptional circumstances (such as a complete or part admission of guilt) which might justify such a deduction, but they would not ordinarily arise.

106. Although these comments expressly concern the statutory arrangements for suspension for doctors, in terms of both their purpose and mechanism that regime seems to me to align closely with the FA safeguarding regime with which I am concerned. The factors that Mr Jones points to, in my view, fall far short of the sort of "exceptional" circumstances which would justify a departure from the general principle that the obligation on the employer to pay wages (absent an express contractual provision) subsists during a suspension which is imposed not as a sanction, but as an interim, precautionary measure.

107. I therefore agree with Mr De Marco that, for the entirely of the period in question, Mr Mendy was subject to an unavoidable impediment in the form of the FA suspension. How the existence of that unavoidable impediment interplays with the other impediments in place during the different periods between August 2021 and June 2023 is considered further below.

Period 1: First custody period
1 September 2021 to 7 January 2022

108. Although Mr Mendy was held in custody from 25 August 2021, with bail being refused by District Judge McGarva on 27 August 2021, he received his full salary in respect of the month of August 2021.

109. By letters dated 27 August and 10 September Manchester City had placed Mr Mendy on suspension with full pay to enable the club to carry out its own investigation. The letter of 10 September notified him of a further 28 days suspension during which he would continue to receive his salary and other benefits.

110. As we know, the disciplinary case was not pursued and the Club's suspension was allowed to lapse, being overtaken by the decision, communicated on 28 September 2021, that he would not receive the payment due at the end of September, nor any further payment until he was "ready and able" to perform the obligations of his contract.

111. I pause to note that no point was taken by Mr De Marco that the period between 1 September and 8 October should be treated any differently to the remaining first custody period by virtue of the point that Manchester City had committed in writing to payment of salary and benefits for this period, and subsequently adopted a different position in the decision, communicated at a very late stage to Mr Mendy, to stop the payment due at the end of September.

112. Indisputably, whilst he was remanded in custody, Mr Mendy could not work. Was being in custody an avoidable impediment or an unavoidable impediment?

113. At this point it is necessary to consider more closely the **Burns** case. Mr Burns was unavailable to attend work because he had been remanded in custody pending trial. He argued that the impediment to his working was "unavoidable" because "the decision to remand him in custody lay with the criminal courts, not with him." In a brief judgment of HHJ Peter Clarke, the EAT held (paragraph 9 of the IRLR report):

> **That submission is correct, up to a point. The decision to remand was the court's and not the Claimant's. However, the question for the Tribunal was whether by his own voluntary actions the Claimant in whole or in part contributed to that state of affairs.**

114. It was relevant that, by the time the matter came to hearing, Mr Burns had in fact been found guilty of some (although not all) of the offences with which he was charged and the sentencing judge had determined that the six months spent on remand should be treated as part of his punishment. Mr Burns' counsel argued in the EAT that if he had only been charged with the offences that he was ultimately convicted of then he would have been bailed and suspended on full pay by his employer. HHJ Clarke considered that was irrelevant, as it was not what actually happened.

115. **Burns** is an example of a rare category of case – where an impediment can properly be considered to be avoidable (or voluntary – as may be more apt in this context) despite the fact that the employee has not positively chosen it for himself. It may be the only example. Probably for that reason, there is a degree of caution expressed as to its effect in the other authorities,

including both **Gregg** and **Kent County Council v Knowles UKEAT/0547/11** (which is referenced in **Gregg** in relation to the **Burns** decision). The editors of *Harvey* opine that "Perhaps *Burns* is best viewed as a case on its particular facts where the outcome of the criminal case was known by the time the appeal was heard." (Division B1, Chapter 1, Section A, 8.03).

116. These doubts reflect a fundamental principle that a suspension from work (i.e. one which is imposed by the employer itself) which is precautionary or investigative in nature (and therefore not a sanction) must be on full pay in the absence of clear contractual provisions to the contrary, and a concern that the *ratio* in **Burns** – if permitted to "grow legs" – might risk a serious erosion of that principle.

117. I make my decision with those matters fully in mind, but I am constrained to make a decision which does not disregard either of what I see as the two key statements of guidance which emerge from the authorities as they are relevant to the facts before me. The first is, per **Burns**, that the question is whether by his own voluntary actions the claimant in whole or in part contributed to the state of affairs whereby he was unable to work. The second, per **Gregg,** is that the issue cannot be determined by reference to guilt or innocence, nor by reference to whether the employee was granted bail.

118. What is meant by "in part" in this context? The causation threshold varies across different areas of statutory employment law. The authorities give no further guidance in this specific context. In my view, having regard to the considerations set out above, in order to be deprived of the right to pay the employee's conduct must have made a material or substantive contribution to the state of affairs. I also consider, as alluded to above in relation to the FA suspension, that there must also be some degree of relevant culpability, or at least recklessness on the part of a claimant. Take an employee who is unable to work due to being caught up in unrest or a natural disaster which prevents them from returning from holiday. If the disaster was unanticipated, their voluntary actions in choosing that destination can hardly be held against them. On the other hand, if the impending disaster was widely expected and publicised, and they travelled against strong advice from relevant public bodies, that might be a situation where their own actions could be said to have contributed to the state of affairs.

119. In relation to District Judge McGarva's decision to remand Mr Mendy in custody it is clear from both the formal record and the informal note that breaches of bail conditions (which are now admitted facts as between the parties) formed part of the grounds for the decision to remand. By breaching his bail conditions Mr Mendy acted in a culpable way, and in a way which inevitably made the possibility of his being remanded in custody more likely. I agree with Mr Jones that it is an inescapable consequence of the fact that breach of bail conditions is recorded as one of the grounds for remand that Mr Mendy was, in **Burns** terms, at least in part responsible for the fact that he was remanded in custody, and therefore unable to work in the relevant period.

120. Mr De Marco invites me to find that the breach in bail conditions was not determinative of the decision to remand, and says I can draw that conclusion from the fact that Mr Matturie was also remanded having not, seemingly, breached any bail conditions. That submission is weak, in my view. I have no evidence as to what factors may or may not have been operating in the mind of the Judge who decided to remand Mr Matturie. I do not even know if it was District Judge McGarva or a different Judge. Further, it cannot be right for me to speculate about what District Judge McGarva might have done in other circumstances, regardless of how that speculation might be informed by what happened to Mr Matturie. As with the argument that Mr Burns might have got bail if he had only been charged with the two offences for which he was ultimately convicted, the short answer is; it doesn't matter because it didn't happen. It sits ill in the mouth of Mr Mendy, who undoubtedly did breach his bail conditions in a repeated and egregious way, to suggest that none of that matters because of the seriousness of the alleged underlying offences. The face of the record shows that, to District Judge McGarva, it did indeed matter.

121. For those reasons I find that in the period 1 September 2021 to 7 January 2022 Mr Mendy was unable to work due to two separate impediments – the unavoidable impediment of the FA suspension, and the avoidable impediment of being remanded in custody.

122. If the latter factor was the sole impediment, then it is clear on the authorities that he was not "ready, willing and able" to work, therefore Manchester City would be entitled to withhold his wages. Is that conclusion undermined to any extent by the existence of a concurrent unavoidable impediment in the form of the FA suspension?

123. In my judgment that depends on the relation between the two. Here, the two impediments arise out of the same factual matrix but are causatively entirely independent of each of other. In those circumstances, the only fair conclusion is that both have played a part in leading to the result that Mr Mendy is unable to work, even if either one alone would have been sufficient to achieve that result. I do not think it can be said, as Mr De Marco seeks to, that the "effective cause" of non-performance in this period is the FA suspension. The effective cause is *both* the FA suspension and the fact that Mr Mendy is in custody. He is therefore responsible in part (again, in the **Burns** sense) for the outcome.

124. In conclusion, I am satisfied that Mr Mendy was not "ready, willing and able" to work within the period 1 September 2021 to 7 January 2022 and Manchester City are entitled to rely on the common law doctrine and withhold his pay for that period. So far as deductions from wages related to this period of the contract, Manchester City was entitled to make those deductions, notwithstanding Mr Mendy's ultimate acquittal. (I am fortified in this conclusion by the observation in **Gregg**, referred to above, that the issue of avoidability cannot be determined by reference to ultimate guilt or innocence.)

Period 2: First bail period
8 January 2022-29 December 2022

125. For clarity, by referring to this as the "first bail period" I am referring to the fact that it is the first bail period during which Mr Mendy was not receiving his wages. Mr Mendy had, as we have seen, been on bail for serious sexual offences from 5 January 2021.

126. I am satisfied as a matter of fact that at all material times (i.e. during the periods of non-payment) the various bail conditions when taken at face value made it impossible for Mr Mendy to perform his contractual obligations as a professional football player. It is a matter of common sense that those obligations included, as a minimum, an obligation to attend training and to attend matches, and that attending matches would involve significant domestic and international travel. To the extent that Mr De Marco tried to submit that the bail conditions were not an impediment as they stood, I reject that submission.

127. I do have some sympathy with the submission that, under other circumstances, it might well have been the case that the bail conditions could have been varied to allow Mr Mendy to offer either partial or, potentially, full performance of his contractual duties. There are various factors which tend to support this conclusion, including the evidence that the bail conditions were varied for other good reason (for example to allow him to attend a place of worship during Ramadan) and Miss Wiltshire's view that this could have been done, which I consider I am entitled to give some weight to, without regarding it, impermissibly, as expert evidence. I also take the view that I am entitled to assume, generally, that the courts will not wish to prevent a person from working and that, where they are able to, they will seek to impose conditions which adequately address the concerns of the court without interfering with the individual's ability to make an honest living. I also note that it is assumed in several of the cases mentioned above, that a bailed employee *will* be able to work, albeit that their employer may wish to suspend them to prevent them from actually doing so.

128. The real problem during this period was the FA suspension. As Miss Wiltshire explained, she could not make an application to the court to vary bail conditions to permit Mr Mendy to work whilst she knew full well that, in reality, he was prevented from doing so by the existence of the suspension.

129. Returning, against that backdrop, to the question of whether the bail conditions amounted to an avoidable or unavoidable impediment, my judgment, in light of the principles set out above, is that they were unavoidable. The existence of bail conditions is inextricably linked with the nature and seriousness of the underlying offences which Mr Mendy was accused of. Mr Jones's submission is that I can infer that the conditions arose partly because of previous breaches, but he can put it no higher than that because, unlike District Judge McGarva's decision to remand, there is nothing on the record to show that that was a distinct factor in the setting of the conditions. Keeping in mind the caution against applying the **Burns** principle too widely, it would be wrong to conclude that Mr Mendy's voluntary actions caused this impediment.

130. In circumstances where there is no avoidable impediment to him returning to work, Mr Mendy is, in my Judgment, entitled to recover the wages which are attributable to this period.

131. Further, even if I am wrong in my conclusion that the impediment presented by the bail conditions in force during this period was unavoidable by Mr Mendy, that would not be the end of the matter. At best, from Manchester City's perspective, I am faced once again with an unavoidable impediment (FA suspension) and an avoidable impediment (bail conditions). In contrast to my finding in respect of period 1, I would have been prepared to find, in respect of this period, that the "effective cause" (in Mr De Marco's words) of non-performance was the FA suspension. Even if I cannot be entirely sure what variations the Crown Court might have entertain, the existence of the suspension had a direct causal impact on the bail conditions as it made it impossible for Mr Mendy's legal team to even apply for bail conditions which would have enabled him to train and/or play. This is in contrast to the position with the court's decision to remand Mr Mendy into custody, in respect of which the suspension played no part, whether directly or indirectly.

Period 3: Second custody period
30 December 2022-17 January 2023

132. Mr Mendy was remanded in custody due to an admitted breach of bail conditions. Mr De Marco struggled to advance Mr Mendy's case in respect of this period, being able only to fall back on the argument that the FA suspension remained the "effective cause" of the inability to work. I reject that argument for reasons analogous to those set out at length in respect of the first custody period.

133. I am satisfied that Mr Mendy was not "ready, willing and able" to work within the period 30 December 2022 to 17 January 2023 and Manchester City were entitled to rely on the common law doctrine and withhold his pay for that period. So far as deductions from wages related to this period of the contract, Manchester City was entitled to make those deductions.

Period 4: Second bail period
18 January 2023 – 30 June 2023 (expiry of contract)

134. Although Mr Mendy had by now been acquitted of several offences, his FA suspension continued. He also continued to be on bail, and I accept that his bail conditions were stricter than they had been previously. There is a cogent argument that this restriction must necessarily follow from the bail breach that had caused Mr Mendy to be remanded into custody for a second time in December. Despite that, all the reservations and difficulties with imputing responsibility to Mr Mendy, even in part, for his inability to play whilst on bail, still subsist in the way that I have elaborated in relation to period 2 above. My conclusion remains the same, therefore, that Manchester City were not entitled to withhold Mr Mendy's pay for this period.

Concluding matters

135. In paragraphs 18 and 19 of the Grounds of Claim, Mr Mendy put forward a claim to be compensated in respect of the post-termination bridging payment he says he was entitled to receive given the date of his move to FC Lorient, and the difference in the salary he receives from that club, as

against his salary level at Manchester City. During the hearing, Mr De Marco accepted that that part of the claim could not be pursued as an unauthorised deduction from wages, as it related to a termination payment, rather than wages, and fell outside the Tribunal's jurisdiction (the grounds of claim having elsewhere expressly limited the claim to one of unauthorised deductions, and reserved the right to pursue contractual claims elsewhere). Mr De Marco therefore withdrew the claim of unauthorised deductions from wages, so far as it related to that period only, and (in his words) without prejudice to his client's right to pursue it in another forum.

136. Mr Mendy's grounds of claim and schedule of loss also included a claim for interest. No interest is available (pre-Judgment) on awards in respect of unauthorised deductions from wages, and Mr De Marco withdrew this request at the conclusion of the hearing.

137. Subject to the matters above, the parties agreed to the proposal that I would give a Judgment in principle in respect of the various periods noted above. To the extent that the claim of unauthorised deductions was made out in respect of one or more periods, the parties would then have an opportunity to agree the relevant figures between themselves. No interest will accrue until 14 days after a monetary Judgment is issued. I have written to the parties separately to ensure that they act in a timely way to agree the relevant sums so that, if necessary, a further Judgment can be issued.

Employment Judge Dunlop

Date: 5 November 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

6 November 2024

FOR EMPLOYMENT TRIBUNALS