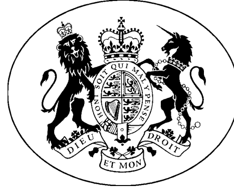

EMPLOYMENT TRIBUNALS

Claimant: **Mr D South**

Respondent: **Danbro Employment Umbrella Ltd**

Heard at: **Judgment on the papers, Cardiff** **On: 1 March 2021**

Before: **Employment Judge R Harfield**

Representation:
Claimant: In person
Respondent: In person

JUDGMENT

It is the decision of the Employment Judge sitting alone that the claimant's complaints of unauthorised deduction from wages and breach of the Working Time Regulations 1998 are not well founded and do not succeed. The claimant's claim is dismissed.

REASONS

Introduction

1. The claimant was employed by the respondent from 17 June 2019 to 1 December 2019. By way of a claim form presented on 9 February 2020 the claimant brings claims for holiday pay and arrears of pay. The respondent defends the claim.

2. Employment Judge Jenkins conducted a case management preliminary hearing on 1 May 2020. The parties agreed that the case could be decided by a Judge on the papers without a need for a hearing. Directions were made for the parties to exchange documents, agree a bundle, produce witness statements and exchange written submissions.

3. I was provided with an agreed bundle extending to 111 pages. In this decision references in brackets [ ] are a reference to the page number in that joint bundle. I was also provided with an audio file of a telephone call on 14 June 2020.

4. The claimant has provided a witness statement and written submissions. The respondent said that their position is adequately set out within their ET3, so they do not intend to provide a witness statement or written submissions. The claimant attached to his written submissions some additional documents comprising two first instance Employment Tribunal decisions, the decision of the then European Court of Justice in Robinson-Steele v PD Retail Services, and a Code of Practice from the Welsh Government in tacking unfair employment practices and false self-employment.

5. The respondent is an umbrella company. The claimant is seeking holiday pay of £3274.90, and reimbursement of deductions he says were unlawfully made from his pay during his employment in respect of employer national insurance contributions and an "employer margin" [67].

Findings of fact

6. Based on the evidence before me and applying a balance of probabilities I make the following findings of fact.

7. The claimant is a qualified barrister and solicitor. He successfully applied for a temporary role at Cardiff Council. On 20 May 2019 the claimant was sent an email from Shannon Singh at the Sellick Partnership (a recruitment business) congratulating him on his appointment with Cardiff Council. The email says that the "assignment" details had a start date of 17 June 2019 and for "Hourly/Daily Rate: £40.00 per hour/day, umbrella." That was the rate quoted by the Sellick Partnership, not by the respondent.

8. Under "Payments" the email says, "*Once you have decided which umbrella company wish you use, please let me know so I can send your assignment information over to them."* The claimant was referred to a link setting out the Sellick Partnership's preferred suppliers list. The email also said, "*our finance director has also written about how best to decide your umbrella company choice, and the link is to this article below."* I have not been given the article concerned or the list of approved suppliers. The email asked the claimant to schedule a time on 14 June 2019 for a 2 to 3 minutes "skype/facetime with myself that will also involve a quick catch up regarding documents and & payment systems."

9. The claimant says that he was informed his employment status would be an employee and he was expecting to receive £40 an hour with normal employee deductions only. I do not, however, accept this, as the email itself talks about an "assignment" and not expressly a contract of employment and it does not say in detail how the payment system or deductions would work. It does set out the hourly rate but also refers to "umbrella." Quite what the terms were to be, particularly in relation to what the hourly rate covered and deductions to be made, is therefore not clear from the email itself. But the email does say that payments would be made through an umbrella company, and there was some guidance for the claimant to read. There was to be a further discussion about "documents and payments systems."

10. As I have said I do not know what was in the guidance documents and I have not been told what other discussions the claimant may have had with the Sellick Partnership. But given the references to an umbrella company that I do know about, I do not agree with the claimant's assertion that any reasonable individual in his circumstances would presume that he was going to be paid £40 with normal employee deductions. I consider, particularly bearing in mind the claimant is a qualified lawyer, that a reasonable individual in his circumstances would do some research about what umbrella companies are and the kind of basis on which they operate. Moreover, as already stated, this was information given to the claimant by the Sellick Partnership, not by the respondent.

11. I do not know what reading or research the claimant then did. Potentially he did some or had time to do some as he responded the next evening, 21 May 2019 to say: "*I'll go with Danbro".* He said that 14 June was fine for the discussion.

12. I do not know why it took the time it did for the contractual documentation to be drawn up or what communications were passing between the claimant and the respondent, and the Sellick Partnership and the respondent, and when. The audio file from 14 June shows that the claimant had been talking to Sophia at the respondent and they had been missing each other's calls. The claimant was due to start work at Cardiff Council on 17 June and this was by then the Friday before. When the claimant called again Sophia was on lunch so he spoke with a colleague, Oscar Twitchett.

13. In the call Mr Twitchett took from the claimant the information required to give the claimant an illustration of what he would get paid if he used the respondent as an employing umbrella company. Mr Twitchett explained that the respondent would become the claimant's employer and would look after his statutory rights for matters such as sick pay, holiday pay and parental rights. He explained that they would deal with the claimant's tax

and national insurance but that it was different to a normal employment relationship as there were additional taxes. He explained the rate was higher than a normal employment relationship but that they would take additional employment costs out. He explained that the largest of these were the employer national insurance contributions but there was also a small apprenticeship levy. He explained there was also an employer's margin of £20 to cover the costs of the respondent providing their services. He explained there were other benefits to the claimant of the relationship such as insurance, a BUPA plan, and discount packages for things such as online shopping and holidays. He explained a pension was offered. Mr Twitchett also explained that holiday pay was different. He explained that holiday pay was paid each week as the employment went along.

14. Mr Twitchett told the claimant by way of an illustration that he could expect his take home pay to be about £916.59 after the employer costs, the £20 margin, and the claimant's own tax and national insurance deductions. The claimant said he was happy with the arrangements. He did ask a question about holiday arrangements. Mr Twitchett explained that the claimant could book holiday directly with Cardiff Council and that the respondent did not really need to know the details as the claimant would not technically get paid as at the time he would be taking the holiday. He explained that this is because all the other payslips the claimant would receive would each have the holiday pay in them. The claimant said that was fine.

15. Mr Twitchett said he would email the documents to the claimant to look and there were also identity checks for the claimant to complete and return.

16. At 14:02 that day Mr Twitchett then emailed the claimant [41] sending him a contract of employment, privacy policy and employee handbook. The email said that once the claimant had read and understood the documents and was happy to accept the terms he must provide confirmation by clicking to agree on the portal or by replying to the email with a set form of wording: "*I [name] have read, understood, and agree to the Contract of Employment, I have also received, read and understood both the Employee Handbook and Privacy Policy."* The email also said "*Payments are made on a cleared funds basis. This means that, when we get the funds from your agency, we will make the necessary deductions and make a payment to your nominated bank account."* The claimant was asked to send in his P45 so that the correct deductions were made and the tax code was correct. I have not been given a copy of the handbook.

17. The email also had attached to it a personal illustration [43] setting out an estimated weekly net take home pay for the claimant of £916.59. It states:

"To get to this figure we start with the invoice value (excluding VAT):

Contracted Rate
37 hours per week at £40 per hour £1480.00

We then account for company deductions and our margin:

Company Deductions

Employer's National Insurance	£156.13
Apprenticeship Levy	£6.49
Danbro Standard Margin	£22.00
Margin Adjustment	-£2.00
Additional Pension Contributions	£0.00

Which gives us your gross pay

Gross Pay

NMW/ Basic Pay + DPSB	£1,157.66
Holiday pay	£139.72

We then account for your own personal deductions:

Deductions

Income Tax	£278.57
Employee's NI	£102.23
Student Loan	£0.00

To get to your total net take-home pay figure of

£916.59

If eligible you will automatically enrolled into our pension scheme at 12 weeks, taking your total income to:

£945.94

Which is made up of £878.42 net take home pay and £67.52 of auto-enrolment pension contributions."

18. The formal contract of employment between the parties is dated 14 June 2019. In short form the contract purports to employ the claimant as a Contractor agreeing to perform and complete client assignments with an

end user that he is allocated from time to time. Paragraph 3 is concerned with Payment and says:

"3.1 Your pay includes Salary and Bonus; a Guarantee in relation to salary; and in additional you may in certain circumstances be reimbursed eligible expenses, all as set out below.

3.2 Salary: We will pay you at the applicable National Minimum Wage (or, if applicable the National Living Wage) rate, to commence when the First Client Assignment commences, for all hours actually worked on Assignment, subject in all cases to you complying with all applicable Company procedures and requirements.

3.3 You will be paid monthly in arrears, directly into your bank account, unless otherwise indicated in your current Employee Assignment Schedule.

3.4 Guarantee: If at the end of any full 12 month period of employment commencing on the Start Date or an anniversary thereof we have not offered you at least 336 hours of paid work, we will pay you at the Pay Rate for such number of hours as is represented by 336, less the number of hours in respect of which we have previously paid you during that 12 month period.

3.5 Bonus: In addition you will be considered periodically for a Discretionary Profit Sharing Bonus (DPSB), provided that:

3.5.1 you have, in the reasonable opinion of the Company, generated sufficient profits, as determined by the Company, to warrant the grant of such a Bonus; and

3.5.2 you have not breached the terms of this Agreement.

3.6 To the extent that your gross taxable pay (excluding holiday pay) exceeds your salary (calculated at the applicable National Minimum Wage (or, if applicable, the National Living Wage) rate, it constitutes your Bonus, even if not separately identified on your payslip…

3.10 Deductions: We will make all necessary deductions from your salary as required by law, including pension contributions which may be required to be deducted. If any money becomes lawfully due from you to us (including money that may have been overpaid to you in error) we may deduct all or part of such money from salary, expenses, or any other payments due from us to you. If we have advanced you monies against your accrued paid leave entitlement, we may recoup that advance by deduction or set-off against any payment due to you for paid leave as and

when you actually become entitled to receive such payment. If you are in breach of contract we may withhold the whole or part or any monies otherwise due to you in full or partial compensation for our losses resulting from your breach, provided that we may not withhold more than would be reasonable compensation for such breach…"

19. Paragraph 4 is concerned with Holidays and says:

"4.1 Your annual paid leave entitlement accrues at 5.6 /46.4 = 0.1207 working weeks per week.

4.2 You may take any accrued paid leave entitlement at any time, subject only to the requirements of any current Client Assignment.

4.3 Periods not worked will be taken as paid leave, to the extent of accrued but any untaken entitlement, and thereafter will be treated as unpaid leave.

4.4 The holiday year runs from 1 April in each year.

4.5 Accrued paid leave entitlements may not be carried forward from year to year, and it is your responsibility to ensure that you take any accrued paid leave entitlement before the end of the holiday year.

4.6 For the purposes of calculating a week's pay in relation to paid leave:

4.6.1 your basic weekly hours of work will be taken as 37.5 hours per week (7.5 hours per day), or (if less) the average number of hours worked per week; and

4.6.2 paid leave taken by the day will be paid at the rate of one fifth of a week for each day's leave."

20. Appendix 1 to the contract was a "Annual Leave pay Advances Form" which says "*I wish to take up employment with Danbro Employment Umbrella Ltd. I understand that as an employee, I have a statutory entitlement to paid annual leave.*

I understand that in order to fund my entitlement to paid annual leave, it will be necessary for Danbro Employment Umbrella Ltd to set aside a reserve fund from the profits of my department, and that setting aside such a provision will reduce the sums which might otherwise be available to be paid to me as discretionary profit sharing bonus.

I understand that you are willing on my request to make advances to me from such reserve fund, on the understand that such advances shall be

repaid by deduction or set off from pay during annual leave, as and when I take such leave.

I request you make advances to me from such reserve fund, and agree that such advances shall be repaid by deduction or set off from pay during annual leave, as and when I take such leave. I understand that repayment of these advances may result in no net sums being actually received by me between annual leave. I understand that I have the right at any time to ask you to cease making such advances to me."

21. I do not have before me the agreement terms signed or authorised by the claimant. That said, it is not in dispute between the parties that he agreed to them. The claimant says that he had "no option" other than to agree to the deductions to be made as put to him otherwise he was unable to take the role and would be left without employment or an income. The respondent says that the claimant chose to accept the terms. I do not have details of when/ in what circumstances the claimant left his previous employment.

22. I also do not know anything about the circumstances in which the claimant's assignment with the respondent came to an end. There is no evidence before me of the claimant, between June 2019 and January 2020 complaining about or querying the arrangements. There is nothing before me, for example, about the claimant complaining that he had taken leave with Cardiff Council but did not consider that he was being paid for it or that he was in general not receiving pay to which he thought he was entitled.

23. On 5 January 2020 the claimant emailed the respondent asking for details relating to his employment including his net pay and holiday paid [65]. A response was sent on 7 January 2020 [64] saying the claimant had received net pay after tax of £20,860.68. In relation to holiday pay he was told:

"Your holiday pay is paid within your contracted rate and this has already been advance to you on the same payslip so therefore, no holiday pay is deducted from your net pay as this has already been advance to you.

Your contract of employment states in clause 4.1 that your holiday accrues at 0.1207 (or 12.07%) working weeks per week (you can see your contract of employment on the Files tab of your online portal).

This allowance is derived from your total holiday allowance of 28 days dividing by the number of working days in a year (232).

Or expressed in weeks, 5.6 holiday weeks divided by 46.4 working weeks in the year.

Appendix 1 of your contract of employment provides for us to advance you an element of holiday pay every time we make a payment to you."

24. The claimant responded to say that on his payslips a deduction is made for holiday pay each time which is equal to the amount paid in holiday pay which looked like had had received no holiday pay for the whole period [63]. The respondent said in response:

"*There was a deduction however, there was also a Holiday Pay Advance, if you look at your payslips, you can see that this was not a deduction on your account."*

25. The claimant said again that he had checked his payslips and where there is a payment for holiday it is then deducted in the same pay. He said ""*Furthermore I also believe that the deduction for Employers National Insurance is Unlawful*." He said he believed that there had been an unlawful deduction of wages for the whole period and asked for a refund of his holiday pay and the employer deductions [62].

26. The respondent responded to say that the rate of pay should enable the claimant to take home the same amount as someone doing the same job who was directly employed by the end client. The respondent said:

"*We would expect that your rate would be higher than a permanent employee because, when you're employed by an umbrella company that hourly rate has to allow for company deductions as well as tax and national insurance.*

Your rate reflects a cost to employ rather than just a pay rate and this is because, when you work through an agency for an end client, and are paid by an umbrella company, you are our employee. We supply your labour to the end client via the agency. The end client pays the agency for the work you have done and the agency pays us. You can trace the progress of this money down page 2 of your payslip which is the reconciliation sheet.

The money we receive is the contracted rate. We are bound by law to make certain deductions and these are itemised in the "Company Deductions Breakdown" section. We retain our margin which in your case is £20 per timesheet.

"Employment Costs" is made up of Employer's NI and the Apprenticeship Levy and the split is shown in the small print below this section.

Employer's NI is deducted at this point out of the money paid to us by the end client for your work. The Apprenticeship Levy is also deducted. It's important to note that we are only acting as a collector of these deductions as they are passed onto HMRC. The ONLY element which we retain from this money is our margin.

One way to think about this is on page 2 the money is not yet "yours". This page shows what happens to the money paid to Danbro via your agency for your work at the end client. The deductions are lawful.

Your money is reflected in the "Gross Pay" figure and the treatment of this is shown on page 1.

In regards to Holiday Pay your contract of employment states in clause 4.1 that your holiday accrues at 0.1207 (or 12.07%) working weeks.

This allowance is derived from your total holiday allowance of 28 days divided by the number of working days in a year (232), or, expressed in weeks, 5.6 holiday weeks divided by 46.4 working weeks in the year.

Appendix 1 of your contract provides for us to advance you an element of your holiday pay every time we make a payment to you, which means your take home pay includes an amount for holiday pay, which you can set aside for future holidays.

If you would rather have us save your holiday pay please let me know and we can arrange this for you."

27. The claimant replied to say that he did not agree those assertions. The respondent responded again [58] sending the claimant a "Pay Guide Document" (which I do not have) said to explain the way they worked with the agency to pay the claimant. The respondent said:

"It might help if I explain the relationships in place between you, us and your agency.

The terms of our relationship with our contractors are set out in your terms and conditions which take the form of an overarching contract of employment which is available on your portal.

Our relationships with agencies are managed separately as there are different obligations in place. Crucially it is the nature of this relationship – and flow of money – which gives rise to the requirement for Employers National Insurance deductions to be made.

When you work at your end client, they will pay your agency for the work you have done at the rate agreed. The money is then paid to us.

The treatment of this money is governed by the Income Tax (Employment and Pensions) Act 2003 (ITEPA) which is the legislation relevant to how umbrella companies operate.

Chapter 7 deals with agency workers and specifically section 44(2)(b) provides that "…remuneration receivable under the agency contract… is to be treated for income tax purposes as earnings from that employment." It is this requirement which gives rise to the need to account for Employer's National Insurance."

28. The claimant responded to request payment of deducted holiday pay and deducted national insurance. The respondent said [57] that holiday pay was paid in the taxable pay each week and therefore no refund is due. The respondent again said that the employer national insurance contribution was a lawful deduction taken from the claimant's contracted rate of pay and therefore no refund was due. Acas early conciliation took place between 10 January 2020 and 16 January 2020 and the claimant then commenced these proceedings.

29. The bundle contains the claimant's payslips. Each payslip is made up of two parts. The second page is a "reconciliation slip" which sets out the contracted rate (made up of hours worked multiplied by the hourly rate of £40). The reconciliation sheet deducts from this "company deductions" which are in turn broken down as the employer margin, employment costs (made up of employer national insurance contributions and Apprenticeship Levy), and holiday pay. This produces a figure called gross pay. In turn the gross pay figure is broken down into an element for National Minimum Wage and the Discretionary Profit-Sharing Bonus. A "holiday pay advance" is then added back in to give a total gross pay figure before employee deductions. The first page of the pay slip then takes this figure for total gross pay and sets out the deductions for employee income tax and employee national insurance to give the overall net payment made.

<u>Relevant legal principles</u>

30. Section 13 of the Employment Rights Act 1996 states:-

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

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

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

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised –

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

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

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

31. Section 27(1) defines "wages" and says, "*In this Part "wages", in relation to a worker, means any sum payable to the worker in connection with his employment, including – (a) Any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise."* Under Section 27(3) the amount of any payment of a non contractual bonus is to be treated as wages. There are some exceptions to the definition of wages including a payment of an advance in wages (although deductions from these are covered) and any payment to the worker otherwise than in his capacity as a worker.

32. In New Century Cleaning Company Ltd v Church [2000] IRLR 27, CA the Court of Appeal held that for a sum to be "properly payable" to the claimant, the claimant had to have a legal (albeit not necessarily contractual) entitlement to the sum. On the facts of that case the claimant's share of a general "workbill price" paid to a team for a piece of work was not a sum that was properly payable to that claimant. In Greg May (Carpet Fitters and Contractors) Ltd v Dring [1990] ICR 188 EAT, the Employment Appeal Tribunal held that in determining what is "properly payable" a Tribunal must apply ordinary principles of common law and contract to determine the total amount of wages properly payable on the relevant occasion.

33. Regulation 13 of the Working Time Regulations which sets out the entitlement to the statutory minimum amount of four weeks annual leave

(supplemented by an additional 1.6 weeks leave in regulation 13A). Regulation 13(9)(b) states that annual leave 'may not be replaced by a payment in lieu expect where the worker's employment is terminated'. Regulation 16 provides for payment in respect of annual leave at the rate of a week's pay in respect of each week of leave. Regulation 16(5) says that "*any contractual remuneration paid to a worker in respect of a period of leave goes towards discharging any liability of the employer to make payments under this regulation in respect of that period; and conversely, any payment of remuneration under this regulation in respect of a period goes towards discharging any liability of the employer to pay contractual remuneration in respect of that period."* The relevant enforcement provision is at Regulation 30 which includes that a worker may present a claim where the employer has failed to pay the whole or any part of holiday pay due.

34. The practice of 'rolled-up' holiday pay is unlawful, i.e., simply increasing the basic wage to cover holiday pay, but not making any payment at the time holiday is taken (Robinson-Steele v R D Retail Services Ltd; Clarke v Frank Staddon Ltd; Caulfield and others v Hanson Clay Products Ltd (formerly Marshall's Clay Products Ltd) [2006] IRLR 386, ECJ). However, an employer may he able to discharge that liability and set off any contractual sums actually paid in advance under transparent and comprehensive arrangements (Robinson-Steele; Lyddon v Englefield Brickwork Ltd [2008] IRLR 198, EAT).

Discussion and conclusions

Employer's margin and employer national insurance contributions

35. I do not find that the contractual agreement reached between the parties was that the claimant would be paid £40 an hour subject only to usual deductions for employee tax and employee national insurance contributions. Firstly, the initial indication of £40 an hour came from the recruitment agency not the respondent (together with the word "umbrella"), and there is no evidence of the respondent telling the claimant this was the flat rate he would be receiving. Given their nature as an umbrella company it is highly implausible that they would do so.

36. Further, Mr Twitchett, on behalf of the respondent, explained to the claimant how umbrella companies operate. The claimant did not disagree with what Mr Twitchett was saying or question it at the time. The claimant said he was content to continue. The claimant did not express any reservations that he was being bounced into agreeing a system that he was not happy with. The audio recording shows it was a perfectly amiable telephone conversation. Mr Twitchett explained to the claimant that the deductions worked differently for umbrella companies compared with

normal employers and included the employer national insurance contributions and the employer margin before deductions were then made for the claimant's own tax liabilities. The personal illustration provided to the claimant, before he agreed contractual terms, showed this all in a worked example. The claimant has not said he did not read or understand this. The worked example in the personal illustration was the same figure Mr Twitchett gave the claimant over the telephone which the claimant had said he was happy to proceed with.

37. The terms in the written contract of employment were that the claimant would receive the National Minimum Wage together with a discretionary bonus (where the respondent has a very broad discretion) less statutory deductions. The personal illustration (together with the phone call) sets out the arrangements for how it is anticipated those figures will be calculated. It shows the respondent first setting out the assignment contractual rate and deducting from that the employer deductions and margin before leaving a figure for the claimant's gross pay (the gross pay being made up of the contractual National Minimum Wage and the anticipated discretionary bonus entitlement). In contractual terms the personal illustration would provide some limits on the proper exercise of the contractual discretion with regard to the bonus calculation.

38. In my judgement, those were the terms the claimant agreed. The claimant has given no legal basis for his argument that because he only had a limited time to consider the terms (and had to accept them as otherwise he would lose the job and not have work/an income) that it should mean they should not bind him. Further, as I have said already, the audio recording does not show the claimant expressing surprise about how the umbrella company arrangements were to work, or the likely figure that he would end up with each week. He agreed with what Mr Twitchett is saying.

39. In my judgement, the wages that were therefore properly payable to the claimant each week and which he had a legal entitlement to were therefore the National Minimum Wage plus the discretionary bonus entitlement. These were the sums that were "payable to the worker" in connection with his employment/ referrable to his employment payable under his contract or otherwise. The additional uplift amount taking it up to the £40 an hour was not, in my judgement, a sum payable to the claimant (as the worker) in connection with his employment but was instead a sum that was payable by the end client to the agency and the agency to the respondent. That it was featured on the claimant's payslips to show the whole calculation process does not, in my judgement, affect this analysis.

40. The deduction of the employer national insurance contributions and the employer margin were therefore not deductions contrary to section 13

Employment Rights Act as they were not deductions from "wages" within the meaning of "wages" in the relevant legislation. Alternatively, I would not uphold the claimant's claim on the basis that the uplifted sum claimed by the claimant are not the wages "properly payable" to the claimant, in the sense of being what his legal entitlement was. The total amount of wages paid to the claimant on each occasion was therefore not less than the total amount of wages properly payable.

41. The claimant has referred to other first instance decisions involving umbrella arrangements in Weldon v 6CATS UK Ltd 2410288/2019 and Glover v Carrington Blake Recruitment Limited & Payroll Village Holdings Limited 2017. However, each case will turn upon its own findings of fact and first instance decisions do not bind another first instance tribunal. In Glover, for example, the Tribunal found on the facts that the claimant in that case had not received the pack of documents setting out how the umbrella arrangement worked.

42. The claimant in his legal submissions also sets out how he sees a compliant and properly functioning umbrella arrangement should operate. However, I have to apply the legislative tests that I have set out above, and it is not for me to judge the case according to what I consider a fair system or arrangement to be. The claimant also refers to Welsh Government Code of Practice guide on tackling unfair employment practices and false self-employment which says that unethical practices can arise where unfair umbrella payment schemes include reduced pay where employer national insurance contributions and various administration fees and equipment fees are deducted from the workers pay. Again, however, such a Code of Practice does not create enforceable rights before this Tribunal, and I have not found that this employer is deducting those things from the claimant's pay.

43. The claimant says that Section 61N of the Income Tax (Earnings and Pensions) Act 2003 means that a recruiter is responsible for paying employer national insurance irrespective of the existence of an umbrella company. He says (paragraph 15 of his submissions) that under section 61N a "fee payer" is responsible for making a "deemed direct payment" to the worker which is treated as earnings from employment. However, the claimant also goes on (in paragraph 16) to say that under section 61N(2) and (1) the "fee payer" should be the respondent (not the recruiter). The claimant says that as the payment is treated as earnings from employment, the fee payer is responsible for paying employer national insurance. The claimant says that it is illegal to deduct employer national insurance from a worker's income and that Section 7 of HMRC Guidance published online in March 2017 states that "They [the fee payer] cannot lawfully deduct the secondary NICs from a fee that has been agreed."

44. Section 61N was introduced as Chapter 10 into ITEPA by the Finance Act 2017 applying to certain public sector recruitment practices. It is due to be further expanded this year. The respondent says that the provisions govern Off Payroll regulations for those working through a Personal Service Company and that as the claimant was paid as an umbrella company this particular regulation does not apply. The particular provisions do relate to where the worker has a material interest in the intermediary (see for example section 61O where, when the intermediary is a company, a qualifying condition is that the worker is to have a material interest in the intermediary). The claimant has no material interest in the respondent (or indeed the agency). This was not a Personal Service Company. In my judgement Chapter 10 of ITEPA, in its relevant incarnation at the time, would not apply to the claimant's situation.

45. The claimant has not provided the Tribunal with a copy of Section 7 of the HMRC Guidance relied upon. It is not the Tribunal's responsibility to trawl the internet to find material the parties rely upon. However, I do note that HMRC Employment Status Manual at ESM2390 says:

> "*Umbrella companies provide the worker with an itemised payslip. All employees are entitled to an individual written payslip. The payslip provided by the umbrella company will usually provide a breakdown of the payment received by the umbrella from the agency which itemises the umbrella company overheads, including employer's NICs. The payslip will also include a separate breakdown itemising the worker's gross pay and deductions to arrive at the net pay.*
>
> *The inclusion of the employer's NICs on the payslip often causes confusion with workers who believe they are paying the employer's deductions. This is not the case as employer's NICs is deducted from the payment the umbrella company receives from the recruitment agency which they have the legal right to.*
>
> *Employers, which includes umbrella companies, cannot by law deduct employer's NICs from a worker's gross pay."*

46. HMRC guidance does not bind the employment tribunal and our respective legislative responsibilities, whilst overlapping, differ. However, the above accords with the conclusions I have separately reached on the particular facts of this case. Moreover, as already said I have not found that the respondent deducted employer national insurance contributions from the claimant's gross pay.

47. If I am incorrect in my primary conclusion, then I would in any event find that the claimant had authorised the deductions for employers national

insurance contributions and employers' margin as forming an express provision of the claimant's contract orally (through Mr Twitchett) and in writing (the personal illustration) the existence and effect of which were notified in writing to the claimant before the deductions started to be made. There was an offer, acceptance, an intention to create legal relations, consideration and sufficient certainty. It was a term that ran alongside, supplementing, and did not contradict that which is in the main written contract of employment. Alternatively, it was an implied term through custom and practice. It was a custom in the use of umbrella companies that was reasonable, notorious and certain. It was a custom that was not arbitrary or capricious, and was, in the context of umbrella companies, generally established and well known. Again it was notified to the claimant in writing (through the illustration) before the deductions started to be made.

Holiday pay

49. The claimant had a contractual paid annual leave entitlement. The respondent operated a system whereby the claimant would not be paid for holiday pay as at the time he took his leave. Instead, he was paid an element of holiday pay in his usual pay slips. Mr Twitchett explained this system to the claimant in their telephone call. It was in response to a direct question from the claimant and the claimant confirmed that he understood it. The claimant agreed an annual leave pay advances form. Within that form he agreed that holiday pay would be paid to him in advance and that the advances would be repaid by deduction or set off from his pay during annual leave as and when he took it. He acknowledged that repayment of the advances may result in no sums being actually received when he was on annual leave. There was the right to opt out of that arrangement. The personal illustration form showed the claimant being paid an anticipated payment of £139.72 a week by way of these advance holiday pay entitlements.

50. The claimant's payslips show the claimant receiving these sums of holiday pay advance in addition to his gross pay for National Minimum Wage and discretionary bonus.

51. The claimant accepts that he did receive holiday payments from the claimant but disputes that they were an additional payment or that the arrangements were transparent. He says that the holiday payments were made after deductions were made to the £40 per hour. He says that even though there appears to be on each pay slip a payment for holiday pay, it had already been unlawfully deducted from the agreed hourly rate and no uplift applied. He says the holiday pay deduction was not mentioned orally or in writing before the commencement of the contract.

52. The system operated by the respondent links in with the findings already made above about the respondent's operations. The assignment rate of £40 an hour was paid from the agency to the respondent to cover all the costs of employment and therefore cover to holiday pay as well as employer national insurance contributions, the apprenticeship levy, the respondent's administration costs, and the claimant's wages. The personal illustration given showed the example of the claimant being paid gross pay of the National Minimum Wage and discretionary bonus of £1157.66 and holiday pay of £139.72 totaling a composite gross pay of £1297.38. That was what was left from the contracted rate of £1480 once the employer national insurance of £156.13, apprenticeship levy of £6.49 and margin of £20 were taken out (£1297.38).

53. The actual payslips received each week provide for the same calculation albeit set out in a slightly different way. For example, by way of a comparison to the personal illustration, the payslip for 20 September 2019 at [88] and [89] is calculated on the basis of similar working hours of 37.04 hours producing a contracted rate of £1481.60. It shows the claimant being paid gross pay of the National Minimum Wage and discretionary bonus of £1139.14 (£304.10 Minimum Wage and £835.04 bonus) and a holiday pay advance of £137.49. This totals composite gross pay of £1276.63. These are very similar figures to those in the pre-employment projection.

54. The section headed "Company Deductions Breakdown" shows deductions for employer national insurance of £153.27, apprenticeship levy of £6.38, pension contributions of £25.32 and employer margin of £20. The company deductions breakdown also includes a deduction of £137.49 for holiday pay. The claimant says that this shows that he had holiday pay deducted and then added back in, meaning that it was never truly paid to him. That is not, however, correct. If you take the composite gross pay of £1276.63 and add back in £153.27, £6.38, £20 and £25.32 you get back to the original contracted rate of £1481.60. I am therefore satisfied that in this sense the holiday pay advance payments were genuinely paid to the claimant in addition to a separately identified payment for National Minimum Wage and discretionary bonus.

55. The question is whether the respondent's system and payslips are sufficiently comprehensive and transparent operating under a genuine agreement. I am satisfied that they are. The personal illustration given to the claimant shows that everything is being funded from the original contracted rate of pay. There was no sense in the telephone call of the claimant not understanding what an umbrella company was or how it operated. The annual leave pay advance form also says that earmarking sums for holiday pay will reduce the sums that might otherwise be available to be paid as a discretionary profit-sharing bonus. This again

shows it being communicated to the claimant that everything was coming out of the same ultimate pot of money. The claimant's payslips have the holiday payment advance payments showing on them. The holiday pay system is also not something that, on the evidence before me, the claimant questioned during the currency of his employment, only once it had come to an end.

56. Whether there has been compliance with the principles in Robinson-Steele and Lyddon depends on the facts of each individual case and whether there is a true agreement providing a genuine and identifiable payment for holidays. In my judgement there was. I have set out already above my conclusion that it was genuine in the sense that it was a real payment and not one cancelled out by another deduction. It was also sufficiently set out, in the phone call with the respondent, personal illustration, and written contract that the claimant would be paid holiday pay on a weekly basis in advance so as to be sufficiently transparent. Particulars sufficient to enable the amount allocated to holiday pay to be calculated are identified in the contract. Within the context of it being known (and expressly set out in the holiday pay advances form) that ultimately the employment costs were being funded from the contractual hourly rate (because that is how umbrella companies operate), I am also satisfied that it was sufficiently clearly set out which part of the claimant's pay was holiday pay and which part was his National Minimum Wage payment and discretionary bonus. In that sense, and in the context of the particular arrangements in play here, it was a sufficiently distinguished and genuine contractually agreed payment to fall within a rolled up pay arrangement that can be offset against the claimant's entitlement to holiday pay under the Working Time Regulations.

57. The claimant's complaints of unauthorised deduction from wages and breach of the Working Time Regulations 1998 are therefore not well founded and are dismissed.

Employment Judge Harfield
Dated: 7 April 2021

JUDGMENT SENT TO THE PARTIES ON
9 April 2021

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS