5 **EMPLOYMENT TRIBUNALS (SCOTLAND)**

Case No: 4100255/2021 (V)

Hybrid Final Hearing held in person in Glasgow
10 **and remotely by CVP on 4 October 2021,**
with written closing submissions from parties on 11 and 17 October 2021,
and deliberation in chambers (without parties attending)
on 2 November 2021

15 **Employment Judge: Ian McPherson**

Miss Audrey Gibson — **Claimant**
In Person

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Churchill Knight Umbrella Ltd — **Respondents**
Represented by:
Mr Quentin Colborn
Consultant

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Judgment of the Employment Tribunal is that: -

(1) By joint agreement of both parties, and after considering the claimant's correspondence with the Tribunal, dated 19, 22 and 23 January 2021, it was agreed by the Tribunal on 4 October 2021, and intimated orally to
40 both parties at that time, that the claimant's complaint to the Tribunal was not time-barred, and it was allowed to proceed on its merits to this Final Hearing for full disposal, including remedy, if appropriate, the respondents accepting that there had been timeous notification to and certification by

ACAS of early conciliation, as required by **Section 18A of the Employment Tribunals Act 1996.**

(2) Having heard evidence from both parties on 4 October 2021, and thereafter considered the respondents' written closing submissions intimated on 11 October 2021, and the claimant's written closing submissions intimated on 17 October 2021, and taking note of parties' e-mail updates to the Tribunal, on 29 October and 2 November 2021 , that a net payment of £476.96 has been paid to the claimant by the respondents, in respect of unpaid holiday pay, and having now resumed consideration of the case, in chambers, on 2 November 2021, and without the need for any further Hearing, the reserved judgment of the Tribunal is that the claimant is unsuccessful in her claim against the respondents, and so the respondents are not ordered to make any further payment to the claimant.

REASONS

Introduction

1 This case called before the Tribunal, sitting as an Employment Judge sitting alone, for a 1-day hybrid Final Hearing conducted in person at the Glasgow Tribunal Centre, on Monday, 4 October 2021, with the claimant and Judge attending in person, but with the respondents attending remotely by CVP, the Tribunal's video conferencing facility.

2 By ET1 claim form presented on 15 January 2021, the claimant complained of being owed holiday pay and other payments, following the termination of her employment with the respondents, as a data gatherer, on 30 September 2020.

3 The claimant stated that she had been employed by them since 6 January 2020 and, she did not feel that she had been treated fairly, as she had had to wait from 23 March to 14 September 2020 to receive any sort of furlough payment from them. While she had received a payment of £6,652.48 from the respondents, the claimant believed that the total owed to her was £15,006.00. Accordingly, if her claim was successful, she sought an award

of compensation against the respondents, which she then quantified as being the sum of **£8,353.52.**

4 The claim was defended by the respondents by ET3 response presented on their behalf on 16 February 2021 by Mr Quentin Colborn, consultant with QC People Management Ltd, Blackburn, Lancashire. The respondents submitted that the claim was out of time, that it had been reasonably practicable for the claimant to apply in time, and they further submitted that they denied that the claimant had any valid grounds for her claim for unpaid holiday pay and wages.

5 After Initial Consideration by Employment Judge Muriel Robison, on 25 February 2021, the case was allowed to proceed to a Final Hearing, and that Judge ordered that a separate Preliminary Hearing on time-bar was not in line with the Tribunal's overriding objective, and she proposed the Final Hearing should be by way of video conference. However, the claimant advised the Tribunal thereafter that she could not participate by video, and the case was then to be listed for an in-person Final Hearing, as her attendance through a mobile phone only was not considered appropriate, and she did not have the technology to access CVP.

6 On 23 March 2021, the respondent's representative, Mr Colborn, submitted amended Grounds of Resistance, following Judge Robison's decision to combine a time-bar Preliminary Hearing with a full merits hearing of the case, as the initial Grounds of Resistance attached to his earlier ET3 response only addressed the time-bar issue.

7 The amended Grounds of Resistance, running to 17 paragraphs, extending over 2 pages, addressed time-bar, as well as the respondents' defence on the merits. It submitted that the claimant had received all payments due to her until 31 July 2021, when the respondents had ceased to use CJRS (the Government's Coronavirus Job Retention Scheme) and that she had no entitlement to payments after that date, and that 14 September 2020 marked the end of her employment with the respondents.

8 While, on 20 May 2021, Mr Colborn applied to the Tribunal to reconsider Employment Judge Claire McManus' decision of 18 May 2021 that the Final Hearing would be in person, his application was refused bv

Employment Judge Lucy Wiseman, on 27 May 2021, and she confirmed that the in-person Hearing would proceed to determine (i) time-bar and (ii) liability and remedy. Judge Wiseman instructed that while the claimant and Judge would be present in-person, the respondents' representative and 5 witness could attend remotely via CVP.

9 Standard case management orders for a Final Hearing by CVP were issued by Employment Judge Susan Walker, on 9 June 2021, and thereafter, on 20 August 2021, both parties were issued with Notice of Final Hearing on 4 October 2021. On 22 September 2021, amended 10 Notice of Final Hearing was issued by the Tribunal, given it was now to be a hybrid Hearing.

10 Further, on direction by Employment Judge Wiseman, on 29 September 2021 , parties were advised that no directions had been issued by the Tribunal regarding the use of witness statements and, accordingly, in line 15 with the usual Scottish procedure, evidence in chief would be heard orally.

Final Hearing before this Tribunal

11 This hybrid Final Hearing was conducted by me sitting in a public Hearing room at Glasgow Tribunal Centre, on Monday, 4 October 2021, with the claimant in attendance, acting on her own behalf, but accompanied by her 20 father, Mr Douglas Gibson, as an observer and for moral support. He was not led as a witness for the claimant. She was her only witness.

12 The respondents' representative, Mr Colborn, and their only witness, Mr Tom Edwards, a director with the respondent company, both attended remotely by the Tribunal's CVP (Cloud Video Platform) facility. As such, 25 this Final Hearing was held in public in accordance with the Tribunal's Rules of Procedure, and it was conducted in that hybrid manner because there was no objection by either party, and both parties were able to, and did, participate effectively in the conduct of the Hearing. Initially, Mr Colborn could not see the claimant, nor the Judge, but, after the Tribunal 30 clerk adjusted the CVP camera angles in the Hearing room, that difficulty was resolved.

13 On 21 September 2021, Mr Colborn, the respondents' representative, lodged with the Glasgow ET, a hard copy agreed Bundle of Documents for use at this Final Hearing, comprising 220 pages.

14 While the claimant had been emailed the Bundle by Mr Colborn, she did not attend the Hearing with a hard copy, printed off, although she said that she could try to access it on her mobile phone. She explained that she did not have a printing facility to produce her own hard copy Bundle. I did not consider it appropriate that she try and access documents on her mobile phone and, accordingly, on my instructions, there was a delay in the Hearing proceeding until such time as the Tribunal clerk could copy my hard copy of the Bundle, and give a further copy to the claimant for her use and reference. The Hearing, listed to commence at 10:00am, did not start until 10:55am.

15 In the course of the Hearing, additional documents, not included in that Bundle, were referred to, and copies provided to the claimant and Judge by the Tribunal clerk, and emailed to Mr Colborn for the respondents. These were the claimant's emails of 21 June, 11 July and 21 September 2021, about her financial loss, which she had provided to the Tribunal, rather than providing a formal Schedule of Loss quantifying the sums sought from the respondents. Whilst copied to Mr Colborn, at the time of sending, these had not been included in the agreed Bundle.

16 In addition to this documentary evidence, the Tribunal heard oral evidence from each of the respondents' witness, Mr Edwards, then the claimant, in turn. After clarification of the issues in dispute, in discussion with the claimant and Mr Colborn for the respondents, and the Tribunal clerk emailing Mr Colborn copies of the claimant's 3 emails with the Tribunal of 19, 22 and 23 January 2021, it was agreed by all that the claim was not time-barred, and that no evidence or submissions on that matter were required from either party in that regard, and so the Hearing of the case should focus on evidence relevant to liability, and remedy, if applicable.

17 The claimant was not represented, being a party litigant acting on her own behalf. She stated that she had no previous experience or knowledge of the Tribunal, its practices and procedures, whereas the respondents were

professionally represented by Mr Colborn. In these circumstances, both parties agreed with my proposal that while Mr Edwards' evidence for the respondents should be taken first, by questions from Mr Colborn, followed by cross-examination by the claimant herself, when it came to evidence in chief from the claimant, her evidence in chief should be elicited by a series of structured and focused questions asked of her by me as the presiding Judge, and the claimant then cross-examined by Mr Colborn, in the usual way.

18 This method of taking evidence was considered appropriate having regard to the Tribunal's duty to deal with the case fairly and justly, and to take account of the fact that the Tribunal was dealing with an unrepresented, party litigant, and putting both parties on an equal footing, so far as practicable, as per the Tribunal's overriding objective, in terms of **Rule 2 of the Employment Tribunal Rules of Procedure 2013.**

19 While, by sitting later than normal that afternoon, both parties were able to conclude their evidence led before the Tribunal, it was decided, again by consensual agreement with both parties, that rather than try and reconvene on a later date, the Tribunal would have an in chambers deliberation day for the Judge at a later date (exact date to be confirmed), where parties would not require to attend, but the Judge would consider, in chambers, parties' written closing submissions, and thereafter draft a reserved written Judgment and Reasons for issue to parties, and posting online on the ET decisions website on Gov.UK.

20 Case management orders in that regard were intimated orally by the Judge, at the close of proceedings on 4 October 2021, and confirmed in writing, by letter from the Tribunal emailed to both parties on 6 October 2021, ordering the respondents' written closing submissions by no later than 4.00pm on Monday, 11 October 2021 , with the claimant allowed no more than 7 days thereafter to lodge her own written closing submissions.

21 In the Tribunal's letter of 6 October 2021, issued to both parties on my instructions, it was further stated, as follows:-

> *"Finally, the Judge has asked me to refer both parties to the concession made openly yesterday by the respondents'*

representative, Mr Colborn, and confirmed by his witness, Mr Edwards, that the respondents recognise their obligation to pay the claimant holiday pay, while on furlough, between 26 March 2020 and 31 July 2020, which the Tribunal was informed they had calculated @ 10.68% of the claimant's earnings over that period, producing a gross amount of £710.95.

The claimant stated in her evidence that she had calculated the appropriate holiday pay sum payable for that period as being £1,006.05, being £52.95 per week x 19 weeks to 31 July 2020.

The Judge orders that the respondents' representative shall clarify by no later than 4.00pm on Monday, 11th October 2021, in their written closing submissions, whether they are consenting to judgment passing against the respondents in that sum of £710.95, or they intend to pay that sum to the claimant before reserved judgment is promulgated, thus reducing the amount of any judgment that might be issued in the claimant's favour (if her complaint is upheld by the Tribunal) to a lesser amount, and clarify whether they continue to resist the claimant's assertion that she is due holiday pay for the period to 30 September 2020 and, if so, why?.

Given the timetable for parties' respective written closing submissions, the claimant can then clarify her own position, as regards holiday pay, when intimating her own written closing submissions, after having had up to 7 days to reflect on the respondents', and considered her own claim against the respondents."

Issues for the Tribunal

22 While the case had been listed by previous Employment Judges to address (i) time-bar and (ii) liability and remedy, there was no agreed List of Issues before the Tribunal at the start of this Final Hearing. As such, as presiding Judge, I spent some time, in discussion with both parties, before taking their oral evidence, clarifying the issues in dispute, before the Tribunal proceeded to take evidence from both parties.

23 After clarification of the issues in dispute, in discussion with the claimant and Mr Colborn for the respondents, it was agreed by all that the claim was not time-barred, and that no evidence or submissions on that matter were required from either party in that regard, the respondents accepting that

there had been timeous notification to and certification by ACAS of early conciliation, as required by **Section 18A of the Employment Tribunals Act 1996.**

24 In summary, the respondents accepted that while the ET1 claim form referred to an ACAS early conciliation certificate **R104065/21/1 4** issued on 15 January 2021 to the respondents per their current address, there had been an earlier ACAS notification on 16 November 2020, and certificate **R219704/20/06** issued on 16 December 2020, with the respondents' previous registered office address that had been changed at Companies House on 10 December 2020.

25 While the claimant had drawn this matter to the Tribunal's attention by emails on 19, 22 and 23 January 2021 , these emails had not been copied by her to the respondents, after service of the claim upon them by the Tribunal, nor copied to the respondents by the Tribunal, as the respondents had not, at that stage, lodged any ET3 response defending the claim. On my instructions, these emails were copied from the Tribunal's casefile for use by the claimant at this Hearing, and a further copy emailed to Mr Colborn, for the respondents, for him to take his client's instructions.

26 After an adjournment from 11:16am to 12:07pm, to allow Mr Colborn to take instructions, he advised the Tribunal that he had not seen the earlier ACAS certificate, and nor had his clients, and while it would have been helpful if they had been copied to him, after the ET3 response was lodged, having considered the emails now provided by the Tribunal clerk, he agreed there was no live issue about ACAS early conciliation, and so the time-bar preliminary issue, previously taken by him, on the respondents' behalf, fell away.

27 The ET3 response form had accepted the dates of employment given by the claimant in her ET1 claim form, being start on 6 January 2020, and end on 30 September 2020. I raised with Mr Colborn why the amended Grounds of Resistance, at paragraph 13, stated : ***"The last day the Claimant received any payment from the Respondent was 14th September and it is submitted that this date marked the end of the Claimant's employment with the Respondent."***

28 Specifically, I queried what was the respondents' position about the claimant's effective date of termination of employment with the respondents, as paragraph 17 of his amended Grounds of Resistance stated that the claimant had no entitlement to any payments after 31 July 2020. The claimant informed me that she had received no letter from the respondents terminating her employment, and giving an end date, and no P45 had been received by her from them. Mr Colborn again stated he needed to take instructions.

29 Mr Colborn stated that as regards 14 September 2020 being the effective date of termination, he was not in a position to confirm or provide any P45, but his witness, Mr Edwards, could give evidence to the Tribunal about the respondents' submissions to HMRC as regards the claimant's termination date, and the rationale for there being no P45.

30 He further stated that no P45 had been sent to the claimant at any date since 14 or 30 September 2020, and the respondents, in giving evidence through their witness, Mr Edwards, would rely on the claimant's Work Assignments, as included in the Bundle lodged with the Tribunal, specifically the BrightPool Ltd Assignment Works Schedule signed by the respondents on 6 March 2020 showing 30 September 2020 as the end date of the claimant's assignment to Deloitte LLP.

31 Further, Mr Colborn advised that the claimant's employment relationship with the respondents ended on 14 September 2020 as soon as the furlough payment was made to her on that date, and after that date, he submitted, no work was performed by the claimant for the respondents, and there was no communication between the parties.

32 That said, Mr Colborn accepted that there is no vouching document for 14 September 2020, and so it was time to be realistic and accept that the claimant's termination date was 30 September 2020. He confirmed that the respondents accepted that date as the effective date of termination, and he believed that his witness, Mr Edwards, would attempt to explain matters to the Tribunal, as to how the claimant was supposed to know that when there were no documents sent to her regarding 30 September 2020 being her end date.

33 In those circumstances, Mr Colborn stated that he agreed with me, as per **Rule 2** and the Tribunal's overriding objective, that it would be helpful for the respondents' witness to be heard first, explain the respondents' position, then be cross-examined by the claimant, and thereafter hear from the claimant with her evidence, to be cross-examined by him on behalf of the respondents. He agreed that as Judge I should ask questions of the claimant, as an unrepresented, party litigant, for her evidence in chief, and he would then cross-examine her.

34 It was further mutually agreed that the Final Hearing should focus on evidence relevant to liability, and remedy, if applicable. By agreement, I heard from the respondent's witness, Mr Edwards first, and then from the claimant herself. Both Mr Edwards and the claimant gave their evidence on affirmation, and each was cross-examined by the other party, with questions of clarification from myself, as presiding Judge, as and when necessary.

35 Arising from the above clarification of the remaining matters in dispute between the parties, I decided that the issues for the Tribunal, requiring judicial determination, were as follows:-

(a) **What was the effective date of termination of the claimant's employment by the respondents?**

(b) **As at that date, what sums (if any) were owing to the claimant as due to her in respect of outstanding, unpaid wages and / or holiday pay?**

(c) **Was there any unlawful deduction from her wages?**

(d) If so, in what amount ?

(e) **In the event of success with her claim against the respondents, in whole, or in part, what sum (if any) should the Tribunal order the respondents to pay to the claimant?**

Findings in Fact

36 There was a degree of conflict in the evidence heard by the Tribunal. I found the following facts proved, on the balance of probabilities, after considering the evidence led before the Tribunal, both oral and

documentary, and after taking into account the written closing submissions made by both parties.

37 I have not sought to set out every detail of the evidence which I heard, nor to resolve every difference between the parties, but only those which appear to me to be material. My material findings are set out below, in a way that is proportionate to the complexity and importance of the relevant issues before the Tribunal.

38 On the basis of the evidence heard at this Final Hearing, from Mr Edwards for the respondents, and the claimant herself, and the various documents spoken to in evidence, and included in the Bundle provided to me for this Final Hearing, along with the additional documents lodged in the course of this Hearing, I have found the following essential facts established: -

(1) The claimant, aged 38 years at the date of this Final Hearing, was formerly employed by the respondents as a data gatherer, working for Deloitte LLP, but from the Clydesdale Bank premises at Guildhall, 57 Queen Street, Glasgow.

(2) Her assignment to that role was arranged by an agency, Brightpool Ltd, but the claimant had no direct contractual relationship with Deloitte LLP, or Brightpool Ltd. She was an employee of the respondents.

(3) As finally agreed between the parties, at this Final Hearing, the claimant's employment by the respondents started on 6 January 2020, and ended on 30 September 2020.

(4) While, at this Final Hearing, parties were agreed that the effective date of termination of the claimant's employment with the respondents was 30 September 2020, there was further joint agreement that no P45 was ever issued to the claimant, and no correspondence was sent to her, by the respondents, confirming that date as being the end date of her employment with the respondents.

(5) Notwithstanding the clear contractual provision in her contract of [illegible]

employment, it appears both parties took that view, and the respondents did not write to the claimant terminating her employment, and she did not write to them maintaining that she was still an employee of the respondents.

5 (6) The respondents are a company providing their employees to work on assignments for other clients. According to their ET3 response lodged with the Tribunal, they employ 7 staff in Great Britain, including 3 at the place where the claimant previously worked for them.

10 (7) Again, as agreed between the parties, and accepted by the respondents in their ET3 response lodged with the Tribunal, the claimant was employed by the respondents on the basis of a 36 hours per week contract, for which the claimant was paid £549 weekly pay before tax (gross), producing £402 weekly normal

15 take-home pay (net).

(8) When the claimant's employment ended , on 30 September 2020, she did not work (nor was she paid for) any period of notice by the respondents. In addition to her earnings from the respondents, where she was in the employer's pension scheme,

20 she did not receive any other benefits from her employer.

(9) While, at the time of presenting her ET1 claim form to the Tribunal, on 15 January 2021, the claimant stated that she had not got another job, at this Final Hearing she confirmed to the Tribunal that she was now in employment again, having secured

25 employment as a call handler with the NHS since 12 July 2021. She had intimated this new employment to the Tribunal, with copy to Mr Colborn for the respondents, by email of 11 July 2021 .

(10) Following termination of her employment with the respondents, on 30 September 2020, the claimant notified ACAS, on 16

30 November 2020, and they issued their ACAS Early Conciliation Certificate on 16 December 2020, under reference **R219704/20/06.**

(11) When, prior to presenting her ET1 claim form to the Tribunal, on 15 January 2021, the claimant discovered that the respondents' address had changed, she again notified ACAS on that date, and on the same day, she received another ACAS Early Conciliation Certificate, under reference **R104065/21/41.** She cited this ACAS certificate in her ET1 claim form, although, in section 8.2, she did reference, and explain, the circumstances giving rise to the updated ACAS certificate.

(12) On 15 January 2021 , the claimant presented her ET 1 claim form to the Employment Tribunal suing the respondents as her former employer. A copy of the ET1 was produced to the Tribunal at pages 2 to 16 of the Bundle.

(13) At section 8.2 of her ET1 claim form, as produced in the Bundle at page 10, the claimant set out the background and details of her claim, including the dates when the events she was complaining about happened, stating as follows: -

"23.03.20 office closed due to coronavirus.

21.05.20 email from employer confirmation they're going to start processing Furlough payments.

03.06.20 I emailed my employer signed copy of Furlough agreement.

04.06.20 email from employer confirming receipt of signed Furlough agreement.

03.08.20 emailed employer for update as hadn't received payment.

04.08.20 emailed employer asking what date I will receive Furlough payment.

04.08.20 received email from employer, I would receive Furlough payment 06.08.20.

07.08.20 emailed employer advising hadn't received payment.

07.08.20 email from Clare Denison saying escalating to a manager.

10.08.20 email from manager Ciaran Woodcock, field sales and marketing manager. He said there appears to have been administration issues our end he was contacting HMRC.

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12.08.20 email from Ciaran. Due to admin error I wasn't officially registered with HMRC as being furloughed, somehow the admin staff missed you from the list. They will pay me a good will gesture.

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03.09.20 email from Ciaran advising I was entitled to £6,652.48 gross £5,802.55 net and I would receive this within 5 working days.

14.09.20 email from employer, payment would be with me today, slightly higher £5,941.93 due to more tax allowances.

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14.09.20 I received £5,941.93. I received approximately 16 payslips that all state FURLOUGHED PAYMENT??

17.09.20 email from employer, As I wasn't officially furloughed, I didn't accrue any holiday ENTITLEMENT.

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I was contracted to work 3 x 12 hour shifts per week for a day rate of £183.00 per shift which = £549.00 per week included in this amount is holiday pay of £52. 95 which I was paid as soon as it accrued weekly.

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I am owed 100% wages and holiday pay from 23/03/20 to 30/09/20 as per my continuous contract of employment. 82 shifts x £183.00 = £15,006.00.

Total owed £15,006.00 less already received goodwill gesture £6,652.48 = £8,353.52

£8,353.52 is the amount I?m owed.

This situation has caused me a significant amount of uncertainty, stress and anxiety.

Please note that the original ACAS certificate was R2 19704/20/06, which had Churchill Knight Umbrella Limited?s previous address. Churchill Knight Umbrella Limited changed their address on 10/12/2020 as per Companies House. I was advised by Daniel at Employment tribunal talk through process, that I had to get ACAS to update the certificate so it shows the current address. I done this. "

(14) Further, at section 9.1 of her ET1 claim form, the claimant stated that, in the event her claim was successful, she was seeking an award of compensation from the Tribunal and, at section 9.2, when asked to detail the compensation that she was seeking, the claimant then stated as follows: - **"£8,353.52 as *per previous explanation",*** the latter being a reference back to her narrative at section 8.2.

(15) Also, at section 15 of her ET1 claim form, the claimant had additionally stated that :-7 ***don't feel that I have been treated fairly. I had to wait from 23/03/20 to 14/09/20 to receive any sort of payment. I have spent a significant amount of time sending emails to Churchill Knight Umbrella Limited and more often than not I have been left hanging on and having to repeatedly chase them up for responses."***

(16) When the respondents lodged their ET3 response, on 16 February 2021 (copy produced at pages 17 to 24 of the Bundle) defending the claim, it was in skeletal form, and it was superceded by amended Grounds of Resistance (copy produced at pages 25 and 26 of the Bundle) lodged on 23 March 2021 , reading as follows :-

"1. The Respondent is an umbrella company which provides payroll services to its clients who are also technically its employees.

2. The Claimant was a client / employee of the Respondent In total the Respondent has around 1200 client / employees working for a variety of organisations.

3. The Claimant was engaged by the Respondent on 6th January 2020 to provide services to the 'end-client', Deloittes, in the role of a Data Gatherer. The Respondent had about 12 other individuals working for the end-client at the same time as the Claimant.

4. The Respondent had no business or other relationship with the end-client, nor did the Respondent have any direct communications with the end-client.

5. The Claimant was sourced to work for the end-client by Brightpool Limited, who are an employment agency (the Agency). The terms of the Claimant's employment were determined by the end-client and the Agency. The Respondent was responsible for making payments to the Claimant as directed by the Agency.

6. The Claimant's initial period of assignment ran from 6th January 2020 until 31st March 2020. This work was to be delivered in the end-client's offices in Central Glasgow.

7. On 24th February 2020 the assignment was extended to include the period 1st April- 5th April 2020.

8. On 6th March the assignment was further extended to run from 6th April - 30th September 2020. The notice period under this extended assignment was 5 days from the Agency to the Claimant.

9. From 25th March the Claimant was unable to continue working on site due to the lockdown restrictions. At that stage the Respondent was unable to confirm if the Claimant would be placed on the Coronavirus Job Retention Scheme (CJRS) as at that time it was not clear if the scheme extended to umbrella

10. Subsequently the Claimant was placed on Furlough leave retrospectively with effect from 25th March, receiving 80% of her normal pay. This was confirmed in a Furlough Leave Agreement.

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11. Due to an administrative error, the Respondent failed to secure a grant from HMRC to cover the costs of the furlough payment to the Claimant. However in September 2020 the Claimant received a payment of £6652.48 gross, £5802.55 net, being her Furlough pay for the period 25th March 2020 until 31st July 2020.

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12. By an email of 3rd September 2020 the Respondent confirmed to the Claimant that they had ceased to use the CJRS after 31st July 2020.

13. The last day the Claimant received any payment from the Respondent was 14th September and it is submitted that this date marked the end of the Claimant's employment with the Respondent.

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14. On 15th January 2021 the Employment Tribunal received the Claimant's ET1 submission. It was accompanied by an ACAS Early Conciliation Certificate dated 15th January 2021 which was issued following an Early Conciliation Notification of the same date.

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15. The Claimant has presented no evidence to indicate why it was not reasonably practicable to submit her claim within the prescribed time limit. Whether the Employment Tribunal accepts the Claimant's or Respondent's assertions of to the termination date, the Claimant's submission was still out of time.

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16. Therefore it is denied that the Claimant can progress this claim.

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17. In the event that the Employment Tribunal concludes that the Claimant's submission was within the prescribed time limit, it is st ihmittoH that fha f~'lairnant hoc rarah/arl all fha not/mon/e that

were due to her until 31st July and that she had no entitlement to payments after that date. ”

(17) On 21 June 2021, the claimant provided the Tribunal, and the respondents' representative, with an email providing a statement of her financial losses, as ordered in the Tribunal's case management orders issued on 9 June 2021, and reading as follows:-

FINANCIAL LOSS STATEMENT

Parties: Miss A Gibson v Churchill Knight Umbrella Limited
Case No: 4100255/2021
Date: 21st June 2021

UNLAWFUL DEDUCTION OF WAGES AND HOLIDAY PAY

a. I am seeking to be paid my accrued holiday pay and unpaid wages which I am entitled to.

b. I was contracted to work 3 x 12 hour shifts per week for a day rate of £183.00 per shift which = £549.00 per week, included in this amount is holiday pay of £52.95 which I was paid as soon as it was accrued weekly.

I am owed 100% of my wages and holiday pay from 23/03/2020 to 30/09/2020 as per my continuous contract of employment. 82 shifts x £183.00 = £15,006.00.

Total owed £15,006.00 less already received goodwill gesture of £6,652.48.

TOTAL AMOUNT OWED TO ME £8,353.52.

c. The claim does not relate to dismissal. The claim relates to unlawful deduction of wages and holiday pay. My employer, Churchill Knight Umbrella Limited enrolled me on to a pension scheme with NEST PENSIONS.

d. 4 payments x £409.89

e+f. As Churchill Knight Umbrella Limited have admitted, by email on 12/08/2020, that they created an admin error, which prevented them from enrolling me officially on to the Coronavirus

Job Retention Furlough Scheme, I never received the goodwill gesture payment, as mentioned above, until 14/09/2020, and then on 17/09/2020 I received an email from Churchill Knight Umbrella Limited advising that, as I was not officially furloughed I did not accrue any holiday entitlement and therefore would not receive any holiday pay. Bearing in mind the fixed contract was due to end on 30/09/2020, so therefore I only received any payment 17 days before the fixed contract end date and made aware of the financial loss, of no holiday pay, 14 days before the fixed contract end date . I was previously advised that I was placed on Furlough and was waiting for payments.

Once I received legal advice from an Employment Solicitor regarding my holiday pay, I was advised that my wages had also been deducted unlawfully.

Future Losses

Travel Expenses and Printing costs relative to attending the Employment Tribunal Hearing.

(18) A copy of the claimant's email of 21 June 2021, including that financial loss statement, was produced as an additional document to add to the Bundle at this Final Hearing. In her oral evidence to this Tribunal, the claimant stated that the four payments of £409.89 referred to in her reply (d) to the Tribunal's case management order of 9 June 2021, seeking details of her financial loss, represented State benefits paid to her through Universal Credit payments.

(19) There was produced to the Tribunal, at pages 27 to 57 of the Bundle, a copy of the claimant's contract of employment with the respondents, dated 24 December 2019, employing her as a Data Gatherer to perform such assignments as might from time to time be allocated to her, and with an Employee Assignment Schedule to be issued to her for each Client Assignment.

(20) Provision was made within her contract of employment, stated to be incorporating particulars required by the **Employment Rights Act 1996,** for salary (at the applicable National Minimum Wage for all hours actually worked on Assignment, under Clause 3.1),

bonus (Clause 3.5), holidays (Clause 4), and hours of work (Clause 6). At Clause 13.1 , it expressly stated that: ***"Termination of a Ciient Assignment does not terminate your contract of employment."***

5 (21) Further, there was also produced to the Tribunal, at pages 58 to 60 of the Bundle, a copy of the claimant's three separate Assignment Work Schedules dated 18 December 2019, 24 February 2020, and 6 March 2020.

(22) In terms of the latter Schedule, that agreement, signed between
10 Brightpool Ltd and the respondents, related to the claimant's assignment to work, starting 6 April 2020 and ending 30 September 2020, as a Data Gatherer for the client, Deloitte LLP, at the rate of £183 per shift, being Thursday 18:00 until 06:00 ; Saturday 07:00 until 19:00; and Sunday 07:00 until 19:00, and
15 with payments to be made fortnightly to Brightpool Ltd.

(23) The claimant's daily rate produced a weekly rate figure of £549 per week gross for the 3-day week. While her assignments refer to fortnightly payments that was the contract between Brightpool Ltd and the respondents, and the claimant was during her
20 employment with the respondents due to be paid weekly by BACS transfer from the respondents .

(24) Further, a copy of the claimant's PAYE P60 end of year certificate from the respondents, dated 5 April 2020, was provided to the Tribunal at page 86 of the Bundle, showing that
25 she had received taxable pay of £4917.86 in that tax year.

(25) The claimant's last day of work on assignment to Deloitte LLP was 24 March 2020. The Glasgow offices at which she was working was closed due to Coronavirus. Thereafter, she did not do any work for the respondents on that assignment, nor any
30 other assignment to any other client.

(26) From and after 25 March 2020, the respondents treated the claimant as being on furlough. The HM Government CJRS

Scheme portal went live on 20 April 2020. There was produced to the Tribunal, at pages 61 to 63 of the Bundle, a copy of the respondents' emails to the claimant on 20 and 21 April 2020, from Clare Denison, sales & marketing executive, stating that , from the definitions in the Governments' CJRS Scheme, whereby umbrella employees would only receive 80% of National Minimum Wage, UK industry bodies were lobbying Government , and the respondents were awaiting clarification from the Government as regards holiday pay and apprenticeship levy in relation to umbrella employees before any decision on furlough was made or actioned by the respondents.

(27) Thereafter, on 27 May 2020, the claimant signed a document entitled ***"Agreement for Furlough Leave"*** with the respondents, prepared and sent to her by the respondents, a copy of which was produced to the Tribunal at pages 64 to 66 of the Bundle, in terms of which she agreed to receive a lower weekly payment, being 80% of her normal earnings (subject a cap of a maximum of £2,500 per month, as per the Government's CJRS, which cap did not apply in the claimant's case).

(28) In terms of clause 1 of that Furlough Agreement it was agreed that : ***'We agree that from 25/03/2020 you shall be on Furlough Leave. This means you cannot do any work for us, apart from undergoing training, although your contract of employment will continue and you will continue to accrue holiday. We will normally expect you to be on Furlough Leave for at least three weeks, as that is the minimum period which will allow us to reclaim 80% of your basic salary from HMRC."***

(29) Further, in terms of clauses 2, 3, 4 , 6, and 9, the following provisions were set forth:

"2. We will pay you:-

- ***80% of your deemed gross salary subject to a maYimiim nf f'7*>nn nor mnnth ralriilatorl arrnrriinn***

to paragraph 3. You agree to waive entitlement to any further remuneration during your Furlough Leave.

3. Your deemed gross salary is calculated as your actual deemed gross salary in the same period in the previous tax year or your average deemed gross salary over the last 12 months prior, whichever is greater.

4. Deductions for tax, national insurance contributions and pension will continue to be made from your salary.

6. Your Furlough Leave shall end on the earliest of the following events:-

(a) the government's Coronavirus Job Retention Scheme ending ; or,

(b) either you or us ceasing to be eligible for funding under that scheme; or,

(c) us deciding to cancel Furlough Leave and asking you back to work; or,

(d) us deciding to cease Furlough Leave.

We will give you as much notice as possible about the end of the Furlough Leave, but it may be as little as 24 hours' notice.

9. While you are on Furlough Leave you will continue to accrue holiday entitlement. This accrued entitlement will not be paid to you until you return from furlough and do some work for us."

(30) In terms of clause 10 of that Furlough Agreement, the claimant acknowledged that there was a *"Non-disclosure agreement* between the parties. In terms, it provided that: *"Under no circumstances are you (Worker) to publicly discuss details*

of the Furlough Leave Agreement in public forums or social media."

(31) Specifically, in terms of that Clause 10 provision, ***"confidential information"*** was defined to include, but not be limited to, ***"written and verbal correspondence between us and you on the topic of furloughed leave and our processing and interpretation of the CJRS, Government legislation, rules and regulations ; emails between us and you; any correspondence, written and verbal, that you have been included in, or made aware of, between us and your recruitment agency and / or end-client. "***

(32) At this Final Hearing, the Furlough Agreement with the claimant and correspondence between the parties was produced by the respondents as part of their Bundle, and no plea of confidentiality was asserted by them, and they referred to and relied on documents in the Bundle.

(33) There was also produced to the Tribunal, within pages 87 to 221 in the Bundle, screenshots of correspondence between the claimant and Brightpool Ltd relating to her assignment to Deloitte LLP, in February 2020, and June 2020, and correspondence between the claimant and the respondents, from March to September 2020, regarding her position with the respondents post Covid lockdown on 25 March 2020, and access to the HM Government Coronavirus Job Retention Scheme ("CJRS").

(34) In an email of 6 April 2020 from the respondents to the claimant, per a Sarah O'Toole, respondents' compliance manager (copy produced at page 111 of the Bundle), the claimant was advised that the respondents had received her contract, for assignment to Deloitte LLP, and her assignment contract dates were 6 April to 30 September 2020, and her rate of pay was £183 per shift.

(35) At this time, the claimant was in email contact with her local Member of Parliament, Amy Callaghan MP, regarding her then current situation and hiohliahtino the claimant's concerns ahnut

laws in the UK Government's package of financial support during the Covid-19 outbreak. Copy correspondence of 6,7 and 13 April 2020 was produced at pages 112 to 120 of the Bundle.

(36) On 28 May 2020, the claimant emailed the respondents (copy produced at pages 149 and 150 of the Bundle) raising some queries regarding points 1, 3 and 9, related to basic salary, total earnings, and accrued holiday pay.

(37) She chased the respondents for a reply to her 3 points on several occasions, on 29 and 30 May, and 1 June, 2020, as produced at pages 153 to 155 of the Bundle - but despite an assurance by Claire Dennison, sales and marketing executive, on 1 June 2020 (page 156) that there would be a reply by 2 June 2020, there was not, and the claimant had to chase up the respondents again on 4 June 2020 (page 156).

(38) On 4 June 2020 (copy produced at page 159 of the Bundle)) the claimant received an email reply from the respondents stating that :

"Your salary is generated by our payroll software Merit and you will receive 80% of your deemed gross salary (your salary before PAYE tax and Employee's National Insurance deductions are made). Your salary will be calculated using one of the following methods :

Average = Total Earnings / (periods worked + periods not worked)

ESPLY = Last financial year earnings for the same week / month / fortnight / 4 week period

It will then use the greater of the two."

(39) No answer was provided on 4 June 2020 to the claimant's query regarding holiday pay. Thereafter, on 4 August 2020, Claire Dennison replied again to the claimant (copy produced at pages 162 to 164 of the Bundle), apologising for the delay, and stating

that, after weeks of dialogue with HR specialists, it was decided that the best way (to deal with holiday pay) would be as follows: ***"1) Workers to be placed on Furlough and receive 80% of their day rate (up to £2500 per month); 2) Holiday pay is accrued; 3) Once the worker returns to work the holiday pay is paid as part of their bonus."***

(40) While, by another email of 4 August 2020 (copy produced at page 165 of the Bundle) Claire Dennison advised the claimant that July 2020's furlough would be paid to her on 6 August 2020, no such payment was made then by the respondents to the claimant, and so the claimant had to chase it up again with Ms Dennison.

(41) On 10 August 2020, Ciaran Woodcock, the respondents' field sales & marketing manager, emailed the claimant (copy produced at page 175 of the Bundle) stating that : "... ***Unfortunately there appears to have been some administration issues our end so I am currently speaking to HMRC. … I will update you tomorrow morning. While I accept that this is not ideal I thank you for your patience."***

(42) Mr Woodcock did not update the claimant the following morning, and so the claimant had to, yet again, chase up the respondents.

(43) By email of 12 August 2020, copy produced to the Tribunal at pages 179 and 180 of the Bundle, Mr Woodcock advised the claimant that :

"Unfortunately due to an admin error you were never officially registered with HMRC as being on Furlough, as such this means Churchill Knight Umbrella are not able to claim for your Furlough payments. We have been paying Furlough since June but somehow admin missed you from the list. We needed to have registered you before the 8th July in order to eligible and clearly we have missed this date.

Clearly none of this has been your fault, so as such I have approached our owners regarding offering compensation payments to yourself. I still need to get some information from our Payroll team so as to the amount we would be required to compensate you for. I hope to have this information by the end of the week and will be in contact with you to confirm the amount."

(44) Until receipt of Mr Woodcock's email to her of 12 August 2020 (copy produced at page 179 of the Bundle), the claimant understood that the respondents had given her name to HMRC, and that she was in the Government CJRS furlough scheme.

(45) Indeed, Ms Dennison's email to her, on 4 August 2020 (at pages 162 to 164) had specifically stated (at page 162) that : *"... it has been a long process to get to the point where we have been able to successfully Furlough you and others under the CJRS."*

(46) On 21 August 2020, the claimant emailed Mr Woodcock, copy produced at page 183 of the Bundle, stating that she was *"extremely concerned, regarding this furlough pay error and the amount of time that it's taking for Churchill Knight to provide a resolution. Can you please provide me with the date that Churchill Knight will resolve this error?"*

(47) She wrote again, in a similar vein, on 24 August 2020 (at pages 184 and 185 of the Bundle), expressing her further disappointment and dissatisfaction with the delay, and asking the respondents to resolve matters *"as a matter of urgency,* and stating that : "As *you have previously mentioned, this is clearly not my fault. The errors have been created by Churchill Knight, and therefore the correct course of action is for Churchill Knight to resolve this issue quickly. It is not fair that Churchill Knight have put me in this terrible position, which has a huge impact on my life, and then expect me to keep waiting and hanging on for a resolution,*

it's totally unacceptable.... I feel like I have been hugely let down by Churchill Knight."

(48) At page 67 of the Bundle, there was produced to the Tribunal a copy of the respondents' email to the claimant sent on 3 September 2020 by Ciaran Woodcock, the respondents' field sales & marketing manager, entitled ***"Furlough Update'.*** It apologised for the delay in getting back to the claimant and for the time it had taken to resolve the issue, explaining that there had been "a ***lot of communication between departments and partners to ensure we have the correct information and figures to resolve this correctly"***

(49) In that email to the claimant, Mr Woodcock advised her that : "As ***you are aware, there was an admin error on our end which meant you were not enrolled onto the Coronavirus Job Retention Scheme by the Government deadline. Unfortunately this meant Churchill Knight Umbrella were not able to claim for your furlough payments and you have not received the furlough payments you were expecting."***

(50) Mr Woodcock continued by advising the claimant that : " As ***the deadline has passed there is nothing we can do in this regards to enrolling you as only candidates enrolled onto the scheme can continue to receive furlough payments. However, I acknowledge that none of this has been your fault and therefore should not be at a loss as a result. As a gesture of goodwill, our owners have kindly agreed to pay you the full amount you would have received if you had been enrolled onto the scheme from the 25/03/2020 when your furlough began to the 31/07/2020 which was when Churchill Knight Umbrella ended all employees furlough leave."***

(51) Finally, Mr Woodcock's email of 3 September 2020 advised the claimant that : "***The total gross amount you would have been entitled to is £6652.48. Furlough payments are subject to usual tax and NI deductions which means the total net pay***

to yourself would be £5802.55. I have instructed the Umbrella team to process a payment for this - this may take up to 5 working days to arrive. Once again, I would like to offer our sincerest apologies for the delay in responding to you and for the uncertainty and inconvenience this has caused you."

(52) On 11 September 2020, the claimant emailed Mr Woodcock again (copy produced at page 194 of the Bundle) to state that she had not received and payment and the 5 day timescale had passed, and asking for it to be dealt with as a matter of urgency, and for a response by close of business that day.

(53) Claire Dennison , the respondents' sales & marketing executive, replied to the claimant (as per page 195 of the Bundle) on 14 September 2020 stating that the payment would be made to the claimant that day, and it would be £5941.93, as the claimant had more tax allowance available and so would be paying less tax than when the initial calculation was run.

(54) The claimant accepted in evidence at this Final Hearing that she received that payment of £5941.93 from the respondents on 14 September 2020.

(55) From the information available to the Tribunal, this amount seems to have been the net payment paid to her from the £6652.48 gross payment that the respondents had calculated was the payment due to the claimant under the terms of the Furlough Agreement entered into between them in May 2020.

(56) In her evidence to the Tribunal, the claimant stated that she had received no further payments from the respondents after 14 September 2020.

(57) On 15 September 2020, Ms Dennison advised the claimant, by further email (page 198 of the Bundle) that it was **"*a company decision to end all Churchill Knight Umbrella employees furlough on the 31st July due to additional employer***

contributions. Therefore, there is no continuation of furiough payments for Churchill Knight employees previously enrolled onto the scheme."

(58) On 17 September 2020, Claire Dennison wrote to the claimant by email, copy produced at page 200 of the Bundle) to advise her that : ***"... as you were not furloughed you did not accrue any holiday entitlement."***

(59) In reply that same day, copy produced at pages 201 and 202 of the Bundle, the claimant's email to Ms Dennison advised the respondents that: ***"The correct course of action is for Churchill Knight to put me in the financial position I would have been in, if the admin error hadn't taken place, which includes paying me the holiday pay that I have accrued and I'm entitled to. Also, please note, employees accrue holiday pay, regardless of whether or not they are placed on the Furlough scheme and the employer has a legal obligation to pay it."***

(60) Thereafter, in response to the claimant, on 18 September 2020, Ms Dennison advised, as per page 203 of the Bundle, that : "4s ***you were not furloughed you did not accrue holiday entitlement.*** We ***believe you have been treated fairly as you have received the full amount you would have got if you were enrolled onto the CJRS."***

(61) In reply that same day, copy produced at pages 203 and 204 of the Bundle, the claimant's further email to Ms Dennison advised the respondents that: "/ ***am not being treated fairly and I will deal with this matter accordingly." She*** then contacted ACAS, and wrote again by email to Ms Dennison later that same day (as per pages 205 and 206 of the Bundle) stating that they had advised her that : ***"If an employee has been in continuous employment they accrue holiday pay and the employer has a legal obligation to pay it, REGARDLESS of whether or not the employee was enrolled on to the Coronavirus job***

retention furlough scheme." Based on that information from ACAS, she asked the respondents to provide her with her holiday pay.

(62) Having no response from the respondents, the claimant emailed Ms Dennison and Mr Woodcock again on 5 and 7 October 2020 (page 207), and on 8 October 2020 to Mr Woodcock (page 209) stating that : " *I have already had to wait 6 months to receive Furlough payment. I'm not prepared to wait again to receive my holiday payment.* "

(63) Thereafter, on 13 November 2020, as per copy produced at pages 211 and 212 of the Bundle, Ms Dennison replied, on the respondents' behalf, thanking the claimant for her patience, and advising her that : *"In your case (and through no fault of your own), you were not enrolled onto the scheme and a furlough claim was not made in respect of you. Therefore, you were not entitled to any furlough money. We believed it would have been immoral for us to leave you with nothing and were pleased to be able to offer you compensation, and pay you the full amount you would have received from the government. Despite the scheme already costing us so much, we made this compensation payment out of our own pockets to ensure you received much needed financial support."*

(64) Ms Dennison's email to the claimant concluded by stating that : *" As you know, whilst on furlough you do accrue holiday pay. However, as you were not placed on furlough, and were in fact compensated by us, this would not apply. I understand you are disappointed that no further money is due but hope you can appreciate the efforts we have gone to for you to ensure you have received money at a time you were unable to work."*

(65) The claimant contacted ACAS on 13 November 2020, as per the copy email produced at page 213 of the Bundle, notified ACAS

of her dispute with the respondents on 16 November 2020 Page 215), and ACAS Early conciliation certificate R219704/20/06 was issued to her on 16 December 2020, as per page 216 of the Bundle.

5 (66) A copy of the claimant's payslips from the respondents, covering the 18 week period from 5 April 2020 to 2 August 2020, but all processed on 14 September 2020, were produced to the Tribunal at pages 68 to 85 of the Bundle.

(67) While the copy payslips so produced to the Tribunal showed some minor variance between weekly pay periods, the respondents at this Final Hearing submitted that her average weekly taxable pay was around £491 per week.

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(68) With the claimant's email of 21 June 2021 to the Glasgow ET, copied to Mr Colborn for the respondents, and copy added to the Bundle used during this Final Hearing, she attached various copy payslips and / or reconciliation sheets received from the respondents, between tax period 41 - w/e 12 January 2020, and tax period 18 - w/e 2 August 2020. These comprise weeks 44 to 50, and weeks 1 to 18, but excluding weeks 2 and 14.

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20 (69) These included some payslips processed by the respondents in the period from January to March 2020 , i.e. pre- the Covid-19 lockdown from 25 March 2020. These were payslips for 12, 19, and 26 January 2020 ; 2, 9, 16 and 23 February 2020; and 1 March 2020, all processed pre-lockdown. Payslips for 8 and 15 March 2020 were processed on 27 March 2020, while the payslip for 22 March 2020 was processed on 9 April 2020.

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(70) In her evidence to the Tribunal, she acknowledged that she received a pay slip each week, and that she did not query it with anybody at the respondents to say that she had any issues arising from the payments made to her. Her payslips referred to ***"furloughed pay",*** although, according to the respondents, her name was not on any payment to the respondents via the HM Government CJRS scheme.

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(71) The claimant did not produce to the Tribunal any reconciliation as between payslips received by her from the respondents, and actual payments received by her from the respondents, as shown by her bank statements.

Tribunal's assessment of the Evidence

39 In considering the evidence led before the Tribunal, I have had to carefully assess the whole evidence heard from each of the respondents' witness, Mr Edwards, and the claimant herself, and to consider the many documents produced to the Tribunal by both parties. My assessment of that evidence is now set out in the following sub-paragraphs: -

(1) Mr Tom Edwards : Respondents' Director

a) Mr Edwards was the only witness led on the respondents' behalf. Aged 33, he is a Companies House director of the respondents, and he has been their Operations Director since 2016. He is responsible for the day to day running of the respondents' business, and of another company, known as Churchill Knight Services & Associates Limited.

b) His evidence to this Tribunal was confused, and confusing, and he did not appear to have a proper or full understanding and knowledge of the material facts in the claimant's case.

c) In giving his evidence to the Tribunal, Mr Edwards did so remotely from somewhere in England, through CVP, and at a different location from Mr Colborn, the witness referring, when appropriate, to relevant documents in the Bundle, and additional documents available to me at this Final Hearing, as provided by the clerk to Mr Colborn, and by him via email to the witness, as and when the need to see relevant documentation arose from the evidence being given by both parties.

d) Overall, I did not find Mr Edwards to be a convincing, or r'l-zarlihlia onrl roliohlo \A/itn<acc and \A/hora hie evidence u/ac

at odds with that of the claimant, Miss Gibson, I preferred her evidence which was clear and coherent, and often vouched by appropriate cross reference to documents produced to the Tribunal.

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e) Even in answering questions, in his own evidence in chief, and replying to Mr Colborn's questions for him, Mr Edwards did not appear at ease, nor fully conversant with the relevant facts and what was in dispute between the parties. He appeared more at ease to speak generally about how umbrella companies operate, and how the introduction of CJRS had an impact on those types of company in that sector, and he acknowledged that there were some assumptions made on his part.

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f) He was confused about the claimant's effective date of termination of employment, and when asked why she had not been issued with any P45, he stated that the respondents had moved from one payroll system to another, and there was a migration of data, and he would need to check with HMRC about the RTI (real time information) provided by the respondents to HMRC.

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g) Mr Edwards believed that there had been some admin error by the respondents, but added that he would need to check the paperwork in the Bundle. He was at pains to explain that the claimant's name was not on the employer's CJRS claim to the Government, so they were unable to claim money from the Government, but the respondents had nonetheless paid the claimant "furlough" as it was ***"morally righf*** to do so, and so the respondents were ***"down by a significant amount of money".***

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h) After an adjournment to allow him to check out matters, Mr Colborn advised the Tribunal that HMRC had not been made aware that the claimant's employment by the

respondents had ended, on 30 September 2020, as far as could be ascertained during the adjournment period.

i) When he was cross-examined by Miss Gibson, as an unrepresented, party litigant, Mr Edwards became defensive and evasive in his answers, and I did not form the impression that he was doing his best to assist the Tribunal in giving his evidence. Some matters were clearly outwith his knowledge, but he was the only witness led by the respondents.

j) When answering questions of clarification, asked by me as presiding Judge, the witness had a tendency to speak about what he thought would or should have happened, rather than to narrate what, if anything, he actually knew about what had, in fact, happened, or not, as the case may be.

k) Even when he offered an apology to the claimant for the respondents' delays in addressing her correspondence, and making payment to her, Mr Edwards did not give the impression that his apology was truly sincere, but more like it was him simply going through the motions, a pain he knew he had to experience before the Tribunal to address the respondents' now acknowledged failings in addressing the claimant's complaints within a reasonable period of time.

l) While Mr Edwards advised the Tribunal that the respondents had used the Government furlough scheme until 31 July 2020, when the Government then decided that they would not meet all the employer's costs, the witness explained that it was then not financially viable for the respondents to use the scheme, and so that is why they ended their participation on 31 July 2020, as otherwise they would ***"haemorrhage money to pay out at our cost."***

m) At the conclusion of his evidence, immediately after the claimant's cross-examination, there being no re-examination by Mr Colborn for the respondents, the witness left the Hearing, and signed out of the CVP link.

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(2) Miss Audrey Gibson: Claimant

a) Miss Gibson was the only witness led on behalf of the claimant. Her evidence in chief was, as agreed by both parties, elicited by questions asked by me, as presiding Employment Judge, and I gave her the opportunity to add anything further, if she felt that it was appropriate to do so.

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b) In giving her evidence to the Tribunal, the claimant did so, in person, at the Glasgow Tribunal Centre, clearly, and confidently, referring when appropriate to relevant documents in the Bundle, and additional documents available to me at this Final Hearing, as provided by her in earlier correspondence to the Tribunal, cc'd to Mr Colborn, as and when the need to see relevant documentation arose from the evidence being given by both parties.

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c) When the claimant came to be cross-examined by the respondent's representative, Mr Colborn, her answers to his questions did not undermine her evidence in chief as the claimant, and her position remained generally consistent, under cross-examination by him, with her pled claim before the Tribunal, as per the ET1 claim form presented by her on 15 January 2021, and her financial loss statement provided to the Tribunal, and copied to the respondents' representative, on 21 June 2021.

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d) Overall, the claimant came across to the Tribunal as a credible and reliable witness, and where there was a dispute as between her evidence, and that of Mr Edwards, the respondents' witness, I have preferred the claimant's evidence.

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e) I considered that the claimant's evidence had the ring of truth to it, and her evidence was generally consistent with her narrative of events in the ET1 claim form, as spoken to by her in her own evidence at this Final Hearing. It was not at all undermined by the cross-examination undertaken by Mr Colborn for the respondents.

f) In her evidence to the Tribunal, commenting upon Mr Edwards' verbal apology to her at the Final Hearing, the claimant advised the Tribunal that his apology was not sufficient, she was very stressed and anxious, and a lot of that anxiety, she explained, was about what was happening, and having to chase the respondents up constantly, and that she spent a lot of time doing that

Closing Submissions

40 As indicated earlier in these Reasons, while evidence from both parties concluded on 4 October 2021 , due to the lateness of the hour, it was not possible to proceed there and then to closing submissions. Rather than reconvene on a later date, it was mutually agreed to allow written closing submissions from both parties, with private deliberation by the Judge in chambers thereafter.

41 With the claimant being an unrepresented, party litigant, I ordered the respondents' closing submissions first, so that the claimant could consider them, with time for reflection, and reply with her own closing submissions thereafter. I explained to her that while both parties could address me on the relevant law, in their closing submissions on what they wanted me to do by way of final judgment, it is my responsibility, as presiding Judge, to apply the relevant law to the facts as I might find them to be in reviewing the evidence led before the Tribunal, and making my findings in fact, as set out earlier in these Reasons.

Reserved Judgment

42 In closing proceedings at 4.22pm on the afternoon of Monday, 4 October 2021 , I advised both parties that I was reserving my Judgment, which

would be issued in writing, with Reasons, in due course, after time for private deliberation in chambers, following receipt of their written closing submissions.

43 Parties were updated by the Tribunal, on 20 October 2021, to advise that Tuesday, 2 November 2021, was set for that deliberation day, in chambers. I had private deliberation on that date.

44 I apologise to both parties for the delay in issue of this my Judgment and Reasons, since 2 November 2021, and I take the opportunity to explain that that was due to 2 week's annual leave immediately thereafter, and other judicial business since my return. This written Judgment and Reasons represents the product of my private deliberations, and subsequent writing up of this document.

Parties' Written Closing Submissions

45 As ordered by the Tribunal, I received written closing submissions for each party. For ease of reference, and rather than summarise their salient points, I reproduce them, *verbatim*, below.

46 In his closing submissions for the respondents, intimated on 11 October 2021, Mr Colborn, stated as follows:-

Respondent's Closing Submissions

Summary:

"It is the Respondent's contention that the Claimant, with one exception, has been paid all that was due to her under the terms of her contract of employment and the Assignment Works Schedule.

The exception relates to the holiday pay accrued during the period the Claimant was on furlough leave. This amount of £710.95 will be paid before the reserved judgement is promulgated.

It is acknowledged by the Respondent that there were delays in arranging payments to the Claimant. While this is not a matter that the Claimant brought a formal claim about to the Tribunal, the Respondent reiterates the apology it provided for the delay in payment.

1. Amount of a weeks' pay

The Claimant's Work Assignment Schedule (pages 58-60) describe her 'Rate' as being £183 per 12 hour day (or £549 for a 3 day week). The Rate' figure is not, in the context of an umbrella company, the same as her gross pay for payment calculation purposes. From the Rate' figure deductions are made for those costs normally borne by the employer such as National Insurance, Apprenticeship Levy, and payroll processing costs. Mr Edwards gave evidence as to how the calculation is performed and it can be seen is examples of payslips presented to the Tribunal showing the payment calculation. The pay slip for Tax Period 48 shows that the taxable pay for the Claimant was £491.61. There appear to be some minor variance in gross pay between pay periods, with an average of about £491 per pay period. The Claimant gave evidence that she had received these payslips with the gross pay calculation and had not raised any concerns about the calculation method for payments until she moved onto furlough leave.

2. Payment in respect of period on Furlough

The Claimant is claiming that she should have been paid her Rate' pay while she was on furlough for the period 25th March 2021 until 31st July 2021 (sic). *This claim is resisted on two grounds:*

1. *The Claimant's weekly taxable pay was £491 per week as per the submission above.*

2. *The Claimant signed a Furlough Agreement (pages 64 - 66) under which she agreed to receive a lower weekly payment, being 80% of her normal earnings (subject to a cap which didn't apply in her case).*

It is contended that the payment received by the Claimant of £6652.48 was the correct payment due to her under the terms of the Furlough Agreement.

3. Termination Date

The parties agree that the Claimant's termination date was 30th September 2020. The fact that due to an administrative error a P45 was not issued is not indicative of any facts relating to the termination date.

Furthermore, as Mr Edwards highlighted during his evidence, there is an obligation for workers to maintain contact with the Respondent as per sections 1.3.11.1 - 1.3.11.3 (page 29) of the Claimant's contract. The Claimant did not maintain contact which further indicates that the Claimant believed her employment had ended. The Claimant had been aware from her Assignment Works Schedule (page 60) which had been issued to her on 6th March 2020 that the assignment was due to end on 30th September 2020.

4. Payment between 1st August and 30th September 2020

The Claimant is claiming payment at the rate of £183 per day for the period 1st August until 30th September 2020. This claim is resisted on the following grounds:

4.1 The Claimant's weekly taxable pay was £491 per week as per the submission above. Furthermore, this figure is not guaranteed. Section 3.2 (page 30) of the Claimant's contract specifies that she is entitled to payment at the rate of the National Living Wage. Section 3.5.1 (page 30) of the Claimant's contract indicates that a bonus would be payable on top of the National Living Wage, to be paid out of any profit generated by the Claimant. If the Claimant was doing no work for the end client she would not be generating any profit to provide for a bonus payment.

4.2 Clause 3.2 (page 30) of the Claimant's contract of employment indicates that she would be paid for 'all hours actually worked on assignment'. The Claimant in evidence acknowledged that she did no work under the contract after 25th March. The Claimant seems to have recognised that she had no entitlement to payment when she didn't work as in April she was pushing to be placed on furlough leave (page 121).

Therefore, it is submitted that no payment is due in respect of this period.

5. Holiday pay in respect of the period 1st August - 30th September 2020

The Claimant's contract clause 4.1 (page 31) indicates the basis on which holidays accrue each 'working week'. It is contended that post 31st July the Claimant did no work under the contract and so no holiday entitlement accrued during this period. Thus there is no liability to pay holiday pay in respect of this period. "

47 The Tribunal has noted the obvious typographical error, in paragraph 2 of Mr Colborn's closing submissions, to the period ***"25th March 2021 until 31st July 2021",*** and I have read those dates as being 2020, and not 2021. Further, the page references quoted by Mr Colborn are to pages in the Bundle produced to the Tribunal.

48 By way of response, in her closing submissions for the claimant, intimated on 17 October 2021, Miss Gibson stated as follows:-

Claimant's Closing Submissions

"My contract of employment provided for early termination of the contract by either party giving notice.

My employer Churchill Knight Umbrella Limited, did not give me notice to terminate the contract and therefore accordingly I am entitled to a payment equal to the wages I would have received up to the end of the fixed term contract (30th September 2020) I calculated this to be £8,353.52 (as per my calculations on the ET1) which includes:

a) wages from 1st August 2020 to 30th September 2020

b) Holiday pay from 25th March 2020 until 30th September 2020

c) 20% wages uplift for what was supposed to be Furlough period which was from 25th March 2020 to 31st July 2020)

I would like to reiterate the following information:

Holiday pay: In the last 14 days of the contract (the 14 days leading up to 30/09/2020) I was still under the impression that I would receive my holiday pay as per the law. I didn't think that I would not receive my holiday pay. Then I was advised by Ciaran Woodcock on 08/10/2020 that he would liaise with the companies external HR Advisor regarding my holiday pay entitlement, this also led my to believe that I would receive what I was entitled to, as I thought once Ciaran Woodcock had liaised with the

external HR Advisor, the HR Advisor would realise that I had accrued holiday pay, as per the law, which is stated on the Government's website. I'm still not sure why there is any dubiety regarding whether or not I accrued holiday pay?

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1. *I was led to believe that I was employed but receiving no payment.*

2. *Then I was led to believe that I was employed, placed on Furlough retrospectively and waiting for payment.*

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3. *Then I was advised that I had not been placed on Furlough.*

4. *Then I was advised I would receive a goodwill gesture payment which I didn't receive until 14/09/2020.*

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5. *Then I was advised that I didn't accrue any holiday entitlement because Churchill Knight Umbrella Limited had an admin error which meant I wasn't placed on Furlough.*

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6. *Then, like I say after the fixed contract had ended I discussed what I thought was only one issue, a holiday pay issue, with an Employment Solicitor. I was then advised by the Employment Solicitor that there was also the issue of unlawfully deducted wages and that I was legally entitled to 100% wages and holiday pay for the duration of my continuous contract of employment.*

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Loss of Wages:

As previously explained, after the fixed contract had ended (end date 30/09/2020) I contacted an Employment Solicitor to discuss ONLY my accrued holiday pay issue, BECAUSE I BELIEVED THAT THE HOLIDAY PAY ISSUE WAS THE ONLY ISSUE THAT I HAD, however, whilst discussing the holiday pay issue, the Employment Solicitor then made me aware of the full extent of my financial loss. The Employment Solicitor advised me that as I had a continuous contract of employment which ran until 30/09/2020, that I was entitled to 100% wages and holiday pay for the duration of the contract. Only once I received this information (AFTER THE CONTRACT END DATE) I then understood the full extent of the financial loss.

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As you can see from the joint bundle, I was continuously contacting CKU which proved to be very difficult and challenging due to lack of, and delayed responses from CKU.

I was extremely confused by the evidence that Mr Tom Edwards provided on the day of the Final Hearing, first of all he stated that my employment with Churchill Knight Umbrella Limited ended on 14/09/2020 and then changed the end date to 30/09/2020. However, when Employment Judge I McPherson asked Mr Edwards if a P45 was issued by Churchill Knight Umbrella Limited to me, Mr Edwards replied that he was not sure, and when asked by Employment Judge I McPherson, if I was still employed by Churchill Knight Umbrella Limited as of 04/10/2021 Mr Edwards replied that he was not sure. This appears to be extremely confusing and contradicting information, which makes me question how reliable this evidence is. There was a great amount of uncertainty regarding this evidence/'

49 The Tribunal has noted that much of the claimant's written closing submissions replicates the terms of her earlier email to the Tribunal, copied to Mr Colborn for the respondents, on 11 July 2021 . In her evidence to the Tribunal, at this Final Hearing, she specifically invited the Tribunal to refer to the 6 bullet points (1) to (6) in her email of 11 July 2021 to the Glasgow ET, as reproduced in the above paragraph of these Reasons reciting her written closing submissions.

Relevant Law

50 Having established the above facts, I now apply the relevant law. As neither party has addressed the relevant law in their written closing submissions, which are both more related to the facts of the case, as they saw them, rather than any narration or discussion of the relevant law, I have given myself a self-direction in the relevant law, which I now set out concisely for the assistance of both parties.

51 As regards unlawful deduction from wages, the relevant law is to be found in **Part II of the Employment Rights Act 1996** dealing with ***"Protection of Wages".*** **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.** There is, as now agreed at the start of this Final Hearing, no time-bar issue between the parties, and so the Tribunal has jurisdiction to consider the claimant's complaint.

52 Under **Section 13,** an employer shall not make a deduction from wages of a worker 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 their agreement or consent to the making of the deduction.

53 Further, in terms of **Section 27 (1), "wages"** is defined to include holiday pay. A worker may present a complaint to an Employment Tribunal under **Section 23,** and where a Tribunal finds a complaint well-founded, then **Section 24(1)** provides that the Tribunal shall make a declaration to that effect, and it shall order the employer to pay to the worker the amount of any deduction made in contravention of **Section 13.**

54 Finally, **Section 24(2)** provides that the Tribunal may order the employer to pay, in addition to any amount ordered to be paid as an unlawful deduction, such amount as the Tribunal considers appropriate in all the circumstances to compensate the worker for any financial loss sustained by the worker which is attributable to the matter complained of.

55 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. In the present case, the claimant's contract of employment has been varied, consensually with her signed agreement, by entering into the Furlough Leave Agreement with the respondents, on 27 May 2020.

56 I have also reminded myself 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. The contract of employment between the parties, as read alongside the Furlough Leave Agreement, provide the basis of that legal entitlement to wages, and holiday pay, for the claimant

57 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.**

58 **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. Given the length of the claimant's employment with the respondents, being less than two years, I need concern myself no further with this statutory provision.

59 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.

60 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.

61 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 breach of contract claim before this Tribunal.

Discussion and Deliberation

62 In carefully reviewing the evidence in this case, and making my findings in fact, and then applying the relevant law to those facts, I have had to consider the questions that I set forth earlier in these Reasons, at paragraph 35 above, under ***"Issues for the Tribunal",*** and I now deal with each of those questions in turn.

(a) What was the effective date of termination of the claimant's employment by the respondents?

63 Arising from Mr Colborn's concession, as recorded earlier in these Reasons, at paragraph 32 above, I find that the effective date of termination of the claimant's employment by the respondents was 30 September 2020, being the end date of her assignment to Deloitte LLP.

64 As I have found earlier in my findings, at paragraph 38(4) and (5) above, while, at this Final Hearing, parties were agreed that the effective date of termination of the claimant's employment with the respondents was 30 September 2020, there was further joint agreement that no P45 was ever issued to the claimant, and no correspondence was sent to her, by the respondents, confirming that date as being the end date of her employment with the respondents.

65 Notwithstanding the clear contractual provision in her contract of employment that end of an Assignment was not termination of employment, it appears both parties took that view, and the respondents did not write to the claimant terminating her employment, and she did not write to them maintaining that she was still an employee of the respondents.

(b) As at that date, what sums (if any) were owing to the claimant as due to her in respect of outstanding, unpaid wages and / or holiday pay?

66 In his written closing submissions to the Tribunal, on the subject of "a ***weeks' wages",*** Mr Colborn, for the respondents, stated that the claimant's gross pay per week varied around £480 to £490, and while the respondents' ET3 response had agreed the claimant's gross wages as being at £549 per week, Mr Colborn's position in his oral closing was that ***"the ET3 does not provide options to reflect the reality of an umbrella company."***

67 I pause to note and record, by way of observation, that I cannot accept his view. Section 6 (earnings and benefits) in the pro forma ET1 claim form asks a claimant to provide information as regards how much they are, or were paid ? Both pay before tax (gross) and normal take home pay (net), and detail as to the pay frequency (weekly, or monthly) are sought. At section 6.2, the claimant provided specific amounts for both gross and net paid weekly.

68 When Mr Colborn completed the ET3 response, at section 5 (earnings and benefits), he ticked "Yes" to the details provided by the claimant in the ET1 as regards hours of work (section 5.1) and pay (section 5.2). He had the option to tick *"No"* at section 5.2, and then insert the details he believed to be correct. He did not do so there, nor anywhere else in the ET3 response, including section 6.1, which allows for free text, with additional information to be given on the blank sheet at the end of the ET3.

69 Further, when amended ET3 Grounds of Resistance were later lodged, Mr Colborn made no submissions there about the claimant's wages as stated in the ET1 being incorrect. It was only in his written closing submissions intimated after the close of evidence at this Final Hearing that he raised this particular point, having put some payslips to the claimant when cross-examining her.

70 In his cross-examination of the claimant, at the Final Hearing on 4 October 2021, Mr Colborn put to her the payslip dated 31 January 2020, for week ending 19 January 2020 (tax period 42), attached to the claimant's email to the Glasgow ET of 21 June 2021 , copy added to the Bundle used at the Final Hearing, showing basic pay of £307.88 (being 37.5 hours @ £8.21 NMW per hour), holiday pay of £53.04, and additional pay of £131.57, giving total gross of £492.49, and net pay of £403.11, after deductions for tax and NL

71 The claimant admitted in evidence that she had received with that payslip the respondents' reconciliation statement, processed on 31 January 2020, showing 5 days @ £110 per day, less company costs of £110.55, including

holiday provision of £53.04, producing receipts less costs of £439.45, plus holiday pay taken this period @ £53.04, showing gross for tax at £492.49.

72 While the claimant acknowledged that she got such a reconciliation statement with each and every payslip (although not all copy payslips produced by her to the Tribunal had an associated reconciliation statement produced alongside), she advised the Tribunal that she did not know why the respondents ***"work it out in such a convoluted wa *** when it's gross £549 per week, being 3 times £183.

73 Mr Colborn also put to the claimant, in evidence, her payslip and the reconciliation statement for tax period 50 (w/e 15 March 2020), showing gross pay of £491 .61, and net pay of £402.62.

74 The Tribunal notes that the reconciliation statement processed on 14 February 2020 (for week 43, being week ending 26 January 2020) is the first to show company receipts at day rate of £183 x 3 = £549. Receipts less company costs of £110.34 (including holiday provision of £52.95) produces £438.66, plus £52.95 holiday pay taken, giving gross £491 .61 for tax. That tallies with the payslip for that week, showing gross £491 .61 , and net pay of £402.62.

75 Payslips and reconciliation statements for weeks 44 to 50 record the same details. For week 1, w/e 22 March 2020, processed on 9 April 2020, the claimant's gross pay is £491 .97, with net pay of £402.66. Receipts of £549 (3 x £183) less company costs of £110.02 (including holiday provision of £52.99) produces £438.98, plus £52.99 holiday pay taken, giving gross £491 .97 for tax.

76 The payslips processed on 14 September 2020 for weeks 1 to 18, being w/e 5 April 2020 to 2 August 2020, all show ***"furloughed payment,*** and there is no reconciliation statement produced along with those copy payslips, presumably because the claimant was not working on

assignment over that period, and so no invoices were being issued for her services provided on assignment.

77 Regrettably, the information provided to the Tribunal by both parties, in the documents included in the Bundle, and the claimant's email of 21 June 2021 added to the Bundle, appears to be incomplete.

78 I have not considered it appropriate to request further documentation, as I know, from their attendance at the Tribunal on 4 October 2021, both parties are keen to get this Judgment in early course, and a referral back to them would simply cause further delay. However, from the copy payslips provided to the Tribunal, the following information has been extracted:-

Tax Period	Week-ending	Date processed	Gross pay (£)	Net pay (£)	
41	12/01/20	31/01/20	492.49 (including holiday pay £53.04)	403.11	
42	19/01/20	31/01/20	492.49 (including holiday pay £53.04)	403.11	
43	26/01/20	14/02/20	491.61 (including holiday pay £52.95)	402.62	
44	02/02/20	14/02/20	491.61	402.62	

			(including holiday pay £52.95)		
45	09/02/20	28/02/20	491.91 (including holiday pay £52.95)	402.62	
46	16/02/20	28/02/20	491.61 (including holiday pay £52.95)	402.62	
47	23/02/20	13/03/20	491.61 (including holiday pay £52.95)	402.62	
48	01/03/20	13/03/20	491.61 (including holiday pay £52.95)	402.62	
49	08/03/20	27/03/20	491.61 (including holiday pay £52.95)	402.62	
50	15/03/20	27/03/20	491.61 (including holiday pay £52.95)	402.62	

51					Not produced
52					Not produced
1	22/03/20	09/04/20	491.97 (including holiday pay £52.99)	402.66	
1	05/04/20	14/09/20	572.26 'Furloughed Payment	513.74	
2					Not produced
3	19/04/20	14/09/20	357.66 'Furloughed Payment	326.83	
4	26/04/20	14/09/20	357.66 'Furloughed Payment	336.70	
5	03/05/20	14/09/20	357.66 'Furloughed Payment	336.70	
6	10/05/20	14/09/20	357.66 'Furloughed Payment	336.70	
7	17/05/20	14/09/20	357.66	336.70	

			'Furloughed Payment		
8	24/05/20	14/09/20	357.66 'Furloughed Payment	336.70	
9	31/05/20	14/09/20	357.66 'Furloughed Payment	336.70	
10	07/06/20	14/09/20	357.66 'Furloughed Payment	336.70	
11	14/06/20	14/09/20	357.66 'Furloughed Payment	336.70	
12	21/06/20	14/09/20	357.66'Furloughed Payment	336.70	
13	28/06/20	14/09/20	357.66 'Furloughed Payment	336.70	
14					Not produced
15	12/07/20	14/09/20	357.66 'Furloughed Payment	273.62	
16	19/07/20	14/09/20	357.66	268.87	

			*Furloughed Payment		
17	26/07/20	14/09/20	357.66 *Furloughed Payment	267.67	
18	02/08/20	14/09/20	357.66 *Furloughed Payment	265.10	

(c) Was there an unlawful deduction from her wages?

(d) If so, in what amount ?

(e) In the event of success with her claim against the respondents, in whole, or in part, what sum (if any) should the Tribunal order the respondents to pay to the claimant?

79 I have taken these three matters together, because they are inter-connected.

80 The claimant has, in the course of pursuing her claim against the respondents, proceeded on the basis that she believed her pay to be £183 per shift, being £549 per week gross, for her 3 shifts on Assignment She used that figure in her Tribunal claim, and in her financial loss statement of 21 June 2021.

81 She stated that in her ET1 claim form as being her weekly gross wages, and that figure was accepted in the ET3 response lodged by the respondents. However, it is clear from the evidence before the Tribunal that that figure was the Assignment rate agreed between the respondents and Brightpool Ltd, and not the claimant's wages.

82 While the respondents accepted that £549 figure in their ET3 response, it is clear from the copy payslips produced to the Tribunal that the claimant's

gross pay per week was around £491 per week, as per the respondents' written closing submissions.

83 Further, in her claim, the claimant asserted that she was **"owed *100% of my wages and holiday pay from 23/03/2020 to 30/09/2020 as per my continuous contract of employment".*** She has left out of account that she entered into a Furlough Leave Agreement with the respondents to receive only 80% gross pay, and that the respondents could bring that to an end.

84 Also, clause 9 of that Furlough Leave Agreement stated : ***"While you are on Furlough Leave you will continue to accrue holiday entitlement".*** Her furlough leave ended on 31 July 2020, although the respondents do not appear to have communicated that to the claimant, until Mr Woodcock's email of 3 September 2020, copy produced at page 67 of the Bundle.

85 Clause 6 of the Furlough Leave Agreement gave the respondents the right to end furlough leave in certain defined circumstances, and while they undertook to give the claimant as much notice as possible, they provided that it might be as little as 24 hours' notice. In the event, the notice given on 3 September 2020 was well after the event, i.e. retrospective, rather than prospective notice of an end at a future date.

86 The claimant did not work for the respondents after 31 July 2020, and so no holiday entitlement can have accrued during the period 1 August to 30 September 2020.

87 In his written closing submission for the respondents, at section 2, it is asserted by Mr Colborn that : "/t ***is contended that the payment received by the Claimant of £6652.48 was the correct payment due to her under the terms of the Furlough Agreement."***

88 It is an assertion, and not something that the respondents have proven at this Hearing. The precise basis of the calculation of the gross and net payments made to the claimant by the respondents on 14 September 2020 is not clear to the Tribunal on the information and documents provided to

the Tribunal for use at this Final Hearing, as not all payslips for the relevant period have been produced to the Tribunal.

89 Similarly, at section 5, Mr Col born stated : "/t ***is contended that post 31st July the Claimant did no work under the contract and so no holiday entitlement accrued during this period. Thus there is no liability to pay holiday pay in respect of this period.*** "

90 Again, it is an assertion, and not something that the respondents have wholly proven at this Hearing. The claimant accepts that she did no work for the respondents under her employment contract post 31 July 2020, but she disputes their assertion that there is no liability to pay her holiday pay post that date.

91 While the respondents gave evidence that they stopped participating in the CJRS on 31 July 2020, the respondents did not take any steps to terminate the claimant's assignment (running to 30 September 2020), nor to bring her employment with them to an end.

92 Nor, on the evidence available to the Tribunal, did the respondents seek to expressly vary or cancel the Furlough Leave Agreement entered into with the claimant on 27 May 2020. On its terms, it came to an end when the respondents , under clause 6, decided to cease using CJRS. Indeed, on the evidence presented, nor did the claimant seek to vary it, or even seek an extension of time, while her Assignment was still running until 30 September 2020.

93 As I have found, at paragraph 38(71) above, in my findings in fact, the claimant did not produce to the Tribunal any reconciliation as between payslips received by her from the respondents, and actual payments received by her from the respondents, as shown by her bank statements, or other evidence provided to the Tribunal. As such, the claimant has failed to prove that there was any unlawful deduction from wages and, if so, to quantify the amount of that deduction.

94 On 29 October 2021, the respondents' representative, Mr Colborn, emailed the Glasaow ET. with coov to the claimant, to advise that the

amount of holiday pay of £710.95, that the respondents had agreed, at the Final Hearing on 4 October 2021 to pay to the claimant, had now been paid into the claimant's bank account

95 Further, on 2 November 2021, the claimant emailed the Tribunal, with copy to Mr Colborn for the respondents, to confirm her receipt of a payment of **£476.96,** stating that she was ***however / am extremely disappointed, I have already had to wait over a year and I have now been further penalised, due to the payment being calculated with an emergency tax code."***

96 As the respondents did not provide to the Tribunal, with their email of 29 October 2021 , a copy of whatever pay advice was issued by them to the claimant when paying her this amount, and nor has the claimant forwarded on to the Tribunal any pay advice received by her from the respondents in this regard, the Tribunal cannot be sure, but it seems that the sum paid to the claimant of £476.96 is a net sum, after deductions, and not the gross amount of her holiday pay that the respondents had calculated at £710.95,

97 In her evidence to the Tribunal, at this Final Hearing, the claimant stated that the respondents' offer of £710.95 gross was not acceptable to her, as it only went to 31 July 2020, and she believed that they should pay her holidays until 30 September 2020. She explained that for the period from 25 March to 31 July 2020, she believed she was due **£1,006.05,** being 19 weeks @ **£52.95,** explaining that £52.95 was the weekly holiday pay element from her gross weekly wages of £549, for 3 shifts @ £183 per shift.

98 The difficulty for the Tribunal is that parties have not presented the information in a format that allows the Tribunal to properly compute what sum (if any) was due, and what sum has been paid.

99 What is clear is that 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 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.**

100 In her ET1, at section 8.2, the claimant had stated : ***"This situation has caused me a significant amount of uncertainty, stress and anxiety."*** In her evidence to the Tribunal, she spoke of the impact on her of having received no payment, then late payment, from the respondents.

5 101 Further, in her email of 21 June 2021, enclosing her financial loss statement, the claimant stated that she was seeking ***"future losses',*** that she described as being : ***"Travel Expenses and Printing costs relative to attending the Employment Tribunal Hearing."***

102 As the claimant presented no evidence to this Tribunal to show that she
io had incurred any such costs, nor any evidence to vouch that she had suffered any financial loss, sustained by her which is attributable to the matter complained of, there is no basis for the Tribunal to make any additional award in her favour in terms of **Section 24(2).**

Disposal

15 103 For the foregoing reasons, I find that the claimant is unsuccessful in her claim against the respondents, and so I have given my Judgment as above. The respondents are not ordered to make any further payment to the claimant.

104 Given the admin errors, and communication delays inherent in them
20 addressing the claimant's concerns, as evidenced in my findings in fact above, the Tribunal trusts that the respondents will have had some organisational learning points, arising from their handling of the claimant's case, and, if not already actioned, they may wish to review their internal policies , practices and procedures.

Employment Judge: **I McPherson**
Date of Judgment: **16 December 2021**
Entered in register: **17 December 2021**
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and copied to parties

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