EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105000/2018

Held in Glasgow on 18, 19 and 20 February 2019 (Final Hearing); 19 July 2019 (Closing Submissions); 24 and 26 July 2019, and 2 August 2019 (Written Representations); 30 August 2019 and 5 February 2020 (Members' Meetings)

Employment Judge I McPherson
Tribunal Member Mrs M Fisher
Tribunal Member Mr R Taggart

Mr Mahdi Saki	**Claimant** **Represented by:** **Ms K Yuill and Ms E Withers-Student Advisors** **Strathclyde University Law Clinic**
Odyssey Enterprises Ltd	**Respondents** **Represented by:** **Ms R Mohammed - Consultant** **Croner Group Ltd**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The **unanimous** Judgment of the Employment Tribunal is that: -

(1) On the evidence led before the Tribunal, the Tribunal finds that the claimant was unfairly dismissed by the respondents, contrary to **Sections 94 and 98 of the Employment Rights Act 1996,** on 17 September 2018, and that that date was the effective date of termination of his employment with the respondents, and not 12 December 2018, as asserted by the respondents.

(2) Further, the Tribunal finds that the claimant's dismissal on 17 September 2018 was an act of victimisation by the respondents, contrary to **Section 27 of the Equality Act 2010,** and that the claimant was discriminated against by the respondents, by reason of his protected act, done in good faith in May 2018, when he presented his first claim to the Employment Tribunal against the respondents complaining of alleged race discrimination.

(3) In respect of the claimant's unfair dismissal by the respondents, the Tribunal finds that the claimant is entitled to financial compensation for unfair dismissal, as also a separate award of compensation for injury to feelings in respect of the unlawful act of victimisation.

(4) The Tribunal directs that, unless parties can mutually agree the *quantum* of compensation payable to the claimant, within 28 days of issue of this Judgment, and agree matters extra-judicially between themselves, through ACAS, or application to the Tribunal, under **Rule 64 of the Employment Tribunals Rules of Procedure 2013,** for a Consent Judgment to be made by the Tribunal, the Tribunal will assign a one-day Remedy Hearing before the same Tribunal on a date to be hereinafter assigned.

(5) In that event, the Tribunal will allow further evidence from both parties on the matter of remedy only, to take account of the respondents' arguments that any financial compensation for unfair dismissal due to the claimant should be reduced on account of his contributory conduct, and / or the ***Polkey*** principle, and that any compensation for injury to feelings should likewise be reduced on account of contributory conduct.

(6) Further, on the evidence led before the Tribunal, the Tribunal also finds that the claimant was subjected to a series of unlawful deductions from his wages, contrary to **Section 13 of the Employment Rights Act 1996**, and the respondents are ordered to pay to him the sum of **SEVEN THOUSAND,**

THREE HUNDRED AND NINETY NINE POUNDS, NINETEEN PENCE (£7,399.19)

(7) Finally, on the evidence led before the Tribunal, the Tribunal finds that the claimant's complaint that he is owed outstanding holiday pay for the holiday year 2008, in terms of the **Working Time Regulations 1998**, is not well-founded, and that part of his claim is accordingly dismissed by the Tribunal, with no order for payment made against the respondents.

REASONS

Introduction

1. This case called again before us on the morning of Monday, 18 February 2019, for a 3-day Final Hearing, further to a discharged Final Hearing on 18 October 2018, as per a Notice of Final Hearing issued by the Tribunal to both parties' representatives on 29 November 2018.

2. It was listed for full disposal, including remedy, if appropriate. By amended Notice of Final Hearing, issued by the Tribunal on 29 January 2019, those same 3 dates were assigned to hear both this case, and a further claim brought by the claimant under case number **4123692/2018**, with both cases being combined by the Tribunal to be heard together at this Final Hearing.

Background

3. Following ACAS early conciliation between 5 April and 5 May 2018, the claimant, then acting on his own behalf, presented his ET1 claim form to the Tribunal on 30 May 2018.

4. He complained of alleged unfair dismissal, although stating his employment as a resource and recruitment consultant was continuing, and he further complained of unlawful deduction from wages, seeking **£6,009.25** as alleged

unpaid wages. He also complained of racial discrimination, by the respondents, although providing no specification of the alleged discriminatory treatment.

5. That claim was accepted by the Tribunal, on 7 June 2018, when a Case Management Preliminary Hearing was assigned for 8 August 2018, and while a copy of that claim was sent to the respondents, on 7 June 2018, it appeared to the Tribunal that they had failed to lodge an ET3 response by the due date of 5 July 2018.

6. When the casefile was referred to Employment Judge Jane Garvie, because it appeared that no ET3 had been received, she instructed that if the respondents wished to lodge an ET3 response, then they must provide it, together with a written explanation why it was not lodged in time by 5 July 2018. Her instructions were intimated to the respondents by a letter from the Tribunal dated 9 July 2018.

7. By a separate letter from the Tribunal, dated 9 July 2018, the claimant was advised that, while no response to his claim had been received, Judge Garvie had directed that the case proceed to the listed Case Management Preliminary Hearing on 8 August 2018.

8. However, it later emerged that the respondents had in fact, on 5 July 2018, per their director, Dr Karen Wilson, lodged an ET3 response, resisting the claim. That response was accepted by the Tribunal, on 16 July 2018, and a copy sent to the claimant.

9. When the casefile in that first claim was referred to Employment Judge Frances Eccles, for Initial Consideration, she directed that the claim and response proceed to the listed Case Management Preliminary Hearing on 8 August 2018. The claimant, and Dr Wilson for the respondents, were so advised by letter from the Tribunal dated 21 July 2018.

10. When the case called before Employment Judge Garvie, on 8 August 2018, for that listed Case Management Preliminary Hearing, the claimant had instructed Livingstone Brown, solicitors, Glasgow, to act for him, and their Ms Kathryn Allen appeared on his behalf, with Dr Wilson appearing for the respondents.

11. Judge Garvie issued a written Note and Orders of the Tribunal, dated 9 August 2018, which was issued to parties' representatives by the Tribunal's letter of 9 August 2018. On 16 August 2018, the case was then relisted for a further Case Management Preliminary Hearing to be held on 14 September 2018.

12. When the case called before Employment Judge Ian McPherson, on 14 September 2018, for that further listed Case Management Preliminary Hearing, the claimant was again represented by his solicitor, Ms Allen, with Dr Wilson again appearing for the respondents.

13. Judge McPherson issued a written Note and Orders of the Tribunal, dated 18 September 2018, which was issued to parties' representatives by the Tribunal's letter of 19 September 2018.

14. At that stage, the case was listed for a 2-day Final Hearing before a full Tribunal on 18 and 19 October 2018, in respect of the claimant's complaints of unlawful deduction from wages, and indirect discrimination on grounds of race, but not unfair dismissal, as that part of the claim was withdrawn by the claimant's solicitor, as the claimant was still employed by the respondents.

15. Following that Case Management Preliminary Hearing held on 14 September 2018, a **Rule 52** judgment signed by Judge McPherson, dated 18 September 2018, and issued to parties on 19 September 2018, dismissed the unfair dismissal part of that first claim against the respondents.

Final Hearing before this Tribunal

16. When the case first called before this full Tribunal, on 18 October 2018, for that listed 2-day Final Hearing, the claimant appeared in person, but no longer represented by Livingstone Browne, although two of their solicitors were present at the Tribunal, and advising the claimant.

17. At that Final Hearing, a Ms Ramiza Mohammed, consultant with Croners, appeared for the respondents, accompanied by their director, Dr Wilson. Ms Mohammed had only been instructed by the respondents the previous day.

18. On 28 September 2018, Livingstone Brown, solicitors, acting for the claimant, wrote to the Tribunal seeking an extension of time to lodge the claimant's Schedule of Loss, as the claimant had advised them that he had been dismissed from his employment with the respondents, and, as the claim then did not include any claim for unfair dismissal, it may be that the claimant required to make an application to amend the claim.

19. A one week's extension of time was allowed to lodge the Schedule of Loss, and, on 4 October 2018, the Tribunal advised the claimant's solicitors that any application to amend the claim should be lodged as soon as possible, given the Final Hearing was listed for 18 and 19 October 2018. An amendment application was made by the claimant, on 18 October 2018, and opposed by the respondents. He also lodged a Schedule of Loss seeking a grand total of **£19,368.34**.

20. After the Tribunal, having heard both parties' submissions, allowed that opposed application by the claimant, dated 18 October 2018, to amend his ET1 claim form, to add in a complaint of him having been allegedly unfairly dismissed by the respondents on 17 September 2018, the full Tribunal discharged the listed 2-day Final Hearing, and we ordered that the amended case be relisted for a 3-day Final Hearing before us, if available, on 18, 19

and 20 February 2019. We also made various case management orders for this relisted Final Hearing.

21. While our interlocutory rulings given orally on 18 October 2018 were thereafter confirmed in writing to both parties, under cover of a letter from the Tribunal dated 24 October 2018, Judge McPherson also issued a detailed written Note and Orders of the Tribunal, dated 7 November 2018, which was issued to both parties by the Tribunal's letter of 8 November 2018. Our reasons for allowing the claimant's amendment were there stated as follows: -

> ***"The claimant's application, intimated to the Tribunal by letter dated 18 October 2018, for leave to amend his ET1 claim form to add a new complaint of unfair dismissal, arising from what he alleges was his dismissal by the respondents on 17 September 2018, is allowed, notwithstanding the respondents' objection, as the Tribunal is satisfied that it is in the interests of justice to allow the claimant to amend his existing claim, to add in a cause of action arising after presentation of his original claim, because there would be greater prejudice and hardship to the claimant if the amendment was refused, than there will be to the respondents if it were allowed, in circumstances where the respondents, if sued by way of a fresh claim would still face a claim for unfair dismissal, but a fresh early conciliation process through ACAS, ET1 claim and ET3 response process would need to be followed, resulting in two separate claims before the Tribunal, which would be combined for any Final Hearing in due course."***

Second claim brought by the Claimant

22. Thereafter, on 18 December 2018, following ACAS early conciliation on 17 September 2018, the claimant, acting on his own behalf, presented his second ET1 claim form to the Tribunal, complaining of alleged unfair dismissal

by the respondents on 17 September 2018, as also alleging discrimination on the grounds of race, citing his Iranian ethnic or national origin.

23. Further, the claimant's second ET1 also alleged victimisation by the respondents, asserting that his first claim against them, complaining of race discrimination, was a material factor in the respondents' decision to dismiss him on 17 September 2018.

24. He further alleged that he was owed holiday pay by the respondents, and he requested that this second claim be conjoined with the first and added into the Final Hearing listed for February 2019. He sought a finding that he was subject to unlawful discrimination, and sought financial compensation, and injury to feelings

25. That second claim was accepted by the Tribunal, on 19 December 2018, under case number **4123692/2018,** when a Case Management Preliminary Hearing was assigned for 1 March 2019, and a copy of that second claim was sent to the respondents, on 19 December 2018, allowing them to lodge an ET3 response by the due date of 16 January 2019.

26. On 16 January 2019, by email sent at 11:26, Dr Wilson, director with the respondents, lodged their handwritten ET3 response form with the Tribunal, resisting the further claim against the respondents, together with her lodging a handwritten, completed PH agenda for the respondents.

27. She stated that the claimant had been employed by the respondents from 30 November 2015 to 12 December 2018, having been AWOL since 12 October 2018. She further stated that: ***"... it is evident that he is clutching at straws seeking to make gratuitous claims in order to force a payment to him."*** She denied that the claimant had been victimised at work, or subject to racism, and stated that she regarded this second claim, brought on 18

December 2018, as retaliation for his dismissal by the respondents on 12 December 2018.

28. Thereafter, by email sent at 16:39 on that same date, Ms Mohammed, consultant with Croners, submitted a completed ET3 response on behalf of the respondents, along with an attached 4-page typewritten paper apart with the respondents' response denying the claimant's allegations. It was denied that the claimant was dismissed on 17 September 2018, and also denied that he had been victimised on grounds of race by the alleged dismissal on 17 September 2018. While the respondents accepted that monies were owed to the claimant, they denied that the failure to make payments were in any way linked to the claimant's race.

29. Dr Wilson's handwritten ET3 response was accepted by the Tribunal, on 17 January 2019, and a copy sent to the claimant. Following referral to Employment Judge Ian McPherson, for Initial Consideration of the new claim and response, Judge McPherson directed that the new claim and response would proceed, he issued a Combining Order and ordered that the listed Case Management Preliminary Hearing in the second case, fixed for 1 March 2019, be postponed.

30. Further, Judge McPherson ordered that the second claim be heard with the first claim, under case number **4105000/2018**, at the Final Hearing listed to begin on 18 February 2019. Amended Notice of Final Hearing, dated 29 January 2019, was thereafter issued to both parties by the Tribunal, combing the two cases to be heard together.

Final Hearing continued to a later date

31. By the time that this case called again before us on the morning of Monday, 18 February 2019, for this 3-day Final Hearing, the claimant had secured *pro bono* representation by student advisors from the University of Strathclyde Law Clinic.

32. When the case called before us, on 18 February 2019, the claimant was in attendance, represented by the Law Clinic, while Ms Mohammed appeared again for the respondents, instructed by Dr Wilson, who was also in attendance.

33. Having been instructed by the claimant, on 6 February 2019, the Law Clinic had lodged further and better particulars on his behalf, with the Tribunal on 8 February 2019, responding to the call by Ms Mohammed, on 25 October 2018, for the claimant to provide further and better particulars, and respond to her response of 25 October 2018 about the claimant's Schedule of Loss provided at the Final Hearing on 18 October 2018. A revised Schedule of Loss was produced for the claimant, seeking **£22,278.57**.

34. The Law Clinic also sought to amend the claim, as set out in the further and better particulars, to amend the original claim to include a complaint of victimisation in terms of **Section 27 of the Equality Act 2010**, and to include a complaint in terms of the **Working Time Regulations**. They withdrew the complaint of indirect race discrimination that was noted to be part of his original claim.

35. Amended further and better particulars for the claimant were intimated on 12 February 2019, with Ms Mohammed tendering the respondents' response to the claimant's further and better particulars on 14 February 2019. Further clarification of the claimant's case was thereafter provided by the Law Clinic on 15 February 2019, submitting a tracked change version of the amended further and better particulars, which resulted in a further amended response from Ms Mohammed later on 15 February 2019.

36. Unfortunately, due to day 1 (18 February 2019) being taken up with clarification of the issues, and opposed applications to amend, this meant (despite a Timetabling Order made by the Tribunal under **Rule 45 of the**

Employment Tribunal Rules of Procedure 2013) that the evidence from the 3 identified witnesses, and closing submissions, could not be concluded within the allocated 3-day Final Hearing sitting. We allowed amendments to both the ET1 claim form, and the ET3 response.

37. The two principal witnesses, the claimant, and Dr Wilson, were both led, and concluded, so when the part-heard Final Hearing was continued to a later date, there was only a Mr Fraser Clarke left over to be heard as a witness to be called by the respondents.

38. Parties' time estimates, which we included in our Timetabling Order, were that his evidence in chief was estimated at no more than 1/2 hour, and likewise for cross-examination, at the Continued Final Hearing. On that basis, so we could conclude the evidence, and proceed thereafter to closing submissions, it was agreed that one further day be allocated for the Continued Final Hearing.

39. We gave specific case management orders in regard to that continued date, including timetabling, orders for a finally agreed List of Issues, and updated Schedule of Loss from the claimant, and specific orders and directions as to the preparation and mutual exchange of outline written closing submissions, as per the written Note and Orders of the Tribunal signed by the Judge on 21 February 2019, and issued to parties' representatives under cover of a letter from the Tribunal dated 25 February 2019.

40. By Notice of Continued Final Hearing issued by the Tribunal to both parties' representatives on 14 May 2019, following date listing stencils, and sundry correspondence with parties' representatives in March and April 2019, the case was relisted for a further one day sitting on Friday, 19 July 2019.

Respondents' Application for Postponement of Continued Final Hearing refused by the Judge, and renewed application refused by the Tribunal

41. In terms of the case management orders made by the Tribunal on 20 February 2019, as set out fully in the Judge's written Note and Orders issued to parties'

representatives, by letter of 25 February 2019, parties' representatives outline written closing submissions were to be prepared, and exchanged, by no later than 7 days before the start of the Continued Final Hearing, i.e. by 12 July 2019 at latest.

42. The Law Clinic student advisers timeously intimated their outline written submissions to the Tribunal, with copy to Ms Mohammed for the respondents, on 12 July 2019. On the morning of 16 July 2019, the Tribunal, on instructions from Judge McPherson, reminded the respondents' representative, Ms Mohammed, that her outline written submissions were due by no later than 12 July 2019, and directing that they be submitted by return of email.

43. Ms Mohammed duly intimated the respondents' outline written submissions by email to the Tribunal, copied to the Law Clinic, that same afternoon, apologising for a misunderstanding on her part.

44. On the late evening of 17 July 2019, Ms Mohammed, from Croner, acting as the respondents' representative, applied to the Tribunal, seeking an urgent postponement of the Continued Final Hearing fixed for 19 July 2019.

45. Having considered objections intimated by the Law Clinic, as the claimant's representative, the Judge, on 18 July 2019, refused the respondents' application, and confirmed that the listed Continued Final Hearing would proceed. His decision was intimated to both parties' representatives, by email from the Tribunal, on the afternoon of 18 July 2019, stating as follows:

> *"I refer to the above case, listed for continued Final Hearing tomorrow, Friday, 19 July 2019, at 10am, for one further day, as per Notice of Continued Final Hearing issued to both parties' representatives on 14 May 2019.*

I write to acknowledge receipt of Ms Mohammed's email of yesterday evening, Wednesday 17 July 2019 @ 21.10, and the Law Clinic's reply this morning @ 11:26, objecting to the respondents' application to postpone the Continued Final Hearing.

Following referral to Employment Judge Ian McPherson, the Judge has instructed that the correspondence be placed on the casefile, as have the emails of 12 and 16 July forwarding the claimant's and respondents' closing submissions, the latter being late.

*After careful consideration of the application and objections, the Judge has **REFUSED** the postponement application. He does not consider it to be in the interests of justice to postpone the listed Hearing, given the lateness of the application, on the eve of the continued Final Hearing tomorrow, and for the reasons well-founded in the detailed objections from the Law Clinic.*

*Whatever the "**internal misunderstanding**" was within the respondents and / or their representative, that does not constitute good cause nor exceptional circumstances to merit postponement of the listed Hearing tomorrow, nor does the fact that Ms Mohammed did not inform Dr Wilson of the date assigned.*

Further, the Judge states that it is not in accordance with the overriding objective to postpone and relist, given the procedural history of this litigation to date, where both parties are entitled to have the case concluded within a reasonable time, and to further continue its conclusion to a later date will simply add further delay and associated cost to not only both parties, but also to the public purse that funds the Tribunal.

Dr Karen Wilson, the respondents' director, concluded her evidence at the Final Hearing held on 18 / 20 February 2019, and she is not required to give any further evidence. The only remaining witness to be heard was the respondents' Fraser Clarke, with estimated ½ hour in chief, and ½ hour in cross. Only he is required as a witness, and that has been known since the previous Hearing.

*No detail is provided as to the nature of the "**business commitments tomorrow that they are unable to get out off"**, and as such the application is woefully unspecific, and nor is it explained why this only came to the respondents' attention yesterday.*

*As per the Judge's written Note & Orders dated 21 February 2019, as sent to both parties' representatives on 25 February 2019, both parties' representatives should ensure that, as per that written Note & Orders, 3 hard copies of the finalised version of the agreed List of Issues, and both parties' closing submissions, and 3 ring-binder, inventoried copy authorities, are all provided to the clerk to the Tribunal **in time for the 10am start of the continued Hearing tomorrow**, along with 4 hard copies of the supplementary Bundle, including updated Schedule of Loss, that should have been intimated by Friday 5 July 2019, and the respondents' Counter Schedule due by last Friday, 12 July 2019.*

*While writing, the Judge notes that in the Tribunal's email of 10 April 2019 @ 15:13 (from Jason Chan) the respondents' representative was asked to reply, by 17 April 2019, whether the respondents sought a **Rule 52** judgment re the second claim **4123692/18.***

As far as the Tribunal's casefile shows, there has been no response to that direction by the Judge by the due date, or to current date.

> *As such, the Judge **orders** that the respondents' representative confirms to the Tribunal, by email, with cc to the Law Clinic for the claimant, her clients' position **by no later than 4.00pm today, Thursday 18 July 2019**, and explains the failure to respond to the Judge's earlier direction."*

46. On the afternoon of 18 July 2019, Ms Mohammed, from Croner, acting as the respondents' representative, having received the Tribunal's email earlier that afternoon refusing her postponement application, applied to the Tribunal, with copy to the Law Clinic, again seeking an urgent postponement of the Continued Final Hearing, and putting forward additional information to allow the Judge to reconsider his earlier refusal.

47. That further application was refused by the Judge, as the reasons submitted in the second application by Ms Mohammed were not included in the original application refused by the Judge earlier that day, and indeed departed from the earlier application. It was confirmed that the Continued Final Hearing would proceed as planned on Friday, 19 July 2019.

48. On 19 July 2019, Ms Mohammed again renewed her application for a postponement. The full Tribunal having heard from her, and from Ms Withers from the Law Clinic on behalf of the claimant, refused the application, for the summary reasons there and then given by the Judge, the Tribunal having adjourned (from 10.50am to 11.33am) for private deliberation, before the Judge orally gave the Tribunal's interlocutory ruling, as follows:

> "***Having considered parties' representations, the Tribunal has decided to refuse Ms Mohammed's renewed application to postpone and relist, to allow the respondents to lead evidence from Mr Clarke, it not being in the interests of justice to do so, nor consistent with the overriding objective. Detailed reasons to follow, but the Tribunal has read the full written representations."***

49. We provide our detailed reasons for refusing that renewed application to postpone later in these Reasons, at paragraph 90(1) to (12) below. At the Continued Final Hearing, on 19 July 2019, Ms Withers acted as the claimant's representative, as Ms Yuill was there, but recovering from recent medical treatment. Ms Mohammed was there representing the respondents again, but Dr Wilson was not there instructing her: she was absent on other (undefined) business, we were advised by Ms Mohammed.

Second Claim withdrawn by the Claimant, and Dismissed by the Tribunal

50. While we heard this case together with a second claim brought by the claimant against the respondent, under case number **4123692/2018**, and combined with this case for Final Hearing, we need here to note and record that, arising from parties' jointly agreed position, as put to us at the Continued Final Hearing on 19 July 2019, the Judge signed off a dismissal Judgment, on 26 July 2019, in terms of **Rule 52 of the Employment Tribunals Rules of Procedure 2013**, dismissing that second claim, on account of its withdrawal by the claimant.

51. That **Rule 52** Judgment, in case number **4123692/2018**, was issued to both parties' representatives under cover of a letter from the Tribunal dated 30 July 2019. It recorded that, having heard parties' representatives at the Continued Final Hearing , and this second claim having been withdrawn by the claimant's representative, by letter to the Tribunal dated 5 April 2019, and confirmed by her at this Final Hearing of the combined claims, and on the application of the respondents' representative, by her email of 18 July 2019 to the Tribunal, in answer to the Tribunal's email of 10 April 2019, this second claim against the respondents was dismissed by the Tribunal, on the unopposed application of the respondents' representative.

52. However, that **Rule 52** Judgment also recorded that the remaining parts of the original claim (as amended by order of the Tribunal dated 18 October 2018, with reserved Written Reasons dated 7 November 2018) alleging unfair

dismissal, victimisation, and unlawful deduction from wages / failure to pay holiday pay, remained standing, and they are the subject of this Judgment and Reasons by the Tribunal.

Delay in issuing this Judgment

53. While we reserved Judgment, following the close of that Continued Hearing, on 19 July 2019, there has subsequently been an unfortunate, but unavoidable, series of delays in our Judgment being progressed. While we met, in chambers, on 30 August 2019, for a Members' Meeting, we did not conclude our private deliberations. 30 August 2019 was the earliest, mutually convenient date for the full Tribunal panel to meet after 19 July 2019.

54. The subsequent, further delay in this Judgment being issued, since 30 August 2019, has largely been occasioned by the Employment Judge being absent, on extended sick leave absence from 16 September 2019 to 25 November 2019. Parties were advised of that absence by the Tribunal on 16 September 2019, at which stage it was not clear when the Judge would return to work, and be able to progress this Judgment and Reasons.

55. The Judge apologises to both parties for this further delay in concluding his draft Judgment and Reasons for discussion with the lay members of the Tribunal, which has resulted in consequential delay in fixing a further Members' Meeting to allow the Tribunal to conclude its private deliberations, in chambers, to take account of the evidence heard, closing submissions made, and subsequent further written representations from both parties, dated 24 and 26 July, and 2 August, 2019.

56. It is only now, at our Members' Meeting held on 5 February 2020, we have had the opportunity to conclude our private deliberations. Having now carefully considered parties' closing submissions, and their further written representations, this unanimous Judgment and Reasons of the Tribunal

represents the final product from our private deliberations, and reflects the unanimous views of us as the specialist judicial panel brought together as an industrial jury from our disparate experiences.

Agreed List of Issues

57. After the part-heard Final Hearing on 18/20 February 2019, the Judge issued a proposed draft of a List of Issues for parties' comments and joint agreement. It was thereafter the subject of interlocutory correspondence between parties' representatives, and the Tribunal.

58. At the Continued Final Hearing, on 19 July 2019, the claimant's representative tendered, and the Tribunal adopted, both parties' representatives being agreed as to its content, a jointly agreed, finalised version of the document.

59. That finally agreed List of Issues is in the following terms:

Unfair Dismissal/ Unfair Constructive Dismissal

1. *Whether or not the claimant was dismissed, expressly or constructively, on either, or both, of 17 September 2018 and 12 December 2018?*

2. *If he was dismissed on either date, whether or not that dismissal was unfair?*

3. *If he was unfairly dismissed, whether or not he is entitled to any compensation from the respondents and, if so, in what amount? Taking into account any contributory conduct by the claimant, whether or not he had mitigated his losses, or any Polkey reduction, and whether or not any compensatory award should be adjusted for either party's unreasonable failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures.*

Victimisation on Grounds of Race

4. *Whether or not the claimant was victimised in terms of Section 27 of the Equality Act 2010 by the Respondent's Director on 17 September 2018?*

5. *Whether or not, in alleging that the respondents had contravened the Equality Act 2010, being the "protected act" relied upon by the claimant in his victimisation claim against the respondents, the claimant was making a false allegation in bad faith, and thus, there is (as the respondents contend) no protected act to rely upon, given Section 27(3) of the Equality Act 2010?*

6. *Whether or not, if the claimant was dismissed on 17 September 2018 (which the respondents deny) the reason for his dismissal on that date was because he had raised a claim for race discrimination against the respondents in May 2018?*

7. *In the alternative, whether or not his dismissal on 12 December 2018 (which the respondents submit was on the grounds that he was AWOL from work) was for that reason stated by the respondents, or because he had raised a claim for race discrimination against the respondents in May 2018?*

Unlawful Deduction from Wages

8. *Whether or not, as the respondents contend, and the claimant denies, any claim for unlawful deduction from wages prior to 28 February 2018 is time-barred and thus not within the jurisdiction of the tribunal?*

9. *Whether or not, as the respondents contend, and the claimant denies, there was a verbal agreement in place between the parties constituting*

a variation, through custom and practice, to the terms of the claimant's written contract of employment with the respondents, as regards payment of his wages?

10. Whether or not the respondents have unlawfully deducted sums from the claimant's wages due and payable and, if so, on what dates and what amounts?

11. To ascertain the monies (if any) owed to the claimant by the respondents, and the extent to which (if at all) the respondents are entitled to recover training expenses and costs of abuse of telephone calls from any monies due to the claimant.

Working Times Regulations (Holiday Pay)

12. Whether or not the respondents owe any monies to the claimant in respect of holiday pay accrued but not taken as at the effective date of termination of his employment, being either 17 September 2018 (as argued by the claimant) or 12 December 2018 (as argued by the respondents) and if so, in what amount?

Findings in Fact

60. We have not sought to set out every detail of the evidence which we heard nor to resolve every difference between the parties, but only those which appear to us to be material. Our material findings, relevant to the issues before us for judicial determination, based on the balance of probability, are set out below, in a way that is proportionate to the complexity and importance of the relevant issues before the Tribunal.

61. At paragraphs 3(a) to (ff) of the claimant's written outline closing submission, produced to us by the Law Clinic on 12 July 2019, at pages 1 to 4 of 17, we

were asked to make certain findings in fact. We have taken those proposed findings into account, but not considered ourselves bound by them, as our findings in fact set forth below in these Reasons, at paragraph 62, are more extensive, having regard to our assessment of the whole evidence led before us, including the documents lodged by parties to which we were referred in evidence at this Final Hearing.

62. On the basis of the sworn evidence heard from the two witnesses led before us over the course of this Final Hearing, being the claimant, and Dr Wilson for the respondents, and the various documents in the Bundles of Documents provided to us, the Tribunal has found the following essential facts established: -

Parties

1) The claimant, who is of Iranian ethnic and national origin, was formerly employed by the respondents as a resourcer and recruitment consultant.

2) The respondents are a private limited company. Although registered as a company in England & Wales, company number 04825653, and with a registered office there, in London, they operated from an office in Glasgow, where the claimant was employed, line managed by the respondents' director, Dr Karen Wilson.

Claimant's Employment by the Respondents

3) The claimant commenced employment with the respondents on a temporary basis in February 2015 and subsequently signed a permanent contract on 9 November 2015 (see page 135 of the joint bundle). Signed on 9 November 2015 by Dr Wilson for the respondents, and by the claimant, the claimant accepted an

amendment to his contract of employment by updating it to permanent employment.

4) By formal agreement entered into between the parties, signed on 9 November 2015 by Dr Wilson for the respondents, and by the claimant, (see pages 136 to 147 of the joint bundle), the claimant's date of commencement of continuous employment was stated to be 30 November 2015.

5) His ET1 claim form stated he started on 9 November 2015, while the respondents' ET3 response stated 1 December 2015 was the start date. The Tribunal finds, as per the written contract of employment, that the claimant's start date with the respondents, for the purposes of continuity of employment, was 30 November 2015.

6) On 12 February 2019, the respondents issued the claimant with a P45 form dated that date, giving 31 December 2016, as his leaving date, and showing total pay to that leaving date of £15,288.94. A copy of that P45 was produced to the Tribunal at page 223 of the joint bundle.

7) Notwithstanding the issue of that P45, giving 31 December 2016, as the claimant's leaving date, the respondents, at this Final Hearing, did not dispute that the claimant had continuity of employment with them from 30 November 2015, being the start date of his permanent contract of employment, although Dr Wilson insisted that he did not start work until 1 December 2015.

8) When Ms Mohammed, the respondents' representative, lodged a response with the Tribunal, on 28 November 2018, paragraph 1 of that response, as produced to the Tribunal at page 133 of the joint bundle, stated:

"***Medhi Saki (MS) commenced full time employment with Odyssey Enterprises Ltd (OE) on December 1 2015. There have been two periods of employment; the first from 1st December 2016*** (sic) ***until December 31st 2016 when a P45 was issued. A second period of employment commenced on January 1 2017 and was terminated with his dismissal on December 12 2018. A second P45 was issued on termination of this employment. This claim relates to the second period of employment from January 2017. Correspondence from HMRC confirms the termination of the first employment in December 2016."***

9) This assertion of two distinct periods of employment was not made by the respondents in either of the two ET3 responses lodged with the Tribunal in reply to the two separate claims brought by the claimant against the respondents. Further, no correspondence from HMRC, as referred to in that correspondence from Ms Mohammed on 28 November 2018, was produced by the respondents for the Tribunal at this Final Hearing.

10) In that written contract of employment, the claimant's normal working hours were specified as 9.00am to 17.00pm with one thirty-minute break and such other rest breaks as may from time to time be designated by the employer, to be taken as directed by the employer, and, given the nature of the employer's work, the claimant was expected when required to work such additional time as might be required by the employer for him to properly fulfil his duties.

11) Ordinarily, the written contract of employment provided that there was no payment for overtime in connection with the claimant's employment. At that time, on commencement of permanent employment with the respondents, his normal working hours were 40 hours per week.

12) The claimant was contracted, at clause 5.1 of that written contract of employment, to be paid £20,000 per annum, payable monthly in arrears by bank transfer or cheque at the employer's discretion on the last Friday of each month (see page 138 of joint bundle). That equates to a gross monthly salary of £1,666.66.

13) By clause 5.2, it was provided that: "***Pursuant to sections 13-27 of the Act, the Employer shall be entitled to deduct any sums owed by you to the Employer from your pay."*** The Act was defined as the **Employment Rights Act 1996**.

14) By clause 7, his annual leave entitlement was stated to be 28 days per year inclusive of public holidays, and the leave year ran from 1st January to 31st December in any one year. Clause 7.6 provided that any unused annual leave entitlement may only be carried forward to the following annual leave year with the advance agreement of the Managing Director.

15) If, on the termination of his employment, the claimant had exceeded his accrued annual leave entitlement, the value of such excess, calculated by reference to clause 7.4 (accruing at the rate of 1/12th of annual entitlement for each complete calendar month of service) and his salary at that time, might be deducted by the employer from any sums due.

16) By clause 9, it was provided that the respondents did not operate a pension scheme applicable to the claimant's employment, but he would be entitled to participate in any pension arrangement which the employer might subsequently introduce.

17) The claimant's employment was to continue, per clause 10, until it was terminated by either party giving to the other not less than 4 weeks' notice, and that any notice of termination whether given by the claimant or the employer must be in writing.

18) At clause 11, (see page 129 of the joint bundle), there was provision made about training:

> "***The Employer will endeavour to provide such training as it deems to be appropriate for all personnel to enable them to carry out their duties to the highest possible standards. The employer reserves the right to require repayment of any costs to third parties it has expended for training where such training is not mandatory and the employee leaves the employment of the Employer within six months of completing the relevant training."***

19) Clause 22, which reserved the employer's right to make changes in writing to any of the claimant's terms and conditions of employment, provided that the claimant would receive not less than one month's notice of any significant changes, and he would be deemed to have accepted the same unless he notified the employer in writing of any objection to the same before the expiry of that notice period.

20) The claimant did not receive any variation to his contract in writing up to the date of his dismissal. The claimant accepts that there was a verbal variation to his contract on or about May 2018 when his hours were reduced to 16 per week.

21) In his ET1 claim form, see pages 6 and 8 of the joint bundle, the claimant stated that he worked on average 40 hours per week, for which he was paid £1,666 monthly (gross) pay before tax, and £1,397.50 (net) normal take home pay.

22) When the respondents' ET3 response was lodged, by Dr Wilson on 5 July 2018, see page 16 of the joint bundle, she stated that the claimant's hours were 16 per week, and not 40, and that the earnings details supplied by him were incorrect – she did not,

however, specify what she asserted were the correct details for 16 hours per week.

23) In the additional information to her ET3 response, see page 22 of the joint bundle, Dr Wilson stated that the claimant had reduced his working hours to 16 per week, without negotiation, in February 2018.

24) When, on 25 October 2018, the respondents' representative, Ms Mohammed, provided to the Tribunal her response to the claimant's Schedule of Loss, at paragraph (8) thereof, it was stated that: "***The claimant reduced his working week to 2 days a week in March 2018. It was at that point that his weekly income became paid for 2 days work per week – 16 hours per week at £10 per hour."***

25) While, Dr Wilson, the respondents' director, in her email to the claimant, on 15 October 2018 (see page 320 of the joint bundle) referred to the claimant being in "***breach of contract***", by reducing his weekly hours from 40 to 16, over the last 6 months, the Tribunal finds that this was a consensually agreed variation, from May 2018, and not a unilateral variation by the claimant.

26) By amendment to the respondents' ET3 response, intimated on 18 February 2019, and allowed by the Tribunal on 19 February 2019, when allowing the claimant's amendment to the ET1 claim form, the respondents pled as follows:

"(1) The Respondent submits that there was a custom and practice in place where there was a discussion once the payslip was generated and an agreement was reached as to how much was paid. The respondent would then make payment. There is sufficient evidence of the alleged custom and practice to allow the court to infer that both employer and employee would regard themselves as bound by the practice,

notwithstanding the absence of any express provision to that effect in any individual employment contract. That conclusion is likely only to be justified where the practice is "notorious, certain and reasonable" although notoriety in this context is to be taken to mean no more than a sufficiently widespread knowledge and understanding of the practice. The arrangement was also long standing. Patel v De Vere group Ltd Case no: IMA4009."

27) When the claimant's representatives from the Law Clinic responded to the respondents' custom and practice argument, by the claimant's response intimated on 19 February 2019, it was denied by the claimant that there was in place a practice whereby a discussion ensued further to the issuing of a payslip as to how much he was to be paid each month.

28) It was explained, in that claimant's response, that this was never the matter of express agreement and / or custom and practice between the claimant and the respondents The claimant denies being aware of any such practice, and at no point when he was raising concerns with Dr Wilson regarding his pay was he advised by her, or anybody else on the respondents' behalf, that this alleged custom and practice was the reason for inconsistencies in his pay, until the amendment to the respondents' ET3 response was intimated on 18 February 2019.

29) The Tribunal finds, on the evidence led at the Final Hearing, that there was no such custom and practice. Indeed, the arrangement suggested by the respondents flies in the face of the clear and express provisions in the parties' written contract of employment, and there was no written agreement between the parties varying those salary payment arrangements.

Claimant's Wages

30) The claimant was initially paid his monthly net salary in accordance with his contract of employment. His gross basic monthly salary was £1,666.66, and he believed that he should have received net pay of £1,547.30, as confirmed in his grievance letter to the respondents' Dr Wilson dated 23 March 2018, copy produced to the Tribunal at page 302 of the joint bundle.

31) In his ET1 claim form, see page 8 of the joint bundle, the claimant stated that his net monthly salary should have been £1,397.50, being £1,666.66 gross, less tax @ £149.80, and NI @ £119.36, producing £1,397.50.

32) The claimant received payslips from the respondents contemporaneously with being paid his salary until March 2017. He would receive these payslips by email. He noted that his pay had changed when the amount received into his bank account was not the amount that he was entitled to from the respondents. He began to receive variations in his salary payments which were also paid at odd dates from March 2017 until September 2018.

33) Inconsistencies arose in the payment of the claimant's wages from March 2017 when his payments became erratic, and they were not always made on the last Friday of the month, as per his written contract of employment. It was because of the erratic nature of payments that the claimant raised his grievance with the respondents' director Dr Wilson, verbally, and by formal letter of grievance.

Claimant's Grievance and Complaints re Unpaid Wages

34) In that grievance letter, dated 23 March 2018, the claimant stated:

"***I am sending this letter to raise a formal written grievance about your failure to pay my full salary on time from the period of March 2017 until end of March 2018. I hope in doing so we can deal with the issue quickly and amicably. I have worked for Odyssey Recruitment for 3 years and I month and my contract states that my salary is £20,000. My monthly net salary should be £1,547.30. I have raised this grievance verbally every week and was assured that my full monthly salary and the previous money owed would be deposited into my account. Since March 2017 I have not been paid my monthly salary on the last Friday of the month, as agreed in my contract. Over this period, I have received inconsistent payment totalling £13,237 for 2017. I am owed £5,327 from 2017, £1,347.390 for January 2018 and £547.30 for February 2018. I also ask you confirm that you have paid all my national insurance and pension contributions throughout my employment. If I am not paid the full amount of £7,221.60 that I am currently owed by the end of March 2018 I will have no choice but to seek legal recourse through an employment tribunal and the Advisory, Conciliation and Arbitration Service (Acas). As a consequence of the failure to pay my salary myself and my wife have had financial difficulties and have been under a huge amount of stress during her pregnancy. I have also occurred*** (sic) ***debt due to my inability to pay my bills. I would ask that you arrange a formal meeting as a matter of urgency to talk this through with you at a convenient time and place."***

35) At this Final Hearing, Dr Wilson denied receipt of the claimant's letter of grievance, and explained that, for that reason, there was no written response by her to its terms. She did not dispute, however,

that the claimant had, from time to time, spoken to her about not receiving his full salary at the end of each month.

36) The claimant and respondents were unable to agree as to the extent of the sums unpaid to the claimant. The claimant raised the issue regarding his unpaid wages with Dr Wilson via email, dated 10th May 2018 (see page 300 of the joint bundle). He explained that he was "***in a very difficult situation and I really need my salary to pay bill***". This followed upon ACAS early conciliation between 5 April and 5 May 2018 (see page 1 of the joint bundle.)

37) Further, in another email from the claimant to Dr Wilson, sent at 11:12 on 16 May 2018, and entitled "***Salary payments delay***", copy produced at page 342 of the joint bundle, the claimant stated: ***"I have calculated my all*** (sic) ***salaries which I have to receive in my bank account but have not received yet. The amount is about £9,850.34 and if I don't revive*** (sic) ***that amount of salaries by 5pm today I will go and take next step which is solicitor and employment tribunal, I had talk with a solicitor at Livingston*** (sic) ***Brown and I fully respect you and I deserve to be respected and have my salaries…. You have a contact from ACAS"***

First Tribunal Claim

38) The claimant raised proceedings in the Employment Tribunal relating to unlawful deductions on 30 May 2018 (see page 2 of the joint bundle). As he explained, at section 8.1 of his claim (at page 7 of the joint bundle), the claimant there stated: ***"I am claiming for my national insurance and tax which my manager has not pied*** (sic) ***for several month".***

39) As the claimant was concerned that he was being treated less favourably due to his race in respect of unlawful deductions, he also

included a claim for race discrimination at that time. He did so in good faith. The claimant continued in the respondents' employment at the time of submitting that first ET1.

40) Further, at section 8.2, the claimant further explained, see page 7 of the joint bundle, that: "I ***have asked Dr Karen Wilson so many times to pay my salary also pay tax and national insurance and she has paid some part of my salary not full amount I claim she should pay my full salary and tax and national insurance."***

41) After that first Tribunal claim had been defended by Dr Wilson for the respondents, by ET3 response lodged with the Tribunal on 5 July 2018, the claimant texted Dr Wilson, on Friday, 17 August 2018, at 08:09, copy produced to the Tribunal at page 303 of the joint bundle, where he stated that: "I ***have been asking you for so many times for my salary and I'm very tired".*** By her reply, that same day, Dr Wilson responded saying: "***Hi Mehdi. I'm working out a payment plan and start from next week."***

42) No payment plan was thereafter agreed between the parties, despite an email exchange between the respondents' director, Dr Wilson, and the claimant between 22 and 31 August 2018, as per the copy emails produced to the Tribunal at pages 304 to 307 of the joint bundle.

Claimant's Dismissal by the Respondents on 17 September 2018

43) At this Final Hearing, the parties were in dispute as to whether or not the claimant was dismissed by Dr Wilson on Monday, 17 September 2018. On the previous Friday, 14 September 2018, both parties had attended the Employment Tribunal for a Case Management Preliminary Hearing before Employment Judge Ian McPherson.

44) The respondents submit that there was no dismissal on 17 September 2018, as alleged by the claimant, nor any victimisation of him on grounds of race, and that the claimant was thereafter fairly dismissed by them on 12 December 2018, Dr Wilson having sought to engage with the claimant who was AWOL and get him to a disciplinary hearing.

45) On the basis of the evidence heard and accepted by the Tribunal, we find, on balance of probability, that Dr Wilson spoke to the claimant, on 17 September 2018, in the terms complained of by the claimant, namely Dr Wilson told the claimant that "***there is no more work here for you anymore and because you took me to the Employment Tribunal you have to leave this office."***

46) Further, we find that, when the claimant explained to Dr Wilson that he had taken her to the Employment Tribunal because she had not paid his wages, Dr Wilson continued by saying ***"you accused me of racism, you took me to the Employment Tribunal. No one will give you a job in Glasgow, even Marks and Spencer's because there will be a record of your tribunal. You have to leave here."***

47) Having been spoken to in those terms by Dr Wilson, the claimant left the respondents' office. He believed that he had been dismissed by Dr Wilson. While the respondents did not thereafter issue him with any letter of dismissal, nor issue him with any P45 leaving certificate for HMRC purposes giving 17 September 2018 as his leaving date, the Tribunal finds that the claimant was dismissed by Dr Wilson on 17 September 2018, and that that dismissal was unfair.

48) There was no potentially fair reason for dismissal given, and the claimant was dismissed without notice or due process. As such, his dismissal was substantively and procedurally unfair. It was not

reasonable, in all the circumstances, to have dismissed the claimant at that stage.

49) Further, on the evidence before the Tribunal, we find that the claimant's dismissal on that date also constituted an act of victimisation by the respondents against the claimant, as the reason for his dismissal by Dr Wilson was related to the fact that the claimant had done a protected act, in good faith, by raising a Tribunal complaint of race discrimination against the respondents in May 2018. The Tribunal is satisfied that this earlier complaint of racial discrimination brought by the claimant against the respondents was a material factor in Dr Wilson's dismissal of the claimant on 17 September 2018.

50) As a result of his unfair dismissal, and victimisation by Dr Wilson, on 17 September 2018, the Tribunal is satisfied, on the evidence led before the Tribunal, that the claimant is entitled to financial compensation, including compensation for any injury to feelings.

Events after 17 September 2018

51) The claimant consulted his legal advisor after leaving the office, on 17 September 2018, because he believed that he had been dismissed (see pages 54 and 319 of the joint bundle), being the claimant's email to Ms Mohammed on 14 November 2018, and his email of 15 October 2018 to Dr Wilson and Livingstone Brown.

52) Further, on 17 September 2018, the claimant notified ACAS that he was the prospective claimant in further Tribunal proceedings against the respondents. ACAS issued an early conciliation certificate to him on 17 September 2018 by email. A copy of that ACAS EC certified issued to him on 17 September 2018 was produced to the Tribunal at page 74 of the joint bundle.

53) The claimant started to look for alternative employment on and after 19 September 2018. He produced details of his job searches in his Supplementary Bundle produced to the Tribunal.

54) On 20 September 2018, Dr Wilson contacted the claimant, by text message, to ask him to "***come to work***" the following day, Friday 21 September 2018 (as per page 315 of joint bundle). The claimant believed that this was to discuss the wages he was owed, not to return to work because he believed he had been dismissed.

55) The claimant apologised on the Friday morning, 21 September 2018, by text message, at 08:44, to Dr Wilson saying he could not come as he had a GP appointment, as he was not well, and then an interview in Edinburgh, but by further text message, at 17:51, he advised Dr Wilson: "***Hi Karen. I am not well at all I can't cope with my situation any more am in 5000 thousand pound debt. I have family issue now... have an appointment with my GP next week again."***

56) Thereafter, by text to Dr Wilson at 05:05 on Monday, 24 September 2018, copy produced at page 316 of the joint bundle, the claimant stated that he hadn't slept, but he would text her if he could come in. He texted her again, at 10:42 (see page 317) saying he was looking after his child, and he offered to meet Dr Wilson at Patisserie Valerie for hot chocolate and a sandwich. Dr Wilson replied, asking the claimant to come to the respondents' office at 14:30.

57) There was no meeting between the claimant and Dr Wilson on 24 September 2018. The claimant, having been seen by his GP at Govanhill Health Centre on 26 September 2018, he obtained a sick note from his GP, detailing ***"stress"*** as the reason for him not being fit to work.

58) A copy of the Med 3 fit note signed by the claimant's GP, on 26 September 2018, and covering the period from that date to 12 October 2018, was produced to the Tribunal at page 314 of the joint bundle.

59) When the claimant went to the respondents' office on 26 September 2018 to get a copy of his payslips printed off, he showed that GP fit note to Dr Wilson, to show his situation as a result of her dismissal of him, and not for the respondents as his employer, She took the GP fit note, and kept it.

60) There was no dialogue between him and Dr Wilson where he stated that he had been dismissed, and Dr Wilson appears to have believed that he was still an employee, as she subsequently wrote to him requesting a reason for his further absence, as no further sick line was presented by him after 12 October 2018.

61) The claimant then went to France on holiday. On 4 October 2018, having been assessed again by his GP, the claimant obtained a further sick note for the respondents, again detailing ***"stress"*** as the reason for him not being fit to work, but this time covering the period from 17 September 2018 to 12 October 2018. A copy of this further Med 3 fit note signed by the claimant's GP, on 4 October 2018, was produced to the Tribunal at page 313 of the joint bundle. The claimant advised the Tribunal that he gave that fit note to the Job Centre. While he claimed for Universal Credit, he advised the Tribunal that he did not receive any State benefits. He was unemployed and searching for new employment.

62) While the respondents had receipt of the claimant's Med 3 certificate, from 26 September 2018, when Dr Wilson took it, and kept it, when the claimant visited their office, the Tribunal would have expected them to pay him statutory sick pay ("SSP") during his

medically certificated absence. However, there was no evidence presented to the Tribunal that the claimant received any SSP.

63) SSP is not shown on the payslip for September 2018 produced by the respondents, at page 210 of the joint bundle, which the claimant did not receive at that time. There were no further payslips provided, for October to December 2018, despite the respondents' assertion that he was AWOL after 12 October 2018, but not dismissed until 12 December 2018.

64) In terms of the parties' written contract of employment, at clause 8.1 (copy produced at page 129 of the joint bundle), the entitlement was up to 28 weeks' SSP, subject to the memorandum on SSP at part 3 of the schedule to the contract (see pages 146 and 147).

65) On 28 September 2018, Livingstone Brown, solicitors, acting for the claimant, had written to the Tribunal, with copy sent to Dr Wilson for the respondents, stating that the claimant had advised them that he had been dismissed from his employment with the respondents, and, as the claim then did not include any claim for unfair dismissal, it may be that the claimant required to make an application to amend the claim.

66) When Dr Wilson emailed the claimant, on 5 October 2018, as per copy produced at pages 308 and 309 of the joint bundle, and replicated at pages 349 and 350, thanking him for coming to the office that day, she attached payslips for April 2017-April 2018, and April 2018 – September 2018. She stated that total pay due for 2017/18 was £13,278.74, and £3,828.24 for 2018/19, totaling £17,106.98, less £15,093.44 paid to him, leaving an amount due of **£2,013.54**. She asked him to review and revert with any comments.

67) On 11 October 2018, as per copy email produced at pages 348 and 349 of the joint bundle, the claimant thanked Dr Wilson for sending

the payslips to him, and he asked her to send an excel spreadsheet for each month of 2018.

68) She sent him a spreadsheet for the 2 financial years April 2017-2018 and April 2018-2019, each year on a separate page. This spreadsheet was not included in the joint bundle along with Dr Wilson's email of 11 October 2018 at page 347 of the joint bundle.

69) The Tribunal has noted the documents disclosed by Ms Mohammed, on 28 November 2018, as per her email to the Tribunal, copied to the claimant, at page 116 of the joint bundle, and the Tribunal has noted that there are various excel spreadsheet summaries for different years produced at pages 118 to 132 of the joint bundle.

70) Contrary to the email of 5 October 2018 from Dr Wilson, at pages 308 and 309 of the joint bundle, stating that the amount due to the claimant was **£2,013.54**, the spreadsheet produced to the Tribunal, at page 125 of the joint bundle, summarising the claimant's pay from December 2015 to September 2018, shows total gross pay due of £49,053.58, giving total net pay of £41,862.72, with the claimant having been paid a total of £36,709.16, leaving a difference of **£5,153.56**. However, the Table 1 provided by Ms Mohammed stated that the deficit was **£6,526.24**.

71) The respondents disagreed with the claimant's figures, stating they did not reflect his payslips, and in attaching a spreadsheet outlining the respondents' position on payments made and monies outstanding, Ms Mohammed stated: ***"The accountant reviewed the figures and agrees the spreadsheet I prepared is correct."***

72) The respondents led no evidence from their accountant before this Tribunal, nor did they lodge any contemporary payroll records, or record of payments made to HMRC in respect of income tax and

national insurance contributions paid on the claimant's earnings in their employment.

73) The claimant thereafter specified in an email to the respondents' Dr Wilson dated 15 October 2018 his belief that he had been dismissed, on 17 September 2018, and that he suffered and had continued to suffer deductions from his wages (see page 319 of joint bundle).

74) The claimant stated:

> "***You very clearly dismissed me from my employment with you on the 17th of September 2018. On the morning of the 17th September, you told me that I should leave as there was no work for me and I had taken you to the employment tribunal. You made no mention of this being a temporary situation and me returning to work the next day. In fact, had there been a situation where there was no work for a day, this would be very unusual for a business, but I would expect that you would present this as an additional holiday due to an error with work planning. I contacted my lawyer on the day and detailed what you had said, they confirmed that this a clear case of unfair dismissal. Furthermore, if you believe there had been a misunderstanding, as you assert now, you did not contact me the following day to ask me why I was not at work. I received your email today, the 15th of October, in which you asked me whether I will return to work with Odyssey Enterprise Limited. I am confused why you would ask me to return to a job which you unfairly dismissed me from and for which I am currently owed £9,200. I hope that we will still be able to settle this matter outside of court."***

75) Dr Wilson, the respondents' director, replied to the claimant's email of 15 October 2018, by email to him later that day, copy produced to the Tribunal at pages 320 and 321 of the joint bundle.

76) Dr Wilson stated:

> "***You were not dismissed from work on September 17th and you were asked to return the following Monday (September 24th). You did not appear at work and instead sent text messages at 5AM stating that you were just going to bed, and again, at 11AM stating that you were going to Patisserie Valerie on West Nile street for hot chocolate and sandwiches and asking me if I would like to join you there. You followed that up with a sick note dated September 26th claiming "Stress" and then took off for holiday to France. Upon your return from France you have visited the office, dressed in a suit and looking very fit. You stated that the sick note covered you until October 12th, after which you would seek another one, despite your evident healthy and fit appearance. If you claim that you were dismissed, why have you submitted a sick note to cover your leave from work? According to the payslips with which you have been provided, you are not due a payment of £9200 and I would ask you to submit calculations of how you have reached that figure which amounts to over 6 months' net pay for a 40 hour week. Over the last 6 months, you have been in breach of your contract, working just 16 hours per week instead of your contracted 40 hours. As you have not turned up for work today, you will be considered as AWOL."***

77) Pages 320 and 321 of the joint bundle show that the email exchange on 15 October 2018 was 3 pages, but only pages 1 and 3 of 3 have

been produced to the Tribunal. Accordingly, it is not known by the Tribunal what Dr Wilson stated after "***AWOL***" at the bottom of page 320.

78) On 14 November 2018, when emailing Ms Mohammed for the respondents, with copy to the Tribunal (see page 54 of the joint bundle), the claimant stated as follows:

"(1). Please see the attached file is brake down the figures. There had been no investigation into the queries I raised regarding the payments. I have a right not to suffer unauthorised deductions from my wages under section 13 of the Employment Rights Act 1996. …

(3) I was dismissed on 17th on September 2018 and I informed Ms. Allen (who was my lawyer at that time) in the same day: I went to work with Odyssey Enterprise Ltd. After I began to work, at 8.50, my manager approached me at my desk and said: "There is no work here for you anymore and because you took me to the employment tribunal you have to leave this office." I explained that I took her to the tribunal because she has not paid my wages. She then continued, "You accused me of racism, you took me to the employment tribunal. No-one will give you a job in Glasgow, even Marks and Spencer's because there will be a record of your tribunal. You have to leave here." I explained that I had been loyal to the business and had worked very hard. I then left the office. The exchange was verbal, and I was given no written statement or confirmation of the termination of my contract. I had been told to leave at 9:15 and this had never happened to me before. I was given no warning before I was told to leave the Odyssey enterprises ltd…..".

79) In a spreadsheet attached to his email of 14 November 2018, the claimant quantified his unpaid wages at **£8,851.58**. The copy email of 14 November 2018, produced at page 54 of the joint bundle, did not include that spreadsheet, but the Tribunal has it in the casefile held by Glasgow ET, and we have had regard to it. It listed, by every month, from January 2017 to September 2018, the salary which the claimant claimed to be entitled to, the amount (if any) paid, and the amount not yet paid.

80) On 14 November 2018, when replying to the respondents' representative, Ms Mohammed, with copy to the Tribunal, as produced at page 54 of the joint bundle, the claimant stated that: ***"(7) The payments became irregular and hard to depend on in March 2017. I raised this with my employer, Odyssey enterprises ltd, on many occasions and that Dr Karen Wilson promised she would sort it, I was patient but could accept this no further in May 2018 when I raised a written grievance. The fact is that Dr Karen Wilson ignored me, and I am victim and discriminated because of the ignorance of Dr Karen Wilson…"***

81) The Tribunal understands the claimant's reference there to a written grievance in May 2018 to be either the reference to the Employment Tribunal (preceded by ACAS early conciliation), or the written grievance letter of 23 March 2018.

Claimant's Dismissal by the Respondents on 12 December 2018

82) The claimant received an "***AWOL from employment"*** letter dated 16 October 2018 from Dr Wilson (see page 322 of the joint bundle), noting that his sick note expired on 12 October 2018, that he had not returned to work, and that she had been unable to contact the claimant, despite attempts to phone and leave messages for him, but there had been no reply, and asking him to make contact

regarding his position. She stated that he would not be paid for days when he was scheduled to work, but he did not appear in the office, and he did not make contact with a reasonable excuse for his non-attendance.

83) Subsequently, the claimant received a "***Notice of Disciplinary Hearing*** – ***AWOL"*** letter dated 16 October 2018 from Dr Wilson (see page 324 of the joint bundle), but posted on 16 November 2018 (see page 323 of the joint bundle), referring to his failure to reply to her earlier letter of 16 October 2018, and giving notice that he was required to attend a disciplinary hearing, "***to assess the reasons for your absence from work"*** , to be held at the respondents' offices on 28 November 2018, and asking him to confirm his attendance by 23 November 2018. He was advised that he might be accompanied by a representative at the disciplinary hearing.

84) That original Notice of Disciplinary Hearing letter was thereafter followed by another on 28 November 2018 (see page 325 of joint bundle), sent by post and email to the claimant, where Dr Wilson noted that the claimant had not replied to her recent letter, and stated that the claimant was required to attend a disciplinary hearing rescheduled , again to be held at the respondents' offices, but now on 5 December 2018, and asking him to confirm his attendance by 30 November 2018. He was again advised that he might be accompanied by a representative at the disciplinary hearing.

85) As the claimant did not respond to Dr Wilson's letters of 16 and 28 November 2018, and he did not attend the disciplinary hearings previously arranged for him, Dr Wilson wrote to him again, by post and email, on 5 December 2018 (see page 326 of the joint bundle) noting that the claimant had not replied to her recent letters.

86) She stated that the claimant was required to attend a disciplinary hearing rescheduled, again to be held at the respondents' offices,

but now on 12 December 2018, and asking him to confirm his attendance by 7 December 2018. He was again advised that he might be accompanied by a representative at the disciplinary hearing.

87) The claimant did not attend the rescheduled disciplinary hearing arranged for 12 December 2018. Accordingly, a "***Termination of Employment***" letter dated 12 December 2018 (see page 327 of the joint bundle) was sent to him, by post and email, by Dr Wilson.

88) In that letter of termination, Dr Wilson wrote as follows: ***"The decision has been taken to end your employment with Odyssey Enterprises Ltd by reason of absence from work without leave (AWOL) for two months and failure to attend three disciplinary hearings. This letter is formal notice of the end of your employment."***

89) Dr Wilson's letter of 12 December 2018 further advised: ***"The following arrangements apply to the end of your employment: (1) P45 has been issued. (2) Please hand back any company property and follow the usual procedures for claiming expenses. (3) Your final salary payment will be made on December 31st less normal deductions of tax or national insurance contributions. If you owe Odyssey Enterprises Ltd and money, by the termination date, this will be deducted from your final salary payment. (4) You will have until December 27th 2018 to appeal this decision. To do so please write to me at the above address giving full reasons for contesting the decision. Any appeal will not halt your dismissal, but if it is upheld, you will be reinstated with retrospective effect and with no loss of pay."***

90) The respondents issued the claimant with a P45 form dated 13 December 2018, giving 12 December 2018, as his leaving date, and

showing total pay to date of **£4,024.10**. A copy of this P45 was produced to the Tribunal at page 230 of the joint bundle.

91) The claimant did not respond to any of these letters from the respondents, from 16 October to 12 December 2018, as he believed that he was dismissed and he was no longer in the employment of the respondents, after 17 September 2018.

92) The claimant believed that he had been summarily dismissed by Dr Wilson, on 17 September 2018, without notice or due process, as he regarded her actions on that date as amounting to an express dismissal from the respondents' employment, and he had thereafter secured alternative employment from 26 November 2018.

93) The claimant did not appeal against Dr Wilson's decision of 12 December 2018 to terminate his employment. He advised the Tribunal that he could not trust her any more. He was not issued with any final salary payment by the respondents on or about 31 December 2018, or at all. He received no notification, by way of a final payslip, or otherwise, of any final salary payment due to him. He had last been paid by the respondents on 14 August 2018, when he received a payment of **£200**.

Second Tribunal Claim

94) The claimant presented his second claim to the Employment Tribunal, on 18 December 2018, as per the ET1 claim form produced to the Tribunal at pages 75 to 87 of the joint bundle. The detail of his claim was set out in a one-page, typewritten paper apart, at page 87 of the joint bundle. It was lodged following ACAS early conciliation on 17 September 2018, as per copy certificate lodged at page 74 of the joint bundle.

95) Dr Wilson lodged the respondents' ET3 response resisting that second claim on 16 January 2019, but a copy was not produced to the Tribunal in the joint bundle.

96) Instead, what was produced, at pages 88 to 96, was the typewritten ET3 produced on 16 January 2019 by Ms Mohammed. In coming to our decision, the Tribunal has referred to the casefile held by the Glasgow Tribunal office, and the copy of Dr Wilson's handwritten ET3, as accepted by the Tribunal on 17 January 2019.

97) The Tribunal having allowed amendment of the first ET1, on 18 February 2019, allowing addition of complaints of victimisation and for unpaid holiday pay, the complaint of race discrimination was withdrawn at the commencement of the Final Hearing, and the second claim was itself withdrawn, and **Rule 52** judgment dated 26, and issued to parties on 30 July 2019.

Claimant's Payslips from the Respondents

98) There were produced to the Tribunal two versions of payslips issued to the claimant by the respondents.

99) As explained in the respondents' response (submitted on 14 February 2019) to the claimant's further and better particulars, copy produced at pages 102 to 107 of the joint bundle, at paragraph (5) on page 4 of 6 (being page 105 of the joint bundle): "***There are 2 versions of the payslips submitted. The Respondent submits that the first version were draft only. The second version are the correct ones and these were the ones submitted to HMRC for PAYE."***

100) Version 1, dated from 29 February 2016 to 31 August 2018, were produced at pages 149 to 178 of the joint bundle. The first payslip dated 29 February 2016 shows gross monthly salary of £1,666.66,

and net pay of £1,547.30. Those same sums are shown on the payslip, dated 31 March 2016, which also shows total gross pay to date at £6,666.64. By 30 June 2016, it shows gross pay of £1,666.66, but net pay of £1,397.50. On 31 March 2017, gross pay is shown as £1,666.00, with net pay of £1,546.72. Total gross pay to date at 31 March 2017 is shown as £4,998.00.

101) On 26 April 2017, gross salary is shown as £1,666.00, with net pay of £1,331.48, including a deduction of £75 for course expenses. Subsequent eight months show gross pay of £1,666.00, with net pay of £1,406.28. On 31 January 2018, gross salary is £833.00, with net pay of £839.84, increasing to gross salary of £1,600.00 on 28 February 2018, giving net pay of £1,361.40, and reducing to gross pay of £833.00, and net pay of £840.04 on 29 March 2018, reducing further to gross pay of £640.00 at 30 April 2018, with net pay of £640.00. Total gross pay to date at 31 March 2018 is shown as £18,260.00.

102) The claimant's salary increases, on 31 July 2018, to gross pay of £800, with net pay of £788.24, with final payslip dated 31 August 2018 showing gross pay of £640, and net pay of £640.00. Total gross pay to date at 31 August 2018 is shown as £3,360.00.

103) Version 2, dated from 31 March 2016 to 28 September 2018, were produced at pages 179 to 201 of the joint bundle. Some of these versions show different amounts than in version 1, and there are not payslips produced for every month. The first payslip dated 31 March 2016 shows gross monthly salary of £1,666.66, and net pay of £1,547.30, as in version 1. Total gross pay to 31 March 2016 is shown as £6,666.64, as in version 1.

104) By 29 July 2016, the next payslip produced, it shows gross pay of £1,666.66, but net pay of £1,200.98, as in version 1. On 31 August 2016, it shows gross pay of £1,666.66, and net pay of £1,397.30, as

in version 1. On 31 October 2016, it shows gross pay of £1,666.66, and net pay of £1,397.50, as in version 1.

105) On 26 April 2017, gross salary is shown as £1,666.00, with net pay of £1,331.48, including a deduction of £75 for course expenses, the same as in version 1. However, for 31 May 2017, gross salary is shown as £1,666.00, with net pay of £1,331.48, including a deduction of £75 for course expenses, which is not the same as in version 1. It had no such deduction, and it showed net pay of £1,406.28. Also, for 30 June 2017, gross salary is shown as £1,666.00, with net pay of £1,331.28, including a deduction of £75 for course expenses, which is not the same as in version 1. It had no such deduction, and it showed net pay of £1,406.28.

106) On 31 July 2017, gross salary is shown as £1,666.00, with net pay of £1,331.28, including a deduction of £75 for course expenses, which is not the same as in version 1. It had no such deduction, and it showed net pay of £1406.28. Further, on 31 August 2017, gross salary is shown as £1,666.00, with net pay of £1,359.85, including employer and employee pension contributions of £46.43 and £38.69, which is not the same as in version 1. It had no such deductions, and it showed net pay of £1,406.28.

107) Thereafter, at page 188 of the joint bundle, there is yet another payslip dated 31 August 2017. Gross salary is shown as £1,666.00, with net pay of £1,331.28, including a deduction of £75 for course expenses, but with no employer and employee pension contributions of £46.43 and £38.69, as shown on version 2 at page 187, and year to date totals showing no pension contributions.

108) On 29 September 2017, gross salary is shown as £1,666.00, with net pay of £1,331.28, including a deduction of £75 for course expenses, which is not the same as in version 1. It had no such deduction, and it showed net pay of £1,406.28. Thereafter, on 31

October 2017, gross salary is shown as £1,666.00, with net pay of £1,291.30, including a deduction of £75 for course expenses, and deductions of £39.98 and £33.32 for employee and employer pension contributions, which is not the same as in version 1. It had no such deductions, and it showed net pay of £1,406.28.

109) Further, on 30 November 2017, gross salary is shown as £1,666.00, with net pay of £1,331.28, including a deduction of £75 for course expenses, which is not the same as in version 1. It had no such deduction, and it showed net pay of £1,406.28. Similarly, on 29 December 2017, gross salary is shown as £1,666.00, with net pay of £1,331.28, including a deduction of £75 for course expenses, which is not the same as in version 1. It had no such deduction, and it showed net pay of £1,406.28. Likewise, on 31 January 2018, gross salary is shown as £ 833.00, with net pay of £764.84, including a deduction of £75 for course expenses, which is not the same as in version 1. It had no such deduction, and it showed net pay of £839.84.

110) On 28 February 2018, gross salary is shown as £1,600.00, with net pay of £1,286.40, including a deduction of £75 for course expenses, which is not the same as in version 1. It had no such deduction, and it showed net pay of £1,361.40. Likewise, on 29 March 2018, gross salary is shown as £ 833.00, with net pay of £635.04, including a deduction of £75 for course expenses, and a deduction of £130 for telephone abuse, which is not the same as in version 1. It had no such deductions, and it showed net pay of £840.04.

111) The version 2 payslips produced for April to August 2018 are the same as those produced in version 1. However, the version 2 section of the joint bundle includes a final payslip dated 28 September 2018, at page 201 of the joint bundle, which shows

salary of £480 and "***correction***" of £17,639.76, producing net pay of **£18,119.76**.

112) That payslip shows total gross pay to date of £21,479.76, but with zero recorded against pension contributions. The claimant never received that final payslip from the respondents, nor any payment after the £200 received on 14 August 2018. As stated on the claimant's calculation, produced at page 115 of the joint bundle: "***This figure (£18119.76) is presumably an error. Neither the Claimant nor the Respondent has produced evidence of a bank transfer to support this."***

113) Further, there was also produced to the Tribunal, at pages 202 to 212 of the joint bundle, copy bank statements for the claimant, covering various dates, from 6 January 2017 to 17 October 2018, and showing payments paid into his bank account by the respondents. The last payment received by him from the respondents, on 14 August 2018, was **£200**.

114) Copy bank statements for the respondents, covering dates from 1 December 2015 to 6 October 2018, were produced to the Tribunal at pages 213 to 217 of the joint bundle, showing payments paid into the claimant's bank account by the respondents. The last payment sent by the respondents to the claimant, on 14 August 2018, was **£200**.

<u>Payments received by the Claimant</u>

115) At this Final Hearing, the parties were agreed as to the payments that the claimant received from the respondents in the period from March 2017 to September 2018.

116) In submitting an updated Schedule of Loss for the claimant, on 8 February 2019, the Law Clinic submitted a breakdown explaining

what they then quantified as unlawful deductions from wages amounting to **£7,610.42**. That breakdown was produced to the Tribunal at page 115 of the joint bundle.

117) At closing submissions, it was replaced by another version, submitted on 5 July 2019, seeking **£6,689.94** in respect of unlawful deductions from wages, as per an updated spreadsheet showing net wages due of £25,390.42, less net wages received of £19,037.66, leaving a difference of £6,689.94.

118) That document was produced to us as document 2, at page 3 of 56, in the claimant's supplementary Bundle lodged with the Tribunal on 19 July 2019.

119) On 28 November 2018, the respondents' representative, Ms Mohammed, produced a response to the claimant's Schedule of Loss, updated with a counter-explanation. This was produced to the Tribunal at pages 116 to 134 of the joint bundle.

120) At pages 133 and 134 of the joint bundle, the respondents stated, at paragraph (3), that the salaries due to the claimant were summarised in the P60 forms issued at the end of each financial year in April 6th 2017 and 2018, and that, from April 2018 until his dismissal (on 12 December 2018), the salary due is summarised in the final payslip issued in September 2018. The claimant received no final payslip from the respondents in September 2018, or December 2018.

121) In a Table 1 (Employment 01.01.2017 – 12.12.2018), the respondents stated that the gross pay due to 30th September 2018 was £27,098, and having paid £17,640.16, against net pay due of £24,166.40, the respondents calculated the deficit as **£6,526.24**.

122) Notwithstanding their assertion that the claimant had not been dismissed by them on 17 September 2018, as alleged by him, but

denied by them, the respondents did not provide calculations to 12 December 2018, which is the date they assert was the date of effective termination of the claimant's employment.

123) There were produced to the Tribunal, at pages 226 and 229 of the joint bundle, copy P60 end of year certificates for 2017 and 2018, issued by the respondents to the claimant for HMRC purposes, showing £4,998.00 pay in year to 5 April 2017, and £18,260.00 in tax year to 5 April 2018. These are the gross pay figures given in that Table 1.

124) While that Table 1 shows **£3,840** as gross pay in 2018/19 (6 April to 30 September 2018), the copy P45 issued to the claimant and dated 13 December 2018, copy produced at page 230 of the joint bundle, shows a leaving date of 12 December 2018, and total pay to that date of **£4,024.10**. The difference between these differing gross amounts was not explained to the Tribunal.

Deductions claimed by the Respondents

125) Further, in that same document, at paragraphs 4, 5 and 6, the respondents set forth their position as to annual leave, training expenses and telephone abuse. They calculated, in a Table 2, that the claimant was entitled to 9.3 days annual leave, and he had taken 9 days.

126) The respondents sought recovery of **£1,325.58** as training expenses, as per Table 3, and, without quantifying the amount to be deducted, referred to telephone abuse, being: "***MS used both mobile and office phones for his personal use making frequent lengthy international calls***", and referring to Vodafone costs, and Cloud Call costs, both unquantified.

127) There were produced to the Tribunal, at pages 233 to 299 of the joint bundle, various copy documents, being 4 Vodafone mobile phone bills to Dr Wilson dated 12 January 2017, 12 February 2018, 12 March 2018, and 11 April 2018, together with Synety phone records from October 2016 to September 2018, and (at pages 300/3011) an email from the claimant to Dr Wilson on 10 May 2018 at 17:06 about phone calls and payment.

128) As per the copy email of 10 May 2018, produced at page 300 of the joint bundle, entitled "***Fw: Re: Fwd: UNAUTHORISED CALLS FROM MOBILE PHONE",*** Dr Wilson's email to the claimant refers to him having previously been warned about unauthorised use of the office telephones, and that it had been drawn to her attention by Vodafone that the claimant had exceeded the limit of his mobile phone tariff on multiple occasions, and she attached the itemised bills supplied by Vodafone for the claimant's reference.

129) Dr Wilson had asked the claimant to go through those bills, referring in particular to a recent one, made outside of office hours, to the USA and costing almost £30. She sought his reply by 4 May 2018. He replied by email, on 5 May 2018, copy produced at page 341 of the joint bundle, saying: "***Sorry I used the phone, mistakenly I just sorry for it. I have stress at the moment and feeling unwell."***

130) By email to the claimant on 8 May 2018 (again see page 341), Dr Wilson advised him: "***This response is not acceptable. Please can you reply to the email I sent with the itemised Vodafone bills. Please go through these and state what you used the additional charges for."***

131) In his email reply of 10 May 2018, the claimant confirmed that he had checked the files attached by her and "***because I had no salary and wasn't able to pay my phone's bills and I used the phone which you mentioned cots*** (sic) ***£30 but as soon as my salary***

pays in I will pay this £30 I explained you last time. I am in a very difficult situation and I really need my salary to pay bill."

132) Further, in another email from the claimant to Dr Wilson, sent on 16 May 2018, copy produced at page 342 of the joint bundle, the claimant, having sought payment of the outstanding salaries due to him, also stated: "***If you pay all my salaries I will be able to pay £30 of phone cost which I have to pay you. I couldn't pay my phone's bills. I explained to you that I am in a very bad difficult financial time. You have a contact from ACAS."***

133) The parties were not agreed as to the respondents' entitlement to make "***course expenses***" deductions, as shown on the version 2 payslips, being deductions of £75 each shown on those 12 payslips dated 28 April 2017,31 May 2017,30 June 2017,31 July 2017,31 August 2017, 29 September 2017, 31 October 2017, 30 November 2017, 29 December 2017, 31 January 2018, 28 February 2018, and 29 March 2018. Those deductions total **£900**.

134) In the respondents' document, produced at pages 133 and 134 of the joint bundle, Table 3 (Training Expenses) stated: "***Clause 11.1 of employment contract permits recovery of training expenses which were incurred by the employee and not completed at the time of departure".*** The table itemised the training expenses claimed, and stated costs were shown on American Express statement.

135) The Table 3 itemised of expense and cost was as follows:

EXPENSE	**COST**
Social Talent Training Academy Programme	£995.58
Flights and accommodation British Airways	£230.00

Taxis and meals	£100.00
Total	**£1325.58**

136) There was produced to the Tribunal, at page 220, a copy of Dr Wilson's American Express account, dated 13 February 2016, showing a payment of £995.58, on 8 February 2016, to Social Talent.Co, Dublin.

137) At page 218, there was produced a copy of Dr Wilson's American Express account, dated 13 February 2016, showing a payment of £230.00, on 11 January 2016, to BA. Com UK, for flights in the claimant's name between Glasgow International and London Heathrow airports.

138) No vouching was produced to the Tribunal by the respondents for the taxis and meals claimed at £100.

139) At this Final Hearing, it was accepted by the claimant that he had taken part in training with Social Talent at the request of the respondents' director, Dr Wilson, in order to upskill the claimant, but he denied that it was mandatory training, and further denied that the respondents had any right to seek to recover costs from him.

140) The claimant stated that he was not liable to reimburse the respondents for any such training as the training he took part in was at the request of Dr Wilson and it took place more than 6 months before his dismissal by the respondents on 17 September 2018.

141) While the basis of how that amount of £1,325.58 was identified by the respondents as being due from the claimant as a lawful deduction from his wages has been explained by Dr Wilson at this Final Hearing, a deduction in that amount was not agreed in writing by the claimant before it was made by the respondents, and, contrary to the respondents' assertion that it was a proper deduction

in terms of the claimant's written contract of employment with them, at clause 11, the Tribunal finds that the respondents made an unlawful deduction of wages in the sum of **£900.**

142) The difference between the £1,325.58 claimed, and the £900 deducted, was not the subject of any deduction by the respondents shown on any payslips issued to the claimant.

143) Further, the parties were not agreed as to the respondents' entitlement to make "***pension contribution***" deductions, as shown on the version 2 payslip dated 31 August 2017 (employee @ £46.43, and employer @ £38.69), as per copy produced at page 187 of the joint bundle, although the similarly dated payslip, produced at page 188, showed no such deductions.

144) The parties were also not agreed as to the respondents' entitlement to make "***pension contribution***" deductions, as shown on the version 2 payslip dated 31 October 2017 (employee @ £39.98, and employer @ £33.32), as per copy produced at page 190 of the joint bundle, and the 29 March 2018 payslip, at page 195, showing year to date totals of those two amounts. No pension contributions are shown as having been deducted at any later date.

145) The claimant's position was that he was not a member of any pension scheme, and as he had not agreed to join a pension scheme, the respondents had no right to make deductions. If they did so, he was not clear who was the pension provider, and what were his entitlements to recover any contributions paid.

146) In the absence of fuller information from the respondents, to establish that they had the claimant's authority to justify them making an employee pension contribution deduction of £46.43, on 31 August 2017, and there being no evidence that it was agreed in writing by the claimant before it was made by the respondents, the

Tribunal finds that the respondents made an unlawful deduction of wages on that date in the sum of **£46.43.**

147) Finally, the parties were not agreed as to the respondents' entitlement to make "***telephone abuse***" deduction of **£130**, as shown on the version 2 payslip dated 29 March 2018, as per copy produced at page 195 of the joint bundle.

148) The basis of how that amount of £130 was identified by the respondents as being due from the claimant as a lawful deduction from his wages has not been established in evidence before this Tribunal, it was not agreed in writing by the claimant before it was made by the respondents, and with the exception of the sum of **£30** accepted by the claimant as being due by him, as per his emails of 10 and 16 May 2018 to Dr Wilson, as produced to this Tribunal, the Tribunal finds that the respondents otherwise made an unlawful deduction of **£100**.

Holiday Pay

149) The respondents deny any liability to the claimant in relation to holiday pay. The claimant sought 11 days not taken, quantified at £836.00, in the updated Schedule of Loss dated 5 July 2019, produced as part of his supplementary Bundle, but varied that in evidence to 13 days at £800.80.

150) Originally, in their 28 November 2018 response, at pages 133 and 134 of the joint bundle, the respondents stated that the claimant's annual leave entitlement for 1 January 2018 to 30 September 2018, taking account of his part-time work, was 9.3 days, and that he had taken leave on 9 days, being 6 days between 1 and 6 January 2018, 2 days on 13 and 14 March 2018, and one day on 21 August 2018.

151) However, in their 14 February 2019 response to the claimant's further and better particulars, produced to the Tribunal at pages 106 and 107 of the joint bundle, the respondents' position changed, and it was stated that the claimant had taken over the amount of holidays owed to him, and accordingly there is money owed back to the respondents for overpayment.

152) In the tabular breakdown, provided at paragraph (8) of that document, entitled "***Working Time Regulations***", it is stated that, taking account of his part-time work, the claimant's annual leave entitlement for 1 January 2018 to 30 September 2018, was 9.3 days, and that he had taken leave on 19 days, being 2 days public holiday on 1 & 2 January 2018, 4 days between 3 and 6 January 2018, 10 days between 12 and 23 March 2018, 2 days for Easter public holidays on 30 March and 2 April 2018, and one day on 21 August 2018.

153) The respondents' inclusion of 21 August 2018 as a day of annual leave conflicts with Dr Wilson's emails to the claimant, on 20 August 2018, as produced at pages 343 and 344 of the joint bundle, where the claimant having on 20 August 2018 requested to take one day's holiday the next day, he was then advised by Dr Wilson that : " ***I confirmed to you when we spoke that 4 weeks' notice are required for leave applications. I cannot therefore grant leave with less than 24 hours' notice. If you do take leave tomorrow, this will be unofficial leave."***

154) When the claimant, in reply, asked to take leave of absence on 21 August 2018, Dr Wilson replied stating that it would be "***unauthorised leave***", she would need to check how many days he had left that year as he took some leave in January and February, and she confirmed that he could take 2 days on 1 and 2 October

2018 as holidays. At this Final Hearing, the respondents produced no annual leave record for the claimant.

155) In his evidence to the Tribunal, the claimant stated that he had two week's leave following the birth of his son on 12 to 23 March 2018, which he stated he considered to be the statutory paternity leave to which he believed he was entitled, following an oral request to Dr Wilson.

156) As the claimant did not make any formal written request to the respondents seeking paternity leave, the Tribunal finds that there was no paternity leave due to him, and the 10 days annual leave taken at that time in March 2018 counts towards what he had taken as annual leave.

157) On the basis that the Tribunal is satisfied, on the material made available to it, that the claimant took more annual leave than was his entitlement in the period from 1 January to 17 September 2018, the Tribunal finds that his claim for holiday pay is not well-founded, and accordingly we make no order for payment against the respondents.

Unlawful Deductions from Wages

158) As per the claimant's supplementary Schedule of Loss, showing details of unlawful deductions from wages, as produced to the Tribunal with the claimant's supplementary Bundle (document 2, at page 3) the sum of **£6,689.94** was sought from the respondents.

159) The Tribunal, having checked the information in that document, has identified that it is in error, and that the net final figure for wages due is **£6,352.76**. We refer to, and incorporate here, our rationale for this recalculation, which we have included as an Appendix to this Judgment.

160) The Tribunal finds that the claimant suffered a series of deductions from his pays as follows: -

- In January 2017, the claimant should have received £1,397.50 for his net monthly wage and on this occasion, he received what he was entitled to.

- In February 2017, the claimant should have received £1,397.50 for his net monthly wage however, he received £1,546.72. This was an overpayment of £149.22.

- In March 2017, the claimant should have received £1,397.50 for his net monthly wage however, he received £1,000.00. This was an underpayment of £397.50.

- In April 2017, the claimant should have received £1,331.28 for his net monthly wage however, he received £2,093.44. This was an overpayment of £762.16.

- In May 2017, the claimant should have received £1,331.28 for his net monthly wage however, he received only £300. This was an underpayment of £1,031.28.

- In June 2017, the claimant should have received £1,331.28 for his net monthly wage however, he received £2,000. This was an overpayment of £1,168.72.

- In July 2017, the claimant should have received £1,331.28 for his net monthly wage however, he received £1,400. This was an overpayment of £68.72.

- In August 2017, the claimant should have received £1,331.28 for his net monthly wage however, he received £600. This was an underpayment of £731.28.

- In September 2017, the claimant should have received £1,331.28 for his net monthly salary however, he received £200. This was an underpayment of £1,131.28.

- In October 2017, the claimant should have received £1,331.28 for his net monthly wage however he received £1,500. This was an overpayment of £168.72.

- In November 2017, the claimant should have received £1,331.28 for his net monthly wage however, he received £600. This was an underpayment of £731.28.

- In December 2017, the claimant should have received £1,331.28 for his net monthly wage however, he received £600. This was an underpayment of £731.28.

- In January 2018, the claimant should have received £1,331.28 for his net monthly wage however, he received £200. This was an underpayment of £1,131.28.

- In February 2018, the claimant should have received £1,331.28 for his net monthly wage however, he received £1,500. This was an overpayment of £168.72.

- In March 2018, the claimant should have received £1,331.28 for his net monthly wage however, he received £200. This was an underpayment of £1,131.28.

- In April 2018, the claimant should have received £1,331.28 for his net monthly wage however, he received £1,200. This was an underpayment of £131.28.

- In May 2018, the claimant should have received £1,331.28 for his net monthly wage however, he received £500. This was an underpayment of £831.28.

- In June 2018, the claimant should have received £640.00 for his net monthly wage however, he received £1,000. This was an overpayment of £360.00.

- In July 2018, the claimant should have received £640.00 for his net monthly wage however, he received £300. This was an underpayment of £340.00

- In August 2018, the claimant should have received £640.00 for his net monthly wage however, he received £400. This was an underpayment of £240.00

- In September 2018, the claimant should have received £640.00 for his net monthly wage however, he received £0. This was an underpayment of £640.00.

- On the basis of those deductions, the Tribunal is satisfied that the claimant was subjected to unauthorised deductions from his wages, in respect of an underpayment of wages totaling **£6,352.76**, and the respondents should pay that amount to the claimant.

- Further, there needs to be added to that sum, the further sum of **£1,046.43**, representing the sums unlawfully deducted from those wages (being **£900** course fees, **£46.43** pension contribution, and **£100** for telephone costs (the admitted £30 being taken into account).

- We have accordingly ordered the respondents to pay the total amount of **£7,399.19** to the claimant, that being the total of the £6,352.76 underpayment of wages, plus the further £1,046.43 unlawfully deducted from those wages.

Claimant's new employment post termination by the Respondents

161) Having been dismissed by the respondents, on 17 September 2018, the claimant sought to find alternative employment from 19 September 2018 by applying for multiple jobs online. Evidence of the various roles which he applied for were produced to the Tribunal in the supplementary bundle prepared by the claimant, at pages 7 to 33.

162) The claimant found alternative employment commencing on 26 November 2018 with the Refugee Survival Trust, Glasgow. A copy of his contracts of employment with the Trust, signed on 26 and 28 November and 3 December 2018, were produced to the Tribunal, at pages 328 to 338 of the joint bundle.

163) As per the copy contract produced at pages 328 to 333, signed by the claimant on 28 November 2018, and for the Trust on 3 December 2018, it was employment for a fixed term until 17 June 2019 as an Accommodation Worker, at Robertson House, working 14 hours per week, for an annual salary of £20,705 pa, pro-rated to £8,232 pa for 14 hours pw.

164) As per the other copy contract produced at pages 334 to 338, signed by the claimant and for the Trust on 26 November 2018, it was employment for a fixed term until 17 June 2019 as a Community Engagement Coordinator, at Robertson House, working 21 hours per week, for an annual salary of £23,894 pa, pro-rated to £14,336 pa for 21 hours pw. A further copy of this contract of employment with the Trust was produced as document 11, at pages 35 to 44, of the claimant's supplementary bundle.

165) There were also produced to the Tribunal, at pages 339 and 340 of the joint bundle, copy payslips for the claimant in that new employment with the Trust dated 31 December 2018 (showing net

salary of £1,840.74) and 31 January 2019 (showing net salary of £1,508.90).

166) Further, in the claimant's supplementary Bundle, at document 12, pages 45 to 56, there were produced further copy payslips for the claimant from the Trust between December 2018 and May 2019, including duplicates of those previously produced for December 2018 and January 2019 in the original joint bundle.

167) These further copy payslips vouched the claimant's receipt of further earnings from that employment, with payslip dated 28 February 2019 (showing net salary of £2,168.90); 31 March 2019 (showing net salary of £1,654.54); 30 April 2019 (showing net salary of £1,487.81); and 31 May 2019 (showing net salary of £1,487.81).

168) A copy of the claimant's bank statement, dated 9 July 2019, added to the supplementary bundle as pages 57 and 58, showed his receipt on 28 June 2019 of a salary payment of £1064.28 from the Refugee Survival Trust.

169) As at the close of the Continued Final Hearing before the Tribunal, on 19 July 2019, the claimant stated that he remained employed by the Trust, his employment having been extended after the initial fixed period appointment to 17 June 2019.

170) As at the date of the close of this Final Hearing, on 30 April 2019, even the sums which the respondents admitted were due to the claimant were still outstanding, and they had not been paid to him by the respondents.

171) Further, while the written statement and summary of jobs applied for, as provided to the Tribunal on 5 July 2019, stated that the claimant submitted 3 job applications on 19 September 2018, another 3 on 3 October 2018, and a further 6 during October, as per the Inventory of Job Applications also provided on 5 July 2019, the

claimant is shown as having applied for 13 roles, in various job titles, with different prospective employers between 19 September 2018 and 25 October 2018.

172) Relevant copy paperwork was produced along with the Inventory. It shows 4 job applications by the claimant on 19 September 2018, 3 on 3 October 2018, 3 on 8 October 2018, and one each on 11, 24 and 25 October 2018. On the basis of the vouching documents produced by the claimant, the Tribunal is satisfied that the claimant made these job applications, and took reasonable steps to mitigate his losses following his dismissal by the respondents on 17 September 2018.

173) While the claimant stated in evidence at this Final Hearing that , following his dismissal on 17 September 2018, he actively pursued gainful employment, and he has produced some documents vouching that fact, the Tribunal notes and records, from his written statement provided on 5 July 2019, that the claimant there states that he received no State benefits following what he refers to as his dismissal by the respondents on 17 September 2018, and that he further states that he did make contact with Job Centre Plus after 17 September 2018, but no claim for benefits was ever made.

Tribunal's Assessment of the Evidence led before the Tribunal

63. In considering the evidence led before the Tribunal, we have had to carefully assess the whole evidence heard from the two witnesses led before us, the claimant, and Dr Wilson for the respondents, and to consider the many documents produced to the Tribunal in the Bundles of Documents lodged and used at this Final Hearing, which evidence and our assessment we now set out in the sub-paragraphs: -

Mr Mahdi Saki: Claimant

(1) We heard evidence from the claimant on Tuesday 19 February 2019, day 2 of 3 of the Final Hearing, continued on to the morning of the next day, 3 of 3, and again on 19 July 2019, at the Continued Final Hearing. While the claimant is Iranian, there was no request by him, or his representatives, for the Tribunal to appoint an interpreter, and, in the course of the Final Hearing, there was no concern raised that he was unable to effectively participate in the proceedings due to English not being his first language.

(2) On days 2 and 3, the claimant was examined in chief by his representative, Ms Yuill, then cross-examined by Ms Mohammed for the respondents, and asked some questions of clarification by the Tribunal. In giving his evidence to the Tribunal, the claimant did so with reference, where and when appropriate, to certain documents in the Joint Bundle.

(3) On 19 July 2019, at the Continued Final Hearing, the claimant's further evidence in chief was related to giving formal oral evidence about the 12 documents (56 pages) produced in the Supplementary Bundle for the claimant, further to the updated Schedule of Loss for the claimant, seeking £23,161.67 (as per document 3, at pages 5/6 of the Supplementary Bundle).

(4) That updated Schedule of Loss had been provided by the Law Clinic, on 5 July 2019, to the Tribunal, and copied to Ms Mohammed for the respondents, along with a supplementary Schedule of Loss showing details of unlawful deductions of wages, written statement of benefits received and job applications, and an inventory of job applications.

(5) Ms Withers, who acted as the claimant's representative at the Continued Final Hearing, stated that it was not necessary for the claimant to speak to these documents, so the claimant, by way of his

further evidence in chief, simply stated that these were his further documents, he was familiar with them, and he sought the compensation set forth in the updated Schedule of Loss.

(6) Ms Mohammed cross-examined the claimant on aspects of this further evidence, there were no questions of clarification from the Tribunal, but Ms Withers, for the claimant, had a brief re-examination of the evidence given in cross by the claimant.

(7) In assessing the claimant's evidence to the Tribunal, we noted, from the executive summary of his representative's closing arguments to the Tribunal, at paragraphs 4 to 7, that the Law Clinic were inviting us to accept the claimant's evidence, find him a credible and reliable witness, and to prefer his evidence, where it differed on material facts, to that given by Dr Wilson, the respondents' witness, whom the claimant's representatives described as "***incredible and unreliable".***

(8) We balanced that invitation from the Law Clinic with the contrary submissions, made by Ms Mohammed for the respondents, at page 1 of 7 of her full written submissions intimated on 16 July 2019, that Dr Wilson demonstrated to be a credible witness, compared to the claimant who was described as: "***having changed the heads of claim on a number of occasions and by these very actions demonstrated that his agenda is to raise the amount of his claim as high as he can. He has as result fabricated claims where he feels this will assist him with this agenda."***

(9) It is true, of course, that throughout the duration of these Tribunal proceedings, the claimant has, from time to time, provided the respondents, and the Tribunal, with conflicting information as to the actual amount which he claims to have lost by way of unlawful deductions from wages by the respondents. It has to be observed, however, that that is hardly surprising, given the fact it emerged there were two different sets of payslips for the claimant, and the

respondents' own position, as to what sums they accept he is owed, have also varied from time to time.

(10) In coming to our final decision on this case, we have relied upon the final breakdown provided by the Law Clinic, and provided, in amended form, after their written closing submissions. We refer to the figures given in the revised Schedule of Loss provided on 5 July 2019, in the total sum of £23,161.67, of which £6,689.94 was the amount claimed by way of unlawful deductions from wages, as further detailed in the separate appendix attached to that Schedule.

(11) Overall, we found the claimant to be a credible witness as to the material facts, even if, due to some of the confusing documentation, he appeared unreliable as to what sums he believed he was due. He was also vague about what holidays he had taken, and what holiday pay he might be due, for 2018.

(12) The claimant was clear and consistent that he was due unpaid wages, and that he had been dismissed and victimised by Dr Wilson on 17 September 2018. His evidence in that regard was unequivocal and it had the ring of truth to it. He did not retract despite cross-examination by Ms Mohammed, who essentially put to him that his evidence in that particular regard was fabricated. We preferred his evidence about 17 September 2018 to that given by Dr Wilson for the respondents.

(13) The claimant's general demeanour in the witness box was co-operative, doing his best to answer questions asked by any of his own representative, Ms Mohammed for the respondents, or the Tribunal, as the case may be, to the best of his recollection, content to say he did not know, or could not remember, if he was not sure, and overall we felt that he was seeking to assist the Tribunal establish the facts, rather than being overtly defensive and evasive, which was how Dr Wilson came across to us.

Dr Karen Wilson: Respondents' Director

(1) We heard evidence from Dr Wilson, the respondents' director, on the afternoon of Wednesday, 20 February 2019, day 3 of 3 of the Final Hearing, following the close of the claimant's evidence to the Tribunal that morning.

(2) Dr Wilson is the sole director of the respondents. She was examined in chief by her company's representative, Ms Mohammed, cross-examined by Ms Yuill for the claimant, and asked some questions of clarification by the Tribunal. In giving her evidence to the Tribunal, Dr Wilson did so with reference, where and when appropriate, to certain documents in the Joint Bundle.

(3) In assessing Dr Wilson's evidence to the Tribunal, we noted that she was generally forthcoming and respectful to questions asked of her by Ms Mohammed, but when it came to her cross-examination by Ms Yuill for the claimant, her general tone and demeanour changed, she repeatedly challenged Ms Yuill, so much so that the Judge had to warn her that Ms Yuill was asking proper and relevant questions, and the witness must answer them.

(4) In particular, Dr Wilson came over as evasive when questioned about the two versions of payslips for the claimant, and why payslip amounts did not relate to sums actually paid to and received by the claimant. She denied receiving the claimant's grievance letter of 23 March 2018, and made much of the fact that the claimant had not produced a recorded delivery receipt for it, yet she was keen to tell the Tribunal that the claimant was trying to get a high figure judgment. She could not explain why a P45 stating the claimant left on 31 December 2016 was dated 12 February 2019.

(5) As the claimant's grievance letter was some 2 months before the first ET1, it appeared that Dr Wilson did not have a proper understanding

of the chronology of events in this case. Likewise, in her dealings with the claimant prior to the Tribunal Hearing, as spoken to in evidence, and recorded in documents before us, she had stated she would arrange a payment plan with the claimant, but she failed to do so.

(6) Further, while she was critical of the claimant "***aiming high***" in the amount he was seeking from the respondents, Dr Wilson did not convince the Tribunal that she was in any way seeking to be co-operative and agree a final figure with the claimant to avoid legal proceedings, and the potential of a judgment against her company. In her evidence in chief, she referred to the claimant as having ***"engaged in guerrilla warfare"*** against her company.

(7) On the matter of what happened on 17 September 2018, and whether or not she acted as the claimant alleged, she vehemently denied that allegation, but we did not believe her denial. On balance of probability, we preferred the claimant's account.

(8) Overall, we did not find Dr Wilson to be a credible or reliable witness, and it was of note to the Tribunal that while she had lodged the ET3 responses to both claims, matters emerged after Ms Mohammed was instructed that were not foreshadowed in the original defence to the claims, in particular the alleged custom and practice about payments. Generally, we preferred the claimant's evidence to that of Dr Wilson where they differed on material facts, as his evidence tended to be consistent and credible.

Parties' Closing Submissions for the Tribunal

64. We received written closing submissions from both parties' representatives, to which they spoke at the Continued Final Hearing on 19 July 2019, and subsequently further written representations, all of which we discuss in the following sections of these Reasons.

65. Ms Withers replied orally, at the end of her closing submissions on 19 July 2019, to the points made by Ms Mohammed in her written submissions for the respondents, and Ms Mohammed, in addressing us with her own written closing submissions, responded to those previously submitted in the claimant's written closing submissions intimated on 12 July 2019.

66. Other than noting and recording here that, as part of her oral submissions for the claimant, Ms Withers advised us that the constructive dismissal argument (at paragraph 52 of the claimant's full submission) was not being pursued, and the claimant's unfair dismissal complaint was only proceeding on the basis of the alleged actual dismissal of the claimant by the respondents, on 17 September 2018, we do not record those oral submissions here, but the points raised, so far as material, we have taken into account in our private deliberations, and we deal with them later in these Reasons in our Discussion and Deliberation.

Reserved Judgment

67. At the close of the Continued Final Hearing on 19 July 2019, we reserved our Judgment to be issued, with Reasons, at a later date, after private deliberation by the Tribunal in chambers.

68. As detailed earlier in these Reasons, at paragraphs53 to 56, we met on 30 August 2019, and again on 5 February 2020, which has delayed the issue of this our final Judgment and Reasons.

Claimant's Outline Written Submissions

69. On 12 July 2019, the claimant's representatives at the Law Clinic wrote to the Tribunal, with copy to Ms Mohammed for the respondents, further to the Judge's written Note and Orders of 21 February 2019 with the case management orders following the part heard Final Hearing, and enclosed the claimant's outline written submissions, and an executive summary.

70. As the full outline written submission for the claimant is held on casefile by the Tribunal, it is neither appropriate, nor proportionate, to repeat its full terms here, but in coming to this our final decision, we have had regard to its full contents. The full submission runs to 64 paragraphs, over 17 typewritten pages.

71. Meantime, it will suffice for present purposes to note here the terms of the 3-page executive summary for the claimant, as provided to us, which was in the following terms:

Background

1. The above claim is in relation to unlawful deduction of wages in terms of Section 13 of Employment Rights Act 1996, unfair dismissal in terms of Section 94 of Employment Rights Act 1996, victimisation in terms of Section 27 of Equality Act 2010 and unpaid holiday pay in terms of Regulations 13 and 16 of Working Time Regulations 1998.

2. The Claimant was employed by the Respondent, Odyssey Recruitment Ltd from February 2015 on a temporary basis and was employed on a permanent contract from 9 November 2015.

3. The Claimant submits that his employment with the Respondent ended on 17 September 2018. The Respondent disputes this and maintains that the Claimant's employment did not end until 12 December 2018.

Comments on Evidence

4. The Tribunal has heard evidence from the Claimant and it is requested that the Tribunal accepts the evidence of the Claimant.

5. It is submitted that the Claimant was a credible and reliable witness. The Claimant's account of evidence was consistent with documentary evidence. The Claimant took his time to consider questions asked of him, during examination in chief, cross examination and questions from the Panel. The Claimant remained composed and did not react aggressively under cross-examination.

6. It is submitted that in evidence Dr Wilson showed herself to be incredible and unreliable while under cross examination. This was highlighted on a number of occasions. For example, when Dr Wilson repeatedly challenged Ms. Yuill during cross-examination. She had to be warned first by Ms. Yuill and then again by Employment Judge McPherson. This was in relation to questions regarding the grievance letter sent to Dr Wilson by the Claimant. Dr Wilson was evasive in cross-examination in respect of the multiple versions of the payslips and was unable to provide a satisfactory explanation as to why multiple versions of the payslips existed.

7. The Tribunal is asked to prefer the evidence of the Claimant to that of Dr Wilson where they differ on a material fact.

Findings in Fact

8. The Tribunal will be asked to make a number of findings in fact but in particular, the following are emphasised:

- *The amounts that were paid to and received by the Claimant from March 2017 until September 2018 is a matter of agreement between the Respondent and Claimant. It is also a matter of agreement that there are payments due to the Claimant but the extent of which is disputed. The Claimant outlines his position in full in the Schedule of Loss and*

accompanying Schedule of Payments and in full submissions, but the amount owed to the Claimant for the deductions between March 2017 and September 2018 totals £6689.94.

- *There is a dispute in facts as to when the Claimant was dismissed from his employment. It is the Claimant's position that he was dismissed on 17 September 2018 and disputes the Respondent's position that he was dismissed on 12 December 2018.*

- *It is the Claimant's position that the dismissal on 17 September 2018 was because of the fact that the Claimant had raised a claim against the Respondent for unlawful deduction of wages and for race discrimination. This is based on the fact that Dr Wilson said to him "there is no more work for you here anymore and because you took me to the Employment Tribunal you have to leave this office." The Claimant explained to Dr Wilson that he had taken the Respondent to the Employment tribunal because she had not paid his wages. Dr Wilson continued by saying you accused me of racism, you took me to the Employment Tribunal. No one will give you a job in Glasgow, even Marks and Spencer's because there will be a record of your Tribunal. You have to leave here." The Claimant then left the office, on the understanding that he had been dismissed.*

- *Dr Wilson's evidence was that she meant that there was no work for the Claimant that day and that he was not dismissed.*

- *The Tribunal is asked to prefer the Claimant's account of the events on 17 September 2018 on the basis that he was a*

more credible witness and the events that followed 17 September 2018 support his position.

- *The Claimant's position is that he was entitled to 28 days annual leave as per his contract. On the basis that his employment ended on 17 September 2018 and his hours reduced to part time in May 2018, this meant that he had a leave entitlement of 13 days that year.*

- *The Claimant maintains that the leave that he took between 12 March 2018 and 23 March 2018 was paternity leave, which he had verbally requested from Dr Wilson personally. Therefore the Claimant maintains that he is entitled to payment for 13 days annual leave, amounting to £800.80.*

The law applicable to the facts in this case:

Unlawful deduction from wages:

- *Employment Rights Act 1996, Sections 13, 14, 23(3)*
- *Deduction from Wages (Limitation) Regulations 2014*
- *Reid v Camphill Engravers [1990] IRLR 268*
- *Bear Scotland Ltd v Fulton [2015] ICR*
- *Fulton and another v Bear Scotland Ltd (No 2) Appeal No. UKEATS/0010/16/JW*

Unfair Dismissal:

- *Employment Rights Act 1996, Section 94*
- *Adama v Partnerships in Care Ltd Eat 0047/14*

- *Tanner v D. T. Kean Ltd [1978] WL 57416*

Victimisation:

- *Equality Act 2010, Section 27 Working Time Regulations (Holiday Pay)*
- *Working Time Regulations 1998, Regulations 14 and 16*

Submissions in law

9. *That the Claimant was subjected to a series of deductions from his wages which were unlawful in terms of section 13 of the Employment Rights Act 1996 because of section 13 (3) and that any other deductions were not agreed in writing and as such were unlawful.*

10. *That the Claimant was dismissed on 17 September 2018 and that this dismissal was unfair as it was not for one of the potentially fair reasons as per section 98 of the Employment Rights Act 1996 and was procedurally unfair as Employers must follow the Acas Code of Practice on Disciplinary and Grievance procedures. Furthermore, this dismissal amounted to victimisation as the Respondent subjected the Claimant to a detriment, namely dismissal, because of his doing a protected act, namely raising a claim for race discrimination in terms of section 27 of the Equalities Act 2010.*

11. *The Claimant asks that the Tribunal finds that the Claimant suffered an unlawful deduction in terms of section 13 of Employment Rights Act 1996 and makes an award for the monies owed to him because of these deductions.*

12. *The Claimant asks that the Tribunal finds that the Claimant was unfairly dismissed on 17 September 2018 by the Respondent's*

Director Dr Wilson, in terms of Section 94 of Employment Rights Act 1996 and makes an award of financial compensation.

13. The Claimant asks that the Tribunal finds that the Claimant was victimised in terms of section 27 of Equality Act 2010 and makes an award of financial compensation.

14. The Claimant asks that the Tribunal finds that the Claimant is owed outstanding holiday pay in terms of the Working Time Regulations 1998 and makes an award of the outstanding monies.

Respondents' Outline Written Submissions

72. On 16 July 2019, the respondents' representative, Ms Mohammed from Croner, wrote to the Tribunal, with copy to the Law Clinic for the claimant, and enclosed the respondents' outline written submissions, and an executive summary. She sincerely apologised that, due to a misunderstanding on her part, her written submissions were lodged after the due date and time previously set by the Judge for compliance.

73. Her executive summary, typewritten, ran to 24 paragraphs over 3 pages. Her full written submission, again typewritten, was 7 pages in length, with a one paragraph submission on credibility and reliability of witnesses at page 1 of 7, followed by 18 paragraphs, running over pages 2 to 7 of 7, addressing the evidence heard in respect of each specific head of claim.

74. Thereafter, later on 16 July 2019, she forwarded a further copy of the executive summary with one minor adjustment, to include, at paragraph 24, a further case precedent (Patel v De Vere Group Ltd) missed on the previous version, and she simply added that into the revised document submitted.

75. As the full outline written submission for the respondents is held on casefile by the Tribunal, it is neither appropriate, nor proportionate, to repeat its full terms here, but in coming to this our final decision, we have had regard to its full contents.

76. Meantime, it will suffice for present purposes to note here the terms of the 3-page revised executive summary for the respondents, as provided to us, which was in the following terms:

Executive Summary

The Respondents would summarise their submissions as follows:

Unfair Dismissal

1. *The Respondent did not dismiss the Claimant on the 17th of September. The Respondent gave a credible statement of her version of the day. She was able to provide email evidence showing dialogue between her and the Claimant after the alleged dismissal by Claimant. The Tribunal is requested to hold the Respondents version of events as the more credible and reasonably likely version of events.*

2. *The Respondent denied saying that "there was no work for him anymore and because you took me to the employment tribunal you have to leave this office." The Respondent requests that the tribunal accept her statement that this was not said by her. In absence of witnesses her actions after the alleged comment demonstrate that there was no intentions to dismiss.*

3. *The Claimants own actions, dialogues via text, submitting sickliness and also arranging to come back into the office and accessing the systems do not indicate that he believed he had been dismissed.*

4. *Should the Tribunal find that the words alleged by the Claimant were said by the Respondent then the Tribunal is requested to consider whether such words could reasonably be considered a dismissal where they may have been said in the heat of the moment and the actions outlined in 2 and 3 followed? The Interpretation under Tanner v Kean should be interpreted in favour of the Respondents position that there was no dismissal intended.*

5. *The Respondent did dismiss the Claimant on the 12th December 2018. The Respondent requests that the Tribunal find this to be the case and that the said dismissal on 12th December was a fair dismissal in terms of the law and the Burchell Test.*

6. *Relevant Law*

s.98 of the Employment Rights Act 1996 provides that misconduct is potentially a fair reason for dismissal.

7. *Relevant Case Law*

Tanner v Kean [1978] IRLR 160
BHS v. Burchell [1978] IRLR 379
Polkey v. AB Dayton Services [1987] ICR 142

Victimisation due to Race

8. *The Respondent requests that the Tribunal find that the claim is time barred. The Claimant accepts that the claim was lodged out of time but have not provided a just and equitable reason for the time limit to be extended.*

9. *In the event the time bar is overruled the Respondent requests that the Tribunal find that there was no dismissal on the 17th September for the reasons outlined in paragraph 1. The Tribunal is requested to accept the Respondents versions of events. The Respondent has provided a consistent version of events. In cross examination the Claimant was not able to provide explanations for why he engaged in the text conversation with the Respondent or submitted sick lines if he believed he was dismissed.*

10. *In the event the Tribunal feel that there was a dismissal the Respondent requests that the tribunal find that any such dismissal to have no link whatsoever with the claimants assertion that it was because he had raised a race discrimination claim. It is submitted that the Claimant had also an employment claim as well as the discrimination claim against the Respondent. The Respondent had no reason to say the things the Claimant has alleged and she requests that the Tribunal accepts her version of events.*

11. *The Respondent requests the Tribunal to find that the race discrimination claim was brought purely to harass the Respondent and therefore under s.27(3) are not protected acts. The Claimant initially tried to raise a claim of direct discrimination. When he realised there was no prospects of success he withdrew this claim and fabricated the victimisation claim. The victimisation provisions were not designed to protect such an act. They are designed to protect bona fide claims; not claims brought with a view to harassing the respondents to them.*

12. *Relevant Law*

S.27 of the Employment Act 2010 **[*Note:* (sic): We have read that as an obvious error for Equality Act 2010.]**

13. *Relevant Case Law*

HM Prison Service & Ors v Ibimidun Employment Appeal Tribunal | April 2, 2008 | 2008 WL 2442994

Unlawful Deduction

14. The Respondent accepts that the Claimants full time salary at the commencement of his employment (1 December 2015) was £20,000 which meant he was owed £1,666 a month salary.

15. In February 2018 the Claimant took 2 weeks unpaid study leave.

16. In March 2018 the Claimant's hours were reduced to 16 hours a week because the Claimant requested this.

17. It was agreed between the parties that the sums paid as per page 115 was agreed.

18. The Respondent submits that there was a custom and practice in place between the Claimant and Respondent. For the entirety of the term of their relationship the Claimant has never been paid the wages shown on his payslip. The Claimant never raised any concerns in relation to this until ******** [Note: no further text was provided.]***

19. In the event the tribunal do not accept that there was a custom and practice amending the terms of the written contract the Respondent requests that the Tribunal consider any claims prior to the 3 months of the application to the tribunal to be time barred.

20. In the event that the Tribunal states that there has been a series of deduction then the Respondent would submit that there are 3 months over payment to his salary on which would break any said series. (April May and June on page 115)

21. The Respondent accepts that there is money owed to the Claimant and requests that the Tribunal accept the figures submitted by the Respondent. The Claimant has not been provided accurate figures. The Respondent refers to page 115 which outlines the payments owed and payments made. Page 133 further breaks down how the payments were made. The Respondent submitted that all payments were up to date at the end of the tax year 30 March 2018. The payment amount for the year 2018/19 was then paid on a monthly agreement between the Claimant and Respondent.

22. The Respondent submits that the £4,059.06 is owed to the Claimant as per page 115 but that they are entitled to deduct from this course fees and expenses of £1,225.00 for course and expenses and £130 for unauthorised calls.

23. <u>Relevant Law</u>

S.13 and s.14(1)(b) Employment Rights Act 1996

S.23(3) of the Employment Rights Act 1996

Working Time Regulations 1998

24. <u>Relevant Case Law</u>

Reid v. Campbell Engravers [1990] IRLR 268

Bear Scotland Ltd v. Fulton [2015] ICR

Patel v. De Vere Group Ltd Case No: IMA4009 para 45 to 72

Additional Written Submissions for the Claimant

77. Following the close of the Continued Final Hearing, the Tribunal wrote to both parties' representatives, by letter dated 23 July 2019, issued on the Judge's

instructions, seeking their further written representations on certain matters, and copy documents, as more fully set out in the Tribunal's case management orders.

78. Parties' replies to the Tribunal's orders were ordered by no later than 4.00pm on Friday, 26 July 2019, and the Tribunal allowed them to reply to the other party's written representations by no later than 4.00pm the following Friday, 2 August 2019.

79. In reply to the Tribunal's letter of 23 July 2019, the claimant's representatives, Ms Yuill and Ms Withers, student advisors at the Law Clinic, provided to the Tribunal, by email of 24 July 2019, copied to Ms Mohammed for the respondent, their additional submissions for the claimant, along with a soft copy of the finalised amended Agreed List of Issues, and updated claimant's Schedule of Loss (as amended during the Continued Final Hearing on 19 July 2019), as also a copy of the claimant's payslip summary for June 2019 from his current employer, at the Refugee Survival Trust.

80. Those additional written submissions for the claimant read as follows:

> 1. *Further to the Case Management Order issued by Employment Judge McPherson on 23 July 2019 following the Continued Final Hearing on 19 July 2019, the Claimant makes the following submissions:*
>
> ***Chief Constable of the Police Service of Northern Ireland v Agnew and Others [2019] NICA 32***
>
> 2. *The case of Chief Constable of the Police Service of Northern Ireland v Agnew and Others is relevant to this case insofar as it addresses the issue of a gap of more than three months in a series of deductions and whether such a gap breaks the series.*

3. *It is the Claimant's position that in this case, there was no gap of three months between any two deductions. This was addressed fully in full written submissions at paragraph 32. In this respect it is the Claimant's position that the above case is not relevant in the particular facts of this case.*

4. *We submit that were the Tribunal able to follow the decision in the above case then in the event that the Tribunal found that there was a gap of more than three months between any two deductions, such a gap would not necessarily break the series of deductions and as such, the Claimant would be entitled to claim for the full series of deductions made.*

5. *However it is the Claimant's position which we state in the interests of meeting our duty to the Tribunal and having been asked to comment on the case, that the judgment in the above case is not formally binding on the Employment Tribunal at this stage as it is a decision of the Northern Ireland Court of Appeal. The case expressly disagrees with Bear Scotland on the above points and is a highly persuasive authority that may well be followed at appeal level in the UK when such a case arises as the legislation interpreted in the above case, namely the Employment Rights (Northern Ireland) Order 1996 is identical to the wording in the equivalent British legislation, the Employment Rights Act 1996. However it is the Claimant's position that as matters stand an Employment Tribunal in the UK but outwith NI, remains bound by Bear Scotland.*

6. *In the event that the Claimant is mistaken and that the ET is bound to be take into consideration the recent decision of the NICA then we submit as follows.*

7. *The discussion regarding a series of deductions in the above case is in relation to holiday pay. However the Claimant submits that the*

discussion is relevant to a case concerning a series of unlawful deductions in terms of sections 13 and 14 of the Employment Rights Act 1996.

8. *The relevant discussion in relation to the meaning of a series of deductions can be found at paragraphs 94 to 110.*

9. *The Claimant would like to highlight paragraph 105 which reads:*

> *[105] As indicated in Harvey on Industrial Relations and Employment Law and as conceded by Mr Beggs holding that a three month gap breaks a series of deductions leads to arbitrary and unfair results. For instance if a three month gap broke a series it would do so when the unlawful deductions occurred consistently and persistently at six monthly intervals but not when they occurred at two monthly intervals. There is nothing in the ERO which expressly imposes a limit on the gaps between particular deductions making up a series. We do not consider that there is anything implied from the terms of the ERO which compels to such an interpretation of a series. As a matter of the proper construction of the ERO we conclude that a series is not broken by a gap of three months or more.*

10. *As such, it is the Claimant's primary position that there was no gap of more than three months between any two deductions therefore there is no issue in finding a series of deductions. However, should the Tribunal find a gap of more than three months, the Claimant submits that the above should be considered highly persuasive authority to depart from the judgment in Bear Scotland Ltd v Fulton which established that a gap of three months would break a series of deductions.*

Saad v Southampton University Hospitals NHS Trust [2018] UKEAT/0276/17

11. The above case arose out of grievance raised by Mr Saad regarding an alleged comment which Mr Saad submitted was abusive and discriminatory on racial and religious grounds. A tribunal found that the allegation was false but that Mr Saad subjectively believed it to be true. It also found that the grievance had been raised with the ulterior motive of postponing an upcoming performance assessment. It was on this basis that the Tribunal concluded that Mr Saad had acted in bad faith and consequently dismissed his claim for victimisation under Section 27 of the Equality Act 2010.

12. However, the Employment Appeal Tribunal allowed Mr Saad's appeal on the basis that a finding that an individual has failed to act in good faith does not automatically mean that they have acted in bad faith. The primary question is whether the worker acted honestly in giving the evidence or information. Mr Saad subjectively believed that the comment had been made and therefore raised the grievance honestly and therefore it was not done in bad faith.

13. Judge Eady QC highlighted the following at paragraph 50:

> *50. When determining whether an employee has acted in bad faith for the purposes of subsection 27(3) EqA, the primary question is thus whether they have acted honestly in giving the evidence or information or in making the allegation. As Burton J observed in Fenton, the issue is not the employee's purpose but their belief. I do not say that the existence of a collateral motive could never lead to a finding of bad faith - not least because it is impossible to*

foresee all scenarios that might arise - but the focus should be on the question whether the employee was honest when they gave the evidence or information or made the allegation in issue. In answering that question, the ET will already have established that the evidence, information or allegation was false; that does not mean the employee acted in bad faith, although it may be a relevant consideration in determining that question (the more obviously false the allegation, the more an ET might be inclined to find that it was made without honest belief). Similarly, the employee's motive in giving the evidence or information or in making the allegation may also be a relevant part of the context in which the ET assesses bad faith. The ET might, for example, conclude that the employee dishonestly made a false allegation because they wanted to achieve some other result, or that they were wilfully reckless as to whether the allegation was true (and thus had no personal belief in its content) because they had some collateral purpose in making it. Motivation can be part of the relevant context in which the ET assesses bad faith, but the primary focus remains on the question of the employee's honesty.

14. *It is the Claimant's primary position that he had no ulterior motive in raising the claim for race discrimination at the time of submitting the original ET1. He had an honest belief that his treatment was related to his Iranian ethnic or national origin d or nationality. Having sought to resolve matters internally relating to the deductions being applied he then raised an ET1 and ticked the box for race discrimination based on this honest belief.*

15. It is the Respondent's position that the Claimant did have an ulterior motive, namely to harass the Respondent's Director and or to increase the value of his claim. This is denied.

16. The Claimant submits that primary finding should be that the Claimant honestly believed that the deductions from his wages were because of or materially related to his race, specifically his ethnic or national origin and or nationality and as such his claim for victimisation arises from his treatment following a protected act based on this honest belief in terms of Section 27 of the Equality Act 2010.

17. For the avoidance of doubt the withdrawal of a complaint of indirect race discrimination in terms of the Equality Act 2010 does not detract from whether the Claimant had the honest belief and genuine concern at the time of raising the complaint.

18. For the avoidance of doubt it is denied that the protected act was done to harass the Respondent and or increase the value of his claim. Should the Tribunal so find, it might also conclude that the Claimant had an ulterior motive for raising the complaint of race discrimination. However, in the event that they were to do so, provided they find that the Claimant had a genuine concern and or honest belief that he may be receiving the deductions for discriminatory reasons because of his race, they can still conclude that the allegation was not made in bad faith following the reasoning in Saad.

Additional Written Submissions for the Respondent

81. In reply to the Tribunal's letter of 23 July 2019, Ms Mohammed, the respondents' representative, provided, by email of 26 July 2019, her additional submissions for the respondent, along with her response to the Schedule of Loss presented at the Hearing.

82. Her additional written submissions read as follows:

"Further to the Case Management Order issued by Employment Judge McPherson on 23 July 2019 following the Continued Final Hearing on 19 July 2019, in light of the 2 cases provided the Respondent makes the following submissions:

Chief Constable, PSNI v Agnew [2019] NICA 32

Unlawful Deduction from Wage

1. *I submit that our position remains primarily that there was no series of deductions made and that there was a custom and practice in place altering how payment was made to the Claimant with verbal agreement of the claimant. In the event this is rejected by the Tribunal we submit that there is a time bar in respect of the deductions alleged. In the event the Tribunal hold that there was a series of deductions then we would submit that any such chain is broken by 3 consecutive months of overpayment by the Respondent as detailed in my initial submissions. This case concludes:*

> *107. Whether there is a series is question of fact to be decided in each individual case.*
>
> *108. A series is not ended, as a matter of law, by a gap of more than 3 months between unlawful deductions nor is it ended by a lawful payment.*
>
> *109. We agree with the formulation by Langstaff J in paragraph [79] of Bear Scotland subject to the additional words "in the alleged series."*

In terms of the case application I would firstly submit that this is not a binding judgement and that the Bear Scotland precedent should remain. In the event that the case is taken as persuasive I would comment that the point of this judgement is to stop a Claimant suffering detriment where they may have a gap of 3 months due to the way they take holidays or are paid commission. In application to our case, this is not relevant. The deductions alleged are in respect of monthly wage and the Claimant was aware of what he was due and what he was paid therefore the facts of this specific case would not warrant a departure from the 3 month rule set in Bear Scotland.

Saad v Southampton University Hospitals NHS Trust [2018] UKEAT/0276/17

Victimisation Claim – Unfair Dismissal

2. We submit that section 27(3) states that:

"giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made in bad faith."

The case in Saad is focused on this being a two part test: -

1. *giving false evidence or information, or making a false allegation*
2. *if that then is given in bad faith*

This case whilst taking a different slant on the original case I have referred to still reinforces the position of the Respondent. The Respondent has submitted that there was no dismissal. The Respondent denies making the statement the Claimant has suggested she made. Therefore the allegation is entirely false. Even if we set aside the ulterior motif (sic) *which we presented*

was to harass the Respondent the evidence provided by the Respondent showing the interactions between the Claimant and the Respondent present a highly likely scenario that the Claimant did not reasonably believe he was dismissed. He fabricated the allegation in bad faith. The Respondent submits that the tribunal take into account the evidence presented in this regard in earlier verbal and written submissions and to hold the Respondents version of events as the true events of what happened that day. I would refer you to paragraph 38 of the case.

> *38. Looking more closely at the wording of subsection 4(2), the EAT observed:*
>
> > *"41. … the first question is whether the allegation is false, not "made falsely" - that would almost render nugatory the first limb and blend it into the second limb. The simple question is whether the allegation was false. It is wrong to suggest that "false" can mean "purposely untrue"; that again blends the words … from limb one into limb two. It is enough for the Tribunal to have correctly said that "false" means "wrong, erroneous or incorrect". … To suggest that the words "good faith" mean "with sincerity" such that consequently "bad faith" means "not with sincerity" or "treacherous" … is wrong. There may be circumstances … in which "bad faith" may carry many other connotations, but, for the purposes of the narrow issue in this case … [the question for the ET] was a simple one, namely whether the Tribunal was satisfied that Mr Fenton had made a false statement, knowing it to be false. …"*

The Respondent would submit that the initial case referred to in their initial submissions HM Prison Service & Ors v Ibimidun Employment Appeal Tribunal | April 2, 2008 | 2008 WL 2442994 remains good law. Consideration should therefore still be given to the allegation of racism made by the claimant regarding his alleged salary deductions which the claimant's legal

representative refers to in her submission. Our position is that the claimant worked for over three years and never perceived any racism in his work and accepted the payment arrangements in place voluntarily and without pressure. The allegation of racism was made in May 2018 before the claimant subsequently made his first claim to the employment tribunal. He claimed that deductions in his wages were the consequence of racial prejudice and not his own agreement. He claimed that another member of staff Fraser Clarke did not suffer deductions but failed to admit that Fraser's contract and work schedule was very different from his.

The claimant was unable to produce any evidence of racism or other form of discrimination and therefore made this allegation with malice in order to increase the amount of his claim. This is not a situation where the claimant misperceived an incident but an act of deliberate dishonesty.

The allegation of summary dismissal was made at a later date in a similar manner to increase the value of his claim. The claimant, after his alleged dismissal, returned to the office on several occasions and was allowed admission to use his computer and present sick notes. If the claimant had believed that he had been dismissed, he would have understood that he could not return to the office and his computer would have been blocked to him. He would also understand that sick notes are not a requirement following dismissal.

The claimant is acting dishonestly in making a series of false allegations in order the increase the value of his claim."

83. Ms Mohammed's comments on the claimant's revised Schedule of Loss read as follows:

"The Respondents responds to the updated schedule of loss provided by the Claimants rep as follows:

1. *The Respondent submits that the Claimant was not dismissed until 12 December accordingly there is no loss until this date. He secured alternative employment of the employment on the 26th November which was before he was dismissed. Therefore there are no losses in this regard.*

2. *The Claimant has not explained was statutory rights they refer to in respect of the loss alleged.*

3. *In the event the Claimant is successful in his claim of victimisation the Tribunal is asked to consider any compensation be reduced as a result of the Claimants own conduct throughout this whole process.*

4. *The Respondent is also asked to consider the Polkey principle in the event they consider that there has been an unfair dismissal.* ***[Note: We have treated the word "Respondent" as in error and, read in context, it should have stated "Tribunal".]***

5. *In respect of the unlawful deduction of wage we do not agree with the supplementary schedule presented. Specifically we submit that the Claimant was part time from February and furthermore that the Claimant did not present for work in September therefore there was no wages due.*

6. *The Respondent's position in regards to the deductions remains as per page 115 of the bundle, a copy of which is attached here for ease."*

Replies from Parties' Representatives to those Additional Written Submissions

84. In reply to the respondents' additional submissions, the claimant's representatives, at the Law Clinic, provided to the Tribunal, by email of 2

August 2019, copied to Ms Mohammed for the respondent, their additional submissions for the claimant, reading as follows:

"Further to Case Management Order issued by Employment Judge McPherson on 23 July 2019 following the Continued Final Hearing on 19 July 2019, the Claimant submits the following responses to the Respondents Submissions.

1. *In respect of the Respondent's submission that there has been a break in the series of deductions due to 3 consecutive months of overpayment. We have addressed much of what is said above in our original and additional submissions. We reiterate that we do not accept that there were three consecutive months of overpayments to break the chain in a series of deductions. We submit that the Claimant's position is that there was not 3 consecutive months of overpayments as per our original submissions at page 11 paragraph 32. We do not believe the Respondents have specified where this occurs.*

2. *We also do not accept there is any outstanding issue of time bar other than arises from whether there is a continuing series of deductions without any gap of more than three months. We say that there is no such gap. The amendment application addressed the general time bar position relating to whether it was just and equitable for the claim to proceed. No particular submissions have been made on this point by the Respondent.*

3. *The Respondent indicates that their primary position is that there is no series of deductions however have conceded that there are monies owed to the Claimant - the £4,059.06 figure. The Respondent has failed to specify where exactly the £4,059.06 figure has come from (we believe they may have relied on our original schedule of payments) but from our understanding, the*

deductions in the 3 months backdated from the claim being raised in May 2018 don't amount to £4,059.06 suggesting therefore that they have included deductions in months prior to the three months before the claim was raised, further suggesting that there must have been a series of deductions. Further they have made deductions in their calculation for £1,030 which to the best of our knowledge had actually already been deducted from the wages due and owing and as such this is double counting of these payments which we in any event claim to be part of the unlawful deductions. We refer you to page 9 paragraph 26 of our full written submissions.

4. *We do not accept that there was any custom and practice in place and refer back to the original submission made at the time opposing this at the start of the hearing. No particular evidence was led on this by the Respondent and in particular while it was originally said by the Respondent that Fraser Clark would give evidence on this he did not and indeed it was said that if he had given evidence it was to be on the issue of when the Claimant reduced his hours.*

5. *In respect of Respondent's submission on Victimisation Claim – Unfair Dismissal, we would respectfully submit that the Respondent's analysis of the victimisation claim is mistaken in its application of the Saad v Southampton University Hospitals NHS Trust [2018] UKEAT/0276/17.*

6. *As part of the test to establish victimisation the above case addresses the issue of good and bad faith in relation to the original allegation which forms the basis of the protected act. Thus we have asserted in our submission that the Claimant did have a genuine concern that he may be getting treated less favourably than other employees not of his ethnic or national origin. He raised these*

concerns and ticked the box for race discrimination in the ET1 and further elucidated on these in the course of case management hearings. We say that there was no bad faith in this and that even if he had made this allegation as a means to harass the Respondent Director according to Saad that would not change the issue of good faith/bad faith in relation to the genuine basis of the belief behind the allegation. The Respondent focusses above on the alleged act of victimisation- namely the comments of the Respondent director when dismissing the Claimant. This is a separate matter. Clearly it is the Claimant's position that these comments were made and the Respondent director denies this. That then is a matter for the ET. However in our submission that is not related to the issues that arise from the case of Saad and on which we have addressed the Tribunal in our submission.

7. *Finally and in view of the Respondent referring to the matters on which we now comment, although not strictly relevant to the case on which we were asked to comment. We reiterate that the Claimant has given a plausible explanation for all of the actions that have been referred to in the Respondent additional submission as evidence of the fact he wasn't dismissed on the 17th September 2018. We refer to his evidence that he was applying for new jobs, had contacted his lawyer, the texts about arranging to meet, showing the Respondent Director the fit note and signing onto the system to get his payslips. We ask that the Tribunal prefer the Claimant's interpretation of events in this respect based on his evidence which we submit to be credible and reliable. We refer to our full written submissions where we have discussed this before."*

8. Further, in reply to the claimant's additional submissions, Ms Mohammed, the respondents' representative, provided to the Tribunal, by email of 2 August 2019, copied to the claimant's

representatives, at the Law Clinic, her additional submissions for the respondent, reading as follows:

"As requested by Judge Mcpherson I would make the following additional comments in respect of the additional submissions made by the Claimant which should be considered along with the additional submissions made by the Respondent:

1. *The Respondent submits that the time bar is applicable to the entire claim for unlawful deduction of wage, not only holiday pay. Furthermore the claimant consented to method of payment and did not raise objection to this for over one year.*

2. *In terms of the victimisation claim the Claimant talks at length about the initial claim that was raised by the Claimant and his intentions at that time. I would respectfully submit that the question for the tribunal is whether the act of dismissal occurred and as such whether the Claimants story in relation to the dismissal is true. It is our position that the statement he alleges was made by the Respondent was fabricated and as such dishonest and made in bad faith. In contradiction to his claim of dismissal on September 17th 2018, he proceeded to enter the office, provide sick notes and use his computer. The use of the computer was not for the purpose of reviewing pay slips but for claiming commission to which he was not entitled. The claimant cannot access the payslips on his computer. He accesses then by email which he can obtain on any device, android, apple or pc.*

3. *The Claimant suggests that the withdrawal of the initial claim should not cause detriment as his intention was honest. We respectfully disagree. If the Claimant genuinely believed this*

was true is would be reasonable for him to continue with the claim regardless of the prospects of success. The claimant's sole aim was to increase the value of his claim and when he realised that it was not likely to succeed, he withdrew it and sought another head of claim to replace it."

Relevant Law

85. Both parties' written closing submissions addressed us on aspects of the relevant law, both by reference to statutory provisions, and the cases cited to us by each of the representatives. We do not understand the relevant law to be in dispute between the parties, but it is the application of that relevant law, to the facts of this case, that has required our specific judicial determination.

86. As such, we do not consider it either appropriate, or proportionate, that we set out the relevant law at length, and instead we have given ourselves a self-direction on the relevant law and, where appropriate, we make reference to parties' respective written closing submissions in the Discussion and Deliberation sections of these Reasons.

Respondents' renewed Application for Postponement of Continued Final Hearing refused by the Tribunal: Reasons

87. As detailed earlier in these Reasons, at paragraph 48 above, we refused Ms Mohammed's renewed postponement application on 19 July 2019. As we reserved our detailed reasons to be given later, as per **Rule 62 of the Employment Tribunal Rules of Procedure 2013**, we now provide them, as follows:

(1) As a full Tribunal, we regarded the claimant's objections to postponement as stated by the Law Clinic on 18 July 2019, as per their email of 11:26am, to be well-founded.

(2) A further delay in concluding the case, given the procedural history to date, was felt by us to be contrary to the overriding

objective of the Tribunal, under **Rule 2**, to deal with the case fairly and justly, and any further delay would mean a continued date sometime after September 2019, given the claimant's representatives are students.

(3) That would not be in the interests of justice, as the claimant is entitled to have the case brought by him concluded within a reasonable time. We accepted Ms Withers' oral submissions to us, on 19 July 2019, that the claimant is in new employment, and trying to move on, and that he is entitled to have his case concluded without further delay, and that it would be disproportionate to postpone, and relist.

(4) The Tribunal had heard the principal witnesses, the claimant and Dr Wilson, at the 3-day Final Hearing on 18 / 20 February 2019, Dr Wilson did not need to be present on 19 July 2019, as her evidence was concluded, and if Ms Mohammed required instructions, she could seek an adjournment to do so. No adjournment was requested.

(5) The fact that Dr Wilson did not, apparently, know the date of the Continued Final Hearing until Wednesday, 17 July 2019, was down to an internal communications failure by her chosen representatives at Croner's head office in Hinckley, and / or Ms Mohammed. When a party is represented, the Tribunal properly only corresponds with the appointed representative, and it is the representatives' responsibility to update the client. Similarly, clients have a responsibility to seek updates from their appointed representatives.

(6) While noting the personal difficulties relating to the respondents' representative, Ms Mohammed, as per her email

to the Tribunal on 18 July 2019, at 3:50pm, with additional information, relating to her personal and family circumstances, and her having to juggle work and family commitments, no explanation was provided to us as to why another consultant at Croners could not have acted earlier on the respondents' behalf.

(7) From the additional information provided orally to the Tribunal, on 19 July 2019, it emerged that the respondents' proposed witness, Mr Fraser Clarke, had left the respondents' employment some time before. Other than a breakdown in communication between Croner and the respondents, no good reason was given to us as to why, if he had been unwilling to attend on 19 July 2019, the respondents could not have sought a Witness Order from the Tribunal to compel Mr Clarke's attendance.

(8) The extent of Mr Clarke's likely evidence, as we understood it to be from Ms Mohammed, was oral only, there being no additional documents to put to him, and it related to the claimant's working hours being changed, and when he was at his work with the respondents. Ms Mohammed explained that Mr Clarke was needed as a witness because the respondents needed a second person to "***corroborate"*** Dr Wilson's evidence, otherwise it would be her evidence, against that from the claimant.

(9) As the Tribunal had already heard fulsome and lengthy evidence from the claimant and Dr Wilson, where they had each been examined, and cross-examined, and the Tribunal had had the opportunity to ask questions to clarify their evidence, the Tribunal regarded it as disproportionate to postpone the listed

Continued Final Hearing, and relist, simply to hear from Mr Clarke, as that would of itself delay conclusion of the evidence, and so delay closing submissions being made to the Tribunal, despite both parties' having prepared and exchanged written submissions on 12 and 16 July 2019.

(10) While it was noted from Ms Mohammed's email of 18 July 2019, at 3:50pm, that Mr Clarke was stated to have a new position as a trainee journalist, and his new employers required a minimum of 6 weeks' notice to authorise any leave, there was no vouching evidence from Mr Clarke, or his new employer, vouching that assertion, and, anyway, a Witness Order for his attendance could and should have been sought far earlier on in these Tribunal proceedings, if there was any doubt about him appearing as a witness for the respondents.

(11) We recalled that a Witness Order for Mr Clarke had been suggested by the Judge, as far back as the Case Management Preliminary Hearing on 14 September 2018, when Dr Wilson had advised the Tribunal that she did not think Mr Clarke had agreed to be a witness for the claimant. When Ms Allen, the claimant's then solicitor, stated that Mr Clarke had not, at that stage, been asked, but if he refused, she would seek a Witness Order, Dr Wilson then stated that Mr Clarke would be led as a witness for the respondents.

(12) In all the circumstances, we felt the respondents and their representatives knew, or ought to have known, that if there was any doubt about Mr Clarke's availability to attend as a witness at the Continued Final Hearing, they should have alerted the Tribunal, and sought a Witness Order on or after 20 February 2019. They did not do so.

Discussion and Deliberation: Issues before the Tribunal

88. In the Tribunal's letter of 23 July 2019 to both parties' representatives, they were informed that further to the Judge's discussion with the full panel, after the close of the Continued Final Hearing on 19 July 2019, the full Tribunal had agreed to meet again on Friday, 30 August 2019, for private deliberation, so attendance of parties was not required, to deliberate on the evidence led, closing submissions, and parties' further written representations and replies. This was the earliest date that the full panel could meet for private deliberation on this case.

89. We duly met on that date, and again, on 5 February 2020, at our further Members' Meeting, when we concluded our private deliberation. In doing so, we used as our agenda the finally agreed List of Issues, as reproduced earlier in these Reasons, at paragraph 59 above, but it is helpful, in setting out our final decision, and reasons for our final judgment, to recall here the various questions then posed, which we highlight for emphasis, and now address in turn: -

Unfair Dismissal / Unfair Constructive Dismissal

1. ***Whether or not the claimant was dismissed, expressly or constructively, on either, or both, of 17 September 2018 and 12 December 2018?***

90. At the Hearing on Submissions on 19 July 2019, the claimant's representative withdrew the allegation of unfair constructive dismissal, as per paragraph 52 of the full written submission. It had previously been argued, in the alternative, that the claimant's dismissal, if not an actual dismissal, amounted to a constructive dismissal. That legal issue was however not pursued, and it was the claimant's "***sole position***" that he was actually dismissed by Dr Wilson on 17 September 2018.

91. As per our findings in fact, we find that the claimant was indeed dismissed by Dr Wilson, on that date, having regard to the words used by her to the claimant, and his acceptance of them as an express act of dismissal, which was made clear by his actions thereafter in contacting his lawyer, contacting ACAS, and also looking for and securing new employment.

92. Further, having regard to the Employment Appeal Tribunal's judgment, in **Tanner v D T Kean [1978] IRLR 110**, to which we were referred, and recognising its words of caution, we consider that the words spoken by Dr Wilson were intended to bring the claimant's employment to an end, and not merely indicative of her annoyance at the claimant and spoken by her, as some form of rebuke or reprimand to the claimant, in the heat of the moment, and not intended as a dismissal.

93. At this Final Hearing, Dr Wilson emphatically denied uttering those words and, in assessing the conflicting evidence before us, which was in essence the classic ***"he says / she says"*** scenario, we felt, on balance of probability, that the claimant's account was to be preferred.

94. We also considered it relevant that both parties had attended a Case Management Preliminary Hearing the previous Friday, 14 September 2018, from which it was clear that the claimant, then legally represented by a solicitor, was insisting on his complaints against the respondents.

95. Further, viewed against that earlier background, and Dr Wilson's later contact with the claimant from 20 September 2018, and thereafter the AWOL letters on and after 12 October 2018, leading to her dismissal of the claimant on 12 December 2018, again all as per our findings in fact, we consider it more likely than not they she had inwardly reflected, after 17 September 2018.

96. Indeed, it seemed to us that Dr Wilson had perhaps taken some legal or HR advice, and sought to retrieve the situation from what occurred on 17

September 2018, but, as the matter of unlawful deductions from wages remained unresolved, this litigation has progressed all the way to this defended Final Hearing.

97. Our view on that matter is strengthened by the fact that while it was not directly put to Dr Wilson, by her representative, that she may have acted in the heat of the moment, and that was never pled as the respondents' position in their ET3 response, or further and better particulars, Ms Mohammed, in her written closing submissions, executive summary, at paragraph 4, stated:

> *"Should the Tribunal find that the words alleged by the Claimant were said by the Respondent then the Tribunal is requested to consider whether such words could reasonably be considered a dismissal* ***where they may have been said in the heat of the moment*** *and the actions outlined in 2 and 3 followed? The Interpretation under Tanner v Kean should be interpreted in favour of the Respondents position that there was no dismissal intended."*

2. If he was dismissed on either date, whether or not that dismissal was unfair?

98. We find that the claimant's dismissal, on 17 September 2018, was unfair. As per our findings in fact, there was no potentially fair reason for dismissal given, and the claimant was dismissed without notice or due process. As such, his dismissal was substantively and procedurally unfair. It was not reasonable, in all the circumstances, to have dismissed the claimant at that stage. He was not dismissed for any of the potentially fair reasons for dismissal open to an employer in terms of **Section 98 of the Employment Rights Act 1996.**

99. Further, on the evidence before the Tribunal, we find that the claimant's dismissal on that date also constituted an act of victimisation by the respondents against the claimant, contrary to **Section 27 of the Equality Act**

2010, as the reason for his dismissal by Dr Wilson was related to the fact that the claimant had done a protected act, in good faith, by raising a Tribunal complaint of race discrimination against the respondents in May 2018.

100. We are satisfied that this earlier complaint of racial discrimination brought by the claimant against the respondents was a material factor in Dr Wilson's dismissal of the claimant on 17 September 2018.

3. If he was unfairly dismissed, whether or not he is entitled to any compensation from the respondents and, if so, in what amount? Taking into account any contributory conduct by the claimant, whether or not he had mitigated his losses, or any Polkey reduction, and whether or not any compensatory award should be adjusted for either party's unreasonable failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures.

101. For the reasons which we give later, see paragraphs 134 to 146 below, while we have decided that the claimant is entitled to compensation for unfair dismissal from the respondents, we are unable to assess the appropriate amount at this stage. Unless resolved between the parties, we will need to have a Remedy Hearing to determine the amount of compensation due to the claimant.

Victimisation on Grounds of Race

4. Whether or not the claimant was victimised in terms of Section 27 of the Equality Act 2010 by the Respondent's Director on 17 September 2018?

102. On the evidence before the Tribunal, we find that the claimant's dismissal on 17 September 2018 constituted an act of victimisation by the respondents against the claimant, contrary to **Section 27 of the Equality Act 2010,** as the reason for his dismissal by Dr Wilson was related to the fact that the claimant had done a protected act, in good faith, by raising a Tribunal complaint of race discrimination against the respondents in May 2018. It is as plain as a pikestaff that that first ET1 claim form was a ***"protected act***".

103. We are also satisfied that this earlier complaint of racial discrimination brought by the claimant against the respondents was a material factor in Dr Wilson's dismissal of the claimant on 17 September 2018. The claimant was clearly treated less favourably than others who did not do the protected act, and the reason for his less favourable treatment is that he did that protected act.

104. While the respondents sought to argue that the claimant is disqualified from relying on the victimisation provisions of the legislation, we have rejected that argument as not well-founded, for the reasons which we given below in relation to issue (5).

105. Further, while there is no set question posed about remedy, in the event of success with the victimisation complaint, that is clearly a matter we need to determine.

106. For the reasons which we give later, see paragraphs 134 to 146 below, while we have decided that the claimant is entitled to compensation for his victimisation by the respondents, being an award for injury to feelings, we are unable to assess the appropriate amount at this stage. Unless resolved between the parties, we will need to have a Remedy Hearing to determine the amount of compensation due to the claimant.

5. Whether or not, in alleging that the respondents had contravened the Equality Act 2010, being the "protected act" relied upon by the claimant in his victimisation claim against the respondents,

the claimant was making a false allegation in bad faith, and thus, there is (as the respondents contend) no protected act to rely upon, given Section 27(3) of the Equality Act 2010?

107. Having carefully considered this argument, advanced by Ms Mohammed on behalf of the respondents, we have decided to reject it as not well-founded. We do not accept that, in bringing his May 2018 claim to the Tribunal, the claimant was making a false allegation in bad faith.

108. We are satisfied that the claimant brought that first claim against the respondents in good faith because, despite repeated attempts to resolve matters internally with Dr Wilson, the respondents' director, and with ACAS early conciliation, before he brought his first ET1, the claimant was still outstanding significant unpaid wages.

109. It cannot seriously be thought that, in those circumstances, the claimant was somehow acting unreasonably, or in bad faith, or with improper motive, simply to harass the respondents. He was, through legal process, seeking to recover unpaid wages from his then employer.

110. While, at the Case Management Preliminary Hearing, on 14 September 2018, the claimant's then solicitor, Ms Allen, withdrew the unfair dismissal part of the first claim, but left standing the unlawful deductions from wages, and indirect race discrimination complaints, that indirect discrimination complaint was subsequently withdrawn, on 8 February 2019, as confirmed at the Final Hearing, on 18 February 2019, and dismissed by **Rule 52** judgment dated 20 February 2019 and issued to parties on that same date.

111. The fact that the claimant withdrew that allegation of indirect race discrimination does not, of itself, mean that his complaint of victimisation, added into his first claim, by way of amendment allowed by the Tribunal, is a false allegation.

112. As we have found, the claimant was victimised by Dr Wilson on 17 September 2018. The victimisation claim was added to the original claim, after the claimant had the benefit of independent, *pro bono* advice from the Law Clinic, and they made appropriate application to amend, so that the respondents had fair notice of the further head of claim. That application was allowed by the Tribunal, despite objection by the respondents, for the reasons given at the time on 18 February 2019.

113. As per Order (2) in the written Note and Orders dated 21 February 2019, and issued to parties' representatives on 25 February 2019, the Tribunal granted the opposed applications by both claimant's and respondents' representatives to amend the ET1 and ET3 respectively.

6. Whether or not, if the claimant was dismissed on 17 September 2018 (which the respondents deny) the reason for his dismissal on that date was because he had raised a claim for race discrimination against the respondents in May 2018?

114. As per our findings in fact, we are satisfied that this earlier complaint of racial discrimination brought by the claimant against the respondents was a material factor in Dr Wilson's dismissal of the claimant on 17 September 2018.

7. In the alternative, whether or not his dismissal on 12 December 2018 (which the respondents submit was on the grounds that he was AWOL from work) was for that reason stated by the respondents, or because he had raised a claim for race discrimination against the respondents in May 2018?

115. We have found that the claimant was dismissed on 17 September 2018. As such, this question no longer arises.

116. We note that the reason given for his 12 December 2018 dismissal by the respondents was that set forth in Dr Wilson's letter of that date to the claimant,

following upon him being AWOL from 12 October 2018 and failing to attend disciplinary hearings.

117. While the claimant accepts that he received that October / December 2018 correspondence from the respondents, but he did not respond to it, there is no doubt that the respondents went through that process, but without the claimant engaging, or indeed querying why it was being done, when he had already been dismissed by the respondents.

118. To that extent, we cannot regard the dismissal process as a sham, although we rather suspect it was an attempt by the respondents to react to what, by then, they must have known the claimant was regarding as his earlier dismissal by Dr Wilson on 17 September 2018.

Unlawful Deduction from Wages

8. Whether or not, as the respondents contend, and the claimant denies, any claim for unlawful deduction from wages prior to 28 February 2018 is time-barred and thus not within the jurisdiction of the tribunal?

119. Having carefully considered parties' competing submissions on this point, we do not accept that the claim for unlawful deduction from wages prior to 28 February 2018 (being three months before the first ET1 was lodged) is time-barred and thus outwith the jurisdiction of the Tribunal.

120. It is clear from the evidence before us that there was a series of unlawful deductions, and Dr Wilson had undertaken, on 17 August 2018, to work out a payment plan, and in pursuing his complaint, the claimant is entitled to do so, in circumstances where no payment plan was thereafter agrred, and where the period for which he seeks recovery of unpaid wages does not exceed the

statutory two-year cap in terms of the **Deductions from Wages (Limitation) Regulations 2014** (SI 2014/ 3322, effective since 1 July 2015).

9. Whether or not, as the respondents contend, and the claimant denies, there was a verbal agreement in place between the parties constituting a variation, through custom and practice, to the terms of the claimant's written contract of employment with the respondents, as regards payment of his wages?

121. As per our findings in fact, we have rejected, as not well-founded, the respondents' argument that there was a verbal agreement in place between the parties constituting a variation, through custom and practice, to the terms of the claimant's written contract of employment with the respondents, as regards payment of his wages.

122. We noted that it was denied by the claimant that there was in place a practice whereby a discussion ensued further to the issuing of a payslip as to how much he was to be paid each month. He explained that this was never the matter of express agreement and / or custom and practice between himself and the respondents.

123. The claimant denies being aware of any such practice, and at no point when he was raising concerns with Dr Wilson regarding his pay was he advised by her, or anybody else on the respondents' behalf, that this alleged custom and practice was the reason for inconsistencies in his pay, until the amendment to the respondents' ET3 response was intimated on 18 February 2019.

124. On the evidence led at the Final Hearing, we have had no difficulty in finding that there was no such custom and practice. Indeed, the arrangement suggested by the respondents flies in the face of the clear and express provisions in the parties' written contract of employment, and there was no

written agreement between the parties varying those salary payment arrangements.

10. Whether or not the respondents have unlawfully deducted sums from the claimant's wages due and payable and, if so, on what dates and what amounts?

125. As per our findings in fact, we have found that the respondents have unlawfully deducted sums from the claimant's wages properly due and payable.

126. In these circumstances, being satisfied that there have been unlawful deductions, we have made a declaration that that effect, and ordered the respondents to pay the appropriate amount to the claimant, as the appropriate financial compensation remedy in terms of **Section 24 of the Employment Rights Act 1996.**

127. While the claimant spoke in evidence to the impact that not having his wages paid on time, or in full had, on him and his family, we were not invited to make any order under **Section 24(3)** for the respondents to compensate him for any "***financial loss***" sustained by him, e.g. bank overdraft fees, or interest charges, etc, which is attributable to the unlawful deductions.

128. While a **Section 24(3)** claim for financial loss is regularly pursued as part of many unlawful deduction from wages complaints brought to the Employment Tribunal, no such head of compensation was brought by the claimant, or even foreshadowed by his representatives from the Law Clinic when submitting his updated Schedule of Loss.

11. To ascertain the monies (if any) owed to the claimant by the respondents, and the extent to which (if at all) the respondents are entitled to recover training expenses and costs of abuse of telephone calls from any monies due to the claimant.

129. As per our findings in fact, we have found that the respondents made unlawful deductions from the claimant's wages, and they are only entitled to recover **£30** from the claimant for telephone costs, where the claimant has, in writing, accepted that deduction in that amount, but no more, and we find that they are due nothing for training / course expenses.

Working Times Regulations (Holiday Pay)

12. Whether or not the respondents owe any monies to the claimant in respect of holiday pay accrued but not taken as at the effective date of termination of his employment, being either 17 September 2018 (as argued by the claimant) or 12 December 2018 (as argued by the respondents) and if so, in what amount?

130. We have found that 17 September 2018 was the claimant's effective date of termination of employment. On the evidence led before us, we find that the claimant's complaint that he is owed outstanding holiday pay for the holiday year 2018, in terms of the **Working Time Regulations 1998**, is not well-founded, and that part of his claim is accordingly dismissed by the Tribunal, with no order for payment made against the respondents.

Remedy and Further Procedure: Compensation for Unfair Dismissal and Victimisation

131. In respect of the claimant's unfair dismissal by the respondents, on 17 September 2018, we find that the claimant is entitled to financial compensation for unfair dismissal, as also a separate award of compensation for injury to feelings in respect of the unlawful act of victimisation.

132. We are, however, unable to proceed on the currently available information to assess the amount of any such compensation. That is partly due to the content of the claimant's updated Schedule of Loss, as we discuss in the next few paragraphs, as a number of matters have emerged from our consideration of the evidence before us where we require clarification of the actual sums that the claimant is seeking, and the basis of those calculations.

133. It is also partly because, in the interests of justice and fairness to both parties, we may require further evidence to take account of the respondents' arguments, in their closing submissions, that any financial compensation for unfair dismissal due to the claimant should be reduced on account of his contributory conduct, and/or the ***Polkey*** principle, and that any compensation for injury to feelings should likewise be reduced on account of contributory conduct.

134. Unless parties can mutually agree the *quantum* of compensation payable to the claimant, within 28 days of issue of this Judgment, and agree matters extra-judicially between themselves, through ACAS, or application to the Tribunal, under **Rule 64 of the Employment Tribunals Rules of Procedure 2013,** for a Consent Judgment to be made by the Tribunal, we will assign a one-day Remedy Hearing before the same Tribunal on a date to be hereinafter assigned. We refer to paragraphs (4) and (5) of our Judgment above for further detail about any such Remedy Hearing.

135. We turn now to look at our comments on the Schedule of Loss. An updated Schedule of Loss for the claimant, seeking **£23,161.67** (as per document 3, at pages 5/6 of the Supplementary Bundle) was provided by the Law Clinic, on 5 July 2019, to the Tribunal, and copied to Ms Mohammed for the respondents, along with a supplementary Schedule of Loss showing details of unlawful deductions of wages, written statement of benefits received and job applications, and an inventory of job applications.

136. In that updated Schedule of Loss, it is stated that the claimant's gross and net weekly pay were both £**147.69 pw**, and his basic award, and past wage loss component of a compensatory award, have been calculated at **£295.38** and **£1,772.28** on that basis.

137. It is not clear to the Tribunal where this weekly pay figure of **£147.69** comes from. It does not appear to be based on the claimant's salary with the

respondents of £20,000 pa for 40 hours pw, pro-rated to 16 hours pw, nor the weekly gross sum of **£160 pw** for 16 hours @ £10 per hour, being his reduced, part-time working in place at the end of his employment, as mentioned in some of the spreadsheets lodged with the Tribunal.

138. Further, for past wage loss from 17 September 2018 to 19 July 2019, the same weekly figure is stated. Past loss should be assessed on net pay, not gross, and be based on the difference in amount between old and new earnings.

139. The claimant seeks past loss, but the period claimed for, between 17 September 2018 (when we find he was dismissed) and 28 November 2018 (when he started his new employment) is not 12 weeks, as stated, but 10 weeks, 3 days. Further, the total net earnings received by the claimant from the Refugee Survival Trust have not been calculated, and netted off.

140. Further, the claimant has sought a **25% uplift** to the compensatory award ***"for failure to comply with Acas code".*** As the basis of calculation for past financial loss appears to be wrongly calculated, the Tribunal has noted the percentage uplift sought, and not relied on the total compensatory award sought being **£15,340.35.**

141. No future loss of earnings was sought after 19 July 2019, although **£500** was sought for loss of statutory rights. **£10,000** was sought for injury to feelings, it being explained: "***Claiming higher level of low level Vento band on the basis of distress and uncertainty caused by treatment".***

142. There is, however, a footnote stating that: "***injury to feelings has been estimated at the bottom of the middle band for present purposes. We reserve the right to make full submissions on this or on any amended figure at the final hearing."***

143. While two fit notes from the claimant's GP were included in the joint bundle before the Tribunal, the claimant's GP was not led as a witness, nor was his wife, and the only evidence led on the claimant's feelings was that taken from the claimant in person. While we have our notes of the evidence given by the claimant, at the Final Hearing, we would benefit from parties' further submissions on the amount of injury to feelings claimed by the claimant, and for the claimant's representative to clarify which ***Vento*** band they say it falls into.

Closing Remarks

144. This has, in many respects, been a most unusual, if not unique, case. What is clear is that the respondents' record keeping, and recording of employee information as to contractual terms and conditions, payment of wages, changes in hours, days and hours worked, annual leave applied for and taken, etc, appear, from the evidence made available to us, to have been somewhat relaxed and informal.

145. While that may be reflective of the respondents as a small employer, having regard to their size and administrative resources, it is also clear that both the claimant and Dr Wilson have lost trust and confidence in each other, and they are both entrenched in their own positions, where each party sees the other as having been unfair and unreasonable.

146. In our collective, judicial experience, it is also the one and only case we have had experience of where an employer has produced two sets of payslips. That has added not only to confusion and lack of clarity for the claimant, but also for this Tribunal.

147. The first ET1 was brought because the claimant had concerns about not being paid, and whether his tax and NI, was being paid. We are not sure if those concerns of his have yet been allayed. On the basis of the evidence provided to us, in the productions in the various Bundles before us, certain sums are

shown as deductions for tax and NI, but we do not know if those sums were remitted to HMRC by the respondents.

148. The claimant may wish to write to HMRC and ask them to provide him with confirmation as to what tax and NI has actually been paid by the respondents, and when.

149. The issues between differences in payslips, and what is shown on his P45 dated 13 December 2018, compared to payments actually received from the respondents in tax year 2018/19, may also merit investigation, and clarification, so that the claimant's tax records and employment history at HMRC are accurate. These are all matters that the claimant should attend to, if he has not already done so.

150. Finally, the Tribunal reminds both parties of **Rule 3 of the Employment Tribunals Rules of Procedure 2013,** about alternative dispute resolution. It provides that: "***A Tribunal shall wherever practicable and appropriate encourage the use by the parties of the services of ACAS, judicial or other mediation, or other means of resolving their disputes by agreement".***

151. If, however, parties cannot resolve matters between them, within 28 days of issue of this Judgment, the Tribunal will make arrangements to fix a Remedy Hearing. Accordingly, both parties' representatives must update the Tribunal in writing, by no later than the expiry of that 28-day period, when the casefile will be referred back to the Employment Judge to decide whether or not any further procedure, or Hearing before this full Tribunal, is required.

Employment Judge : I McPherson
Date of Judgment : 11 February 2020
Date sent to parties : 13 February 2020

APPENDIX – this is the appendix referred to in our findings in fact, at paragraph 62 (160) of our Reasons

The Tribunal found three errors in the spreadsheet provided by the claimant's representatives. It looks to us that whoever prepared this did not do it in spreadsheet software otherwise the difference column would have calculated each month's over or underpayment of wages automatically and accurately as well as the total of that column which we explain below.

From our review of the spreadsheet, we checked all the figures in the claimant's difference column against our review, and we found that one figure is an incorrect calculation and the other is a figure shown as a minus when it should be a plus. They also incorrectly totaled the difference column.

The net final figure for wages is **£6,352.76.**

The first error is at February 2017. The incorrect difference is shown as +149.50 when it should be +149.22 (i.e. 1,546.72 minus 1,397.50).

The second error is at October 2017 where the amount of £168.72 appears in their document as minus £168.72 when it should be plus £168.72 (i.e. 1,331.28 wages due but £1,500.00 wages received, therefore an overpayment of wages, not an underpayment as they have it).

Once these errors are corrected the cross hatches in our columns tally in the righthand corner as £6,352.76.

The third error we discovered is that their difference column total (using their two error figures as in their document) is incorrect and over by two pence. It should be £6,689.92, not £6,689.94.

The discrepancy between what should have been their total difference column of £6,689.92 and our final figure of £6,352.76 is £337.16. This is explained firstly by the £168.72 being shown as a minus when it should be a plus, so to correct this it is necessary to double that figure making £337.44 then deduct the 28 pence (the difference between the error figure of £149.50 and the correct amount of £149.22), so 337.44 minus 0.28 equals £337.16 which means the double check confirms the final figure.

Our revised spreadsheet is appended for the information of parties.

Month	Net Wages Due	Net Wages Received	Difference	Error - Figure on Schedule
January 2017	1,397.50	1,397.50	0	
February 2017	1,397.50	1,546.72	149.22	149.50
March 2017	1,397.50	1,000.00	-397.50	
April 2017	1,331.28	2,093.44	762.16	
May 2017	1,331.28	300.00	-1,031.28	
June 2017	1,331.28	2,500.00	1,168.72	
July 2017	1,331.28	1,400.00	68.72	
August 2017	1,331.28	600.00	-731.28	
September 2017	1,331.28	200.00	-1,131.28	
October 2017	1,331.28	1,500.00	168.72	-168.72
November 2017	1,331.28	600.00	-731.28	
December 2017	1,331.28	600.00	-731.28	

January 2018	1,331.28	200.00	-1,131.28	
February 2018	1,331.28	1,500.00	168.72	
March 2018	1,331.28	200.00	-1,131.28	
April 2018	1,331.28	1,200.00	-131.28	
May 2018	1,331.28	500.00	-831.28	
June 2018	640.00	1,000.00	360.00	
July 2018	640.00	300.00	-340.00	
August 2018	640.00	400.00	-240.00	
September 2018	640.00	0	-640.00	
Total	**25,390.42**	**19,037.66**	**-6,352.76**	