



## EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Nos: 4122594/2018 & 4103066/2019

5 Final Hearing held in person in Glasgow on 8, 9 and 10 February 2021;  
Further written representations from both parties on 17 February 2021; and  
Deliberation by Members' Meeting held remotely on 25 May 2021

10 Employment Judge Ian McPherson  
Tribunal Member Mrs Paula McColl  
Tribunal Member Mr Robin Taggart

15 Mrs Elaine Jackman

Claimant  
In Person

Mrs Wendy Lambie and Mr Derek Lambie  
t/a Water Babies Scotland Central

Respondents  
Represented by:  
Mr William Lane -  
Solicitor

### JUDGMENT OF THE EMPLOYMENT TRIBUNAL

25 The unanimous Judgment of the Employment Tribunal is that the claimant's  
complaints of unlawful deductions from wages are not well-founded, and her claim  
against the respondents is accordingly dismissed by the Tribunal.

### REASONS

#### Introduction

30 1. These combined claims, which have had a protracted procedural history  
before the Employment Tribunal, were listed for a two-consecutive day Final  
Hearing in person commencing on Monday, 8 February 2021, as per Notice  
of Final Hearing issued to parties on 3 October 2020, for full disposal,  
including remedy if appropriate. As per instructions given by Employment  
35 Judge Lucy Wiseman, on 23 September 2020, as intimated to parties by email  
from the Tribunal on that date, she directed that the case be listed for a 2-day  
Final Hearing to be heard before a full Tribunal.

2. In the event, while we were able to conclude the evidence from both parties, the case did not conclude within the 2 days allocated but, by co-operation with both parties, and the Tribunal administration, we were able to reconvene and hear closing submissions, on a third day, immediately following.
- 5 3. On account of adverse weather conditions affecting travel, Mr Lane and Mrs Lambie joined the Hearing remotely on that third day by video link connection using the Tribunal's cloud video platform (CVP), the claimant, and full Tribunal, all being present in person, at the Glasgow Tribunal Centre, as on the previous days. No technical issues arose, and both parties and the  
10 Tribunal were all able to effectively participate using CVP to see and hear the proceedings remotely.
4. On Wednesday, 10 February 2021, conducted as a hybrid Hearing, with Mrs Lambie and Mr Lane joining in remotely via CVP, having heard oral submissions from both parties, Mr Lane and Mrs Jackman speaking to their  
15 own written closing submissions, and answering points of clarification raised by the Tribunal, the full Tribunal reserved judgment, to be issued later, after private deliberation, and considering parties' further written representations.
5. In light of the oral submissions from the claimant, and her lack of clarity around the actual sum she was suing for, in the event of success with her claim  
20 against the respondents, and how she had calculated the sum sued for, we called for further written representations by 17 February 2021, all as per the Judge's oral ruling, followed up by his written interlocutory Note and Orders, dated 12 February 2021, as copied and sent to both parties by the Tribunal on 18 February 2021.
- 25 6. We gave the claimant 7 days to do so, with a further 7 days thereafter for the respondents' representative to set out any comment or objection to the claimant's revised calculation of the sum sued for, and, if appropriate, make any further closing submission, augmenting what was already stated in the respondents' skeleton argument spoken to by Mr Lane in his closing  
30 submissions to the Tribunal.

7. Specifically, the Tribunal ordered the claimant to provide a new document setting out the total amount she sought from the respondents, in the event of success with her claim, in whole or in part, to supercede the schedule of loss dated 14 July 2020 (reproduced at page 106 of the respondents' Bundle), to identify whatever was to be the new sum sued for, being less than the **£10,191.15** shown at page 106, and to break it down to date periods for each of the specified periods from 8 November 2016 to 31 July 2019, showing the sums claimed as due for each of (a) annual pay increments; (b) administration rate ; (c) mileage rate; and (d) holiday pay, to be shown in separate columns, and sub-totals, producing whatever might be the grand total sum sued for.
8. On 17 February 2021, the claimant intimated her updated schedule of loss, in the reduced sum sued for of **£8,183.55**. We set out the detail later in these Reasons. As ordered, the claimant set out a detailed breakdown of her calculation for her revised sum. While we had allowed Mr Lane up to 7 days to respond, he did so within a few hours of receiving the claimant's email, and he confirmed that the respondents did not agree that the claimant is owed any of the sums set out in the updated schedule of loss, and he did not seek to augment what he had already stated in his skeleton argument spoken to in his closing submissions delivered orally on 10 February 2021.
9. While the Tribunal planned to meet again in early course for private deliberation, after receipt of those further written representations, which both parties timeously lodged on 17 February 2021, unfortunately, the Judge's sick leave absence from the office, from 18 March to 3 May 2021, meant the full Tribunal was unable to finalise its final decision, until recently, and the Judge apologises to both parties for this unavoidable delay, which has already been intimated to parties by letter from the Tribunal sent on 13 May 2021, explaining the position.

### **Claim and Response**

10. Following ACAS early conciliation between 10 and 24 October 2018, the claimant, acting on her own behalf, initially presented her first ET1 claim form

in this case to the Tribunal, on 7 November 2018, and processed under case no. 4122594/2018. She complained of unlawful discrimination by the respondents on the grounds of disability, and that she was owed arrears of pay, arising out of her ongoing employment by the respondents as a swim teacher.

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11. That first claim was defended by the respondents, by ET3 response presented on their behalf on 6 December 2018. Following a Case Management Preliminary Hearing in that original claim, held by Employment Judge Jane Garvie, on 16 January 2019, that first claim was listed for a Final Hearing on 10,11 and 12 April 2019.

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12. In the event, that Final Hearing did not proceed, as it was postponed, on 2 April 2019, after a new claim was brought by the claimant against the respondents, on 19 March 2019, and processed under case no. 4103066/2019. This new claim, again brought by the claimant acting on her own behalf, complained of unlawful discrimination by the respondents on grounds of disability, and that she was owed holiday pay, arrears of pay, and for breach of contract, all arising out of her ongoing employment by the respondents as a swim teacher.

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13. This second claim against the respondents was originally rejected by Employment Judge Laura Doherty, on 22 March 2019, and re-presented by the claimant on 29 March 2019, along with a fresh ACAS early conciliation certificate issued on 28 March 2019.

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14. As re-presented, it was then accepted by the Tribunal administration, and served on the respondents by Notice of Claim issued by the Tribunal on 5 April 2019, assigning a Case Management Preliminary Hearing for 5 June 2019. An ET3 response was presented on the respondents behalf on 3 May 2019, and so that case too proceeded as defended.

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### **Earlier Preliminary Hearings**

15. After that date, both casefiles were administratively linked, but not formally combined. Of consent of both parties, both claims were later combined by order of the Tribunal, at the Case Management Preliminary Hearing held by Employment Judge Ian McPherson, on 5 June 2019. Judge McPherson  
5 ordered that the combined claims be listed for a one-day public Preliminary Hearing before an Employment Judge sitting alone to address the respondents' opposed application that the claims should be struck out as having no reasonable prospects of success, which failing for the Tribunal to make a deposit order.
- 10 16. By Notice of Preliminary Hearing issued by the Tribunal, on 30 June 2019, the case was listed for that strike out / deposit order Preliminary Hearing on 22 August 2019. On that date, the case called before Employment Judge Rosie Sorrell, but there was no appearance by the claimant, although the respondents were present and represented by their solicitor, Mr William Lane  
15 from Peninsula.
17. In the circumstances, Judge Sorrell ordered that the case be postponed, the claimant's absence having been unforeseen and through no fault of her own, on account of the overnight illness of her son and her inability to make suitable  
20 alternative childcare arrangements, and the Judge refused the respondents' application to proceed in the absence of the claimant, and strike out the claim. She ordered that the Preliminary Hearing be relisted as soon as possible.
18. Thereafter, the Preliminary Hearing was relisted, on 3 December 2019, for 13  
25 February 2020, on which date both parties appeared, and by written Judgement with Reasons dated 18 February 2020, copied and issued to parties on 26 February 2020, Employment Judge Mary Kearns held that (1) the complaint of indirect disability discrimination by association had no reasonable prospect of success and it was struck out ; (2) the Tribunal had  
30 no jurisdiction to hear the complaint of breach of contract as the claimant was still employed by the respondents ; and (3) she ordered that a Hearing be fixed to determine the claimant's remaining claims.

19. Due to the Coronavirus pandemic, the case was relisted, on the ET President's direction, on 21 May 2020, for a telephone conference call Preliminary Hearing on 16 June 2020 to discuss how to progress the case in accordance with Presidential guidance. The case called before Employment Judge Robert Gall, on 16 June 2020, for that purpose, and his written Note and Orders were issued to parties on 23 June 2020.
20. Judge Gall, after discussion with the claimant and Mr Lane, solicitor for the respondents, ordered that the case proceed to be listed for Final Hearing, on 4 discreet, identified issues, with a Joint Bundle to be finalised, witness statements to be prepared and submitted, and the claimant to provide a detailed schedule of loss.
21. The four issues that Judge Gall identified were as follows:-
- (1) *whether there has been a failure by the respondents to make payment to the claimant of annual pay increments as alleged by her. The respondents say that the claimant received pay increments in April 2016 and April 2017.*
  - (2) *whether there has been a failure by the respondents to make payment to the claimant of the correct sum by way of admin rate. The respondents contend that payment has been made to the claimant at the correct rate which, from August 2018, they say was £8.50 per hour.*
  - (3) *whether there has been a failure by the respondents to make payment to the claimant of the correct sum by way of mileage rate. The respondents maintain that the claimant was paid at the mileage rate to which she was entitled, being initially 20p per mile, increasing to 40p per mile in August 2018.*

(4) *whether the respondents made payment to the claimant of the appropriate sum in respect of annual leave accrued but untaken by her at date of termination of her employment and whether they made payment to her the appropriate rate of holiday pay to her during her employment.*

### **Final Hearing before this Tribunal**

22. Arrangements for the Final Hearing in person were agreed with both parties and the Judge, at a telephone conference call Case Management Preliminary Hearing held on 27 January 2021, the terms of which were copied to them by the Tribunal in an email sent on 1 February 2021, there being no formal Note & Orders, as the purpose of the telephone conference call was the circa 7 day before Final Hearing in person check with parties re social distancing, and logistical arrangements for the Final Hearing.
23. Previously, on 21 December 2021, by email from the Tribunal sent to both parties, the Judge had instructed that parties be advised (in response to an email of 9 December 2020 from Mr Lane, the respondents' representative, who had suggested that the Tribunal might wish to consider whether a full Tribunal panel was necessary, as the claimant's complaints for alleged arrears of pay could be considered by an Employment Judge sitting alone, under **Section 4 of the Employment Tribunals Act 1996**) that a full Tribunal was still considered appropriate, but the Tribunal would wish to discuss with both parties the scope of the Final Hearing given a letter to the Tribunal from the claimant dated 11 August 2020, and Mr Lane's email of 4 September 2020, the latter stating that the claimant should not be permitted to proceed with complaints which the Tribunal (per Judge Kearns' judgment) had previously dismissed, and that her schedule of loss still seeking injury to feelings (@ **£8,600**) was inapplicable, as her discrimination complaint had been dismissed by the Tribunal.
24. When the case called before the full Tribunal, on Monday, 8 February 2021, at the Glasgow Tribunal Centre, the claimant was in attendance, as an

unrepresented, party litigant. The respondents were represented by their solicitor, Mr William Lane from Peninsula, accompanied by Mrs Wendy Lambie as instructing client, and as a witness for the respondents.

- 5 25. While, at an earlier case management stage in these proceedings, it had been indicated that Mr and Mrs Lambie, the two partners of the respondents' business, would each be giving evidence, only Mrs Lambie was led as a witness for the respondents at this Final Hearing, while the claimant was the only witness led on her own behalf.
- 10 26. The Tribunal received two separate Bundles of Documents, each in a separate ring binder, one from each party, rather than an agreed Joint Bundle, comprising documents each party wished to refer to or rely upon before the Tribunal, as part of their evidence to us.
- 15 27. The claimant's Bundle comprised 46 documents, across 208 pages, as per a list of documents, comprised Tribunal pleadings; pre-contract correspondence; contractual documents; and other correspondence, including letters, emails, text messages, timesheets, and associated documents.
- 20 28. The respondents' Bundle comprised 27 documents, across 299 pages, as per a Bundle index, comprising pleadings and Tribunal documents; contractual documents / policies ; chronological documents ; timesheets and payslips; and holiday calculations. An additional document (No.28), being an email of 24 April 2017, was added in as page 300 during the course of the Final Hearing.
- 25 29. At the Judge's request, on 27 January 2021, Mr Lane provided A3 sized copies of the claimant's spreadsheets, originally contained in the respondents' Bundle, at pages 107 to 114, on the basis that those original copy pages were unusable / unreadable in their original A4 formatting.
30. The A3 size productions were used by the Tribunal, although, on day 2, the claimant provided an even larger formatted size, but as these copies were not



a true copy of the lodged production, already in the Bundle, we thanked the claimant for producing them, but returned them to her, instead continuing to use the A3 sized versions of the claimant's spreadsheet, as set forth in the respondents' Bundle.

5 31. We also had written witness statements submitted by each of the claimant, and Mrs Lambie for the respondents. The claimant's witness statement, which was intimated on 3 February 2021, after an extension of time granted to her by the Judge, at the telephone conference call on 27 January 2021, ran to 11 pages, comprising 20 separate paragraphs, and incorporating tables with  
10 examples of discrepancies in pay, and cross-referenced to documents in the claimant's Bundle of Documents.

32. Mrs Lambie provided the sole witness statement for the respondents. It was intimated by Mr Lane on 3 February 2021, at the same time as the respondents' written skeleton argument. Her witness statement runs to 7  
15 pages, across 36 paragraphs, with tables showing timesheets and payslip details, cross-referenced to pages in the respondents' Bundle of Documents.

33. As agreed with both parties and the Judge, at the telephone conference call Case Management Preliminary Hearing held on 27 January 2021, the Tribunal pre-read both parties' witness statements, before starting the Final  
20 Hearing. It had been intended to start at 10am on day 1, and parties attended for 11am, as instructed. Unfortunately, due to an administrative error, the lay members of the Tribunal had been cancelled the previous Friday afternoon, and so were not in attendance at the scheduled start time. When parties appeared, the Judge called the case, at around 11.10am, and explained the  
25 situation. It was agreed to adjourn to 1.00pm, to allow for the lay members to be in attendance, the claimant confirming that she still wished a full Tribunal.

34. The case then called before the full Tribunal, commencing at around 1.05pm, when the Judge apologised to parties for the delay in starting, confirmed the witness statements had been read by the panel, and a brief housekeeping  
30 discussion was then had about likely length of evidence, and closing

submissions. As previously agreed, Mrs Lambie then gave her evidence first for the respondents, confirming that nothing needed to be altered in her witness statement, and that she understood it constituted her evidence in chief to the Tribunal, being taken as read, and followed by cross-examination by the claimant in person.

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35. In the course of her cross-examination, Mr Lane, on behalf of the respondents, took objection to the claimant seeking to allow in a further document, not included in her Bundle, and stating that the claimant had made no attempt to amend her case, there would be prejudice and hardship to the respondents to allow in new documentation at this stage, which could lead to significant new lines of factual enquiry. The claimant stated she did not agree with Mr Lane's objection, and spreadsheets had been submitted to the Tribunal before.

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36. Having retired into chambers, at around 3.35pm, to have private deliberation on the application and objection, when the Tribunal returned, after about 10 minutes, the Judge read out orally from a note written in chambers, and agreed with the members of the Tribunal, allowing the claimant's application, and repelling Mr Lane's objection.

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37. We stated that the Tribunal had decided it was in the interests of justice to allow the claimant to add her additional document to her Bundle, as it was legitimate to put to the respondents' witness that the document Mrs Lambie was relying upon, at page 240 of the respondents' Bundle, was not all that was submitted by the claimant, when claiming for payment. The following day, as a housekeeping matter, at the start of proceedings, we labelled the claimant's additional production as page 240C, and placed it in the respondents' Bundle immediately after 240R.

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38. We stated that the claimant was entitled to cross-examine Mrs Lambie on her witness statement, and we did not accept Mr Lane's argument that there was substantial prejudice to the respondents to allow her to do so, as the claimant could have done so without producing this additional document, but it was

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here, and we ruled that the witness could be asked about it, there and then, and we did not accept that by allowing it in there would be substantial injustice and hardship to the respondents.

39. In further discussion with the claimant, and Mr Lane, about the scope of the issues before us at this Final Hearing, just prior to the close of proceedings, at 4.00pm, on day 1, the claimant agreed with Mr Lane, and the Tribunal, that the outstanding issues before the Tribunal remained those 4 issues articulated by Judge Gall (as reproduced at page 98 of the respondents' Bundle).
40. Arising from objections, made by the respondents' solicitor, to the claimant's line of questioning, in cross examination of the respondents' witness, Mrs Wendy Lambie, on Monday, 8 February 2021, on the morning of day two of three of this Final Hearing, the claimant invited the Tribunal to allow her to lodge further additional documents.
41. She tabled two new documents : (1) Schedule of Loss workings up to May 2019, and (2) Actual Pay to May 2019. She explained that this was a previous Schedule of Loss, and not the same as what was pages 106 and 107 in the respondents' Bundle. Mr Lane, for the respondents, stated that he had some concern about these documents, as **£10,191.15** was the sum sued for, as at page 106, whereas there now seemed to be a considerably larger figure of **£31,639.20**.
42. Without reviewing it, and taking instructions, Mr Lane stated that he objected to these documents being lodged. When the claimant then stated, in reply, that she was only seeking **£10,191.15**, Mr Lane commented that the new documents were more likely to confuse matters, if used, so the claimant then stated that she was happy to withdraw the new documents, and they were returned to her, and not lodged for use by the Tribunal.
43. Further, also on the morning of day 2, the claimant tabled a one-page, written application for leave to amend in order for the two issues set out by her in her written application to be considered at this Final Hearing.

44. Those two issues were as follows:-

(i) *“Some documents issued by the Respondent to the Claimant, throughout her employment, are at odds with the versions of these documents, issued by the Respondent under SAR and / or contained within the Respondent’s Bundle for the Final Hearing. There are material variations in contents of the documents, held by the respective parties.*

(ii) *Information on some timesheets submitted by the Claimant to the Respondent is at odds with the versions held by the Respondent. Information appears to have been altered or removed once in the possession of the Respondent. In some instances this has resulted in the Claimant being paid incorrectly. As a result of these amendments, the Claimant has been paid incorrect rates, incorrect hours, and at other times, has not received payment at all for items claimed.”*

45. We heard oral argument from the claimant in support for her application for leave to amend, and from the respondents’ solicitor with his objections. To allow the claimant, as an unrepresented, party litigant, to fully consider her position, in light of the legally well-known **Selkent** factors, which Mr Lane, the respondents’ solicitor, had referenced in his objections to the application for leave to amend, we allowed the claimant an adjournment, of half an hour between 10.55 and 11.25am, to read the **Selkent** judgment, a copy of which Mr Lane emailed to the Tribunal clerk who printed it off for the claimant to read during the adjournment.

46. Following the adjournment, we heard from the claimant, in reply, before adjourning into chambers at 11.56am for private deliberation, after allowing Mr Lane an opportunity to reply. When we returned, at 12.28pm, the Judge read **verbatim** from a written Note drafted in chambers, and unanimously agreed by the full Tribunal, the terms of which, so far as material for present purposes, are reproduced here, as follows:-

5 *“The Tribunal has carefully considered matters, in light of the claimant’s application for leave to amend her claim, as per the amendment tabled this morning, and as per Mr Lane’s objections on behalf of the respondents. While the claimant has sought leave to amend, the Tribunal does not consider that she needed to do so, as the basis of her claim is as set out in her ET1 claim forms, and they make it clear the legal basis of the claim of unlawful deduction of wages, and she has clarified today that she seeks payment of £10,191.15, and nothing any greater.*

10 *While Mr Lane seeks further specification of the documents and timesheets she challenges, we do not believe such particularisation is required, as it will be clear from cross examination which documents the claimant puts to Mrs Lambie. She is here, she has the documents in the Bundle, and she can*  
15 *answer.*

*Having regard to the interests of justice, and the Tribunal’s overriding objective to deal with the case fairly and justly, we consider what the claimant seeks to do, by her amendment, already captured in the four issues identified by Employment*  
20 *Judge Gall, and so it is not necessary to add a fifth issue for determination by us as the fact finding Tribunal.*

*Given the time estimates which have been provided by both Mr Lane, and the claimant, we will proceed with further cross examination of Mrs Lambie, not exceeding one hour, any*  
25 *questions by the panel, and any necessary re-examination by Mr Lane, to a maximum of 15 minutes. We do so as a formal Timetabling Order.*

*If we had felt an amendment was necessary, then we still would have allowed it, being satisfied that the balance of injustice and*  
30 *hardship favours the claimant, as an unrepresented party litigant,*

***doing her best to present her case. She has prepared her witness statement, and given the respondents' fair notice of all she seeks to prove, and establish in front of the Tribunal.***

5 ***It would be wholly unfair and unnecessary, if amendment were allowed, to vacate this Final Hearing part heard to come back at a later date for future days. Both parties are here – each has seen the witness statement and Bundle for the other party, and so both parties can and should be able to lead their evidence at this allocated sitting where we have already allocated tomorrow morning, as an additional half day, to take account of the delay in starting due to the Tribunal's administration cancelling the members, when the case required a full panel. We will now list all day tomorrow.***

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15 ***As regards evidence from the claimant, once Mrs Lambie's evidence is concluded, we will take the claimant's evidence in chief, after her being sworn, her witness statement taken as read, and open to cross examination by Mr Lane, for a period not exceeding three hours.***

20 ***Finally, as regards closing submissions, we will invite Mr Lane to speak to his skeleton argument, with oral submissions not exceeding 30 minutes, and similarly we will give the claimant 30 minutes to reply, and present her own closing submissions to the Tribunal."***

- 25 47. After the Judge had read verbatim from the Tribunal's interlocutory ruling, he asked if there were any matters of clarification required by either party, but no clarification was sought by either the claimant in person, or Mr Lane on behalf of the respondents. Mr Lane did, however, state that he required reasons for the Tribunal's ruling under **Rule 62**, to which the Judge replied, stating that oral reasons had just been given, and these would, as requested, be

committed into written reasons, in identical terms, as part of the formal written judgment of the Tribunal in due course.

48. We note and record here that those Written Reasons for that decision by the full Tribunal were thereafter set forth in the Judge's written interlocutory Note and Orders, dated 12 February 2021, as copied and sent to both parties by the Tribunal on 18 February 2021. As that Note is only copied to parties, and not put on the public record, we have felt it appropriate to reproduce its material terms in these Reasons for our final Judgment so as to allow readers to see things in proper context.
49. We then proceeded with the claimant's further cross-examination of Mrs Lambie, after the lunchtime break, from 1.20 to 2.20pm, followed by some questions of clarification asked by Mr Taggart from the Tribunal. Mr Lane had no re-examination of his witness, and so he closed the respondents' evidence.
50. Following the close of Mrs Lambie's evidence, and starting at 2.25pm, the Tribunal then heard sworn evidence from the claimant, who confirmed her unsigned written, witness statement as her evidence in chief, stating that she had read it in preparation for this Final Hearing, and there was nothing in it that required to be amended. She stated that the only sum now being sued for was £10,191.15, as her claim for injury to feelings was not being insisted upon, following upon Employment Judge Kearns' Judgment. The claimant was then cross examined by Mr Lane on behalf of the respondents.
51. Mr Lane had estimated 3 hours for this purpose. However, his cross examination of the claimant was significantly shorter than anticipated, at only around 30 minutes, and the Tribunal thereafter adjourned, after a point of clarification raised by Mr Taggart, when evidence from the claimant concluded, at around 3.05pm on the afternoon of Tuesday, 9 February 2021, to continue the following morning to receive closing submissions from both parties.
52. In reply to Mr Lane's cross-examination, the claimant confirmed that she had signed the January 2015 contract, then for her dual role as both administrator,

and swim teacher, and that subsequently, from April 2017, she had been a swim teacher only. She agreed the terms of that contract re remuneration, including increments, and agreed that she was never told there would be an annual increase, although she added that she still believed that she had an entitlement to receive annual increases.

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53. The claimant, when referred to page 240C in the respondents' Bundle, stated that, the timesheet for April 2017 she submitted was different from that provided by the respondents, at page 240R, and, while, as per her spreadsheets at page 107 onwards, she challenged certain timesheets in the respondents' Bundle, the claimant agreed that she had not asked Mrs Lambie any questions about those matters when she was cross-examining her, but further stated that she did not accept that all the respondents' records were accurate.

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54. Referred to the details of her claim, as set forth in her second Tribunal claim against the respondents, presented on 19 March 2019, and in particular page 9 of 11, as reproduced at page 42 of the respondents' Bundle, the claimant agreed with Mr Lane that while she had there stated that she had been paid erratic and inconsistent admin rates throughout her employment, that was the first time she had mentioned that complaint.

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55. The claimant agreed with Mr Lane that, for the period from November 2016 to July 2018, her payslips showed she had been paid £8.00 per hour for weekday admin, and £10 per hour for weekends. Further, the claimant also agreed with Mr Lane that, from August 2018, her payslips showed weekday admin rates were paid at £8.50 per hour, and weekends at £10.00.

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56. As regards mileage rates, the claimant agreed with Mr Lane that, up to July 2018, she was paid the contractual rate of 20 pence per mile, and while she stated that she did not expressly agree to that increasing to payment at 40 pence per mile, from August 2018, the claimant agreed that she did not protest about that increase, and she accepted that she was paid at that higher rate thereafter.

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57. On the matter of her weekly swim teacher hours, the claimant disputed that, from April 2017, she worked 40 weeks per annum, or less, and she further stated that she challenged Mr Lane's reference to 40 weeks, despite the email of 4 April 2017 saying 40 weeks .
- 5 58. Also, she added, she did not agree with his statement that her 5.6 weeks annual leave entitlement, including public and bank holidays, was pro-rated from 52 weeks to 40 weeks, and she commented that she took Mr Lane's word for it that the respondents calculated it as 4.038 weeks, as per paragraph 30 of Mrs Lambie's witness statement, and the calculations produced in the  
10 respondents' Bundle.
59. In answer to Mr Taggart's point of clarification, the claimant was clear and unequivocal that the reasons for her claim, and the sums sought from the respondents(@ **£10,191.15**), were all to be found in the commentary in the various right hand columns of the spreadsheets prepared by her at page 107  
15 and following in the respondents' Bundle.
60. The third day of the Final Hearing had to be converted into a hybrid Hearing, as both Mr Lane, the respondents' solicitor, and his client, Mrs Lambie, were unable to attend, due to inclement weather conditions, and so they both joined the hearing remotely by CVP, the Tribunal's Cloud Video Platform. The  
20 claimant, and the full Tribunal, were all present at the in person Hearing within the Glasgow Tribunal Centre.
61. After hearing oral closing submissions from both parties, between 10.10 and 11.55am, the full Tribunal reserved judgment, to be issued, in writing, and with reasons, in due course, after a Member's Meeting to be fixed on a date to be  
25 arranged, by the Judge, after receipt of parties' further written representations, which were the subject of oral directions given by the Judge, and later confirmed in writing by the Tribunal via email.
62. The claimant was given seven days to provide a redrawn, revised schedule of loss, showing the amount that she now sought from the respondents, being  
30 less than the **£10,191.05** shown as page 106 of the respondents' Bundle, and

thereafter, within no more than seven days from the claimant sending that document to the respondents' solicitor, Mr Lane for him to set out any comment or objection to the Tribunal and, if appropriate, make any further closing submissions, augmenting what was already stated in the respondents' skeleton argument spoken to by Mr Lane in closing submissions. We detail these further written representations later in these Reasons.

### **Findings in Fact**

63. We have not sought to set out every detail of 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 as set out below, in a way that is proportionate to the complexity and importance of the relevant issues before the Tribunal.

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64. As is our primary, fact finding role, we have made the following findings in fact, on the basis of the evidence heard from the claimant and Mrs Lambie, the only witnesses called before us over the course of this Final Hearing, and the various documents in the separate Bundles of Documents provided to us, so far as spoken to in evidence.

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65. The Tribunal has found the following essential facts established:-

(1) The claimant was formerly employed by the respondents from 1 September 2014 until she resigned with effect from 31 July 2019. During her time with the respondents' business, the claimant was employed in various roles. She is currently working as a fitness instructor.

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(2) As per her ET1 claim form, and as accepted by the respondents in their ET3 response, the claimant's employment dates were agreed,

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as was her working an average of 10.5 hours per week as a swim teacher.

5 (3) While there was some confusion regarding the claimant's employment status, at the time when she raised her first Tribunal complaint against the respondents, the respondents, in their ET3 response in that original claim, conceded that the claimant's correct status is an employee, although she had been paid on a zero hour's contract as a worker.

10 (4) In bringing her second Tribunal claim against the respondents, the claimant stated (as per the statement of claim at attached to section 8.2 of her ET1 claim form ( copy produced to the Tribunal at page 42 of the respondents' Bundle) that she had discovered "**pay anomalies**", and she sought "**reimbursement of arrears of pay to take account of**

- **Full contracted hours**
- **Underpayment / inconsistencies of Admin rate**
- **Expected pay increments**
- **Underpayment / inconsistencies of Mileage Rate**
- **With-holding of wages from relocated classes."**

20 (5) In her letter of 14 July 2020 to the Tribunal, copy produced to the Tribunal at pages 104 to 106 of the respondents' Bundle, the claimant attached a schedule of loss, and spreadsheet workings (at pages 107 to 114), detailing how she had arrived at the total figure of **£18,791.15** +, her breakdown being as follows:

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30 **Arrears of Pay / Withheld Wages**

September – December 2014    £73.37

	<i>January – December 2015</i>	<i>£780.73</i>
	<i>January – December 2016</i>	<i>£1881.09</i>
5	<i>January – December 2017</i>	<i>£1564.70</i>
	<i>January – December 2018</i>	<i>£1669.81</i>
	<i>January – July 2019</i>	<i>£4221.45</i>
10	<i>+ holiday pay to be calculated(request full breakdown of holiday payments made, from respondent)</i>	

**£10,191.15**

**Injury to Feelings**

15

<i>Compensation for Injury to Feelings for arrears of pay / Withheld monies</i>	<b>£8600</b>
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**Grand Total**

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<i>Arrears of Pay / Withheld Wages</i>	<i>£10,191.15 +</i>
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<i>Injury to Feelings</i>	<i>£8600</i>
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**£18,791.15+**

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- (6) In their solicitor's letter of 17 July 2020 to the Tribunal, copy produced to the Tribunal at pages 115 to 124 of the respondents' Bundle, the respondents lodged their response to the claimant's additional information and schedule of loss intimated on 14 July 2020. They opposed any attempt by the claimant to advance heads of complaint

not previously raised by her, and to continue to advance heads of complaint dismissed by the Tribunal. They disputed that her claim for injury to feelings was live, given her previous discrimination complaint had been dismissed by the Tribunal.

5

(7) The respondents denied that the claimant had any entitlement to annual pay increments. They also denied that they had unlawfully failed to pay the claimant the correct sums by way of administration rate, and detailed the sums they had paid her between November 10 2016 and July 2019. Further, they denied that they had unlawfully failed to pay the claimant the correct sums by way of mileage rate, and detailed the sums they had paid her between November 2016 and July 2019.

15

(8) Finally, they stated that they did not unlawfully fail to pay the claimant holiday pay, explaining that in her July 2017, 2018 and 2019 pays, the claimant had received the appropriate rate of holiday pay due to her during her employment, calculated on the basis of her average weekly pay during the 12 working weeks prior to the calculation, on 20 the basis that her entitlement was 4.307692 weeks, being the equivalent of a full-time employee's annual holiday entitlement of 5.6 weeks, pro-rated to reflect that the claimant worked 40 weeks per year, rather than 52 weeks.

25

(9) The respondents are a husband and wife partnership, trading as Water Babies Scotland (Central), where they are franchisees for the Central Scotland region of Water Babies, a UK wide franchise. They have employed various staff from time to time, including the claimant, and they hire pool time at various venues across central Scotland. 30 They employ around 10 staff.

5 (10) The respondents' business, as part of that franchise, is an operation that (a) teaches babies how to swim, and (b) helps babies to develop water confidence. During swimming classes, the swim teacher, babies and parents are all in the water together. The core business is basic swimming lessons for babies and parents, and the respondents run swimming classes for that purpose.

10 (11) Swimming classes are run during school term-times, and the respondents have operated blocks of classes during each year, running from August to June, with no classes in July. Generally, classes have operated as 4 ten-week blocks during the calendar year. A copy of the term dates 2018-2019 was produced to the Tribunal at page 195 of the respondents' Bundle.

15 (12) The claimant was initially employed by the respondents as an admin assistant, with effect from 1 September 2014. While, at the time of her recruitment, the claimant advised the respondents that she wanted to be a swim teacher, she did not then have the required teaching qualification.

20 (13) When the claimant obtained the required teaching qualification, the respondents having put her through the training required by their franchisor, the claimant's employment then moved, from 27 January 2015, to the role of admin assistant / swim teacher.

25 (14) There was produced to the Tribunal, at pages 131 to 134 of the respondents' Bundle, a copy of the statement of main terms of employment issued by the respondents to the claimant in respect of her job as admin / swim teacher which began on 27 January 2015. It referred to an Employee Handbook, for various applicable capability, disciplinary and grievance, procedures, and equal opportunities

30

policy, a copy of issue 5 (January 2017) of which was produced to the Tribunal at pages 136 to 184 of the respondents' Bundle.

5 (15) That statement of main terms and conditions of employment included the following specific provisions, as follows:

*JOB TITLE: admin / swim teacher*

10 *Your job title is an indication of the work you are required to undertake and the main duties involved are set out in the attached job description.*

*PLACE OF WORK*

15 *You will normally be required to work in the office or any of the swimming pool(s) in which we operate.*

*HOURS OF WORK*

20 *Your normal hours of work are 22.5 hours per week worked between 9.00am and 5.30pm Monday to Wednesday with a 60 minute unpaid lunch break each day.*

25 *During term time, you will perform a maximum of 12 teaching hours each week with the remainder of your time spent carrying out administrative duties. Outside of term time, all of your weekly hours will be spent on administrative duties, as directed.*

*REMUNERATION*

30 *Your wage per hour is £17.50 for duties undertaken as a Swim Teacher and £10.25 per hour for duties undertaken as an*

*Administrator payable monthly in arrears by credit transfer on the 27<sup>th</sup> as detailed on your pay statement.*

5 *Except by agreement, no extra payment will be made in respect of extra time worked, nor will time off in lieu be allowed.*

*Your salary / hourly rate will be reviewed annually, with effect from the 1<sup>st</sup> September each year. Any revision to your salary / hourly rate will take effect from this date.*

10

#### **ANNUAL LEAVE AND PUBLIC / BANK HOLIDAYS**

15 *Your holiday year begins on 1<sup>st</sup> January and ends on 31<sup>st</sup> December each year, during which you will receive a paid holiday entitlement of 5.6 working weeks inclusive of public / bank holidays and pro-rata for part-time employees.*

20 *In the event of termination of employment holiday entitlement will be calculated as 1/12<sup>th</sup> of the annual entitlement for each completed month of service during that holiday year and any holidays accrued but not taken will be paid for. However, in the event of you having taken any holidays in the current holiday year, which have not been accrued pro-rata, then the appropriate payments will be deducted from your final pay.*

25

#### **MILEAGE AND EXPENSES**

*You will be paid 20 pence per mile for all business mileage incurred in the proper performance of your duties.*

30

(16) Although that copy of the statement of main terms of employment produced by the respondents was unsigned by both parties, the



5 claimant produced in her Bundle, at pages 70 to 73, a signed version of that admin / swim teacher contract signed by her on 27 January 2015, but not signed on behalf of the respondents. The claimant's Bundle also produced, at pages 31 to 69, a copy of issue 2 of the respondents' Employee Handbook dated August 2014. No copy job description, as referred to in the claimant's statement of main terms, was produced to the Tribunal by either party.

10 (17) While, initially, the claimant mostly covered classes of other swim teachers who were absent, as the respondents' business grew, the claimant began to be assigned classes of her own. Following a meeting held on 3 April 2017 between the claimant and Mrs Wendy Lambie, it was agreed that the claimant would thereafter solely teach classes, and Mrs Lambie sent her a letter on 5 April 2017 to confirm  
15 what had been agreed.

20 (18) A copy of that letter was produced to the Tribunal at page 135 of the respondents' Bundle. The claimant also produced a copy of that letter at page 85 of her Bundle, as well as a copy of e-mails between herself and Wendy Lambie on 4 and 5 April 2017, produced at pages 81 to 84 of her Bundle. Mrs Lambie there advised the claimant that "*there's no need to redraft your contract but if you could sign the attached letter confirming your agreement to your change in terms of employment and get it back to me that would be great.*"  
25

(19) That letter of 5 April 2017 from Mrs Lambie to the claimant stated as follows:

30 "*Dear Elaine*

*Further to our consultation meeting(s) on 3<sup>rd</sup> April 2017 this letter confirms your agreement to accept a change to your current job description on a permanent basis.*

5 *This agreement will come into effect from 4<sup>th</sup> April 2017.*

*Current terms : 15 hours admin in the office and 12 ½ hours teaching.*

10 *Proposed terms : 12 ½ hours teaching changing after the summer when feasible to drop the Sunday afternoon hours.*

*By signing this agreement any sums that become due to you when you leave your admin position will be based on the hours and salary in effect at that time. This includes any pay for accrued holiday.*

15 *All other terms and conditions / contractual benefits (other than those outlined above) will remain the same.*

20 *You should however be aware that as payments into the company pension scheme are based on a percentage of your salary, this may affect benefits.*

*Please sign both copies below to confirm that you agree to this change in job description and hours.”*

25  
30 (20) No signed copy of that letter of 5 April 2017 was produced to the Tribunal by either party, although it contained a docquet for signing by the claimant stating : *“I hereby agree to the revised terms and conditions of my employment as detailed in the above letter.”* Nonetheless, both parties agreed, at this Final Hearing, that this letter was the only written amendment to the claimant’s contract of employment with the respondents.

5 (21) The Sunday teaching hours were thereafter dropped, and the claimant started to teach for 9 hours per week from 18 August 2017, and when she was offered extra hours, which she accepted, on 6 October 2017, her hours increased to 10.5 hours per week, and she was paid at that rate from 5 November 2017 until she resigned from the employment of the respondents.

10 (22) By letter of 20 July 2018 from Wendy Lambie to the claimant, copy produced to the Tribunal at pages 102 and 103 of the claimant's Bundle, arising from the claimant's request for flexible working, and a subsequent grievance, Mrs Lambie confirmed in that letter that the claimant's contracted hours were 10.5 hours per week. No other, formal, jointly signed amendments to the claimant's statement of main terms and conditions of employment, post April 2017, were produced to the Tribunal by either party. Further, the respondents did not issue her with any written statement of changes in her particulars of employment.

20 (23) The claimant resigned from the respondents' employment as of 31 July 2019. She produced to the Tribunal, as documents within her Bundle, a copy of her resignation letters to Wendy Lambie dated 12 and 24 June 2019, as per pages 86/87 and 90/91 of the claimant's Bundle. By her letter to Mrs Lambie of 24 June 2019, the claimant stated that : *"I am happy for my contract to terminate on 31<sup>st</sup> July 2019."*

30 (24) The respondents reviewed all employees' pay on an annual basis. The claimant had no entitlement to any annual pay increment from the respondents, as such increments were at the respondents' discretion and they were not guaranteed every year. They were

dependent upon a number of factors, including the respondents' financial circumstances.

5 (25) The discretionary nature of pay increments was reflected in the claimant's statement of main terms of employment, as detailed above, and also in the Water Babies' Payment Policy guidance document, produced by the franchisor, a copy of which was produced to the Tribunal at pages 185 to 192 of the respondents' Bundle, stating that annual reviews did not mean that any pay increase must  
10 be given, only that a review was considered once per year.

(26) From time to time, the respondents did exercise their discretion to increase the claimant's pay. In particular, in April 2017, they increased the claimant's rate of pay for teaching scheduled classes  
15 from £18.00 per hour to £18.50 per hour, as detailed in the email from Wendy Lambie to the claimant sent on 4 April 2017, a copy of which was produced to the Tribunal at page 193 of the respondents' Bundle, as also at page 84 of the claimant's Bundle. That email referred to 12  
20 ½ hours for 40 weeks, later reduced to 10.5 hours per week, as per Mrs Lambie's letter of 20 July 2018, copy produced at pages 102 and 103 of the claimant's Bundle.

(27) Up to and including July 2018, the claimant's administration rate was £8.00 per hour for weekday admin work and £10.00 per hour for  
25 weekend admin work. From August 2018, the rate was increased to £8.50 per hour for weekday admin work, and £10.00 per hour for weekend admin work.

(28) These admin rates were paid to the claimant, consistently at £8.50 or  
30 £10.00 per hour for 3 years from August 2018, and in accordance with timesheets submitted by the claimant, and she did not challenge

them prior to presenting her Tribunal claim form (ET1) on 19 March 2019.

5 (29) Up to and including July 2018, the claimant's mileage rate was 20 pence per business mile, increased to 40 pence per business mile from August 2018. She was paid mileage by the respondents in keeping with these rates, and in accordance with timesheets submitted by the claimant.

10 (30) As regards holiday pay, the respondents paid their employees, including the claimant, holiday pay each July, being the month when no classes took place, and her holiday pay was calculated by the respondents based on her average earnings over the last 12 remunerated weeks, as their method of paying her holiday pay as a  
15 term-time worker, working 40 weeks per year.

(31) In her letter to the claimant, dated 11 February 2019, copy produced to the Tribunal at pages 162 to 164 of the claimant's Bundle, Wendy Lambie confirmed to the claimant that her holiday entitlement was  
20 worked out pro-rata to 4.3 weeks per year, as she taught for only 40 weeks per year, and with her holiday payment being worked out from the average of her last 12 weeks worked prior to her holiday pay being paid to her each July.

25 (32) A copy of the timesheets and payslips relating to the claimant, between 27 January 2015 and 26 July 2019, were produced to the Tribunal at pages 196 to 295 of the respondents' Bundle, while various holiday calculations by the respondents for July 2016 to July 2019 payroll were produced at pages 296 to 299, showing the basis  
30 of their calculation of the claimant's holiday pay.

5 (33) As per those calculations, the claimant's holiday pay was based on her average weekly earnings, and her annual holiday allowance of 5.6 weeks holiday per year, calculated on the basis of a pro-rata for 40 weeks per year, giving her an annual allowance of 4.307692 weeks holiday pay.

10 (34) The payslips issued by the respondents to the claimant were issued in the name of Water Babies Scotland Central (Stirling), and showed the sums paid to the claimant, monthly, by BACS transfer, itemising, as appropriate, weekday teaching hours, admin hours, weekend hours, weekend admin, holiday accrued, and mileage.

15 (35) In her final payslip from the respondents, dated 26 July 2019, copy produced to the Tribunal at page 295 of the respondents' Bundle, the claimant received a payment of £829.59 gross for holiday accrued, representing, as per the calculation produced at page 299, 12 weeks at average earnings of £192.58. She was paid £997.00 in July 2017, and £812.90 in July 2018, calculated by the respondents using the same methodology.

20 **Tribunal's assessment of the evidence heard at the Final Hearing**

25 66. In considering the evidence led before the Tribunal, we have had to carefully assess the whole evidence heard from Mrs Lambie for the respondents, and the claimant on her own behalf, as the only witnesses led before us, and to consider their witness statements, and the many documents produced to the Tribunal in the separate Bundles of Documents lodged and used at this Final Hearing, so far as spoken to by witnesses in evidence, which evidence and our assessment we now set out in the following sub-paragraphs:-

30 **(1) Mrs Wendy Lambie : respondents' joint proprietor, and partner**

- 5 (a) Mrs Lambie, aged 45, was the first witness to be heard by the Tribunal on Monday, 8 February 2021, and continued to the following day. Along with her husband, Mr Derek Lambie, she is joint proprietor, and partner, in the respondents' franchised business.
- 10 (b) In giving her evidence in chief to the Tribunal, Mrs Lambie did so, under reference to her previously submitted, written witness statement, taken as read, and under reference to various documents lodged with the Tribunal, mainly in the respondents' Bundle, explaining her position as the former employer of the claimant, and in particular explaining her resistance to the claimant's complaints brought to the Tribunal against the respondents.
- 15 (c) When Mrs Lambie came to be cross-examined by the claimant, acting on her own behalf, her answers to her questions in cross-examination were generally fairly clear and, where it was appropriate to do so, she conceded that perhaps the respondents' pay and other employee record keeping was not
- 20 all that it might be, albeit they tried their best as a small employer.
- 25 (d) Overall, Mrs Lambie's evidence to the Tribunal at this Final Hearing satisfied us that she was giving the Tribunal as best a full recollection of events, as she could remember them, and she came across to the Tribunal as a credible and reliable witness. Her recollection was assisted by reference to contemporary documents referred to in the Bundles.
- 30 (e) Generally, her account was in accord with the employer's contemporary records taken at the time, and produced to us in the respondents' Bundle, even though there were sometimes

some points of fine detail where, with the passage of time, and events years ago now, her reliability may have been called into question by the claimant's forensic cross-examination of certain documents in both Bundles.

5

**(2) Mrs Elaine Jackman : claimant**

(a) The claimant, aged 49, was the second witness to be heard by the Tribunal on day 2 of the Final Hearing, on Tuesday, 9 February 2021. In giving her evidence to the Tribunal, she did so under reference to her previously submitted, written witness statement, taken as read, and she referred us to various documents lodged with the Tribunal, mainly in her own claimant's Bundle, explaining her case to the Tribunal, and why she believed she was owed **£10,191.15** from the respondents.

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(b) Her evidence in chief was given in her written witness statement dated 3 February 2021. At page 11 of 11, after her numbered paragraph 20, the claimant summarised her position, as follows:-

25

30

***“In summary there are several incidences of the Respondent withholding wages from the Claimant throughout the whole term of employment. As has been demonstrated, the Respondent does not always keep full and accurate employee records. The Respondent alters submitted records and saves these, rather than adding notes to them if there are discrepancies/dispute over claims.***

***Throughout the term of employment the Respondent consistently communicated that the Claimant's contract of employment was of a Zero Hours nature, however this***



***turned out not to be the case. The Respondent continued with this communication to the Claimant right up until January 2019, despite being advised to the contrary on 25th May 2018 (page 94 of the Claimant's Bundle).***

5

***The Claimant has taken much time to meticulously ensure the claim is accurate and has faced many challenges with the respondent declining to provide information requested. Had this information been provided it would have greatly assisted in collating the evidence.***

10

***The claimant is merely seeking monies to which she believes she is due and have been withheld by the Respondent.”***

15

(c) The claimant gave her oral evidence to the Tribunal clearly and confidently, under reference to the relevant productions contained within appropriate Bundles used at the Final Hearing, and she was fairly clear and articulate in answering questions put to her in cross-examination by Mr Lane, solicitor for the respondents.

20

(d) Her cross-examination by Mr Lane, lasting about ½ hour, was telling, and we refer to our narration of it, as detailed above at paragraphs 52 to 58 of these Reasons. We also refer to her answers to the Tribunal member, Mr Taggart, as per paragraph 59 above.

25

(e) She accepted, under cross-examination, that she had been paid what the respondents' records and her payslips showed, and that she had not protested at the relevant times, even

30

although she now challenged certain things in her spreadsheets supporting her Schedule of Loss.

5 (f) However, she insisted that she did not accept that all the records produced by the respondents were accurate. While she accepted she had signed the January 2015 contract, and that it had later been amended in April 2017, the claimant stated that she challenged the respondents' assertion that she was on a 40 weeks' per annum contract.

10 (g) Overall, the claimant's evidence to the Tribunal at this Final Hearing satisfied us that while she was trying to give the Tribunal as best a full recollection of events, as she could remember them, parts of her evidence were at odds with Mrs Lambie's evidence, and the contemporary documents in the Bundles, and so while we had no reason to doubt her credibility as a witness, we did have cause to doubt her reliability.

20 (h) Further, we found the claimant to be a person with an evident passion for her cause, and belief that she has been the victim of unlawful deductions of wages by the respondents. The fact that, after the close of evidence and closing submissions, she reduced the sum sued for to **£8,183.55** demonstrated to us that she was prepared, on reflection, to recognise points advanced by the respondents, and modify her claim accordingly. Despite her answers in cross-examination, however, she has insisted upon her claim against the respondents, albeit at a now reduced amount.

30 **Reserved Judgment**

67. When proceedings concluded, on the afternoon of Wednesday, 10 February 2021, the claimant and Mr Lane were advised that Judgment was being reserved, and it would be issued in writing, with reasons, in due course, after private deliberation by the Tribunal. With limited opportunity that afternoon,  
5 further private deliberation has only taken place recently, by further, remote discussion by the Judge with the lay members of the Tribunal. This unanimous Judgment represents the final product from our private deliberations, and reflects our unanimous views as the specialist judicial panel brought together as an industrial jury from our disparate experiences.

10

### **Issues for the Tribunal**

68. This case called before the full Tribunal for full disposal, including remedy, if appropriate. The principal issue before the Tribunal was to consider the  
15 respondents' liability, if any, for the claimant's complaints of unlawful deduction from wages and, if the Tribunal found the claimant to have been the subject of any unlawful deductions by the respondents, then it would be for the Tribunal to go on and consider the further issue arising of determining the appropriate remedy for any such unlawful deductions.

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69. While the claimant had previously brought a breach of contract complaint against the respondents, that head of complaint was dismissed by  
Employment Judge Kearns, following the Preliminary Hearing held before her on 13 February 2020, as per her written Judgment and Reasons issued on 26  
25 February 2020, as she held that the Tribunal then had no jurisdiction to hear the breach of contract complaint due to a lack of jurisdiction on the Tribunal's part, as the claimant was still employed by the respondents at the time of bringing her ET1 claims. Her second claim, brought on 19 March 2019, was made before the claimant resigned from the respondents' employment,  
30 effective 31 July 2019, and as at the date of presentation of both her Tribunal claims, she was still a continuing employee of the respondents.

70. The only issues before this Tribunal were those detailed by Employment Judge Gall, in June 2020, as set forth earlier in these Reasons, at paragraph 21 above.

5 **Parties' Closing Submissions**

71. In advance of this Final Hearing, the respondents' solicitor, Mr Lane, intimated his written skeleton argument, on 3 February 2021, in the following terms:-

**RESPONDENTS' SKELETON ARGUMENT**

***Introduction***

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1. *The issues for the Employment Tribunal to determine at the final hearing were identified during the preliminary hearing on 16 June 2020 (pages 97 to 103 of the Respondents' bundle).*

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2. *Those issues can be summarised as:*

a. *annual pay increments;*

b. *Administration rate;*

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c. *Mileage rate; and*

d. *holiday pay.*

25

***Preliminary issues***

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3. *Pursuant to **section 23(4A) of the Employment Rights Acts 1996**, the Employment Tribunal does not have jurisdiction to consider a complaint of unauthorised deductions from wages to the extent it relates to an alleged deduction where the date of payment of the wages from which the deduction was allegedly made was before*

*the period of two years ending with the date of presentation of the complaint (the "Cut-off Date"). In this case, the Cut-off Date is 8 November 2016.*

- 5           4.    *With reference to **Bear Scotland Limited v Fulton and another, UKEATS/0047/13** at paragraph 81, a gap of more than three months between any two deductions or non-payments breaks any "series of deductions" in terms of **section 23(3) of the Employment Rights Act 1996.***

10

#### ***Annual pay increments***

5.    *The Respondents did not unlawfully fail to pay the Claimant annual pay increments to which she was entitled.*
- 15           6.    *The Claimant had no entitlement to annual pay increments. Pay increments were at the Respondents' discretion, and were not guaranteed every year.*

20

#### ***Administration rate***

7.    *The Respondents did not unlawfully fail to pay the Claimant the correct sums by way of Administration rate.*
- 25           8.    *Up to and including July 2018, the Claimant's Administration rate was £8.00 per hour for weekday admin work and £10.00 per hour for weekend admin work. From August 2018, the Claimant's Administration rate was £8.50 per hour for weekday admin work and £10.00 per hour for weekend admin work.*
- 30           9.    *The above Administration rates were agreed between the Claimant and the Respondents, and the Claimant was paid in keeping with them.*

10. *In any event, the Claimant did not challenge her Administration rates prior to presenting a form ET1 on 19 March 2019. The Claimant therefore impliedly agreed to the Administration rates paid to her.*

5

11. *Reference is made to GAP Personnel Franchises Limited v Robinson, UKEAT/0342/07 and Cartwright and others v Tetrad Limited, UKEAT/0262/14.*

10

### **Mileage rate**

12. *The Respondents did not unlawfully fail to pay the Claimant the correct sums by way of Mileage rate.*

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13. *Up to and including July 2018, the Claimant's Mileage rate was 20p per business mile. From August 2018, the Claimant's Mileage rate was 40p per business mile. The Mileage rates were agreed between the Claimant and the Respondents, and the Claimant was paid in keeping with them.*

20

### **Holiday pay**

14. *The Respondents did not unlawfully fail to pay the Claimant holiday pay.*

25

15. *The Respondents paid the Claimant holiday pay each July (being the month when no classes took place). The Claimant's holiday pay was calculated based on average earnings over the last 12 remunerated weeks (footnote 1), as required by the **Employment Rights Act 1996** and the **Working Time Regulations 1998**. [Footnote 1: The appropriate reference period only changed from 12 to 52 weeks from 6 April 2020, by virtue of the **Employment Rights (Employment***

30

***Particulars and Paid Annual Leave) (Amendment) Regulations 2018.]***

16. This method of paying a term-time worker holiday pay was approved by the Court of Appeal in **Harpur Trust v Brazel, [2019] EWCA Civ 1402.**

**Parties' Further Written Representations**

72. In her further written representations to the Tribunal, intimated on 17 February 2021, the claimant set forth her final position on the new (and now reduced) sum sued for, as follows:-

*As requested by Judge Ian McPherson, please find below the breakdown for revised sums now sued for in the above case.*

PERIOD	TEACHER RATE INC. ANNUAL PAY INCREMENTS	ADMINISTRATION RATE	MILEAGE RATE	HOLIDAY PAY	TOTAL
08 Nov -31 Dec 2016	166.25	2.38	0	238.43	407.06
01 Jan – 31 Dec 2017	1016.25	55.18	16.60	1438.02	2526.05
01 Jan – 31 Dec 2018	1024.25	36.88	0	1496.92	2558.05
01 Jan – 31 Jul 2019	4433.25	0	1.42	897.21	5331.88
<b>TOTAL</b>	<b>6640.00</b>	<b>94.44</b>	<b>£18.02</b>	<b>£4,070.58</b>	<b>10823.04</b>

**Total 10823.04**

*Minus Holiday paid but which Claimant believes to have been incorrectly calculated:-*

*Holiday paid July 2017 (inc Nov and Dec 2016) – £997.00*

*Holiday paid July 2018 – £812.90*

*Holiday paid July 2019 – £829.59*

***Total Sum of Revised claim***    **£8183.55**

73. Mr Lane, the respondents' solicitor, in his response of 17 February 2021 to the claimant's updated schedule of loss was succinct, stating that:

5                                    **RESPONSE TO CLAIMANT'S UPDATED SCHEDULE OF LOSS**

1. *The Claimant submitted an updated schedule of loss on 17 February 2021.*
- 10                                2. *This document is the Respondents' response to the updated schedule of loss.*
3. *The Respondents do not agree that the Claimant is owed any of the sums set out in the updated schedule of loss.*
- 15                                4. *The Respondents maintain the points advanced in their skeleton argument spoken to in closing submissions at the final hearing.*
5. *The Respondents do not seek to augment what is already stated (and*  
20 *has already been spoken to) in their skeleton argument.*

**Relevant Law**

74. While the Tribunal has received some brief, legal submissions from Mr Lane, the respondents' solicitor, and some statutory provisions and case law  
25 references, in his written skeleton argument, the Tribunal has required to give itself a self-direction on the relevant law provided to us by the Judge.

75. As an unrepresented, party litigant, the claimant did not understandably address us on the relevant law, although she confirmed, and accepted, that 8  
30 November 2016 had to be the "**cut-off date**" (and so her claims should be from that date, and not from September 2014) and, indeed, we had no expectation that she should so address us on the relevant law, having explained to her that she was entitled to comment on the law, as presented to us by Mr Lane, but the Judge would be addressing us on the relevant law



to apply to the facts of the case as we might find them to be after assessing the whole evidence led before us at this Final Hearing.

- 5 76. As regards unlawful deduction from wages, the relevant law is to be found in **Part II of the Employment Rights Act 1996**. **Section 13** provides the right not to suffer unauthorised deductions from wages, and an employee may (subject to time limits) present a complaint to an Employment Tribunal, under **Section 23**, which the Tribunal can then determine under **Section 24**.
- 10 77. The key issue involved in determining whether or not there has been a deduction is whether the wages are properly payable, and the answer to that question turns on the contract of employment. Further, in terms of **Section 27**, “wages” is defined, as including any holiday pay, but excludes any payments in respect of expenses incurred in carrying out the employment.
- 15 78. The **Deduction from Wages (Limitation) Regulations 2014**, SI 2014 No.3322, in force since 8 January 2015, apply to complaints presented to an Employment Tribunal on or after 1 July 2015. Those Regulations inserted **Section 23(4A) and (4B)** into the **Employment Rights Act 1996**, and amended **Regulation 16 of the Working Time Regulations 1998**.
- 20 79. **Section 23(4A) of the Employment Rights Act 1996** provides that a Tribunal is not to consider so much of a complaint as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.
- 25 80. Further, rights and obligations concerning working time, and entitlement to annual leave, are set forth in the **Working Time Regulations 1998**. In terms of **Regulation 30**, a worker may present a complaint to a Tribunal that their employer has failed to pay them the whole or any part of any amount due to them under **Regulation 14 or 16** for compensation related to entitlement to leave, and payments in respect of periods of leave.

81. Following **Stringer and others v Revenue and Customs Commissioners [2009] ICR 985**, the House of Lords held that a claim for unpaid holiday pay can, instead of being brought under the **Working Time Regulations 1998**, be brought as an unlawful deduction from wages claim under the **Employment Rights Act 1996**. The claimant's claim for unpaid holiday pay is brought as an alleged unlawful deduction from wages.
82. Finally, in terms of the **Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994**, an employee may bring a contract claim before an Employment Tribunal if such a claim arises or is outstanding on the termination of the employee's employment. There was no live breach of contract claim before this Tribunal.
83. We declined to allow the claimant to further expand her pled case, into new matters not previously foreshadowed by her, the Judge reminding her to stick to her pled case, and the 4 issues identified by Judge Gall, unless she was seeking to further amend it, which she did not seek to do.
84. She was informed by the Judge, and Mr Lane for the respondents, of the guidance from the then President of the Employment Appeal Tribunal, Mr Justice Underhill, in **Chandhok v Tirkey [2015] IRLR 195**, about the importance of the ET1 claim form, where each party requires to know in essence what the other party is saying, so they can properly meet that case, and that the giving of fair, advance notice is at the heart of the Tribunal system. The essentials of the claim need to be in the ET1 claim form, and not elsewhere, for example in a Schedule of Loss, a document in a Bundle, or in a witness statement.
85. While "pleadings" are relatively informal in this Tribunal, as compared to the civil courts, the ET1 should set the parameters of the dispute before the Tribunal. It is not appropriate to allow a claimant, even an unrepresented, party litigant, to build a case on shifting sands, and raise the case which best seems to suit the moment from their perspective. In conducting the Final

Hearing, we were conscious of that, and that there is always a balance to be struck between avoiding unnecessary formalism and ensuring the fairness of the Tribunal process to both parties.

5 **Discussion and Deliberation**

86. In coming to our final decision in this case, the Tribunal has carefully reviewed and analysed the whole evidence led before it, both orally in sworn evidence, and within the various documents spoken to in evidence at the Final Hearing.

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87. Having done so, and reflected, during our private deliberations, on the whole evidence, and both parties' closing submissions, we have come to the clear view that the claimant has not proven her pled case.

15 88. We are satisfied that the arguments advanced by Mr Lane, in his written skeleton for the respondents, as detailed earlier in these Reasons, are correct, and, as such, we agree with him that the claim brought against the respondents is not well-founded, and as it fails, we must dismiss the claim, which is what we have ordered in this Judgment.

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89. In her oral reply, on 10 February 2021, to Mr Lane's oral arguments, speaking to his written skeleton, the claimant accepted, as per the relevant law in the **Deduction from Wages (Limitation) Regulations 2014**, the "*cut off*" date, and she has modified her sum sued for accordingly.

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90. Mr Lane also made a submission, in his skeleton argument, about time-bar, and that, as per the Employment Appeal Tribunal ("EAT") judgment in **Bear Scotland Ltd**, a gap of more than three months between any two deductions or non-payments breaks any series of deductions in terms of **Section 23(3) of the Employment Rights Act 1996**.

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91. That legal proposition was not disputed by the claimant, and as the decision of a higher Court binding upon this Tribunal, we must have regard to that

judicial guidance to us from the EAT on the relevant law. The practical difficulty for this Tribunal is that as the dates of the actual alleged deductions or non-payments are not clear from the claimant's evidence to us, we have been unable to deal with the time-bar point as a preliminary issue.

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92. As such, without deciding the point, we have proceeded to look at the situation as if the claimant had proven that her claim was not time-barred or, if it was, that it was not reasonably practicable for her to have brought her complaint any earlier, and we had decided to grant her an extension of time to do so.

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93. The main issue, time-bar left to the side, is the matter of wages properly due and payable to the claimant. We have reminded ourselves that, in **New Century Cleaning Co Ltd v Church** [1999] EWCA Civ 1112 / [2000] IRLR 27 (CA), the Court of Appeal held that for wages to be "***properly payable***" the employee / worker must have a legal entitlement to them.

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94. We agree with Mr Lane that the respondents did not unlawfully fail to pay the claimant annual pay increments to which she was entitled, as we are satisfied that the claimant had no entitlement to annual pay increments, as pay increments were at the respondents' discretion.

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95. On the matter of the administration rate, we agree with Mr Lane that the respondents did not unlawfully fail to pay the claimant the correct sums. The evidence before us shows that the administration rates were agreed between the parties, and the claimant was paid in keeping with that agreement, and she did not challenge those admin payments prior to presenting her ET1 claim form on 19 March 2019.

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96. Mr Lane submitted that the claimant therefore "***impliedly agreed***" to the administration rates paid to her. He referred us to two case law authorities : **GAP Personnel Franchises Limited v Robinson**, UKEAT/0342/07 and **Cartwright and others v Tetrad Limited**, UKEAT/0262/14. At the Judge's

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invitation, Mr Lane drew our specific attention to paragraphs 24 to 26 in GAP, per His Honour Judge Peter Clark, and paragraphs 7 and 8 in Cartwright, again per His Honour Judge Peter Clark.

- 5 97. We have read those judgments and, on their facts and circumstances, the facts of those other case are different from the facts and circumstances of the present case, and so distinguishable. As Mr Lane informed us, those cases are not analogous, as they involved a collective situation, rather than an individual case, but he stated that they illustrate that there can be implied  
10 consent to a contractual variation, by employee acquiescence.
98. In his oral submissions to us, Mr Lane made the point that paragraph 22 of Mrs Lambie's witness statement dealt with this matter yet, when the claimant came to cross -examine her on it, she did not do so, and he further submitted  
15 that it was "**telling**" that she did not challenge Mrs Lambie's evidence in chief on this aspect of the claim before the Tribunal.
99. Next, on the matter of mileage rates, we agree with Mr Lane's submission. In speaking to his written skeleton, he reminded us that, in her evidence, the  
20 claimant had confirmed that all her allegations of underpayment related to prior to the cut-off date, and therefore outside the frame of reference for this case before this Tribunal.
100. On the evidence before us, we are satisfied that Mr Lane was correct to submit  
25 that the respondents did not unlawfully fail to pay the claimant the correct sums by way of mileage rate, initially 20 pence, later (from August 2018) at 40 pence per business mile. Those mileage rates were agreed between the parties, and the claimant was paid in keeping with them.
- 30 101. Finally, on the holiday pay issue, we also agree with Mr Lane's submission, as per his written skeleton, at paragraphs 14 to 16. He added to his paragraph 15 orally, stating that the respondents correctly pro-rated 5.6 weeks to the

equivalent for a 40-week term-time employee, which he submitted was the claimant's employment status.

- 5 102. In his submissions to us, Mr Lane stated that the respondents' method of paying a term-time worker holiday pay was approved by the Court of Appeal in **Harpur Trust v Brazel**, [2019] EWCA Civ 1402. At the Judge's invitation, he drew our specific attention to paragraph 63 of the judgment by Lord Justice Underhill, describing it as "***not a pithy statement of the relevant law***". We have read that judgment and, on its facts and circumstances, the facts of the
- 10 **Brazel** case are different from the facts and circumstances of the present case, and so distinguishable.
- 15 103. On the evidence before us, we are satisfied that the respondents did not unlawfully fail to pay the claimant holiday pay. The evidence presented shows us that the respondents did pay the claimant holiday pay each July, and the basis of their calculations, using a 12 week reference period, the then applicable period, has been explained in evidence to us, and the arithmetical workings shown in supporting documents in the respondents' Bundle, identified by, and spoken to, by Mrs Lambie in her witness statement.
- 20 104. While the claimant's position is that her holiday payments are wrongly calculated, as she asserts that she was a full-time worker, on 52 weeks per annum contract, we do not accept that, on the evidence before us, and we are satisfied that she was a term-time employee on 40 weeks per annum.
- 25 Applying the pro-rata principle, she has been paid correctly in our view, as to pay any part-year worker holidays without an appropriate pro-rata reduction could easily produce odd results, and anomalies, which would be iniquitous to others in the workforce.
- 30 105. In reviewing the evidence heard by the Tribunal in this case, we have been struck by the fact that the claimant did not question, at or around the time she received them, the various payments received from the respondents, as

itemised in her monthly payslips, and she did not challenge matters until submitting her Tribunal claim, which suggests to us that the claimant felt she was being paid correctly at the time of payment for the work that she was carrying out for the respondents.

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106. In his oral submissions to us, on 10 February 2021, Mr Lane added to his written skeleton, to address us on the accuracy of time-sheets. He submitted that when the claimant cross-examined Mrs Lambie, the respondents' witness, she focussed on time-sheets, and communications prior to the cut-off date, for the vast majority of her cross-examination, mainly from 2015, and the only exception to that was when looking at April 2017, and page 240C. He submitted that as there was no meaningful cross-examination on other time sheets, within the relevant period, the claimant is not entitled to advance an argument that the respondents' time-sheets are wrong. We accept that submission.

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107. In her oral submissions to us, the claimant sought to make a statement, rather than summarise her position, and she made reference to getting advice from the CAB, and discussions with ACAS, until the Judge advised her that such matters are confidential, and ought not to be disclosed in this public Hearing. She was critical of Mrs Lambie's evidence, which she described as not having accurate or evidenced responses, but guesses, and relying heavily on assumptions. In assessing the evidence before us, suffice it to say we were satisfied that Mrs Lambie was a credible and reliable witness, as we have detailed earlier in these Reasons.

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108. Specifically, on holiday pay, the claimant submitted to us that she should have received pay on the basis of a 52 weeks' contract but, for the reasons detailed above, earlier in these Reasons, we have rejected that argument as not well-founded. As regards her other arguments, we do not accept them, preferring instead those advanced on the respondents' behalf, which we have accepted.

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109. As the claimant did not respond, in her own oral submissions, to the detailed points in Mr Lane's written skeleton, the Judge invited her to do so , at the end of her own oral submission. In general, she accepted the "**cut-off**" point, but otherwise stated she did not agree with Mr Lane's submissions, but  
5 without developing the basis of her opposition.
110. In all these circumstances, we have decided that her complaints of unlawful deduction of wages by the respondents are not well-founded, and her claim against the respondents is accordingly dismissed by the Tribunal.
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111. In coming to this decision to dismiss her claim, the question for the Tribunal has been to decide whether the total amount of wages paid to the claimant by the respondents were less than the total amount properly payable to her. The burden of proof is on the claimant. She has to show that the sums now sought  
15 by her, totalling **£8,183.55**, were properly due and payable to her by the respondents, and that she has brought her complaints of alleged unlawful deductions from wages within the prescribed time limits set by the legislation.
112. In our view, the claimant has failed to do so. She has not established a contractual or other legal entitlement to annual pay increments. Albeit the  
20 respondents could, and really should, have committed her revised terms and conditions of employment to updated written particulars of employment, or written statements of changes of employment particulars, after April 2017, as per their duty under **Sections 1 to 4 of the Employment Rights Act 1996**, we are satisfied that, by reason of parties' conduct thereafter, the respondents  
25 have established in evidence before us that the claimant was on a 40 week per annum, term-time teaching only contract as a swim teacher.
113. Itemised pay statements were provided by the respondents to the claimant, as is their legal duty under **Section 8 of the Employment Rights Act 1996**, but the claimant did not seek to challenge payments made to her at or about  
30 the relevant time of payment, by taking it up with the respondents as her then



employer, and / or reference to the Tribunal under **Section 11 of the Employment Rights Act 1996**.

114. From her updated Schedule of Loss, both as at 14 July 2020, and revised at 17 February 2021, we consider that there was insufficient analysis of the relevant pay periods and sums paid, and the amounts that the claimant alleges were properly payable to her, but were not, to allow the Tribunal to conclude that there were wages properly due to the claimant but which had not been paid to her by the respondents. On that basis, we have unanimously decided that her claim fails, and that is why we have dismissed it.

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Employment Judge: Ian McPherson  
Date of Judgment: 02 June 2021  
Entered in register: 15 June 2021  
and copied to parties

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