EMPLOYMENT TRIBUNALS

Claimant: **Ms. B. Ujvari**

Respondents: **(1) Sentinel Employed Limited**
(2) Apple Europe Limited

Heard at: London Central (by CVP) **On:** 20, 21, 22, 23 & 24 November 2023

Before: Employment Judge J. Galbraith-Marten
Ms. S. Aslett
Mr. T. Ashby

Appearances

For the Claimant: In person

For the Respondents: (1) Mr. L. Fakunle, Solicitor
(2) Mr. C. Kelly, Counsel

JUDGMENT

The unanimous Judgment of the Tribunal is as follows:

1. **The complaint of unlawful deduction of wages against the first respondent is not well founded and is dismissed.**

2. **The complaint that the first respondent failed to pay the claimant for accrued but untaken holiday in accordance with Regulation 14 Working Time Regulations 1998 is not well founded and is dismissed.**

3. **The complaint that the first respondent refused to permit the claimant to exercise the right to paid annual leave in accordance with regulation 16 of the Working Time Regulations 1998 is well founded and the first respondent is ordered to pay the claimant the sum of £244.78 less tax and national insurance.**

4. **The complaint of automatic unfair dismissal for asserting a statutory right contrary to s.104 Employment Rights Act 1996 against the first respondent is dismissed as the Tribunal does not have jurisdiction to determine it as the claimant was not an employee of the first respondent.**

5. **The complaint of automatic unfair dismissal for making a protected disclosure contrary to s.103A Employment Rights Act 1996 against the first respondent is dismissed as the Tribunal does not have jurisdiction to determine it as the claimant was not an employee of the first respondent.**

6. **The complaint of being subjected to a detriment for making protected disclosures contrary to s.47B Employment Rights Act 1996 against the first respondent is not well founded and is dismissed.**

7. **The complaint of being subjected to a detriment in respect of working time contrary to s.45A Employment Rights Act 1996 by the first respondent is not well founded and is dismissed.**

8. **The complaints against the first and second respondent that they each breached regulation 5 of the Agency Worker Regulations 2010 are not well founded and dismissed.**

9. **The complaints against the first and second respondent that they each subjected the claimant to a detriment contrary to Regulation 17 Agency Worker Regulations 2010 are not well founded and dismissed.**

10. **The complaint against the first respondent that it dismissed the claimant contrary to Regulation 17 Agency Worker Regulations 2010 is dismissed as the Tribunal does not have jurisdiction to determine it as the claimant was not an employee of the first respondent.**

REASONS

Request for Written Reasons

1. Judgment was given orally on Friday 24 November 2023. On the 27 November 2023 and in accordance with **Rule 62(3) of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, Schedule 1,** the claimant requested written reasons and they are provided below in accordance with that request.

Preliminary Issue

2. At the beginning of the hearing the claimant pursued an application for specific disclosure. This was the subject of much correspondence between the parties and raised by email with the Tribunal on 10 November 2023.

Application

3. The claimant requested disclosure of four categories of documents from the second respondent; (a) slack communications between herself and her manager, Renee Gittins, regarding positive feedback she received from the business (she alleged only negative feedback had been included in the bundle), (b) slack communications between the claimant and her colleague Ozge Gulec (who shared concerns regarding the first respondent), (c) slack communications between the claimant and her colleague Ola Cole (who also shared concerns regarding the first respondent) and, (d) feedback regarding her fellow recruitment co-ordinators employed by the second respondent who the claimant alleges also received negative feedback as a result of workloads and technology but were not dismissed.

Second respondent position

4. The second respondent resisted the application on the basis the documentation sought was not relevant to the issues the Tribunal must determine. Para 35 of the list of issues at page 69 of the bundle identified the claims against the second respondent i.e. did it fail to provide the claimant with the same basic working and employment conditions after the qualifying period had the claimant been recruited directly and secondly, did it subject the claimant to a detriment because she raised concerns regarding the **Agency Workers Regulations 2010**. However, the reason Renee Gittins gave for terminating the claimant's engagement was performance and for the purposes of the claims brought, the Tribunal does not need to determine whether that decision was merited.

5. The claimant's concerns regarding the application of the **Agency Worker Regulations 2010** as set out at para 29 of the list of issues and in the claimant's email of 19 July 2022 included at page 605 of the additional bundle was only sent to the first respondent. It was not sent to the second respondent. Renee Gittins' position is that she neither saw that email nor was aware of its content.

6. Whether the second respondent was right in taking its decision to terminate the claimant's engagement would arise in an ordinary unfair dismissal claim, but there is nothing in the **Agency Workers Regulations 2010** that places a burden on the second respondent in respect of that claim. Whether or not the reason for termination was justified is irrelevant and all the requests for disclosures go to that issue and therefore, the application should be refused.

7. Furthermore, the two other employees the claimant referenced exchanging slack messages with are no longer employed by the second respondent and it no longer has access to those messages.

The law

8. In relation to applications for disclosure the Tribunal must give effect to **Rule 2 Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, Schedule 1** and the overriding objective which is to enable cases to be dealt with fairly and justly meaning, the Tribunal must treat the parties equally, save expense, act proportionality in relation to the complexity of the case and avoid unnecessary delay.

9. The test for whether an order for disclosure of documents should be made was set out by the Court of Appeal in **Canadian Imperial Bank of Commerce v Beck [2009] IRLR 740**. This is a two-limb test in that documents will be disclosable if they are both relevant and necessary for fairly disposing of the proceedings.

10. The Tribunal's powers in relation to ordering specific disclosure are also set out in **rule 31.6 & 31.12 Civil Procedure Rules 1998** as confirmed by the Employment Appeal Tribunal in **Santander UK plc and others v Bharaj [2021] ICR 580**.

Conclusion

11. In respect of the feedback regarding the London based co-ordinators and the slack communications between the claimant and her colleagues, the Tribunal did not consider those to be disclosable as they were neither relevant nor necessary for fairly disposing of the proceedings.

12. However, the Tribunal did consider the positive feedback from Renee Gittins to be relevant and necessary for fairly disposing of the proceedings. Albeit the detriment claim against the second respondent in respect of terminating the claimant's engagement did not require the Tribunal to determine whether that was a fair decision, that material would assist the Tribunal determine the claimant's contention that conduct/performance was not in fact the true reason for the termination.

13. Therefore, the claimant's specific disclosure application in respect of the positive feedback she received from her line manager, Renee Gittins, was granted. The

second respondent was ordered to produce the material to the claimant, the first respondent and the Tribunal and it did so.

Evidence

14. The claimant represented herself and the first respondent was represented by Mr. L. Fakunle, solicitor, and the second respondent was represented by Mr. C. Kelly of Counsel. The parties prepared a bundle of 601 pages and three additional bundles were also disclosed during the proceedings.

15. The claimant gave sworn evidence under oath and was cross examined by both respondents. The first respondent called sworn evidence from Mr. Darren Burford, Director, Mr. Henry Lee, CEO and Ms. Natasha Moore, Financial Controller. The second respondent called sworn evidence from Ms. Renee Gittins, Coordination Services Manager. Ms. Gittins was recalled on day 5 of the hearing as she submitted a supplemental witness statement in response to a question from the Tribunal during the second respondent's submissions. The claimant cross examined the respondents' witnesses and both parties made oral submissions.

Issues

16. The issues the Tribunal was required to determine were:-

Jurisdiction – Time Limit (ERA & WTR)

1. Has the claimant presented her claims within the primary three month time limit?
2. If not: (a) was it not reasonably practicable for the claimant to have presented her claims in time; and (b) if so, did she present her claims within such time as was reasonable?

Jurisdiction – Employment Status

3. For the purposes of section 230 of the Employment Rights Act 1996 (ERA) and regulation 2(1) of the Working Time Regulations 1998 (WTR) was the claimant an employee or worker of the first respondent?
4. If not a worker or employee of the first respondent for the purposes of section 230 ERA 1996 was the claimant a worker of the first respondent for the purposes of sub-section 43K(1)(a) ERA?

Automatic Unfair Dismissal – s.104 Employment Rights Act 1996

5. Did the claimant allege that the first respondent had infringed a right? The claimant relies on: -

   (a) On 27 May 2022 by two emails to Mandy Grant of Sentinel, the claimant said that she (i) had not been paid properly and, (ii) 15 days holiday had been deducted for May 2022.

(b) On 27 May 2022 by two emails to Natasha Moore, payroll department of Sentinel, the claimant said there had been incorrect deductions of tax and in respect of holiday pay.
(c) On 29 May 2022 by email to Natasha Moore, payroll department of Sentinel, the claimant said that deductions had been made from her pay without her agreement.
(d) On 31 May 2022 by email to Natasha Moore, payroll department of Sentinel, the claimant said that she had not been paid for the holidays she had taken and that she had not agreed to be paid by rolled up holiday pay and she asked to be paid by accrued holiday pay.
(e) On 31 May 2022 by email to Natasha Moore, payroll department of Sentinel, the claimant said that she had not agreed to rolled up holiday pay and asked to be paid by accrued holiday pay.
(f) On 20 June 2022 by email to David Burford, Director of Sentinel, the claimant said that she had not been paid for the holidays she had taken and she had not agreed to be paid for rolled up holiday pay, she is/was not aware what rolled up holiday is, and she asked to be paid by accrued holiday pay.
(g) In June 2022 by email to David Burford, the claimant said that the first respondent had made unlawful deductions from her wages because it had not paid for her holiday she had taken, and she asked to be paid for her holiday.
(h) On 31 May 2022 the claimant asked Natasha Moore to be paid for the two day Jubilee holiday in June 2022, as she was now on accrued holiday pay, which was refused by the first respondent as the claimant has not accrued them yet. The claimant never got paid for those days. However, the first respondent then stated that those were paid in her June payment. The claimant relies on the email between Kirsty Engstrom (Employment Agency Standards) and Sentinel, in which Sentinel claims exactly the contrary such that the claimant was paid for those at the end of June.
(i) On 15 July 2022 by email to Laura Carroll of Apple, the claimant said that she has concerns about sentinel and payment issues amongst the apple recruitment coordinator team in London.
(j) On 15 July 2022 the claimant sent a grievance to Henry Lee, CEO of Sentinel, against David Burford and Natasha Moore, stating that the claimant had not been paid for the holidays she had taken until June 2022 and that David Burford had given false information about the holiday pay and what had been agreed about holiday pay at the start of her employment.
(k) On 19 July 2022 the claimant emailed David Burford and Charlotte Gray and stated that she was an agency worker and that the Agency Worker Regulations had not been mentioned.

6. Was the claimant's claim to the right and that it had been infringed made in good faith? The relevant right relied on was the right to be paid for holiday and the right not to suffer unlawful deduction from wages.

7. Was the right a relevant statutory right listed in sub section 104(4) ERA 1996? The claimant relies on s.104(4)(a) &(d) ERA 1996.

8. Was the claimant dismissed by the first respondent?

9. Was the reason, or the principal reason for dismissal that she has alleged that the first respondent has infringed a relevant statutory right?

   Automatic Unfair Dismissal – s.103A Employment Rights Act 1996

10. Did the claimant disclose information? The claimant relies on paragraph 5 above.

11. Did the claimant have a reasonable belief that the disclosure was made in the public interest and tended to show; (i) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject and, (ii) in respect of 15 July 2022 grievance only and regarding David Burford giving false information about the holiday pay and what had been agreed about holiday pay at the start of employment that information tending to show a person's failure to comply with a legal obligation, was being or was likely to be deliberately concealed?

12. Was any protected disclosure made in accordance s.43C ERA 1996, such that it was a qualifying disclosure?

13. Was the claimant dismissed by the first respondent?

14. Was the reason, or the principal reason for the claimant's dismissal, that she made a protected disclosure?

   Detriment – s.45A Employment Rights Act 1996

15. Was the claimant subject to any detriment by the first respondent? The claimant relies on the first respondent terminating the engagement.

16. Was any such detriment done on the ground the claimant refused to forego a right conferred by the Working Time Regulations and/or alleged that the first respondent had infringed the Working Time Regulations?

   D*etriment – s.47B Employment Rights Act 1996*

17. Was the claimant subject to any detriment by the first respondent? The claimant relies on the decision to dismiss her.

18. Was any such detriment done on the ground that the claimant made a protected disclosure?

   Unlawful Deduction from Wages – s.13 Employment Rights Act 1996

19. Did the first respondent make an unlawful deduction from the claimant's wages? The claimant relies on the failure to pay her holiday pay and being on accrued holiday pay?

20. Was any such deduction required or authorised to be made by virtue of a statutory provision or a relevant provision of the claimant's contract? The first respondent relies on (i) the Agreement for the Engagement of Temps (PAYE) signed by the claimant on 8 February 2022 and, (ii) the offer letter that was emailed to the claimant on 13 January 2022 enclosing the Key Information Document.

21. Had the claimant previously signified in writing her agreement or consent to the making of the deduction? The first respondent relies on the agreement signed by the claimant on 8 February 2022 as indicated in the paragraph above.

    Holiday Pay – regulations 14 & 16 Working Time Regulations 1998

22. Was there ambiguity in the Agreement for the Engagement of Temps (PAYE) in the paragraphs referring to holiday pay?

23. Did the first respondent pay the claimant in respect of any period of annual leave as required by regulation 16 WTR?

24. Is/was rolled up holiday pay unlawful in the UK during the employment of the claimant by the first respondent?

    Agency Worker Regulations 2010

25. Was the claimant an employee or worker of the first respondent for the purposes of regulation 3 of the Agency Worker Regulations 2010?

26. It is agreed that the claimant was supplied by the first respondent to work temporarily for and under the supervision and direction of the second respondent.

27. It is agreed that the first respondent was a temporary work agency.

28. It is agreed that the second respondent was a hirer.

29. On 19 July 2022, did the claimant ask the respondents about why the Agency Worker Regulations had not been mentioned after 12 weeks continuous service and ask them to get back to her by 22 July 2022 with a response? The claimant contends therefore that she mentioned the 12 week qualifying period under the Agency Worker Regulations 2010, after which she would have been entitled to the same basic working and employment conditions as she would be entitled to for doing the same job had she been directly recruited by the hirer.

30. At the time of any such breach, had the claimant worked in the same role with the second respondent for 12 continuous calendar weeks, during one or more assignments?

31. To what extent were the first and/or second respondents responsible for any such breach?

32. Did the claimant:

    (a) Do anything under the AWR in relation to the first respondent, second respondent or any other person;
    (b) Allege that the first or second respondent had breached the AWR;
    (c) Refuse or proposed to refuse to forgo a right conferred by the AWR? or;
    (d) Did the hirer or a temporary work agency believe or suspect that the agency worker has done or intends to do any of the things mentioned in paragraphs (a) – (c)

    The claimant relies on paragraph 29.

33. Did the first respondent dismiss the claimant?

34. Was the reason, or principal reason, for the dismissal that the ground identified in paragraph 32?

35. Did the first or second respondent subject the claimant to a detriment? The claimant relies on the second respondent terminating the claimant's engagement.

36. Was any such detriment done on the ground identified in paragraph 32? The claimant believes termination could only happen in exceptional circumstances and relies on the email from David Burford dated 2 February 2022.

    Jurisdiction – Time Limits

37. Did the claimant present her claims within the primary three month time limit?

38. If not, in all the circumstances of the case, is it just and equitable for the Tribunal to consider the claimant's claims?

    Remedy

39. If any of the claimant's claims succeed, to what remedy is she entitled?

Findings of Fact

Background

17. The claimant was engaged by the first respondent as a temporary agency worker on 7 March 2022. The first respondent is an employment business that operates information technology consultancy activities.

18. The claimant was engaged by the first respondent to undertake a 12 month fixed term contract with the second respondent working as a recruitment co-ordinator until 26 February 2023. As a recruitment co-ordinator the claimant worked with the second respondent's managers to arrange interviews.

19. The second respondent is a client of the first respondent, and it is a subsidiary of Apple Incorporated which is a global technology company.

20. The claimant's assignment with the second respondent was terminated early on 22 July 2022 and as a result, the claimant's engagement with the first respondent also ended.

21. The claimant alleges she was unfairly dismissed by the first respondent on the grounds she asserted a statutory right and/or made protected disclosures. She also alleges she was subject to a detriment for raising concerns regarding her holiday entitlement and for making protected disclosures. She further alleges the first respondent made unlawful deductions from her wages and did not allow her to take paid annual leave nor was she paid for all her accrued but untaken annual leave when her engagement terminated. Finally, she alleges the first respondent dismissed her for raising concerns regarding the **Agency Worker Regulations 2010**, that both respondents were in breach of **Regulation 5 Agency Worker Regulations 2010** as she wasn't afforded the same rights as she would have if she had been hired directly by the second respondent after the qualifying period and both respondents subjected her to a detriment for raising her concerns regarding their application of the **Agency Worker Regulations 2010**.

Offer of Engagement

22. Mr. Burford, Director of the first respondent was approached by Ms. Gittins Coordination Services Manger of the second respondent on 5 July 2021 to assist with hiring a recruitment co-ordinator. That email was included in the bundle at page 81.

23. The claimant was interviewed by the second respondent and was offered the position by Mr. Burford on 13 January 2022. He emailed the claimant details of the offer from the second respondent, and he attached the first respondent's KID (Key Information Document) and standard contract. In addition, he set out in his email that the claimant had two options in respect of holiday pay in terms of how she could take it and when she would be paid, and he offered to explain that to her.

24. The KID was included at pages 99 & 100 of the bundle. In respect of holiday entitlement, the claimant was provided with two worked examples setting out the difference in pay. On page 99 was the rolled-up holiday pay option calculated at a rate of 15.56% of the claimant's gross salary. The claimant's daily rate was £142.31 per day, and she would receive 15.56% of £142.31 per day holiday pay in addition to her daily rate and this provided a higher monthly salary. The second option was the accrued holiday option, and the example calculation confirmed this option would provide a lower monthly salary.

25. What the document did not state is that in respect of the rolled-up holiday pay option and if the claimant did take annual leave, it would be unpaid as any holiday pay had been paid in advance.

26. Mr. Burford also confirmed the claimant's daily rate of pay of £142.31 was equivalent to £37,000 per annum. Mr. Burford also stated the claimant would be entitled to 27 days holiday plus bank holidays a total of 35 days annual leave. A copy of Mr. Burford's email was included in the bundle at page 83.

27. The first respondent's standard terms and conditions document entitled "*Agreement for the Engagement of Temps (PAYE*)" was included in the bundle at pages 85 – 90. At clause 2.1 the contract is referred to as a contract for services between the employment business (the first respondent) and the temporary worker (the claimant). Clause 2.3 stated the contract did not give rise to a contract of employment between the employment business and the temporary worker.

28. The claimant's leave entitlement was set out at clause 8. Clause 8.2. stated the claimant's entitlement was 6.6 weeks which accrued at a rate of 0.55 per month as set out in clause 8.3. Clause 8.4 provided the claimant could take accrued leave entitlement at any time. However, clause 8.7 stipulated that *by default***,** holiday pay would accrue at a rate of 14.54% and would be paid alongside other pay. Followed by clause 8.8 which provided that if the temporary worker would like to retain leave (holiday pay) so that it is not paid out alongside other pay they must inform the employment business at the start of the assignment so that this can be arranged.

29. Notwithstanding Mr. Burford's offer to explain the options as set out at clauses 8.7 and 8.8 in the respondent's standard terms, the claimant did not take up his offer and she did not inform the first respondent that she wished to have the accrued holiday pay option. In evidence the claimant confirmed that in all her previous employment she had only ever received accrued holiday and she had no knowledge of rolled up holiday pay nor the implications of it.

30. Termination of the Agreement was dealt with at clause 9. At clause 9.2 the employment business was entitled to terminate the assignment and the agreement at any time and without any liability by providing the period of notice in the assignment schedule. In addition, at clause 9.4, the employment business could end the agreement or provide short notice in certain circumstances including at clause 9.4.4 if the temporary worker proved unsatisfactory to the client.

31. The claimant was also provided with an assignment schedule included at page 91 of the bundle which provided different information. It again confirmed the first respondent was not required to provide the claimant with any notice of termination. It confirmed that following completion of the qualifying period of 12 weeks an agency worker regulations adjustment would be applied if any comparator information deemed that necessary. Finally, there was a clause which stated if there was a conflict between the standard terms and conditions

and the assignment schedule, the assignment schedule prevailed. The claimant's assignment schedule varied clauses 8.3 & 8.7 of the standard terms and conditions.

32. As set out in the assignment schedule the claimant's clause 8.3 read the claimant's entitlement to annual leave would accrue at a rate of 0.58 working weeks per month and not 0.55 and default holiday pay would accrue at 15.56% not 14.54% of the claimant's gross pay for each period and be paid out alongside other pay.

33. Upon receipt of this information the claimant queried her notice entitlement with Mr. Burford who informed her he would speak to the second respondent to get that changed. To have queried that entitlement, the claimant must have read and understood that information. In evidence the claimant suggested she didn't understand the documentation provided by the first respondent, but the Tribunal did not accept that entirely as the claimant was able to challenge those parts of the terms she recognised as being less favourable to her.

34. The claimant chased Mr. Burford about the notice provision by email and he confirmed on 19 January 2022 that either side would be required to give 4 weeks' notice other than in a disciplinary situation and the standard template must not have been changed and he would get back to the claimant about that. His email was included in the bundle at page 512.

35. The claimant chased Mr. Burford again and on 1 February 2022 he confirmed by email that the change was in hand. His email was included in the bundle at page 497. He emailed the claimant again on 2 February 2022 confirming changes to the schedule were minimal but for legal reasons the minimal notice had to be displayed. He further stated; "*Apple usually have two weeks either side in contracts, we will give you as much notice as possible, unless there is a disciplinary, poor performance related issue, that would result in no notice, examples of these are detailed in the body of contract*." That email was included in the bundle at page 487.

36. Notwithstanding the notice issue was not resolved, and the claimant was seemingly unaware she was to be placed on rolled up holiday as that was the first respondent's default position, the claimant signed the first respondent's standard terms and conditions including the assignment schedule on 8 February 2022 and her signature was included at page 92 of the bundle.

37. Alongside those terms, the first respondent had a temporary workers guidance notes document, and this was included in the bundle at pages 93 - 94. Payments are dealt with at section 3 which stated, "*salary payments will be processed monthly. For all approved timesheets received by close of business on 22nd of each month payment will be made on the last working day of the month. Payments will be made net of all statutory deductions, including income tax, national insurance, pension contributions and student loan deductions/attachments orders if relevant. Holiday pay will be paid monthly as a supplement to base pay, unless you have chosen to have this held back and*

accrued as paid leave." The claimant did not advise the first respondent she wished to receive accrued holiday pay.

38. As the claimant did not challenge the default rolled up holiday pay in the same way in which she challenged the notice entitlement and as she had never been in receipt of rolled up holiday previously, the Tribunal did accept her evidence that she was unaware the first respondent intended to pay her holiday in this manner despite Mr. Burford's offer to explain this to her.

Salary – March & April 2022

39. The claimant received her first salary payment on 31 March 2022 and her pay slip was included in the bundle at page 128. Her pay slip confirmed a gross base rate payment of £1423.10 (the equivalent of 10 days' pay) and a payment for holiday pay of £221.43 which was 15.56% of £1,423.10. The claimant received a net payment of £1,423.45 in March 2022.

40. The claimant's April 2022 pay slip was included in the bundle at page 129 and she received a gross base rate payment of £3,273.13 (the equivalent of 23 days' pay) and a payment for holiday pay of £509.30 which was 15.56% of £3,273.13. The net amount was £2,843.51. As the amounts varied on both occasions the claimant struggled to understand the figures.

Feedback – Henry Wellesley-Davies

41. In relation to the assignment with the second respondent, the claimant had a two-week induction period and the equipment she received from the second respondent had not been wiped by the previous worker and as a result she couldn't log onto their system for the first two days. Thereafter, she completed her training and commenced her tasks. The claimant stated the volume of work was high and fast paced and she routinely worked additional hours to meet demand.

42. Feedback regarding the claimant was provided to Ms. Gittins from her colleague Henry Wellesley-Davies on 22 April 2022 and he stated there were five issues the claimant needed to work on at that time. This was included at page 150 of the bundle.

43. Also at that time, the first respondent sent the second respondent a comparator request form on 28 April 2022. The first respondent's email to Ms. Gittins email was included in the bundle at page 151 & 152 and it outlined the requirements and rights of agency workers on day 1 and at week 12. The week 12 rights emphasised the requirement for agency workers to be provided with the same basic working and employment conditions as a comparable permanent employee including in respect of pay and annual leave.

Comparator Information

44. Two comparator forms were included in the bundle at pages 95 - 98. Ms. Gittins confirmed the comparator was in receipt of a salary of £20.87 per hour and

based on a 35-hour week that equated to £37,983.40 and this was at page 97 of the bundle. In addition, the comparator cited received 27 days holiday and all bank holidays i.e. 35 days paid holiday. Ms. Gittins served a supplemental witness statement as her original witness statement stated the form submitted to the first respondent was the one that appeared at pages 95 & 96 of the bundle which provided the same hourly rate as the claimant, and she clarified it was in fact the form at pages 97 & 98 citing a higher hourly rate than the claimant. The Tribunal queried why two comparator forms appeared in the bundle.

45. When she was recalled, Ms. Gittins stated she had made a mistake with the original form. She believed she had to provide the details of an actual comparator and not an estimate of what the claimant might have received had she been hired by the second respondent directly. The comparator she relied on was Ros Chadburn who was engaged by the second respondent via another temporary work agency in 2020 and was taken on as a permanent employee in July 2021. Ros was originally on a salary of £36,000 per annum as an agency worker and this was increased to £38,000 upon her permanent appointment. Therefore, Ros was in receipt of £20.87 per hour and that is why that figure was included in the form at pages 97 & 98.

46. Ms. Gittins explained that Ros was the same level of recruitment co-ordinator as the claimant, level S4. The second respondent has a salary range with a minimum, median and maximum salary point it uses to recruitment permanent employees. The bottom of the range is £28,300, the middle is £35,500 and the maximum is £42,700. Ms. Gittins stated managers can take compensation advice prior to appointing and with competitive salaries in London, that can mean different appointees are placed at different points of that scale depending on experience. Taking into consideration the claimant's previous experience as set out in her CV at page 263 of the bundle, Ms. Gittins remained of the view she would have been appointed as a new permanent employee at £37,000, the same salary she received as an agency worker.

47. In her opinion, and although Ros Chadburn was on the same grade and had the same job title as the claimant, she was not a comparable permanent employee as she had more experience working for the second respondent at the date of her permanent appointment and as such that merited a higher salary on their scale.

Feedback – Ozge Gulec & Henry Wellesley-Davies

48. Ms. Gittins relayed the April 2022 feedback from Henry Wellesley-Davies to the claimant on 9 May 2022. In her statement Ms. Gittins stated she wasn't overly concerned by the feedback and in evidence confirmed she put it down to a learning issue at that time. Whilst sharing the feedback Ms. Gittins also thanked the claimant for her recent hard work and confirmed the follow up actions of their meeting and her email was included in the bundle at page 153. This supported the claimant's contention that the second respondent's recruitment co-ordinators were under pressure with their workload.

49. Ms. Gittins received more feedback about the claimant from one of her colleagues and that was included at page 219 of the bundle. The colleague reported that the claimant had asked her to stop being patronising and she found that to be rude. During Ms. Gittins' cross examination it was confirmed this was feedback from Ozge Gulec and the claimant clarified with Ms. Gittins that after their discussion she directed the claimant to speak to Ozge and the issue was resolved between them.

50. Mr. Wellesley-Davies provided further constructive feedback to Ms. Gittins regarding the claimant on the 26 May 2022. His email was included in the bundle at page 157. He complained about a variety of interviews the claimant had scheduled.

Salary – May 2022

51. On 11 May 2022 the first respondent received a direct earnings attachment notice (DEA) in respect of the claimant from the Department of Work & Pensions (DWP) in the sum of £333.32. The first respondent was required to deduct that amount from the claimant's salary and send it to the DWP. That letter was included in the bundle at page 154-156. The letter stated the claimant had also been sent a copy but she did not receive it.

52. Therefore, the claimant was shocked to see a deduction of £294.81 from her salary in May 2022. The remainder was recovered in June 2022 and the claimant's pay slips for May and June were included in the bundle at pages 130 & 131.

53. In May 2022 the claimant received a gross base payment of £2,134.65 (the equivalent of 15 days' pay) and a holiday payment of £332.15 which was 15.56% of £2,134.65. Less the DEA deduction the claimant received the net sum of £1,670.59. The reduction in her salary was also compounded by the fact the claimant took annual leave during May 2022 to celebrate her 40th birthday and she was not paid for that leave given she was in receipt of rolled up holiday pay. She also had two days sick leave in May 2022. This resulted in fewer working days and salary for the claimant.

54. The claimant was very upset at the low level of her May 2022 salary, and she emailed the first respondent on 27 May 2022 to query it. Her email was included in the bundle at pages 161 – 164. In her second email of that date to Ms. Moore, the first respondent's financial controller, the claimant asked why her tax deduction was changing each month, how she was able to add her holidays on and that she hadn't received any information regarding the DEA.

55. Ms. Moore responded the same day and provided a breakdown of the claimant's salary each month with reference to how many days the claimant worked in each pay period, the holiday pay she had received, the deductions that were required to be made and the total net amounts. Her email was included in the bundle at page 166 - 167.

56. Ms. Moore confirmed the claimant's salary varied depending on the number of days she worked each month, and she also confirmed the DEA deduction in May 2022. She further confirmed the claimant's tax deduction would change each month depending on the amount of salary she earned. She also expressly stated the claimant would not be paid for holidays or bank holidays as payment in respect of holiday had already been added to her daily rate and itemised separately on her pay slip.

57. The claimant replied on 29 May 2022, and she was very unhappy the respondent had deducted the amount required by the DEA without discussing it with her first. She understood she could have agreed a repayment plan with the DWP and by taking the money without consulting with her, the first respondent prevented her from doing so. Secondly, she stated if she was not to be paid for holidays, she believed that should also have been communicated to her from the outset. The claimant's email was included in the bundle at page 168.

58. Ms. Moore responded again on 30 May 2022. She stated the first respondent was obliged to recoup the DEA deduction and it was not negotiable and in respect of the claimant's holiday pay, the claimant was in receipt of holiday pay, but this was paid as a percentage of her daily rate and in advance of any holiday taken. She pointed out this was included in the KID, the claimant's wage slips and had been explained by Mr. Burford.

59. The claimant sent another reply on 31 May 2022. She confirmed she remained unhappy regarding the DEA recoupment and although the holiday pay "*was explained it didn't make much sense to her*". Her email was included in the bundle at page 170. She also pointed out she didn't get paid for the pre booked holidays she had discussed with Mr. Burford prior to her accepting the assignment which he assured her she could take. That email was included in the bundle at page 173.

60. Ms. Moore attempted again to explain to the claimant the difference between rolled up and accrued holiday pay on 31 May 2022. She set out very clearly that as per the claimant's rolled up holiday pay arrangement, she would not be paid when she took holiday nor for bank holidays. However, if the claimant chose to receive accrued holiday pay, she could accrue 2.92 days per month which she could take in the following month after they had been accrued and she would receive her usual daily rate for those days but anything above that amount would remain unpaid. Ms. Moore asked the claimant whether she wished to change to the accrued holiday system and if so, she would amend her contract accordingly. That email was included in the bundle at page 174.

61. The claimant accepted Ms. Moore's offer and chose to revert to accrued leave with effect from 1 June 2022. Her email was included in the bundle at page 175. The claimant completed 12 weeks of her assignment with the second respondent on the same date.

62. A copy of the claimant's amended terms and conditions confirming the amendment to clause 8.8 was included in the bundle at page 178 and the claimant signed the amendment on 8 June 2022.

63. The claimant sent another email to Ms. Moore on 5 June 2022 regarding the amendment. She was anxious for her new terms to go live so that she could use her paid accrued leave. She is also remained upset this option was not provided before and she stated other workers engaged by the first respondent were aware of it but she was not. She asked if Ms. Moore would return the DEA recoupment as again she wasn't aware of it. In evidence it was clear the claimant felt the first respondent should have done more in terms of communicating it would be deducting the DEA and explaining the holiday pay position despite her written terms and conditions, the KID, her pay slips and the assignment schedule she was provided with and signed.

64. Mr. Burford was made aware of the claimant's dissatisfaction regarding her salary when she requested a salary advance on 8 June 2022. He emailed her in response regarding the accrued holiday pay option and stated, "*hope that this option is better for you, apologies that this was not offered in the first instance – the view was that rolled up option was favourable but that was not the case for everyone*." His email was included in the bundle at page 181.The Tribunal accepted that Mr. Burford and the claimant did not discuss the holiday options when he offered to do so and as the claimant did not notify the first respondent after she signed her terms and conditions and assignment schedule that she wished to have accrued holiday pay, the first respondent did automatically place her on rolled up holiday pay and this was confirmed by Mr. Burford's email.

65. The claimant responded to Mr. Burford on 9 June 2021 and stated, "*I am financially in a very difficult position… I have to say this is very frustrating and, of what I have heard from some others they are in the same position, and they are experiencing the same issues*". The Tribunal asked the claimant in evidence to confirm the other workers of the first respondent who had shared their concerns regarding the rolled-up holiday pay option, and she confirmed she had only discussed the rolled-up holiday pay option with one colleague Luiba who actively chose that option. Therefore, and although the claimant referenced her colleagues being upset generally with the first respondent so far as the rolled-up holiday pay option was concerned, the Tribunal finds that was not accurate based on the claimant's own evidence. A copy of the claimant's email was included in the bundle at page 183.

66. On 14 June 2022 the claimant began raising her concerns regarding her salary with Ms. Gittins. She did so via slack the second respondent's internal messaging service on 14 June 2022 and their exchange was included in the bundle at page 184. Ms. Gittins offered to speak to Mr. Burford on her behalf.

Feedback – Toni Carter

67. A couple of days later further feedback was provided to Ms. Gittins about the claimant on 16 June 2022. This was feedback related to her performance and written communication conduct. However, this was contradictory as the feedback also confirmed the claimant was very helpful and supportive when the team needed her to be. That feedback was anonymous and included in the bundle at pages 185 & 186.

68. This was followed on the same day by negative feedback about the claimant from one of the second respondent's recruiting managers, Toni Carter. On 16th June 2022 Ms. Carter shared her concerns regarding the claimant with Ms. Gittins. Ms. Carter stated this was her first interaction with the claimant and it was not a great experience. Ms Carter complained about the claimant's approach to ical appointments, the delay in an interview starting on time, alleged incorrect links for interviews and Ms. Carter said overall it was not a good interaction between her and the claimant.

69. Ms. Gittins responded to Ms. Carter immediately and confirmed she would raise this feedback with the claimant and the first respondent. Their email exchange was included in the bundle at pages 187 & 188.

70. Ms. Gittins shared the feedback with the claimant verbally and on screen and in her opinion the claimant became very angry, and she based this on the tone the claimant used and her body language and for that reason she didn't provide the claimant with a copy of the feedback.

71. This prompted the claimant to raise her concerns regarding Ms. Carter's feedback directly with her line manager, Mr. Martin Hodgson. The claimant explained the negative feedback that was shared with Ms. Gittins was in her opinion not representative of the true facts of the situation.

72. Mr. Hodgson responded to the claimant and informed her he would look in it. That email exchange was included in the bundle at pages 189-193. This was brought to the attention of Ms. Gittins who responded to Mr. Hodgson on 17 June 2022. She copied her reply to her line manager, Ms. Carroll, and Mr. Burford of the first respondent. She advised them the claimant did not take Ms. Carter's feedback well but in her opinion, there were pieces that were valid. A copy of her email was included in the bundle at page 194.

73. In evidence Ms. Gittins stated she felt the claimant's action in contacting Mr. Hodgson was inappropriate and not professional and it was around this time she had discussions with Ms. Carroll regarding terminating the claimant's engagement.

Salary – June 2022

74. Also at this time, the claimant sent the first respondent additional queries regarding the calculation of her salary as she remained of the view it was not £37,000. Ms. Moore responded to her queries by email on 20 June 2022 and her email was included in the bundle at page 198. Ms. Moore confirmed that if the claimant had chosen the accrued holiday pay option from the outset, she would have received £66.71 gross less than the amount she had received by way of rolled up holiday pay.

75. In June 2022 the claimant received a gross base payment of £2,134.65 (the equivalent of 15 days' work) and a payment for holiday pay of £44.29. The claimant received a net payment of £1,734.57.

76. On 1 July 2022 the claimant vacated her rented property as confirmed by the email from her former landlord included in the additional bundle at page 603. The claimant then left the UK and visited a friend in Copenhagen.

77. On 7 July 2022 Ms. Gittins shared feedback with the claimant, namely her stats for the month via slack. The claimant thanked her for providing those stats and she also took that opportunity to raise her increasing concerns regarding the first respondent's approach to her salary. A copy of that exchange was included in the bundle at page 204.

78. The claimant also did the same with Ms. Gittins line manager, Ms. Carroll, who she contacted by email on 10 July 2022. She also informed Ms. Carroll that other workers supplied by the first respondent were having similar issues and she requested her assistance. A copy of her email was included in the bundle at page 205.

Feedback – Sharon Ubi & Henry Wellesley-Davies

79. Ms. Gittins received another piece of constructive feedback about the claimant on 11 July 2022. The concern related to not attaching CVs to Ical appointments, missed emails, not confirming interview times with candidates, and not raising Hireright checks. A copy of that feedback was included in the bundle at page 207. Sharon Ubi also supplied feedback to Henry Wellesley-Davies on 11 July 2022 who shared it with Ms. Gittins on 12 July 2022. In his opinion the claimant was using very little initiative, and his email was included in the bundle at page 209 and attached to Ms. Gittins witness statement.

Grievance

80. On 14 July 2022 the claimant raised a formal grievance with Mr. Lee, CEO of the first respondent, in relation to Mr. Burford and Ms. Moore. The claimant alleged she mentioned her pre booked holidays to Mr. Burford prior to her accepting the first respondent's assignment with the second respondent and he assured her it wouldn't be a problem and she would make more money if she didn't take any annual leave than the £37,000 salary provided. She continued that from April 2022 she had noticed that she had not been paid for the Easter bank holidays and various deductions had been made from her salary in May and June which required her to give up her accommodation in London due to the dire financial circumstances she found herself in. She alleged Mr. Burford had lied to her to convince her to accept the role with the second respondent. She further advised Mr. Lee that she had messaged her line manager, Ms. Gittins, that day to request to stay abroad longer as she no longer had anywhere to live in the UK and she had gone to Copenhagen to stay with a friend at a reduced cost. Finally, the claimant asserted that the payment of rolled up holiday pay had been unlawful in the UK since 2006. A copy of her grievance was included in the bundle at pages 210 & 211.

81. A copy of the slack messages between the claimant and Ms. Gittins regarding her accommodation were included in the bundle at page 212. Ms. Gittins asked

the claimant to put her request to the first respondent to work from abroad and it would make the request for approval on her behalf and the second respondent's leadership team would review it in due course. The claimant also recounted her difficulties with the first respondent and commented; "*if you are not happy with this, I am happy to resign*. *This has been the worst nightmare of my life."*

82. On 15 July 2022 the claimant sent a further email to the first respondent. In evidence the claimant stated she was not in a good place when she sent this email, and she was not proud of it. In her email she accused the first respondent of lying to her about her salary and she proposed a resolution of the issues in exchange for the sum of £5,000. If the first respondent did not provide it, she stated she would submit a claim to the Tribunal and she had experience of that from a previous employment. A copy of the email was included in the bundle at page 213 & 214.

83. The claimant reached out again to Ms. Carroll on 16 July 2022 repeating her concerns regarding the first respondent and her email was included in the bundle at pages 215 & 216.

Agency Worker Regulations

84. On the 19 July 2022 the claimant sent another email to Mr. Burford entitled "12 weeks entitlement - agency workers" in which she stated she understood that agency workers acquired the same rights as permanent employees after the 12 week qualifying period. She asked why the first respondent had not notified her of this and she asked for a response by 22 July 2022. A photograph of the email was included in the additional bundle at page 605.

85. On 21 July 2022 and despite submitting her grievance, the claimant confirmed to Mr. Lee that she wouldn't engage with the grievance process. The first respondent engaged Peninsula face2face to investigate the claimant's concerns and she disagreed about their involvement. Mr. Lee confirmed in evidence the first respondent does not have an HR department and therefore needed external assistance with this matter. A copy of the claimant's email was included in the bundle at page 222.

Termination

86. At 3.39pm on 21 July 2022 Ms. Gittins emailed Mr. Burford and asked to speak with the first respondent regarding the termination of the claimant's assignment. Her email was included in the bundle at page 223. Ms. Gittins had reached this point due to the claimant's ongoing performance issues, her conduct, and the fact the claimant was no longer in the UK and couldn't be physically present in the office three days per week as required. In evidence she confirmed this was not related to the grievance the claimant submitted to the first respondent or the claimant's email of 19 July 2022 regarding her entitlement to week 12 agency worker rights. Ms. Gittins did not receive that email and had no knowledge of it prior to taking the decision to terminate the claimant's engagement. No evidence was provided which contradicted Ms. Gittins statement.

87. Ms. Moore spoke to Ms. Gittins and Ms. Moore asked Mr. Lee to communicate the news to the claimant and he asked to speak with the claimant the following day at 2pm. His email to the claimant was included in the bundle at page 226.

88. Prior to that conversation, the claimant emailed Mr. Lee at 1.29pm. She confirmed her grievance related to the deductions in her salary in April, May & June 2022, the holiday deductions and the failure of the first respondent to inform her about the **Agency Workers Regulations 2010** and that she was entitled to be paid the same as a permanent comparable employee after the 12 week qualifying period. She then refused to return to work until such time as the first respondent confirmed her salary details, and stated she did not believe in modern slavery. A copy of that email was included in the bundle at page 227.

89. Mr. Lee and the claimant didn't speak, and he emailed her at 2.59pm on 22 July 2022 confirming that; "*Apple have contacted us today and have asked us to end your assignment. Under our agreement with Apple, they are entitled to end an assignment early for convenience. This is what they have chosen to do. Consequently, we will be early finishing your assignment with Sentinel. Your assignment will end at 2pm today*." A copy of his email was included in the bundle at page 229.

90. The first respondent did not provide the claimant with notice or pay in lieu of notice prior to terminating her assignment. Nor did it provide her with an alternative assignment.

91. The claimant received her final salary from the first respondent on 31 July 2022 and her pay slip was included in the bundle at page 132. She received a gross payment of £4,114.18. This was equivalent to 28.9 days' pay and that represented 25 days worked and 3.9 days accrued holiday pay as set out in Ms. Moore's email to the Employment Standards Agency included in the bundle at page 286.

The Law

Unlawful Deduction from Wages

92. **Section 13 Employment Rights Act 1996**

13(1) An employer shall not make a deduction from wages of a worker employed by him unless—
(a)the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
(b)the worker has previously signified in writing his agreement or consent to the making of the deduction.

Automatic Unfair Dismissal

93. **Section 94 Employment Rights Act 1996**

(1) *an employee has the right not to be unfairly dismissed by his employer*.

94. **Section 103A Employment Rights Act 1996**

"*An employee who is dismissed shall be regarded for the purposes of this part as unfairly dismissed if the reason (or, if more than one, the principal reason) is that the employee made a protected disclosure*."

95. **Section 104 Employment Rights Act 1996**

(1) An employee who is dismissed shall be regarded for the purposes of this part as unfairly dismissed if the reason (or, if more than one, the principal reason) is that the employee-
(a) Brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or
(b) Alleged that the employer had infringed a right of his which is a relevant statutory right
(2) It is immaterial for the purposes of section (1) –
(a) Whether or not the employee has the right, or
(b) Whether or not the right has been infringed;
But for that subsection to apply, the claimant to the right and that it has been infringed must be made in good faith.
(3) It is insufficient for subsection (1) to apply that the employee, without specifying the right, make it reasonably clear to the employer what the right claimed to have been infringed was.
(4) The following are relevant statutory right for the purposes of this section-
(a) Any right conferred by this Act for which the remedy for its infringement is by way of a complaint or reference to an employment tribunal.
(d)The rights conferred by the Working Time Regulations 1998

96. **Section 230 Employment Rights Act 1996**

(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
(2) In this Act "contract of employment" means a contract of service or apprenticeship whether express or implied and (if it is express) whether oral or in writing.
(3) In this Act "worker" means an individual who has entered into or works under (or, where the employment has ceased, worked under)-
(a) a contract of employment or,
(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.

<u>Detriment</u>

97. **Section 45A Employment Rights Act 1996**

(1) A worker has the right not to be subjected to a detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker-
(b) refused (or proposed to refuse) to forgo a right conferred on him by those regulations.
(f) *alleged the employer had infringed such a right.*

98. **Section 47B Employment Rights Act 1996**

(1) A worker has the right not be subjected to a detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

Agency Worker Regulations

99. **Regulation 3 Agency Worker Regulations 2010**

(1) In these Regulations "agency worker" means an individual who
(a) Is supplied by a temporary worker agency to work temporarily for and under the supervision and directions of a hirer and,
(b) Has a contract with the temporary work agency which is-
(i) A contract of employment with the agency, or
(ii) Any other contract with the agency to perform work or services personally].

100. **Regulation 5 Agency Worker Regulations 2010**

(1) Subject to regulation 7, an agency worker (A) shall be entitled to the same basic working and employment conditions as A would be entitled to for doing the same job had A been recruited by the hirer-
(a) Other than by using the services of a temporary work agency; and
(b) At the time the qualifying period commenced.
(3) Paragraph (1) shall be deemed to have been complied with where-
(a) an agency worker is working under the same relevant terms and conditions as an employee who is a comparable employee.
(4) For the purposes of paragraph (3) an employee is a comparable employee in relation to an agency worker if at the time when the breach of paragraph (1) is alleged to take place –
(a) both the employee and the agency worker are-
(i) working for and under the supervision and direction of the hirer, and
(ii) engaged in the same or broadly similar work having regard where relevant, to whether they have a similar level of qualification and skills.

101. **Regulation 17 of the Agency Workers Regulations 2010**

(1) *An agency worker who is an **employee** and is dismissed shall be regarded as unfairly dismissed….*

(2) An agency worker has the right not to be subjected to any detriment by, or as a result of, any act, or any deliberate failure to act, of a temporary work agency or the hirer, done on the ground specified in paragraph (3)
(3) The reasons or, as the case may be grounds, are –
(a)that the agency worker –
(v) alleged that a temporary work agency or hirer has breached the regulations
(vi) refused (or proposed) to refuse to forgo a right conferred by these regulations.

Holiday Pay

102. **Regulation 14 Working Time Regulations 1998**

14.(1) This regulation applies where—
(a) a worker's employment is terminated during the course of his leave year, and
(b) on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13(1) differs from the proportion of the leave year which has expired.
(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

103. **Regulation 16 Working Time Regulations 1998**

16. (1) A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13, at the rate of a week's pay in respect of each week of leave.
(2) Sections 221 to 224 of the 1996 Act shall apply for the purpose of determining the amount of a week's pay for the purposes of this regulation, subject to the modifications set out in paragraph (3).
(3) The provisions referred to in paragraph (2) shall apply—
(a) as if references to the employee were references to the worker;
(b) as if references to the employee's contract of employment were references to the worker's contract;
(c) as if the calculation date were the first day of the period of leave in question; and
(d)as if the references to sections 227 and 228 did not apply.
(4) A right to payment under paragraph (1) does not affect any right of a worker to remuneration under his contract ("contractual remuneration").
(5) Any contractual remuneration paid to a worker in respect of a period of leave goes towards discharging any liability of the employer to make payments under this regulation in respect of that period; and, conversely, any payment of remuneration under this regulation in respect of a period goes towards discharging any liability of the employer to pay contractual remuneration in respect of that period.

Employment Status

104. The leading case on employment status is **Autoclenz v Belcher and ors [2011] ICR 1157** in which Lord Clarke said:

18. As Smith LJ explained in the Court of Appeal [2010] IRLR 70 , para 11, the classic description of a contract of employment (or a contract of service as it used to be called) is found in the judgment of MacKenna J in Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497 , 515 c :
"A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service … Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be …"
19. Three further propositions are not I think contentious: (i) As Stephenson LJ put it in Nethermere (St Neots) Ltd v Gardiner [1984] ICR 612 , 623, "There must … be an irreducible minimum of obligation on each side to create a contract of service." (ii) If a genuine right of substitution exists, this negates an obligation to perform work personally and is inconsistent with employee status: Express & Echo Publications Ltd v Tanton [1999] ICR 693 , 699 g , per Peter Gibson LJ. (iii) If a contractual right, as for example a right to substitute, exists, it does not matter that it is not used. It does not follow from the fact that a term is not enforced that such a term is not part of the agreement: see eg the Tanton case, at p 697 g .
20. The essential question in each case is what were the terms of the agreement..

105. The Supreme Court confirmed in **Uber BV and Others v Aslam and Others [2021] UKSC 5**, this requires the tribunal to have regard to the protective nature of statutory employment rights and the inequality of bargaining power between the parties.

106. When determining employment status, the Tribunal must consider all the relevant factors both consistent and inconsistent with a contract of employment as confirmed by the Court of Appeal in **Kickabout Productions Ltd v Revenue and Customs Commissioners [2022] EWCA Civ 502 (CA).** Those factors can include how the individual is paid, who provides equipment, whether the individual receives holiday pay, sick pay, tax and national insurance, the extent of any integration into the organisation, the terms of the contract and the intention of the parties.

107. In respect of whistleblowing claims the definition of worker is expanded further in s**.43K(1) Employment Rights Act 1996** to include individuals who are not workers as defined in **s.230(3)** but who work or worked for a person in

circumstances that she was introduced or supplied to do that work by a third person. That extension was specifically to provide protection to agency workers.

Holiday Pay

108. The European Court of Justice held in **Robinson-Steele v RD Retail Services Ltd [2006] IRLR 386** the entitlement of workers to paid annual leave is an important principle of community law from which there can be no derogations and it is unlawful for an employer to simply designate part of remuneration that a worker has already received for work done as holiday pay. Therefore, workers must receive a payment relating to holiday pay that is additional to the payment received for work done.

109. Notwithstanding that, the European Court of Justice also held that **Article 7 of Council Directive 93/104/EC** did not preclude employers setting off genuine holiday payments paid under the rolled-up payment method against a worker's entitlement to payment when he or she actually takes leave. However, such sums must be paid "*transparently and comprehensively as holiday pay*" and the burden is on the employer to prove such transparency.

110. In **Smith v AJ Morrisroes and Sons Ltd and other cases 2005 ICR 596, EAT**, the Employment Appeal Tribunal held that for an employer to be given credit for rolled up holiday payments there must be genuine payments for holidays representing a true addition to the contractual rate of pay for time worked. This may be evidenced by a provision for rolled up holiday pay in the contract of employment, the amount allocated to holiday pay being identified in the contract and wage slip and records kept of the holidays taken. Post Robinson-Steel, in **Lyddon v Englefield Brickwork Ltd [2008] IRLR 198, EAT** the Employment Appeal Tribunal again held that payments representing rolled up holiday pay made transparently and comprehensibly could be set off against a worker's entitlement to holiday pay.

Submissions

First Respondent

111. The first respondent's submissions were difficult to follow. After intervention from the Tribunal, it was clarified the first respondent was not taking any time points in respect of the claims presented against it and its position was the claimant was engaged as a worker and not an employee.

112. In relation to the allegations at paragraph 5(a)-(k) of the list of issues, the first respondent accepted the claimant raised those concerns, but she did not do so in good faith nor was it in the public interest and the first respondent does not accept that resulted in any detriment to the claimant nor were they the reason she was dismissed.

113. In respect of the claimant's wages and holiday pay claim, the first respondent maintained the claimant has been paid everything that was properly

due, and no sums are outstanding. The first respondent was unable to address the Tribunal in relation to the lawfulness of rolled up holiday pay.

114. In respect of the breach of **Regulation 5 Agency Worker Regulations 2010**, the first respondent denied any such breach and in relation to the claimant's dismissal, the first respondent accepted it dismissed the claimant because the second respondent chose to terminate the assignment early.

Second Respondent

115. The second respondent accepted the claims against it were in time and submitted that in relation to **Regulation 5 Agency Worker Regulations 2010**, the claimant complained that no one discussed that with her once the 12-week point passed. However, there was no obligation on the second respondent to inform or consult with the claimant in that respect in contrast to **Regulation 13** and **Regulation 16**. Furthermore, that is not relevant to what the Tribunal must determine.

116. In respect of comparable and permanent employees, the second respondent is not relying on the defences provided in **Regulation 5 (3) & (4**) of the **Agency Worker Regulations 2010**. What is relevant in relation to **Regulation 5 (1)** is what the claimant, had she been engaged directly, would have received in respect of her basic employment conditions and what salary she would have been engaged on. She was engaged on a day rate which produced an equivalent salary of £37,000.

117. All the employees cited in Ms. Gittins statement are more experienced and were longer in post than the claimant and wouldn't be comparable as they were more skilled and common sense suggests that those employees should be paid more than a new hire.

118. They were not paid overtime and their annual leave was 27 days plus 8 bank holidays as per the claimant's entitlement. There were no differences in the claimant's rights on day 1 than had she been engaged as a permanent employee of the second respondent.

119. In respect of the detriment claim, the claimant's email of 19 July 2022 does amount to a protected act in accordance with **Regulation 17(3)(a)(iii) or (iiii)**. However, the claimant's engagement was not terminated by the second respondent because of her sending that email, there is no evidence of that whatsoever. Ms. Gittins was not aware of its contents and the Tribunal is not required to determine if the claimant's performance justified termination rather, was sending the email the true reason for the second respondent terminating the engagement.

120. Negative feedback was received regarding the claimant and included at pages 150, 219, 187 & 188 of the bundle. The July 2022 negative feedback referred to at paragraph 23 of Ms. Gittins statement was included at page 207 of the bundle. All that feedback predated the claimant's 19 July 2022 email. The claimant's own evidence was Ms. Gittins' attitude changed in mid-June. The

relationship between the claimant and Ms. Gittins soured a month before the email was sent, and all of that is consistent with the reason for termination of engagement being performance and for those reasons the claims against the second respondent must fail.

Claimant

121. The claimant submitted that rolled-up holiday pay was not clearly explained to her, it should have been her choice and not implemented by default. Her time sheets didn't show the number of holidays she had taken and therefore the rolled-up holiday amounted to an unlawful deduction of wages. Even when the holiday was changed to accrued it was still not clear to her.

122. In relation to **Regulation 5 Agency Worker Regulations 2010** the claimant didn't believe that either respondent complied. She pointed out that Ms. Gittins' evidence on her potential comparators was inconsistent and it was clear she didn't take advice on who might be an appropriate comparator for the claimant before completing the comparator form supplied by the first respondent.

123. The first respondent never replied to her written request of 19 July 2022 even when they should have done so within 28 days.

124. Regarding the termination of her assignment with the second respondent, the claimant maintains it has failed to disclose the positive feedback she received during her employment and the reason for her termination doesn't add up.

125. She raised all her concerns in good faith, and she took 11 days holiday in total during her employment and had she known she wasn't going to be paid she would not have done so.

Conclusions

126. The list of issues agreed by the parties was included at pages 66 – 70 of the bundle and the first issue was time limits. However, both respondents confirmed in submissions neither took any time point in respect of the claims presented.

Employment Status

127. There was however another matter of jurisdiction the Tribunal was required to determine and that related to the claimant's employment status. The claimant asserted she was an employee of the first respondent, whereas the first respondent asserted she was a worker. The second respondent's position was the claimant was an agency worker.

128. The Tribunal's findings are as follows. In relation to personal service, the Tribunal finds the claimant was required to perform the work required of her by

the first respondent i.e. her services as a recruitment co-ordinator during her assignment with the second respondent, personally.

129. Regarding mutuality of obligation, the claimant was engaged on a contract for services and clause 2.3 of the first respondent's standard terms and conditions expressly stated the claimant was to provide her services as a temporary agency worker and not as an employee.

130. However, at clause 3.4.3 & 3.4.4, the agreement also stated that no contract would exist between the claimant and the first respondent when she was not provided with an assignment and there was no obligation on the first respondent to provide the claimant with work nor was, she required to accept it.

131. Therefore, and although mutuality of obligation was present in respect of the assignment with the second respondent, no overarching contract existed between the claimant and the first respondent as the first respondent was not required to provide the claimant with any assignment nor was, she required to accept any assignment. This was substantiated by the fact when the claimant's assignment with the second respondent ended, she was not offered an alternative assignment by the first respondent, nor did she expect to receive one as she confirmed during evidence.

132. Lastly and in relation to control, the first respondent asserted no day-to-day control over the Claimant or her work during her assignment. That was undertaken by the second respondent who supervised and directed the claimant's work, hours, and location.

133. In relation to other relevant factors in determining the claimant's employment status, the intention of the claimant and first respondent was not to enter an employment relationship as reflected in the standard terms and condition document, and the claimant adduced no evidence to suggest otherwise. Although the claimant was paid by the first respondent, the company was to all intents and purposes a pay roll processing function and the claimant was not in any way integrated into the first respondent's business.

134. For those reasons and notwithstanding the claimant provided personal service during her assignment, the Tribunal finds the claimant was not an employee of the first respondent.

135. The first respondent accepted the claimant was its worker and in those circumstances the Tribunal is not required to determine whether the claimant was a worker pursuant to **s.230(3) Employment Rights Act 1996** or the extended definition in **s.43K Employment Rights Act 1996**.

136. As the claimant was supplied by the first respondent to work temporarily for and under the direction of the second respondent, and as she had a contract with the first respondent to provide services personally, the Tribunal finds the claimant also satisfied the definition of an agency worker in **Regulation 3 Agency Worker Regulations 2010**.

137. As the Tribunal found the claimant was not an employee, the Tribunal has no jurisdiction to consider the claimant's automatic unfair dismissal claims pursuant to **s.103A & s.104 Employment Rights Act 1996** and **Regulation 17 Agency Worker Regulations 2010** brought against the first respondent and those complaints are dismissed.

Unlawful Deduction from Wages

138. The claimant's case on what wages she says were not properly payable by the first respondent was difficult for the Tribunal to ascertain. She seemed to be suggesting her salary was not £37,000 per annum as she was not paid for her holidays prior to 1 June 2022.

139. The first respondent provided a breakdown of the claimant's salary in March, April, and May 2022 and that was included in the bundle at page 166. This set out the days the claimant worked, the rolled-up holiday payments she received, and the deductions made. The claimant's wage slips also accord with the daily rate and rolled up holiday pay set out in the assignment schedule included at page 99 of the bundle. Furthermore, the days worked accord with the claimant's time sheets that were included in the bundle at pages 108-127.

140. It appeared to the Tribunal that the claimant misunderstood the application of rolled up holiday pay which meant she received more than her daily rate and not less in the period prior to 1 June 2022 but she was not paid when she took leave.

141. As the claimant did not identify nor establish what payments she believed were properly payable and were not, the Tribunal finds the unlawful deduction from wages claim against the first respondent is not well founded and is also dismissed.

142. The Tribunal was not required to determine the matter of the DEA deduction on behalf of the DWP as the claimant accepted in evidence that amount was recoverable from her salary, but she was aggrieved at how the first respondent handled that. In any event, relevant DEA deductions are referenced in the assignment schedule at page 99 of the bundle and the claimant signed it.

Holiday Pay

143. There were two elements to the claimant's holiday pay claim. First, she maintained she did not receive her accrued but untaken holiday following the termination of her engagement. However, again, the claimant failed to particularise that complaint before the Tribunal.

144. She stated in evidence that she did not believe she had received payment for two bank holidays in June 2022. The first respondent submitted she did receive payment for those bank holidays and as she was on accrued holiday pay by that date, this was not reflected as holiday pay on her June 2022 pay slip but in her basic rate. The claimant was paid for 15 days in June 2022 inclusive of 2 & 3 June as confirmed by her time sheets included in the bundle at pages

120-122. Her timesheets record her as having worked on 3 June but not 2 June and in total she should have been paid for 14 days worked that month, but she was in fact paid for 15 days and 2 June 2022 was included as per Ms. Moore's email at page 201 of the bundle.

145. The claimant's time sheets for the period 20 June 2022 to 22 July 2022 equate to 25 days' work.

146. The claimant sought the assistance of the Employment Standards Agency regarding her final salary and her outstanding accrued leave and a copy of the correspondence with the first respondent regarding that was included in the bundle at pages 283 & 284. The first respondent explained the claimant had been paid for 25 days in her final salary and for 3.9 days holiday she had accrued since 1 June 2022. As the claimant was entitled to 27 days holiday per annum that equated to 2.25 days per month.

147. However, this differed from the information on the claimant's amended terms included in the bundle at page 178 which stated her holidays accrued at 2.92 days per month. Ms. Moore confirmed in evidence that bank holidays were treated differently and were not included in the accrual as they were paid automatically. This does correlate with the claimant's salary in June when she received payment for the two bank holidays. Meaning her accrued annual leave less bank holidays did accrue at a rate of 2.25 days per month (27/12) and not 2.92 and the first respondent calculated between 1 June 2022 and 22 July 2022 the claimant had accrued 3.9 days for which she was paid.

148. Therefore, the first respondent did provide the claimant with a payment for her accrued but untaken holiday between the period 1 June 2022 and 22 July 2022 upon the termination of her engagement. Accordingly, that claim against the first respondent is also not well founded and is dismissed.

149. The second aspect of the claimant's holiday pay claim relates to the payment of rolled-up holiday during the period 7 March 2022 to 31 May 2022. She submitted that was unlawful and a breach of **Regulation 16 Working Time Regulations 1998** which entitles workers to be paid in respect of any period of leave to which she was entitled at the rate of a week's pay in respect of each week of leave.

150. The first respondent submitted it paid the claimant in respect of any holiday pay entitlement during that period by providing her with 15.56% in addition to the claimant's daily rate of pay and in advance of any holiday taken i.e. rolled up holiday pay.

151. The remedy for any breach of **Regulation 16(1)** is defined in **Regulation 30(1)(b) and (5) Working Time Regulations 1998** and if a Tribunal finds that an employer has failed to pay a worker in accordance with **Regulation 16(1),** it shall order the employer to pay to the worker the amount which it finds due.

152. As per the ECJ decision in **Robinson-Steele** and the Employment Appeal Tribunal decisions of **Smith & Lyddon**, employers are entitled to offset

any rolled-up holiday pay if the payments were made transparently and comprehensively. Utilising the guidance in **Smith**, these payments were set out in the claimant's terms and conditions, the KID and the assignment schedule. The rolled-up holiday payments were also clearly included on the claimant's pay slips and did amount to a true addition to her daily rate as opposed to being taken from it.

153. The claimant stated in her submissions that she took 11 days annual leave during her engagement with the second respondent. The claimant's time sheets confirm she was not paid for 11.5 days annual leave during her assignment. The claimant took 5 days leave for her 40th birthday during the week commencing the 23 May 2022. There were bank holidays on Friday 15 April 2022, Monday 18 April 2022 and Monday 2 May 2022. The claimant's time sheet at page 111 records she took a half day holiday on Thursday 31 March 2022, and she was absent on Friday 29 April 2022, 2 May 2022, half a day on 3 May 2022, 4 May 2022, half a day on 5 May 2022 and 6 May 2022 i.e. a total of 13.5 days. As set out in her witness statement at paragraph 12 two of those days represented sick leave leaving a total of 11.5 days annual leave.

154. 11.5 days' pay at the claimant's base rate of £142.31 = £1,636.57. By the end of May 2022, the claimant had received a total of £1,062.88 gross rolled up holiday pay, she received £44.29 in holiday pay in June 2022, and she was also paid for two bank holidays amounting to £284.62. In total, the claimant received holiday pay payments totalling £1,391.79 providing a shortfall in holiday pay of £244.78 gross.

155. The Tribunal finds the first respondent failed to pay the claimant in accordance with **Regulation 16(1) Working Time Regulations 1998**, but the rolled-up holiday payments made to the claimant were both transparent and comprehensible and can be offset against the amount due. Therefore, that claim succeeds, and the first respondent is ordered to pay the claimant the outstanding sum of £244.78 gross less tax and national insurance.

Breach of Regulation 5 Agency Worker Regulations 2010

156. **Regulation 5 Agency Worker Regulations 2010** provides that after the qualifying period, an agency worker is entitled to the same basic working and employment conditions they would be entitled to for doing the same job had the agency worker been recruited directly by the hirer. Basic working and employment conditions means the relevant terms and conditions that are ordinarily included in the contracts of employees of the hirer.

157. **Regulation 5 Agency Worker Regulations 2010** is deemed complied with where an agency worker is working under the same relevant terms and conditions as an employee who is a comparable employee. An employee is a comparable employee in relation to an agency worker if at the time when the alleged breach occurred (in this case 1 June 2022) both the employee and the agency worker are; (i) working for and under the supervision and direction of the hirer, (ii) engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification and skills and, (iii)

the employee works or is based at the same establishment as the agency worker. Finally, an employee is not a comparable employee if that employee's employment has ceased.

158. The claimant asserted that Ros Chadburn was a comparable employee as they worked at the same level, had the same job title, and were based in the same office. Ms. Gittins, and although she shared Ms. Chadburn's hourly rate with the first respondent on 28 April 2022 in the comparator request form, disputes that as she mistakenly thought she was required to provide details of the closest actual comparator and not a best estimate as to what terms the claimant would have been hired on if she were a permanent employee of the second respondent.

159. Ros Chadburn was recruited first as an agency worker on a salary of £36,000 per annum in 2020 and when recruited permanently by the second respondent on 26 July 2021, her salary was increased to £38,000. Ros Chadburn left the second respondent in April 2022. Ms. Gittins maintained she was paid that rate as she had more experience working for the second respondent and her salary was within the minimum and maximum of the salary range for S4.

160. The second respondent's salary scale for those working at S4 provided a minimum, median and maximum and those with more experience were allocated to a point on the scale accordingly. Bearing in mind the claimant's qualifications and skills, Ms. Gittins confirmed that she would have been recruited at a salary of £37,000 if she had been a permanent employee. Ros Chadburn was recruited on a higher salary as she had more experience working for the second respondent and therefore, she was not a comparable employee to the claimant.

161. There were two other named permanent employees, Justine Monnier and Poonam Tanna but Justine had 7 years' experience with the respondent, and she was at the top of the S4 scale and Poonam was on a higher level S5. Again Ms. Gittins was of the opinion they were not comparable employees for those reasons.

162. It proved difficult for the Tribunal to understand the factual matrix of the second respondent's salary scale and the relevant information in respect of the three named comparators and this resulted in Ms. Gittins being recalled by the Tribunal and the provision of additional information by the second respondent.

163. However, and although the three permanent employees all worked for and under the control of the second respondent and at the same location, and even if they did the same or broadly similar work, it was not established they had a similar level of qualifications and skills. Each of the three named comparators had more experience working for the second respondent than the claimant thus explaining their higher salary level and in fact Ros had left the second respondent by the date of the alleged breach in any event.

164. Therefore, the Tribunal was not persuaded that if the claimant had been employed as a permanent employee by the second respondent that she would have been recruited on a higher salary similar to Ros, Justine or Poonam. Accordingly, the Tribunal finds there was no breach of **Regulation 5** by the second respondent and accordingly nor by the first respondent and that claim is dismissed.

Detriment – Agency Worker Regulations 2010

165. The claimant alleges that both respondents subjected her to a detriment contrary to **Regulation 17 Agency Worker Regulations 2010**. The detriment she relies on is the termination of her assignment with the second respondent and as a result her engagement with the first respondent.

166. The claimant contends this occurred as she alleged the first respondent had breached the **Agency Worker Regulations 2010** by not informing her of her week 12 rights by email on 19 July 2022. The claimant's email queried why the first respondent had not informed her that she had qualified to receive the same basic working and employment conditions as a comparable and permanent employee, and she requested a response. The email was not sent to the second respondent.

167. Although not formally labelled as a **Regulation 16 Agency Worker Regulations 2010** request for a written statement that is what the claimant was asking of the first respondent in her email. That request then afforded her protection from detriment if the reason for that detriment was the request for a written statement.

168. The first respondent accepted it terminated the claimant's engagement and the second respondent accepted it terminated the assignment but neither accepted that was done because the claimant did a protected act with reference to **Regulation 17 Agency Worker Regulations 2010**.

169. The second respondent's position was clear that Ms. Gittins decided to terminate the claimant's assignment because of her performance, conduct and relocation away from the UK. Ms. Gittins was unaware of the claimant's email of 19 July 2022 to the first respondent and the Tribunal accepts that. Although Ms. Gittins was aware of the claimant's ever-increasing concerns regarding the first respondent and her salary, she had not shared with her any concern regarding the **Agency Worker Regulations 2010**. That being the position, the claim of detriment contrary to **Regulation 17 Agency Workers Regulations 2010** against the second respondent is not well founded and is dismissed.

170. In respect of the first respondent, its decision was even more clear cut, it terminated the claimant's engagement in accordance with clause 9. 4 of the standard terms as the second respondent had ended the assignment early and the Tribunal accepted that. Therefore, the detriment claim against the first respondent is also not well founded and is dismissed.

Detriment – Working Time & Protected Disclosure

171. In relation to the two other detriment claims in relation to working time and making a protected disclosure against the first respondent, the claimant relies on the same detriment i.e. the first respondent terminating her engagement.

172. The first respondent accepted in submissions that the claimant had made protected disclosures and raised concerns regarding her rights pursuant to the **Working Time Regulations 1998** but that was not the reason why it terminated her engagement. The first respondent terminated the claimant's engagement as the second respondent ended the assignment early.

173. For the avoidance of doubt the Tribunal accepted the termination of her engagement amounted to a detriment. However, the claimant had been raising concerns regarding her salary and holiday pay consistently since early May 2022 and her engagement with the first respondent continued. It was only after the second respondent chose to end the claimant's assignment that the first respondent terminated its engagement with the claimant and the Tribunal finds that was the reason and not because the claimant raised concerns regarding her rights pursuant to the **Working Time Regulations 1998** or because she made protected disclosures. Therefore, the detriment claims against the first respondent pursuant to **s.45A & s.47B Employment Rights Act 1996** are not well founded and are dismissed.

Employment Judge J. Galbraith-Marten

Date 4 December 2023

JUDGMENT SENT TO THE PARTIES ON

05/12/2023

FOR THE TRIBUNAL OFFICE