



EMPLOYMENT TRIBUNALS

Claimant: Mr J Moules

Respondent: Churchill Knight Umbrella Ltd (First Respondent)
Churchill Knight & Associates Ltd (Second Respondent)

Heard at: Watford Employment Tribunal (In person and by video)

On: 7 March 2023

Before: Employment Judge Quill (sitting alone)

Appearances

For the claimant: Attending by video, and representing himself
For the respondent: Mr Colborn, External HR consultant (attending in person)

RESERVED JUDGMENT

1. The application for an order under Rule 50 to anonymise any part of this decision is refused.
2. The First Respondent made an unauthorised deduction from wages on Sunday 12 December 2021 when it failed to pay (at least) £334.13 that day and an unauthorised deduction from wages on Sunday 2 January 2022 when it failed to pay (at least) £334.13 that day.
3. The First Respondent is not ordered to make any payment to the Claimant for those unauthorised deduction because the sums were paid (as part of larger payments) on 13 December 2021 and 7 January 2022 respectively, which was well in advance of the date on which the claim was presented to the Tribunal.
4. Save as mentioned above, all of the complaints of unauthorised deduction from wages are not well-founded and are dismissed.
5. The Claimant is not entitled to damages for breach of contract, or to any sum for interest, or injury to feelings, or pain and suffering, or distress and inconvenience.
6. All complaints against Second Respondent are dismissed.

REASONS

Rule 50

1. This was a public hearing. No members of the public actually attended. I was present in the physical hearing room. Also present in the physical hearing room were the Respondent's representative and the Respondent's witness. I was also logged into the video hearing room, as was the tribunal clerk. Apart from the two of us, the only other person who attended by video was the Claimant.
2. At the outset of the hearing, the Claimant objected to the hearing being in public. He suggested that he had previously written to the Tribunal about this on 11 May 2022. There was no copy of any such communication from him on the Tribunal file, which the Claimant suggested was probably because of incompetence by the Tribunal. The Respondent also had no copy of any such application.
3. I asked the Claimant if he would like to explain orally why the hearing should be in private. He said that that would defeat the object, as I was effectively asking him to say, in public, what the issues were that he thought should be private.
4. I asked the Claimant if he would like to re-send the written application. After some discussion, it was agreed that, since no members of the public were present anyway, we could proceed with the hearing, and re-visit the matter if it became necessary.
5. In fact, the 3 hour hearing slot was taken up fully by the evidence and submissions, meaning that it was necessary for me to reserve. For that reason, I allowed the party the opportunity to make written submissions about Rule 50. I ordered that:
 - 5.1. if the Claimant seeks to make an application for his name, or any other part of the judgment and reasons, to be anonymised, the judgment and reasons, to be anonymised, then he must write to the Tribunal, with copy to all other parties by no later than 4pm on 14 March 2023. He must give full details of why such an order would be justified, taking into account that, save where anonymisation is justified, it is in the public interest for parties' names to be included in the documents published following a hearing.
 - 5.2. If the Respondent seeks to make any comments on the Claimant's application or reasons then it must write to the Tribunal, with copy to all other parties by no later than 4pm on 21 March 2023.

Law in relation to the Claimant's Rule 50 application

6. Sections 10, 10A, 10B, 11 and 12 of the Employment Tribunals Act 1996 ("ETA") contain express powers to restrict reporting of cases involving issues of national security, confidential information, sexual misconduct and disability.
7. Rule 50 of the Employment Tribunals Rules Of Procedure 2013 states:
 - (1) A Tribunal may at any stage of the proceedings, on its own initiative or on application, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers necessary in

the interests of justice or in order to protect the Convention rights of any person or in the circumstances identified in section 10A of the Employment Tribunals Act.

- (2) In considering whether to make an order under this rule, the Tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression.
- (3) Such orders may include—
 - (a) an order that a hearing that would otherwise be in public be conducted, in whole or in part, in private;
 - (b) an order that the identities of specified parties, witnesses or other persons referred to in the proceedings should not be disclosed to the public, by the use of anonymisation or otherwise, whether in the course of any hearing or in its listing or in any documents entered on the Register or otherwise forming part of the public record;
 - (c) an order for measures preventing witnesses at a public hearing being identifiable by members of the public;
 - (d) a restricted reporting order within the terms of section 11 or 12 of the Employment Tribunals Act.
- (4) Any party, or other person with a legitimate interest, who has not had a reasonable opportunity to make representations before an order under this rule is made may apply to the Tribunal in writing for the order to be revoked or discharged, either on the basis of written representations or, if requested, at a hearing.
- (5) Where an order is made under paragraph (3)(d) above—
 - (a) it shall specify the person whose identity is protected; and may specify particular matters of which publication is prohibited as likely to lead to that person's identification;
 - (b) it shall specify the duration of the order;
 - (c) the Tribunal shall ensure that a notice of the fact that such an order has been made in relation to those proceedings is displayed on the notice board of the Tribunal with any list of the proceedings taking place before the Tribunal, and on the door of the room in which the proceedings affected by the order are taking place; and
 - (d) the Tribunal may order that it applies also to any other proceedings being heard as part of the same hearing.
- (6) "Convention rights" has the meaning given to it in section 1 of the Human Rights Act 1998.

8. In Fallows v News Group Newspapers Ltd [2016] IRLR 827 it was held that the requirements of Rule 50(5) applied to any order for restrictions made by a Tribunal exercising its discretion in Rule 50(1).

9. Rule 50(1) has a broad scope. The Tribunal may make an order preventing or restricting public disclosure of any aspect of its proceedings at any time whether on the application of a party or on its own initiative. However, any such decision must be made judicially, taking into account all relevant factors and ignoring all irrelevant factors. The tribunal must only make an order imposing any restriction under Rule 50 if it has been persuaded that such restriction is necessary, whether that be necessary in the interests of justice or necessary to protect Convention rights or necessary to protect confidential information (as defined in s10A ETA).

10. As made clear by Rule 50(2), when making a decision about whether such an order is actually necessary, the Tribunal is required to give full weight to the principle of open justice and full weight to the right to freedom of expression .
11. Freedom of expression is dealt with in Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, agreed by the Council of Europe on 4 November 1950. It is set out in Schedule 1 of Human Rights Act 1998 (“HRA”), and reads:

Article 10

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

12. Furthermore, the Tribunal is obliged to act in a way compatible with the provisions of the Human Rights Act 1998. As well as Article 10, the other rights most likely to be engaged are Article 6, the right to a fair trial and Article 8, the right to respect for private and family life and (in an appropriate case) Article 9, freedom of thought, conscience and religion. Articles 6 and 8, as per Schedule 1 of HRA, read:

Article 6

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

- (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- (b) to have adequate time and facilities for the preparation of his defence;
- (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

- (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 8

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
13. The Tribunal is required to take account of the competing rights, and balance them, in order to make a decision under Rule 50. When a party makes an application for an order, it will not always be appropriate to grant the application, even if the other parties are neutral towards, or support, the application. When a party makes an application, then any objections from the other parties to the litigation must be considered. However, and in any event, the Tribunal must always balance the competing arguments for and against making an order under Rule 50 regardless of what (if any) opposing arguments are raised by the litigants.
14. It is particularly important to have regard to section 12 HRA, which reads:
- 12 **Freedom of expression.**
 - (1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.
 - (2) If the person against whom the application for relief is made (“the respondent”) is neither present nor represented, no such relief is to be granted unless the court is satisfied—
 - (a) that the applicant has taken all practicable steps to notify the respondent; or
 - (b) that there are compelling reasons why the respondent should not be notified.
 - (3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.
 - (4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to—
 - (a) the extent to which—
 - (i) the material has, or is about to, become available to the public; or
 - (ii) it is, or would be, in the public interest for the material to be published;
 - (b) any relevant privacy code.
 - (5) In this section—

“court” includes a tribunal; and

“relief” includes any remedy or order (other than in criminal proceedings).

15. Open justice is a fundamental principle. The general rule is that hearings are carried out in public and that judgments and orders are public. As well as being a requirement of Article 6, it is also the position at common law. See Scott v Scott which was discussed by the Supreme Court in Khuja v Times Newspapers Limited [2019] AC 161:

12. With limited exceptions, the English courts administer judgment in public, at hearings which anyone may attend within the limits of the court's capacity and which the press may report. In the leading case, Scott v Scott [1913] AC 417, public hearings were described by Earl Loreburn, at p 445, as the “inveterate rule” and the historical record bears this out. In the common law courts the practice can be dated back to the origins of the court system. As Lord Atkinson observed in the same case, at p 463, this may produce inconvenience and even injustice to individuals:

“The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect.”

13. The justification for the principle of open justice was given by Lord Atkinson in this passage, and has been repeated by many judges since, namely the value of public scrutiny as a guarantor of the quality of justice. This is also the rationale of the right to a public hearing protected by the European Convention on Human Rights. It is a “means whereby confidence in the courts can be maintained”: B and P v United Kingdom [2001] 2 FLR 261, para 36. Its significance has if anything increased in an age which attaches growing importance to the public accountability of public officers and institutions and to the availability of information about the performance of their functions.

16. An order (under Rule 50) imposing any restriction is therefore a departure from the general principle. Such a departure from the general principle might be appropriate. However, it can only be justified in exceptional circumstances, and where it is necessary to impose a restriction to secure the proper administration of justice. Any restrictions made (where a restriction is justified) must be no greater than is strictly necessary.
17. There is no general exception to the fundamental principle requiring open justice where privacy or confidentiality is in issue. Cases will only be heard in private if and to the extent that the court is satisfied that by nothing short of the exclusion of the public can justice be done. Anonymity will only be granted where it is strictly necessary, and then only to that extent.
18. The burden of establishing any departure from the general principles of open justice lies on the person seeking it. The necessity must be established by clear and cogent evidence. However, where the necessity for an order is established, then the order

must be made. There is, in those circumstances, no discretion to refuse to make an order.

19. The Claimant has referred me to the EAT's decision in X v Y UKEAT/0302/18/RN. In that case, having set out the relevant facts and law, the EAT decided that the Tribunal had been wrong not to make a Rule 50 order, and the EAT made such an order.

Decision on the Claimant's Rule 50 application

20. On 11 March 2023, at 20:40, the Claimant sent an email to the Tribunal which, by implication, contained the text of the email he had referred to in the hearing as having been sent originally on 11 May 2022. He did not include the header information with the text.

21. The (relevant) part of the text said to have been sent on 11 May 2022 read:

> Anyone who wishes to apply for an order under Rule 50 should do so as early as possible in the tribunal proceedings.

I would like to invoke this. Unfortunately Rule 50 is a wall of legalese gibberish so I have no idea how to specifically invoke it, and interest in wasting CAB tim to find out

22. Even on the assumption that that communication was sent to (and received by) the Tribunal in May 2022, I do not necessarily regard it as an application, given that it was not sent to the Respondent, and contained no details of (a) which specific restriction, under Rule 50, was being requested or (b) what the grounds for making such an order would be. However, the point is academic, because the application was made at the hearing, and in the correspondence sent afterwards, and it was not too late for the application to be made.

23. The 11 March 2023 email continued with the Claimant's reasons for the application, which were as follows:

My justification is as follows:

* My name being associated with it has no bearing on "seeing justice done".

* I shouldn't have to give up my privacy to get justice. This seems counter to the principles behind the Human Rights Act (<https://www.equalityhumanrights.com/en/human-rights-act/article-8-respect-your-private-and-family-life> - I don't consider this to warrant triggering the "public interest" angle) and the more recent GDPR (which has tons of loopholes for just sort of thing, but the principle is clear - personal stuff is personal).

* I assume the vast vast majority of people never invoke this if it's anything like other societal opt-outs (i.e. Organ donation), so it's unreasonable to assume that this hearing needs to be in the public when said majority are already in public (you'll have an idea of the stats; they're not in the Tribunal Quarterly reports).

* It seems vaguely immoral to require me to justify why I want to retain my privacy. Given it's opt-out it's reasonable that all opt-out's should be granted by default unless there's

special circumstances, as very few people are going to invoke this anyway. To do otherwise (as the court does) is to prioritise the perception of justice in objectively insignificant (from a societal perspective, certainly not to me!) cases over an individual's privacy. That doesn't seem reasonable at all.

* This is a lower court so I don't see it setting precedent (but not a lawyer so not certain that's how that works) which means no-one apart from those involved is likely to care.

* Should the hearing documents be made digitally available publicly, they'll potentially be available for the rest of time online and readily associated with my name via search engines. While I can invoke the "Right to be forgotten" later, it's best that things not be out there in the first place (as not everyone complies with them), so I suppose I'm invoking it now with you. By having my name associated with this, it's less likely that things that are important that should be associated with my name will come up (if not now, then in the future - remember that once something is online it is there *forever*; any attempt to remove it will typically incur the Streisand Effect, so it's impossible for you to reverse the action of it being public, whereas it can be reversed to take it from private to public).

These arguments apply to all things covered by Rule 50, though it is of course too late for some things.

24. As well as these points, I have also taken into account the Claimant's email of 15 March 2023 (at 6.03pm) which responded to the Respondent's objection to the application, and commented on GDPR definitions of certain categories of data, and commented on the X v Y case. In terms of the latter, the Claimant accepted that the facts of that case did not necessarily match his own.
25. As well as the written correspondence, I have also taken into account that, as mentioned in the hearing, it is the Claimant's contention that his medical history was potentially relevant. However, my decision is that his medical history is not relevant to the matters which I had to decide (and was not discussed in any detailed way during the evidence phase of the hearing) on liability. I need say no more about it.
26. My decision is that there are no exceptional circumstances justifying a departure from the principles of open justice. I have taken into account the Claimant's Article 8 rights. However, the matters to be discussed in this decision are typical of the matters discussed in the Tribunal hearings (identity of employers, salary information, details of certain clauses in the contract). I do not doubt that the Claimant would prefer those details to be kept private (and I acknowledge that he genuinely believes that it is only wrongdoing by the Respondent which creates the situation whereby there might be publication). As set out in Scott v Scott, it is common, in a wide variety of types of court and tribunal case, that there will be matters which are relevant to the matter to be decided, but which a litigant would have preferred to have kept private. Applying the principles of open justice can sometimes appear harsh from the point of view of the litigant (or it could be a witness or third party) who feels that (through no fault of their own, perhaps) certain details of their lives are being described in public documents, or in media reports of the proceedings. However, having balanced the Claimant's own needs and preferences against the requirements for open justice, I am satisfied that the application must be refused.

The Claims and The Issues

27. The wrongdoing by the Respondent which the Claimant summarised at the start of the hearing fell into four categories:
 - 27.1. That it underpaid him in relation to “employer’s national insurance contribution”. That is, the Claimant argues that the wages properly payable to him should have been calculated without any deduction under this heading.
 - 27.2. That it underpaid him in relation to “margin”. That is the amount which the Respondent retained for itself, allegedly on the basis of “margin” was too high.
 - 27.3. That it made deductions which were purportedly for PAYE, but which were incorrect (and too high) because the employment income wrong tax year was attributed to the wrong tax year.
 - 27.4. That there were several occasions on which the Respondent failed to pay wages that were properly payable to him on that occasion, because it paid him – not on that occasion – but on a later date. (The “lateness issue”)
28. In terms of the last of these four things, the lateness issue, the Claimant accepted that, while not paid – on his case – on the correct date, the payments had all been made to him prior to his presentation of the employment tribunal claim (though he disputes the correctness of the amount paid for the other three reasons). The Respondent’s witness admitted in evidence that there was one payment which was one day late. However, more generally, the Respondent asserted that the Claimant had not followed correct procedures, and that it was the Claimant, not it, that was responsible for any delays in payment. Put another way, it did not agree with the Claimant (subject to the one exception mentioned) that there were occasions on which it had been obliged to pay him, but failed to do so.
29. In relation to the first two things (the “margin issue” and, especially, the “employer NI issue”) the Respondent disputed that the gross sum which the Claimant had identified as payable to him (£510 per day) fell within the definition of wages. On the Respondent’s case, this sum was payable TO the Respondent, and was – therefore – not “wages” (and, also not “properly payable” to the Claimant on any occasion.
30. The Claimant also told me that he wished to allege breaches of data protection legislation by the Respondent. I told him that the allegations he was describing did not fall within the jurisdiction of the Tribunal and I would not be dealing with them as claims.

The Hearing and The Evidence

31. I had a paper bundle of 157 pages, and the Claimant had that too. I had a 10 page spreadsheet which was an updated schedule of loss from the Claimant. I also had a written copy of a statement of Mr Woodcock on behalf of the Respondent, and the Claimant had that too. I had a paper copy of a witness statement from the Claimant

(handed to me by the Respondent's representative) of a witness statement prepared by the Claimant (with line numbers up to 200).

32. Each of Mr Moules and Mr Woodcock have evidence by swearing to the truth of their respective written statements, and answering questions from the other side and from me.
33. The Claimant's application to attend by video had been granted. There was some delay at the start of the day for reasons beyond the Claimant's control. The log in information had been unclear or incorrect. However, that problem was solved and did not cause a significant delay. Throughout the remainder of the hearing, there were no significant technical issues, and the parties and me could all hear each other.

The Findings of Fact

34. The Claimant works as a Senior Data Engineer. He has his own limited company, but it was not used in the transactions that are in dispute in this case.
35. There was a chain of contracts as follows:
 - 35.1. End User had contract with Concept Information Technology Ltd ("Concept").
 - 35.2. Concept had a contract with Churchill Knight Umbrella Ltd (which is the First Respondent to these proceedings, and which I will simply call "the Respondent").
 - 35.3. The Respondent had a contract with the Claimant
36. There was no contract between the Claimant and Churchill Knight & Associates Ltd (which is the Second Respondent to these proceedings) and all complaints against it are, therefore, dismissed.
37. I was told that End User was Companies House (and that is stated on the assignment confirmation note on page 53 of the bundle). It is not necessary for me to make any specific findings about the exact identity of End User, or to decide whether it was a public body or not.
38. The Claimant does not know exactly how much End User agreed to pay Concept. However, he is aware that the agreement was such that Concept was willing to pay out £510 per day in connection with the Claimant's services. The Claimant infers (and I am sure that he is correct) that Concept was actually receiving more than £510 per day from End User and was retaining part of what it received for its own benefit.
39. Concept had originally suggested it would pay out £500 per day. However, the Claimant negotiated, and got an increase to £510. The Claimant emphasises, and I accept, that it was he – and not the Respondent – who persuaded Concept to make that increase. It is not necessary for me to decide whether Concept persuaded End User to pay the extra, or whether it absorbed that sum by reducing its own profit margin.

40. The Claimant did not seek to persuade Concept to pay that £510 directly to him. The Claimant sought to persuade Concept to pay it directly to his limited company. This would have been on the basis that Concept was NOT making PAYE deductions from the amount it paid to the Claimant's limited company (and, nor was End User making PAYE deductions from the amount it paid to Concept). Thus, the situation would have been that, if any PAYE deductions had to be made at all, at any stage of the process, that would have been a matter for the Claimant's own limited company to address in relation to payments made by it to the Claimant.
41. Concept refused to agree to that arrangement. It is not necessary for me to decide whether End User played any part in the decision. The refusal was communicated to the Claimant by Concept. Concept informed him that it was willing for there to be an intermediary between Concept and the Claimant, provided that intermediary was a member of the Freelancer and Contractor Services Association ("FCSA").
42. To the extent that the Claimant argues that Concept (or End User) insisted that he use an FCSA intermediary, and that he had no choice in the matter (that is, no choice other than rejecting the opportunity to do the work for End User and be paid for such work), the context is as just mentioned. That is, the decision communicated to him was that if there was to be an intermediary at all, then it had to be an FCSA intermediary. There was no discussion between the Claimant and Concept (or the Claimant and anybody else) in which the Claimant sought a direct contract (no intermediary) between him and Concept and – therefore – no express refusal by Concept of such an arrangement. I do not know – because there was no evidence presented to me about it – whether Concept would have been likely to have said "yes" or "no" to such an arrangement.
43. In any event, I am satisfied that, in all the discussions about what Concept was willing to pay out (£500 day initially, increased to £510 per day following negotiations) that both the Claimant and Concept knew that Concept would NOT be making a payment of £510 (or £500) directly to the Claimant, but would be making that payment to an intermediary. I make no assumption one way or the other as to whether Concept would have been willing to pay the Claimant directly. However, had the discussions been about a contract in which Concept was going to pay the Claimant directly, it cannot necessarily be assumed that the amount it was going to pay out was the same. Its commercial decision was that it would pay £510 to an intermediary; it would not have necessarily made the same commercial decision to pay £510 (with no intermediary) directly to the Claimant as an individual. Had Concept been willing in principle to pay the Claimant directly, it would also have had to decide whether it was obliged to make PAYE deductions, and whether it had any other obligations in relation to (for example) national insurance or pension.
44. Thus, the Claimant did agree that he would choose an FCSA member to be the intermediary. Concept supplied him with a list of 4 possibilities. The Claimant tells me, and I accept, that all of the contracts on the FCSA standard terms were such that they were contracts of employment. That is the intermediary was to be the employer, and the worker (in this case, the Claimant) was to be an employee of the intermediary.

45. The Claimant considered the terms of the employment contracts that the intermediaries on Concept's list were willing to offer. None of them had wording which was acceptable to the Claimant and so he looked further afield.
46. In total, the Claimant considered around 20 members of FCSA looking for one which would offer an employment contract (between him as an individual, and that company) that he thought best met his needs.
47. In other words, neither Concept nor End User dictated to the Claimant that he had to use a particular intermediary. It had to be an FCSA member, but, subject to that, the Claimant had a choice in the matter. The Claimant had already arranged with Concept that the amount it would pay out would be £510 per day, but, subject to that, once the Claimant had chosen a particular intermediary, the exact terms of the commercial agreement between the intermediary and Concept would be a matter for those two parties. Once the Claimant had chosen his intermediary, the chosen intermediary and Concept would then enter into the contract.
48. To the extent that the Claimant argues that there was effectively no choice at all open to him in the terms of the employment contract, I do think it likely that, in order to be an FCSA approved arrangement at all, there must have been some boundaries. That is, some limits on what the contract could, and could not, say. However, the argument that he had no choice at all, and that the contracts were all effectively identical, is contradicted by the fact that the Claimant did study the offered contracts carefully, did reject some (including all four on Concept's initial list) before deciding to choose the Respondent as the intermediary. He clearly perceived some differences between the terms on offer from different organisations.
49. To the extent that the Claimant argues that he only had a finite amount of time to do his research, because he was eager for the assignment to start, then that is true, of course. Furthermore, End User was not necessarily going to wait indefinitely for him to start. I accept the Claimant's point that the fact that he did agree to the employment contract on the terms offered by the Respondent does not necessarily mean that he was entirely happy with every single clause. I accept that, had more time been available, he might have carried on researching, and looked at more than the 20 or so that he did consider. However, it is my finding that the Claimant carefully read the Respondent's offered employment contract, did note the wording of each of the clauses, and did look at other available information, including on the Respondent's website, and did willingly decide to enter into an employment contract – on the offered terms – with the Respondent. He fully understood that the Respondent would then be entering into a separate contract with Concept, and that he, the Claimant, would not be expressly made party to that contract.
50. In general terms, it is agreed between the parties that the Respondent would receive a payment from Concept of £510 per day, and that the Respondent would make some payment to the Claimant.
 - 50.1. To oversimplify the argument that the Claimant makes to the Tribunal, the actual agreement should be construed as being that the Respondent would pay the entire £510 to the Claimant, less only the agreed amount for "margin". To the extent that

the Respondent is responsible for any employer's national insurance contribution (or any other costs) then that should not be taken from the balance of the £510 to be paid to him.

- 50.2. To oversimplify the argument that the Respondent makes to the Tribunal, the actual agreement should be construed as being that the Respondent only agreed to pay the Claimant the national minimum wage, and no more than that. The Respondent was entitled, it would say, to keep an amount for "margin" from the sums received from Concept, but, in any event, was not obliged to make any payment at all to the Claimant, apart from the national minimum wage (and holiday pay). Any other sum paid by it to the Claimant was on an entirely discretionary basis as a "bonus". On the Respondent's case, it is irrelevant that the amount it received from Concept was £510 per day gross (save to the extent that the profit it made on the Claimant's work might be taken into account, when making a discretionary decision about whether to pay a bonus and, if so, how much). On the Respondent's case, the net amount paid to the Claimant would be that which was left having properly applied any PAYE deductions. It would also, as the employer, be responsible for employer's national insurance contribution and that cost would also be taken into account when assessing what (if any) profit it made on the Claimant's work when making a discretionary decision about whether to pay a bonus and, if so, how much. [To be clear, the Respondent does not expressly assert or concede that its discretionary decision about bonus payments to the Claimant would *only* take account of what profit it made on the Claimant's work specifically. Rather its position is that the employment contract give it a completely unfettered discretion as to whether to share profits with the Claimant and, if so, on what basis.] On the Respondent's case, while it would potentially be willing to inform the Claimant of what sums it was receiving from Concept, what sums it was deeming to be for "margin" and what sums it was paying by way of employer's national insurance, there was no agreement that the Claimant was entitled to £510 per day, less only agreed deductions from that.

Written Documents produced on or before 19 November 2021

51. The written agreement between the parties appeared at pages 32 to 51 of the bundle (with pages 45 to 51 being Annexes A, B, C, D, and E).
- 51.1. The front page includes a heading "important note" which specified that the amount that "the Agency or Client will pay us is NOT your gross pay". "Us" was a reference to the Respondent. "Your" was a reference to the Claimant. "Agency" was a reference to "Concept". The capitalisation for "NOT" was in the original. The Claimant read this page (and the entire document) carefully before signing.
- 51.2. It went on to say that "It" (meaning the payment from the Agency) was intended to cover all employment overheads (including employer's national insurance contributions and employer's auto-enrolment pension contributions and apprenticeship levy) and the Claimant's holiday pay and "our own margin" (meaning the Respondent's own margin).

- 51.3. Clause 3.1 specified that the Respondent would pay the Claimant's wages whether or not the Respondent was paid by the Agency. It also specified that the Claimant was entitled to wages "for all authorised time actually worked on the Assignment" subject to the Claimant complying with all applicable procedures and requirements.
- 51.4. Clause 3.1.2 specified the payment would be at National Minimum / Living Wage ("NMW") rates.
- 51.5. Clause 3.1.4 specified that he would be paid monthly in arrears "unless otherwise indicated in your Employment Assignment Schedule)"
- 51.6. Clause 3.1.5 specified a payslip for "each pay period".
- 51.7. There was a guarantee of at least 336 paid hours per year (clauses 3.2 and 1.3.10) some of which might be on work other than Client Assignments (clause 1.3.9).
- 51.8. Clause 3.3 referred to a bonus, described as "Discretionary Profit Sharing Bonus (DPSB)". Clause 3.4 asserted that anything that the Respondent paid over above NMW was deemed to be for DPSB "even if not separately identified as such on your payslip".
- 51.9. Clause 3.9 dealt with deductions.
- 51.10. Clause 21.11 was an "entire agreement" clause and 21.4 said that the Claimant was entitled to no other benefits other than as described.
52. Notably, the written agreement did not discuss expressly how the sums received by the Respondent from Concept would be distributed. Although the word "margin" (with no capital letter) is mentioned on the front page, it is not mentioned elsewhere. Clause 3.3 did not state that everything left over from Concept's payments (after appropriate deductions for specific matters) would be paid to the Claimant. The written agreement did not (either in Clause 3.3, or at all) specify that any of the payment made by Concept to the Respondent was to be regarded as belonging to the Claimant.
53. The Claimant signed the agreement with the Respondent on 19 November 2021. The assignment to End User was scheduled to (and did) last 29 November 2021 to 31 March 2022.
54. On 19 November 2021, the parties also executed the "Employee Assignment Schedule" (page 145 of bundle). This took precedence over Clause 3.1.4 of the written employment contract. It stated (row 10) that frequency of payment was weekly in arrears. The document reiterated (row 9) that amount of payment was dictated by clause 3.1.2 of the contract. The document also contained a footer which stated that the Respondent would only pay the NMW rate to the Claimant (so, by implication, no DPSB) where the agency had not paid the Respondent.

55. Prior to doing signing the employment contract with the Respondent, the Claimant had carefully read (as well as the contract) the published material on the Respondent's website.
- 55.1. This included, for example, "**No unpleasant surprises** – no hidden costs ..." (page 5 of "Introduction to Churchill Knight Umbrella" at page 58 of bundle) and "the only administration you will need to do after signing up is to log the hours you have worked on the My Digital app" (ditto).
- 55.2. It also included the FAQs document (bundle pages 88 to 97). That claimed, amongst other things, that use of an umbrella company might be beneficial in light of IR35 changes in April 2017 (public sector) and April 2021 (private sector). (It also stated that use of a personal service company was potentially more tax efficient, subject to IR35 rules.)
- 55.3. It said that there was no "joining fee". It said "Like all businesses, umbrella companies have overheads. Therefore, to make their money, they charge a small margin in exchange for their payroll service. A majority of umbrella companies will deduct a fixed margin every time you are paid (weekly or monthly). However, some umbrella companies choose to take a percentage of a clients income instead."
- 55.4. It said "the cost of using an umbrella company (margin) will vary but you should typically expect to pay between £25 - £35 per week and £110 - £140 per month". This was on page 89 of the bundle, and the following page contained two separate assertions that the only difference between different umbrella companies was the margin rate.
- 55.5. In response to the FAQ "What will an umbrella company deduct from my pay" there was no mention of margin. The response did refer to the umbrella company making PAYE deductions, and accounting to HMRC for those, as well as stating "you'll also be responsible for employment costs including the Apprenticeship Levy, and Employer's National Insurance Contributions".
- 55.6. At page 92, the FAQs discussed the difference between the rate the Respondent received from an agency and the gross rate to be paid to the worker. It did not comment on a DPSB arrangement. It asserted that the agency factored in the employer's national insurance contributions, and that "umbrella companies are not in a position to cover the Employer's NI alongside other employment costs as they only retain a small margin for processing your payroll and do not benefit from any of the work completed by you".
- 55.7. The Claimant also read the "How does an umbrella company work" guide (page 99 of bundle) which referred to the ability for a worker to submit their hours directly to the Respondent, using an app, in a manner which would mean that the agency and the Respondent were both notified at the same time.

56. The additional documents did not therefore expressly state what “margin” the Respondent would apply in his case. That is, they did not specify a particular sum that would be deducted (or calculation method) or frequency.
57. Furthermore, my finding is that the additional documents were not consistent with the actual employment contract which the Claimant signed. In particular, the written contract expressly and clearly stated that the Claimant’s actual pay would be at NMW rates (with the potential addition of DPSB). On one reading of the FAQs, they implied – without expressly stating – that the Claimant’s (gross) pay from the Respondent would be what was left over, from the sum paid by agency to the Respondent, after deduction of margin, employer’s NI, Apprenticeship Levy, employer’s pension contributions.

Start of assignment

58. The Claimant started the assignment around 29 November 2021. In terms of the Respondent’s literature stating that people who signed up to use it as an intermediary would/could submit their timesheets/hours directly to the Respondent, the Claimant was aware that he should submit his timesheets to Concept. That is what he did for the hours which he worked in the first couple of weeks.
59. On 1 December 2021, the Claimant wrote to the Respondent, pointing out that Concept had supplied him with a link to upload timesheets to them, Concept, and that the Respondent had not supplied him with a link (or the information needed for their app) so that he could supply the timesheets to the Respondent. This email was acknowledged on 2 December 2021, but by 10 December, he needed to chase, as there was no substantive response.
60. On Friday 10 December 2021, Sarah Cardy, payroll supervisor, replied to the Claimant to state that she would chase up Concept for the payment. The Claimant was paid on Monday 13 December 2021. This is the payment which Mr Woodcock accepted in cross-examination was one day late. He said it should have been paid on Sunday 12 December 2021.
61. The Claimant’s payslip was sent to him by email on 13 December 2021. The Claimant informed the Respondent that it must not send them to him by email in future. The Respondent (Ms Cardy) agreed to cease doing so.
62. On Thursday 16 December 2021, the Claimant made a complaint about the payment just mentioned. He alleged that there had been a delay and that he had been given misleading information. He received a reply the same day from Alisha Subherwal, Payroll Manager. She said that the arrangement was described more fully in a 16 November email (which is not in the bundle) and was that the Respondent would pay the Claimant weekly, on receipt of funds from Concept (and would also pay the NMW amount even without such funds from Concept). Ms Subherwal alerted the Claimant to the fact that Concept had not yet paid, meaning that he might not receive a payment from the Respondent on Friday 17 December (or 18 or 19 December).

63. A further exchange of emails the same day resulted in Ms Subherwal stating again that the practice would be to pay (i) weekly and (ii) on receipt of funds from Concept. She stated again that this information would – she believed – match what the Claimant had been told by the Respondent during his onboarding. She confirmed Concept had now paid the Respondent and that the Respondent would therefore pay the Claimant that day.
64. Both the Claimant and Ms Subherwal at the time (and Mr Woodcock in his oral evidence) accepted that the “Employee Assignment Schedule” signed by the Claimant on 19 November 2021 took precedence – as far as pay frequency was concerned – over Clause 3.1.4 of the written employment contract.

Margin

65. Each of the first 3 payslips were dated for a week ending on a Sunday: respectively 5 December, 12 December and 19 December 2021. They were paid, respectively, 13 December, 16 December and 23 December.
 - 65.1. Each set out “company income received” meaning the income which the Respondent received from Concept. In each case that was £2550. (5 days at £510 per day).
 - 65.2. Each set out the same 3 items underneath: Apprenticeship Levy £11.19, Employer’s NI £285.43 and Company Margin £15.00.
 - 65.3. Thus the difference between “company income received” and the aggregate of those 3 items was always £2238.38.
 - 65.4. Each payslip also showed the gross payments to the Claimant and, in each case, the gross was £2238.39. (That is, a difference of a penny.) The 3 components said to make up that were: Basic rate (37.5 x £8.91) of £334.13; Holiday pay £241.06; Additional Taxable Wage £1663.20.
 - 65.5. There were PAYE (and student loan) deductions applied to that gross, and the net was paid to the Claimant.
66. On Monday 3 January 2022, there was an exchange of emails between the Claimant and Ms Cardy, in which the Claimant asserted that he had not been paid (for the weeks ending Sunday 26 December and ending Sunday 2 January). Ms Cardy asserted that since Concept had not paid the Respondent, then no payment would be made.
67. On 7 January 2022, payment for those two weeks was made. The Respondent had received payment for 8 days from Concept. It paid the Claimant the minimum wage rate for 8 days (at 7.5 hours per day). On the balance of probabilities, the 8 days were 5 in the week ending Sunday 26 December 2021 (Monday to Friday 20 to 24 December) and 3 in the following week (Wednesday to Friday 29 to 31 December.) I say this because 27 and 28 December were bank holidays.

68. Again, the aggregate which the Respondent received from Consent less deductions for Apprenticeship Levy, Employer's NI and "margin" exactly matched the gross pay to the Claimant. Put another way, after NMW rates and holiday pay had been accounted for, the DPSB (or "additional taxable wage" as described on the payslip) was the exact sum required so that the Claimant's gross income from the Respondent (prior to PAYE and student loan) matched what the Respondent had received from Concept minus Apprenticeship Levy, Employer's NI and "margin".
69. On this payslip, rather than £15 for margin, there was £30. The Claimant queried this. Ms Cardy's reply the same day, 7 January 2022, matches what the Respondent's position has been ever since. That is (a) the margin is £15 per week of work (and not £15 per payslip, where a single payslip covers more than one week of work) and (b) the Claimant had been told this when he signed up.
70. The Claimant does not accept that he was told, when he signed up, that the Respondent would work on the basis that the "margin" it was entitled to keep would be £15 per week worked (and not £15 per payslip). The Respondent has produced no evidence to show what was specifically discussed. Neither side has produced any written information about what agreement (if any) was reached between the Respondent and the Claimant prior to 19 November 2021.
71. I believe the Claimant when he says that he does not remember having it drawn to his attention, expressly (orally or at all), that the Respondent would make two deductions for margin" of £15 per week on the same payslip if the payslip included payment for two weeks of work. The Claimant was being careful in his choice of intermediary and scrutinising the terms each one offered. Had he been expressly told this, my finding is that he would have remembered.
72. In considering what was agreed between the parties before the Claimant signed the documents on 19 November 2021, I take into account that any assertion by the Respondent that there was an express oral agreement between the Respondent and the Claimant about margin, and that it was that the Claimant would receive, as gross pay from the Respondent, exactly [What the Respondent received from Concept] minus [Apprenticeship Levy and Employer's NI] minus [exactly £15 per week for margin] conflicts with the oral evidence presented to the Tribunal to the effect that the agreement was genuinely that the Claimant would only be paid NMW (and holiday pay) and that there was no obligation to pay anything else whatsoever, and that the bonus arrangement was purely the exercise of an unfettered discretion.
73. However, my finding is, in fact, that the parties did come to an oral agreement that was different to what the written employment contract said. The agreement was, in fact, that the Claimant would receive, as gross pay from the Respondent, exactly [What the Respondent received from Concept] minus [Apprenticeship Levy and Employer's NI] minus [some sum for margin]. In questioning Mr Woodcock, the Claimant asked if the DPSB clause meant that the Respondent would ever pay him a bonus based on income which the Respondent received from other sources (as opposed to just the income received from agencies for the Claimant's own work). Mr Woodcock said "no". I asked Mr Woodcock whether, in practice, the DPSB always

was the exact amount that was necessary to bring the employee's gross pay up to the sum required to match what the Respondent received (less levy, NI and "margin"). In his experience, it was.

74. Thus, while there is a dispute about what the two parties actually agreed as the rate/calculation for margin, my finding is that both parties did reach an agreement that, although described as "bonus" or "DPSB" or "Additional Taxable payment", the Respondent would always pass on to the Claimant the benefit of the payment received by it from Concept, having retained only ascertainable sums, for specific agreed reasons.
75. I am not satisfied that the Claimant was expressly told (orally or otherwise) that the sum retained for what was described as "margin" would be £15 per payslip, rather than £15 per week. In his emails to the Respondent on 7 January 2022 which queried why a margin of £30 was shown, he did not assert that he had been expressly told previously that it was one margin per payslip. I am sure that if the Claimant had been told that a short time earlier (in mid-November 2021) then he would have clearly remembered and would have said so – including precise details of who said it and when – in emails to the Respondent on 7 January. Instead, his correspondence disputed the fairness/appropriateness of making a £30 deduction, but did not say it was contrary to an express term of any agreement, or contrary to what he had been told expressly.
76. On 7 January 2022, the Claimant wrote to FCSA asking them to clarify whether the margin rate was per week or per payslip. FCSA's replies (over a trail of emails at pages 85 to 83) were that it depended on what terms had been agreed between its member (the FCSA approved intermediary) and the worker. In his emails to FCSA, the Claimant does not assert that he had been specifically told that the margin was deducted one time per payslip. In the circumstances of the email trail (criticising FCSA for not, in the Claimant's opinion, requiring sufficient clarity/standardisation), it would have been very surprising if he had omitted to mention that, in his opinion, an FCSA member was purporting to renege on an oral agreement. My finding is that, at the time he wrote these emails, the Claimant did not believe that the Respondent was purporting to renege on an express oral promise.
77. From 7 January 2022, until the end of the assignment in March, the Claimant did not challenge the margin issue again with the Respondent. (He did refer to it in an email to Ms Subherwal at 13:31 on 20 January 2022; however, in context, it is clear that he has accepted the Respondent will be deducting £15 per week, not per payslip.)

Time Sheets January 2022 onwards

78. The Claimant emailed Ms Subherwal on 17 January 2022 to say he had not been paid. She replied stating that Concept had not paid the Respondent and asking if the Claimant had submitted his timesheet to Concept. He replied by saying that he had submitted them to the Respondent. On 18 January, Ms Subherwal said he was required to do it via Concept. She asserted that he must have been aware that this was the process (that Concept was "self-billing" as she termed it) because he had followed that process, and been paid, previously.

79. The Claimant replied at 12:56 on 19 January 2022. His email was sarcastic. Taken literally, he was asserting that he genuinely thought he had followed the incorrect procedure previously (by submitting the time sheet to Concept) and that he had genuinely just realised that he should have been submitting them to the Respondent all along. My finding is that he knew that he had been told to submit them to Concept.
80. Ms Subherwal answered the same day, stating that he had previously been following the correct procedure (submission to Concept) and should continue to follow it.
81. The Claimant continued the email trail in similar vein. He purported to rely on an email from Ms Cardy (a comment that the Respondent had not “received approved hours and payment”) as meaning that Ms Cardy had suggested that he had not been paid by the Respondent because he had not told the Respondent what his hours were. That is not what Ms Cardy said, and the Claimant did not think that is what she had said. Clearly, in context, “approved” hours meant a notification from Concept about approval, and clearly, in context “approved hours and payment” were both referring to items which the Respondent had not received from Concept. The Claimant knew that.
82. On 20 January 2022, Ms Subherwal reiterated that, whether he had misunderstood Ms Cardy’s 4 January email or not (and my finding is that he had not) he must submit timesheets to Concept, so that Concept would check with from End User and then instruct the Respondent to make payment. He objected again (13:31) and she stated the position again (15:50). He objected again (18:14).
83. On 21 January 2022, Ms Subherwal stated the Respondent’s position again. The Claimant replied at 16:29, purporting to supply his hours for that week in the body of the email. The Claimant’s position, as repeatedly stated, was that the Respondent should forward details of his claimed for hours to Concept. At 17:01, Ms Subherwal repeated that he needed to send the submissions directly to Concept. At 17:20, the Claimant refused again.
84. From that point onwards, the Respondent sent details of the Claimant’s hours (as supplied to it by the Claimant) to Concept, which, in due course, approved them for payment. I accept that the Claimant’s communications with Concept on 31 January, 24 February, 29 March and 31 March are as stated in his witness statement. On 31 March, at 15:36, the Claimant forwarded to the Respondent an email from Concept to the Claimant which stated that his hours up to and including 31 March 2022 (his last day with End User) had been approved by Concept.
85. The Claimant received payment for 4 weeks (ending 9, 16, 23 and 30 January) on 4 February 2022. The “Company Margin” was said to be £60 on that payslip (which is, of course, 4 x £15).
86. The Claimant received payment for 4 weeks (ending 6, 13, 20 and 27 February) on 4 March 2022. The “Company Margin” was said to be £60 (and it is common ground that the Respondent is arguing that is 4 x £15, and is, according to the Respondent, correct).

87. The Claimant received payment for 5 weeks (6, 13, 20 and 27 March and the days up to 31 March) on 8 April 2022. The “Company Margin” was said to be £75 on that payslip (which is, of course, 5 x £15).

Which Tax Year / PAYE

88. Mr Woodcock does not have detailed knowledge of exactly how the Respondent decides what PAYE deductions are applicable. It is his understanding that the Respondent uses software approved by HMRC in order to make the relevant calculations. He does not believe that the Respondent uses a system by which it inputs employees’ remuneration and receives a decision, in real-time, from HMRC about what PAYE deductions should be made.
89. The Respondent accounted to HMRC for all the deductions shown on the Claimant’s payslips.
90. It is the Claimant’s position, and Mr Woodcock accepts it is true, that, for the last set of payments made to the Claimant (the 5 weeks in the 8 April payslip), that was remuneration properly attributable to the tax year 6 April 2021 to 5 April 2022. For some reason, and Mr Woodcock does not know why, the Respondent apparently attributed it to the tax year which commenced 6 April 2022.
91. It was Mr Woodcock’s position that this potentially could have been resolved near to the time. That is, HMRC could have been informed of the error during, or soon after, April 2022. It was not done at the time, and Mr Woodcock does not know why. (I observe that the fact that the Claimant’s employment had ceased, and a P45 issued, might have limited the Respondent’s ability to make PAYE adjustments, but Mr Woodcock believes that a correction could have been made despite those things.) His understanding is that it would now be too late to resolve the matter by the Respondent simply informing HMRC that there had been an error.
92. The parties agree that the deduction rates were higher in 2022/23 than in 2021/22. Thus, at the time, there was a higher PAYE deduction made than would have been the case if the remuneration had been allocated to the correct tax year.
93. The Claimant had commenced ACAS early conciliation on 20 January 2022, and the certificate was issued on 2 March 2022. The claim was presented on 13 April 2022.

The Law

94. Part II of the Employment Rights Act 1996 deals with Protection of Wages. The right not to suffer unauthorised deductions is described in section 13. Wages are defined by section 27. Employees (and other workers) have the right to receive the wages properly payable on each pay date. Deciding what wages are actually properly payable may require the Tribunal to analyse the meaning of the contract, and to find facts.
95. The Employment Rights Act 1996 provides a right against unauthorised deductions, and exceptions:

13. Right not to suffer unauthorised deductions:

(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.

14. Excepted deductions

(3) Section 13 does not apply to a deduction from a worker's wages made by his employer in pursuance of a requirement imposed on the employer by a statutory provision to deduct and pay over to a public authority amounts determined by that authority as being due to it from the worker if the deduction is made in accordance with the relevant determination of that authority.

23. Complaints to employment tribunals

(1) A worker may present a complaint to an employment tribunal –

(a) that his employer has made a deduction from his wages in contravention of section 13 ...

(2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—

(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, ...

(3) Where a complaint is brought under this section in respect of—

(a) a series of deductions or payments ...
... the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

(3A) ... section 207B (extension of time limits to facilitate conciliation before institution of proceedings) apply for the purposes of subsection (2).

(4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

27. Meaning of "wages" etc.

(1) In this Part "wages", in relation to a worker, means any sums payable to the worker in connection with his employment, including—

(a) any fee, bonus, commission, holiday pay or other emolument referable to his

employment, whether payable under his contract or otherwise,

... but excluding any payments within subsection (2).

2) Those payments are—

(e) any payment to the worker otherwise than in his capacity as a worker.

(3) Where any payment in the nature of a non-contractual bonus is (for any reason) made to a worker by his employer, the amount of the payment shall for the purposes of this Part—

(a) be treated as wages of the worker, and

(b) be treated as payable to him as such on the day on which the payment is made.

(4) In this Part “gross amount”, in relation to any wages payable to a worker, means the total amount of those wages before deductions of whatever nature.

96. In Patel v Marquette Partners (UK) Ltd UKEAT/0190/08/JOJ

21. The reference in that case to Sunderland [1993] I.C.R. 392 is a reflection on the slightly different situation, but nevertheless one which was covered by the exception, arising in relation to deductions for taking part in industrial action. In that case the approach of the EAT was legitimately informed by reference to Hansard under established canons of construction. It will be noted from paragraph 26 of the judgment given by Wood P for the EAT that the relevant Minister was making clear that what became s13 of the Employment Rights Act “will not apply to tax deductions”.

...

23. The scheme of the Act we perceive to be this: disputes arising in specific fields should be determined by the specific designated authorities, thus tax matters should be determined under the aegis of the tax regime and statutory sick pay should be determined under the social security regime; see, for example, Taylor Gordon & Co Ltd v Timmons [2004] IRLR 180 . The statute exempts payments which are taken from a worker’s wages for six specific reasons. It may well be that the right, granted universally by s13(1) , and which is then itself subject to exceptions in respect of deductions made by virtue of a statutory provision or worker’s contract, contains some duplication. So if a payment deducted under, let us say, a PAYE requirement is exempt under s13(1)(a) so it would be under s14(3) .

...

25. We do not accept that the PAYE scheme, as outlined to us by Mr Southern, begins with the general law that the HMRC may call for the collection of taxes and that the obligation on an employer is to deduct tax for which the worker is liable and to make it over to the Revenue. The amount of tax begins with the Notice of Coding as, to put it neutrally, notified by the Revenue to the employee, generally speaking following the assessment or self-assessment of his or her tax liabilities for the previous year. That then is followed by a communication to the employee’s employer by way of schedules indicating what deductions should be made over to the Revenue.

26. In our judgment that system constitutes a determination. An employer who makes a deduction following a communication from the Revenue to make deductions according to the employee's Notice of Coding, will be making it in a way which is authorised by reason of s14(3) . The purpose, as indicated by Mummery P in the SIP case (above), is to keep all disputes about these six excepted categories out of the Employment Tribunal. They are simply not justiciable.

27. In respect of a dispute about tax there is a statutory regime for resolving it. We have already indicated that Mr Southern's specific approach to the wording of s14(3) fails to encompass decisions made under s8 Social Security Contributions (Transfer of Functions, etc.) Act 1999 and yet they too constitute in a broad sense determinations.

28. In our judgment, 'determination' is not directed exclusively to determinations in PAYE Regulation 80 but is apt to include all decisions by which a direction is given to an employer by a public authority. This included the specific figures to be paid over and those figures are referable to the payments made to the Claimant and his co-workers. Thus, an obligation was imposed upon the Respondent to make the payment or to face, as the officer said, litigation, which means a determination and the right of appeal. Pursuant to those injunctions by the Revenue the deduction was made.

29. The correct answer was given by the Employment Tribunal in relation to jurisdiction. The dispute over the correctness of the deduction is not one which is triable before an Employment Tribunal. It relates to a deduction of money in accordance with a decision made by an authority that the sum specified should be paid over to it by the Respondent. We are told that the Revenue directs taxpayers by other forms - notices, for example - and we have seen decisions and direction notices under PAYE Regulation 81 . It seems likely they would be determinations under s14(3) .

30. We thus agree with Ms Booth that s14(3) is not directed exclusively to determinations made under the PAYE Regulations but is apt to include decisions made under s8 of the 1999 Act and, broadly speaking, directions by a public authority in accordance with statute to an employer to make a deduction of a relevant figure.

97. Outside the field of employment law, the ability of courts to look behind the written terms of a signed contract is limited to situations where (there is a mistake that requires rectification; something which is not argued in this case or where) the parties have a common intention to mislead as to the true nature of their rights and obligations under the contract. Ie where the contract is a "sham" in the sense described in Snook v London and West Riding Investment Ltd 1967 2 QB 786, CA. ("Snook")
98. In the field of employment law, a claimant does not necessarily have to demonstrate a common intention to mislead in the Snook sense (although, if the Claimant can show the written contract is a "sham" in the Snook sense, the tribunal can determine the true agreement). In the field of employment law, potentially there might have been unequal bargaining power between the claimant and the alleged employer and that it might be the latter who decided upon all of the terms of the written document(s). This is a principle addressed by the Supreme Court in Autoclenz Ltd v Belcher [2011] UKSC 41 and again in Uber BV v Aslam [2021] UKSC 5.

99. An employment tribunal faced with an allegation that a written document is a “sham” must consider whether or not the words of the written contract represent the true intentions or expectations of the parties (and therefore their implied agreement and contractual obligations), not only at the inception of the contract but at any later stage where the evidence shows that the parties have expressly or impliedly varied the agreement between them. Determining the true intentions of the parties does not mean that a tribunal should base its decision on what one (or each) party thought privately to itself; rather it requires the tribunal to determine what was actually mutually agreed – in reality – between the parties. The Tribunal must also bear in mind that the purpose of employment legislation is to protect vulnerable workers.

Analysis and Conclusions

Contractual Interpretation

100. I have set out, in the findings of fact, what the parties actually agreed. They did not reach an agreement that the Claimant would receive National Minimum Wage / National Living Wage only. They did not reach an agreement that the Respondent was not obliged to make any other payment to the Claimant (other than for holiday pay) and that the Respondent had a free and unfettered discretion about whether to pay him a “bonus” or not.
101. Instead, what was agreed was that the Respondent would be receiving £510 from Concept for each day that the Claimant worked for End User, and that the Respondent would retain some of that, and pay the entire balance to the Claimant. They agreed that the written employment contract would describe what the Respondent paid to the Claimant as being broken down into National Minimum Wage (for 7.5 hours per day, and usually 5 days per week), plus holiday pay (actually a purported payment in lieu of holiday, paid each week, and not at end of employment) plus “bonus”. However, the so-called bonus was – the parties had agreed – always going to be the amount required to bring the Claimant’s gross pay from the Respondent up to an aggregate figure which matched what the Respondent had received from Concept, minus the sums which the parties had agreed (or thought they had agreed) would be retained by the Respondent.

Employer’s National Insurance Contribution Issue

102. It is plain and obvious, not just from the employment contract (which the Claimant read carefully before signing) but the other literature which the Claimant read before signing the contract, that the Respondent and the Claimant did not agree that the Respondent would pay the Claimant £510 per day gross.
103. Furthermore, and in any event, the parties expressly agreed that, from the £510 per day paid to it by Concept, the Respondent would retain an amount for employer’s national insurance contributions.
104. The Respondent was obliged to account for employer’s national insurance contributions to HMRC, and did so.

105. There was no occasion on which the wages properly payable to the Claimant were to be calculated in such a way that the Respondent was obliged to calculate the gross pay to the Claimant based on a figure of £510 without the Respondent first deducting an appropriate amount that it was going to use as the employer's national insurance contributions applicable to the gross salary that it was, in fact, going to pay to the Claimant. For avoidance of doubt, the same applies to Apprenticeship Levy and any employer's pension contributions.

Margin Issue

106. I do not doubt the Claimant's word on oath that he was not specifically told that "the £15 margin deduction will be made for every week for which we pay you, meaning that, if we pay multiple weeks on a single payslip, we will make multiple deductions".

107. The parties do agree that the margin was going to be £15, but have produced nothing in writing about that part of their agreement.

108. To state the obvious, if it were to be per payslip, then that would mean that if all of the Claimant's timesheets were submitted/approved at the end of the assignment, he would receive one single payment from the Respondent and there would be one single £15 deduction. On the other hand, if the Respondent decided to send him a separate payment for each day he worked, the Respondent might be keeping £75 per week (5 x £15) from the income received from Concept.

109. I am satisfied that the Claimant knew that the agreement was £15 per week. At the time that the parties entered into that agreement (on or immediately before 19 November 2021), it may well be that the Claimant simply assumed that he would get paid every single week, and so (if he thought about it at all) he might have concluded that it would, in practice, be £15 per payslip. However, he was not told by the Respondent that it would be £15 per payslip. The FAQs document does not imply that a margin has to be per payslip (and that the parties always have to agree a fixed sum of money and, once done, that sum will always be the exact same sum deducted once from every payslip). The FAQs document suggests that the time the margin will be deducted will be at the time of the payment/payslip; but that is a different issue to how the deduction will be calculated.

110. I am satisfied that the reason that the Claimant did not challenge the margin further in correspondence with the Respondent after 7 January 2022 is that he knew that the true agreement actually reached in November 2021 had been £15 per week.

111. Even if there was any ambiguity (and my finding is that there was not) about whether it would be per payslip or per week, the Claimant accepted, from 7 January 2022 onwards, that the clarification of that ambiguity was, as stated by the Respondent in the emails at the time, that the deduction would be per week. The Claimant's own emails to FCSA (as well as to the Respondent) demonstrate that he was not able to come up with a convincing argument that he had actually been led to believe that the Respondent would only keep £15 per payslip, no matter how many weeks' payments were on a single payslip.

112. In making the decision that the actual agreement between the parties was £15 per week of work, I have paid heed to the principles in Autoclenz and Uber, including, in particular, that the purpose of the legislation is to protect workers. However, ultimately, there was no an inequality of bargaining power between the Claimant and the Respondent. If the Respondent had not wanted to enter an employment contract with the Respondent, that would not have left him jobless for the relevant period. On the contrary, he would have still done the same work for End User, and still done it via Concept, but would have used a different intermediary rather than the Respondent. There is, in my judgment, no default position (that an agreed figure for margin would be deducted at a rate of one times that figure per payslip) such that the Respondent has to justify a departure from the default position by – for example – showing the Tribunal that it clearly drew the Claimant’s attention to the fact that the agreement was departing from a default position which he might otherwise have expected to apply. There was simply a bargain reached, and the Claimant knew that that bargain included the Respondent retaining £15 per week for “margin” (in addition to other retained sums) from the amount it received from Concept.
113. By retaining £15 for each week (from the sum received from Concept) before calculating the Claimant’s gross pay, the Respondent was not breaching the agreement reached with the Claimant, and was not failing to pay him the wages properly payable to him.

Tax Year Issue

114. Based on the Respondent’s witness evidence, it does not appear that HMRC told the Respondent which specific amounts it needed to deduct, under the PAYE scheme, from the Claimant’s gross pay for employee’s tax and employee’s national insurance.
115. Rather, according to Mr Woodcock, the Respondent decided how much the legislation required to be deducted from the Claimant’s gross pay, and then paid the net amount to the Claimant, and accounted to HMRC for the amounts it had deducted.
116. It did so by using the Coding information supplied to it by HMRC for the Claimant. It did so by using HMRC approved software. It did so by applying (in theory) the legislation and relevant tax band information for the year in question.
117. As a result of what both parties agree has happened (namely 5 weeks being allocated to tax year 22/23 rather than 21/22), the overall effect is as follows:
- 117.1. The Claimant’s taxable income for 21/22 was lower than it should have been. That is, lower than it would have been if those 5 weeks had been correctly allocated to 21/22. The amount he has paid in income tax and national insurance for that year is therefore lower than it should have been.
- 117.2. The Claimant’s taxable income for 22/23 was higher than it should have been. That is, higher than it would have been if those 5 weeks had been correctly allocated to 21/22. The amount he has paid in income tax and national insurance for that year is therefore higher than it should have been.

118. The Claimant argues – and the Respondent did not seek to dispute – that his overpayment to HMRC for 22/23 is greater than the underpayment for 21/22. In other words, he is worse off than if the Respondent had allocated the payment correctly.
119. I asked the Claimant why he could not simply inform HMRC himself about this issue, and have them recalculate correctly what he owes for 21/22, and have them use the overpayment for 22/23 to net off against any resultant sum owing for 21/22. He states that he cannot do this until much later, that is until he submits any assessment for 22/23 and settles that year.
120. The right in Part II is not to suffer unauthorised deductions (my emphasis). As per section 13(1), a deduction which is “required or authorised to be made by virtue of a statutory provision” is not unauthorised. Although, of course, in itself that does not answer the question “what if employer genuinely believed that it was deducting the amount required by the statutory provision, but got it wrong”.
121. Section 14(3) is quoted in the legal analysis above, as is the commentary on the whole of section 14 as per Patel. As mentioned in Patel, and discussed more fully in the cases analysed therein, the appeal courts have interpreted Parliament’s intention to have been to carve out from Part II ERA those disputes for which there was already an appropriate mechanism for resolution. In particular, that Parliament’s intention is that disputes about PAYE deductions are to be resolved via HMRC appeal mechanisms (and eventually litigation by way of challenge to HMRC decisions where applicable), rather than by way of employment tribunal.
122. Potentially, where an employer simply lied about a deduction, and pretended it was an amount for PAYE, when really it was not (and, therefore, did not account to HMRC for it) then there is room for a Claimant to persuade the Tribunal that it has jurisdiction. However, that is not this case. The Respondent has, in good faith, accounted to HMRC for the sums, and the Claimant will effectively be able to benefit from the payments made by the Respondent to HMRC if and when there is a (re)assessment of what he actually owes for 21/22 and 22/23.
123. The Tribunal does not have jurisdiction to reassess the sums which ought to have been deducted, for PAYE, for those last 5 weeks of the assignment, and to ensure that they are properly allocated to the right tax year, or to ensure that the sums which actually were deducted are credited to the Claimant as an overpayment for 22/23.
124. Furthermore, and in any event, to the extent that the Claimant will eventually be able to resolve the matter with HMRC, it would be double recovery for the Tribunal to order the Respondent to reimburse him for an unauthorised deduction. It would also be wrong in principle for the Tribunal to purport to decide that there was no need for the parties to inform HMRC about the issue, and to seek to resolve it that way.

Lateness Issue

125. The period from 21 January 2022 (the day after early conciliation started) to 2 March 2022 (end of early conciliation) is 41 days. The claim was presented on 13 April 2022.

126. All of the complaints about lateness (the first of which is that he ought to have received payment by no later than Sunday 12 December 2021 (according to the Respondent; or Friday 10 December 2021, according to the Claimant) are in time.
127. Clause 3.1.4 of the employment specified that he would be paid monthly in arrears “unless otherwise indicated in your Employment Assignment Schedule)”. It was “otherwise indicated” in that Schedule, because it specified payments would be weekly in arrears.
128. There is ambiguity as to what that actually means in terms of pay date. Neither the contract nor the Employment Assignment Schedule dealt with the exact date on which payment became due. It was specified (and the Respondent does not seek to resile from this) that a payment would have to be made by the Respondent even if the Respondent had not received payment from Concept. However, in itself, that does not make it unambiguous as to which date the Respondent was agreeing to make the payment by.
129. However, in the contemporaneous correspondence, and in Mr Woodcock’s oral evidence, the Respondent’s position was that weekly in arrears meant that the week ended on a Sunday, and the payment for that week became due the following Sunday. That is not inconsistent with the written agreement between the parties. It is an admission by the Respondent that payments became due no later than that. The Claimant has not persuaded me that there was an earlier due date.
130. There are some qualifications, however. Firstly, where the Respondent had not received funds from Concept by the pay date, the agreement was that it would pay the Claimant for his hours at National Living Wage rate only, without the “DPSB” amount. Secondly, as per Clause 3.1 of the contract, the Claimant was entitled to wages “for all authorised time actually worked on the Assignment” subject to the Claimant’s complying with all applicable procedures and requirements.
131. I am satisfied that the applicable procedures and requirements in this case included the Claimant submitting his timesheets direct to Concept.
132. On the Respondent’s own admission, that first payment was one day late. For the week ending Sunday 5 December 2021, the Claimant should have been paid $37.5 \times \pounds 8.91 = \pounds 334.13$ (minimum wage only, no bonus) by 12 December 2021, even though the Respondent was not paid by Concept until 13 December 2021. The Claimant had, for that week, submitted his timesheet to Concept, as required by his agreement with the Respondent.
133. Rather than pay $\pounds 334.13$ on (or before) 12 December 2021, and then a balancing payment (for bonus) once it was paid by Concept, it paid him the whole sum on 13 December. Thus there was an unauthorised deduction from the Claimant’s wages. The $\pounds 334.13$ was properly payable on 12 December 2021, and he received it one day late.
134. The Respondent makes no other admissions. However, my finding is that for the week ending Sunday 26 December 2021, the Claimant had submitted his timesheet

to Concept, as required by his agreement with the Respondent. He was therefore entitled to a payment from the Respondent, for that week, by no later than Sunday 2 January 2022. He was only entitled to be paid for the hours worked at National Living Wage rates, because the Respondent had not been paid by Concept by then. Thus there was an unauthorised deduction from the Claimant's wages. The £334.13 was properly payable on 2 January 2022, and he received it about 5 days late, on 7 January 2022.

135. For the remaining payments, there were no unauthorised deductions due to the alleged lateness issue.

135.1. The payments made for weeks ending 12 December and 19 December 2021 and 2 January 2022 were all made in time (that is, by no later than the following Sunday).

135.2. The payments for later weeks did not become "properly payable" any earlier than the dates on which the payments were made because the Claimant was in breach of contract with the Respondent. He was required to submit his timesheets directly to Concept and, by Clause 3.1 of the contract, he was only entitled to be paid after he had done so. He did not do so. In order to facilitate the payments in light of the Claimant's unambiguous and repeated refusal to comply with this requirement, the Respondent and Concept co-operated with each other. The Respondent forwarded the Claimant's time information to Concept, and Concept authorised it. However, the Respondent was under no obligation to do this, and by doing it, it did not waive the requirement under Clause 3.1. Ms Subherwal, Payroll Manager, made it unambiguously clear (repeatedly so) to the Claimant that the requirement was for him to submit the payslips to the Respondent. She was not purporting to introduce a new arrangement, but was simply reiterating that the arrangement which the Claimant had complied with for the first few weeks remained unchanged.

Employment Judge Quill

Date: 14 April 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

18/4/2023

NG

FOR EMPLOYMENT TRIBUNALS