IN THE WATFORD EMPLOYMENT TRIBUNAL **Case no: 3320666/2021**

BETWEEN:

NARAYANAN KRISHNAN Claimant

and

Respondent

SAMSUNG CAMBRIDGE SOLUTION CENTRE LTD

WITNESS STATEMENT OF BETH SUMMERS

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1 I, Beth Summers of St John's House, St John's Innovation Park, Cowley Road, Cambridge, CB4 0DS, will say as follows:

2 I joined the Respondent in January 2014, originally as an HR Analyst, as my background was finance-based reward-schemes and annual salary reviews. I was promoted to the position of HR Manager in August 2015 and then to Senior HR Manager in March 2018. Within the role of Senior HR Manager, I am responsible for managing the HR team and oversee payroll, bonus and salary reviews and benchmarking, as well as corporate social responsibility and social clubs.

3 I was first aware of the Claimant when we were recruiting for his role of Staff Engineer, DevSys. I was involved in the Claimant's final interview in December 2019 for that role and I also helped approve and ultimately signed off the paperwork for the Claimant to be offered that position [pages 86 and 90].

4 The financial package included in the Claimant's offer of employment was checked against benchmarking data. The Respondent carries out annual benchmarking as part of a salary survey exercise. The offer provided to the Claimant was reflective of the seniority of the role and the industry in which we operate. It was carefully considered to ensure it reflected fairly the complexity of the work carried out and the expectations of the role.

Relocation Expenses

5 Shortly after the Claimant accepted the offer of employment, that offer and its accompanying contract were updated to reflect that the Claimant wished to take advantage of the Respondent's relocation expense support. The Claimant had decided to move closer to his new place of work.

6 The Respondent's Relocation Policy [pages 48-52 and 61-67] provides for up to £8,000 to be provided for an employee to move to a location which is a reasonable commutable distance from their place of work. It also sets out a staggered clawback provision which applies if employment ends in certain circumstances within the first two years of employment, one such circumstance being resignation [pages 50 and 64-65].

7 The Respondent was offered up to £3,000 towards his relocation expenses [pages 88-89]. Both the offer letter and contract of employment referenced the relocation expenses of £3,000 and the clawback arrangement [pages 88-89 and 92-93]. Both documents were signed off by the Claimant on 31 January 2020 [pages 90 and 100].

Immigration Fees

8 When offering employment to the Claimant, the Claimant was already residing in the UK but the Claimant required a Tier 2 visa sponsorship, which the Respondent agreed to fund and arrange. This was discussed verbally with the Claimant prior to the offer letter being issued to the Claimant. The Claimant was made aware that this would be subject to a clawback arrangement which applies if employment ends in certain circumstances within the first two years of employment, one such circumstance being resignation, as per the Respondent's Immigration Policy [pages 53-60 and 79-85 and more specifically pages 59 and 82].

9 On 13 February 2020, the Respondent wrote to the Claimant to confirm that the Respondent would cover the Claimant's visa application costs of £7,947.20 exc. VAT subject to a clawback provision that covered the first two years of employment as set out in the Respondent's Immigration Policy (page 103). The Claimant signed the letter the next day, being 14 February 2020, and provided this to the Respondent.

10 Around this time, the Claimant had been corresponding with one of my HR colleagues, Lucy Bedford, about seeking financial support for the immigration application of his wife and two children. The Immigration Policy explains that support for dependants is only provided for those who have two years' service and already residing in the UK [pages 57 and 82]. However, we exercised our discretion with this policy and agreed

to fund the dependant immigration costs. This is because shortly after the Claimant started work with the Respondent the COVID-19 pandemic began and we were concerned that the Claimant could end up living in the UK without family for a long time.

11 The Claimant was made aware, via an email, that payment of the dependant immigration fees would be offered but made subject to a clawback arrangement. The Claimant acknowledged this and gave his agreement to be bound by this requirement, by sending an email in response [page 102].

12 On 17 March 2020, the Respondent sent a letter to the Claimant to communicate that the Respondent would fund £5,125 exc. VAT of the dependant immigration fees subject to the clawback provision and this was signed by the Claimant the same day and returned to the Respondent [page 104].

13 The Claimant is the only individual I am aware of that has ever had flexibility afforded to them to allow fees for dependants to be covered early. His was considered an exceptional case because of COVID-19.

14 The premise of the clawback provisions has always been to protect the Respondent from incurring the cost of investing in talented individuals from abroad who then move onto new employment in a short timeframe.

Working Arrangements

15 At clauses 9.1 and 9.2 of the Claimant's contract of employment [pages 92-100] sets out that the Respondent's business has normal business hours, that the Claimant's hours of work may vary from this and that there is an expectation for the Claimant to work in addition to normal business hours without additional remuneration. It sets out that the Claimant is expected to work 'as necessary during as well as outside normal business hours in order properly to perform [his] duties' [page 93].

16 Given his full-time position and the potential for additional hours to be worked, the option was provided to the Claimant, under clause 9.3 of his contract of employment, to opt out of the average 48 hour working week restrictions under Working Time Regulations 1998. [Page 93]. The Claimant signed his contract of employment without question the same day on which it was issued, being 31 January 2020 [page 100].

17 Extra hours are commonplace within the Respondent and within our industry because of the reactive nature of the work. There is a requirement to often resolve IT issues

during times where others do not require use of their IT applications/systems. This is because adjustments or fixes applied to an IT application/system will often warrant part or all of that application being offline or may cause it to run in a way that disrupts users.

18 The role in which the Claimant worked involves coding applications. When an application goes down or requires an update, the Clamant and his colleagues would respond.

19 There were around 37 individuals in the Claimant's team (**DevOps**) and his line manager was Mark Humphrey.

20 In DevOps, there are occasions where the team needed to cover weekends. This was infrequent. This would be needed because maintenance work occasionally must be done whilst users do not require any access to the system or in circumstances where carrying out the maintenance on a week evening may not allow enough time for the work to be completed.

21 A need for weekend working initially gets raised by Stephen Roe, who is the manager above Mark Humphrey. This would be raised in Leadership meetings, in which potential weekends would be suggested. Mark Humphrey would then speak to DevOps and ask them to decide which weekend worked for them. This was not a regular request and to my knowledge would happen around every 2-3 months. I am not aware of any issues with Mark Humphrey finding enough people to cover weekend working. My understanding is that staff in DevOps would take turns to do weekend working knowing that this forms part of their working hours commitment from time to time.

22 The Respondent has a Weekend Working policy [pages 74-78] which did not apply to the Claimant. The policy applies to employees who are involved in one of three schemes on weekend working, being:

(a) Customer Support Rota – The Claimant was not on a Customer Support on-call rota and nor was he asked by the Programme Manager of any particular weekend to help with urgent customer queries. The Claimant's weekend working was maintenance related, dealt with on a pre-planned basis and not providing support to the Respondent's customers;

(b) Ad Hoc Weekend Working – This does not provide for additional remuneration and applies to those working out of their own free choice across a weekend and not by request or because it formed part of their contractual hours. Prior to

the pandemic there had been an Amazon voucher gift for every eight hours worked in the office over a weekend. However, working in the office was prohibited during the pandemic unless business critical and so this voucher arrangement was suspended, to ensure we were not promoting office attendance that would pose a risk to health and safety. In its place there was the option for a spot bonus at the line manager, leader and VP's discretion. This did not apply to the Claimant as infrequent weekend working was part of the additional hours required in the Claimant's role ;

(c) Specific Project bring-up & Major Release – this provides for time off in lieu should an employee work across a weekend because of a major release or a bring-up. A 'bring-up' is essentially a key project milestone for the Respondent's customer projects. These involve usually tight and extremely demanding deadlines and there is usually a big surge of effort needed when we get closer to the milestone. The Claimant's occasions of carrying out weekend working were routine maintenance jobs to applications.

23 Whilst the Claimant may not have had the benefit of the provisions of the Weekend Working Policy, I am aware that DevOps provides flexibility with its working hours. For example, one member of staff in that team adjusts his working hours to arrange pickups for his children.

24 In DevOps the team work on tickets that are raised and allocated to a member of the team. The nature of the issue will dictate the pace of response required. If a critical system goes down, then that gets a higher priority setting compared to a scenario where someone spots something is not working correctly and requires fixing at some point. The team's work is mainly reactive, which is common for this type of team.

25 If there was a serious IT issue which required attention out of hours, typically Stephen Roe would be informed first and seek to deal with it out of hours. If it were not something that Stephen Roe could deal with, he would contact Mark Humphrey who in turn would contact DevOps to see if anyone could help.

26 Mark Humphrey normally has daily status meetings with DevOps to check what everyone is working on. If there are any issues, I would expect that to be the forum in which they would be dealt with informally or alternatively though one to one direct communication.

27 During my eight years with the Respondent there have only ever been two grievances raised amongst a workforce of approximately 150 people. One being within the HR team and another being the Claimant raising concerns about his management by Mark Humphrey. The Respondent has never received any other complaints regarding Mark Humphrey or relating to the working hours of that team more generally.

28 The Respondent started home-working arrangements to manage the risk of COVID-19 around 18 March 2020. There were around five employees initially who remained working from the Respondent's premises because they were considered business critical. The Claimant was not one of these individuals so worked from home from around 18 March 2020 until he started to gradually return to the office in July 2020.

Resignation

29 On 5 May 2021, the Claimant contacted Lucy Bedford and I over email, requesting a 'HR discussion' [page 118]. I was on annual leave at the time so Lucy Bedford arranged to meet in person with the Claimant later that day. Within that meeting, the Claimant informed Lucy Bedford that he wished to resign citing workplace issues. I saw a copy of the meeting note [page 119] on my return from annual leave, and it appeared to me his concerns were with how work was allocated to him, not about how many hours he worked.

30 Lucy Bedford manages immigration at the Respondent so was immediately aware, in her meeting with the Claimant, that the Claimant was subject to repayment obligations and mentioned this to him [page 119]. What she would not have known at the time is that he was also subject to relocation repayment obligations but this was communicated to the Claimant on my return. Lucy Bedford explained to me in later conversations, that the Claimant did not seem surprised when she mentioned the immigration clawback in their meeting.

31 I was copied into the Claimant's written notice of resignation on 6 May 2021 [page 120].

32 On 10 May 2021, the Claimant wrote to Lucy Bedford and I requesting a discussion on 'negotiating Clawback terms' [page 121]. My first impression of this was that it was common for individuals to want to know more information, such as how much was owed. However, the use of the word 'negotiation' was odd because there was a clear commitment to repay and it was his decision to leave the business, which triggered the need for repayment.

33 Lucy Bedford and I met with the Claimant the following day, 11 May 2021, and a note was taken of the meeting [pages 123-124]. Within that meeting I confirmed the clawback figures owed to the Respondent and that the Claimant was contractually committed to repay this. The Claimant wished to discuss a repayment plan. Initially, he referred to spreading the cost over two years, but I considered this an unreasonable timeframe and we moved on to discussing other options. The Claimant explained he would receive a sign-on bonus of £3,000 from his new employer, ARM, and he suggested that this could be used to pay some of what was due. He also mentioned that his friend may be able to pay him some money before he received the bonus from ARM. We confirmed ARM had previously reimbursed us directly for clawback monies and so they were likely to be open to a discussion with the Claimant about this. It was left that the Claimant would further discuss this with ARM and that I would confirm the exact figures owed by the Claimant, which I did later that day along with providing some repayment options for him to consider, one of which was deductions from wages [pages 125-126].

34 Within that email, as a gesture of goodwill, because the Claimant would just reach 18 months' service before he left, I confirmed the relocation clawback would be 50% and not 75%. I was aware from the meeting earlier that day that the Claimant was interested in bringing his leaving date forward but I was happy to keep the rate at 50% even if we agreed to an earlier date.

35 The Claimant's contract of employment contains an unlawful deduction from wages provision at clause 5.3, permitting deductions for any sums that are due from the Claimant to the Respondent [page 92]. The Claimant responded the following day requesting that deductions be taken from the remaining payroll and that he would be speaking with ARM as previously indicated [page 125]. I replied to confirm an estimate of what this would make his take-home pay, as we had to make sure he did not dip below the National Minimum Wage. I also let the Claimant know what would be left outstanding for him to pay after his final salary payment [page 129].

36 On 17 May 2021 the Claimant sent an email encouraging us to no longer deduct from his payroll. He explained that he had chosen to send money to support friends and relatives and that this left him unable to commit to paying what was due to the Respondent [pages 127-128]. He went on to say that he worked longer hours than his contract permitted and that he was under continuous pressure because of the 'well-known work of nature' of Mark Humphrey. He suggested that because he had never been given time off in lieu that the hours he considered to be in addition to his

contractual hours should be set-off in some way against what he owed to the Respondent. He said that he was 'told to perform schedule Maintenance tasks' which involved weekend working and provided some documents to show that he had worked a few weekends. He referenced 'rarely' being 'told' to assist others with weekend upgrades.

37 He said that his previous employer had offered him time off in lieu or extra pay whenever dealing with upgrades or maintenance across weekends. He acknowledged that it was up to Mark Humphrey as to whether or not to offer time off in lieu for 'non-business hours'. I believe he is referring to hours outside the 'normal business hours' as that is the wording used in his contract. If that is not what he meant, my view is there is not a clear set of hours in a day that are 'non-business hours' given the industry in which we work. He lastly mentioned that he no longer wanted to ask ARM how they may be able to support him.

38 As mentioned previously, I was aware that there was a flexible approach to allowing time off within the day for appointments or commitments [paragraph 23 above]. Time off in lieu was at the discretion of line managers [page 93] and I do not believe it is commonly used.

39 Shortly after the Claimant sent his email, he requested a meeting, which I agreed too. I was accompanied by Natasha Willett, who took a note of the meeting [pages 167-169]. The Claimant said that ARM and his friends could not financially support him. I asked that given his email earlier that day did he wish to raise a complaint against Mark Humphrey. He said he did not wish to raise a grievance unless the Respondent took legal proceedings to recover monies from him. He said that morally he wanted to provide feedback for the future. I asked what he wanted the outcome to be and he said he wanted a 'favour' and a 'reference'. The Claimant went on to explain that he had been offered the role with ARM in March 2021 but had not handed in his notice to the Respondent until he had his visa arrangements confirmed with ARM.

40 In March 2021, the Claimant received a performance bonus of £4,474.00 gross. I asked why he had not reserved this to deal with his repayment obligations as he would have known then that there was a potential that he could be leaving the Respondent, having accepted the ARM offer. The Claimant said that he had sent 'all of his money' to his friends and, because his offer was conditional on his visa, he 'didn't think' to retain the money.

41 I do not consider that the Claimant had forgotten his repayment obligations to the Respondent, as they had been signed only 15-18 months prior to this meeting. I felt that he had made a choice to send the money elsewhere.

42 On 20 May 2021, I was invited to a further meeting with the Claimant regarding clawback, which I attended on 21 May 2021, again with Natasha Willett in attendance as a note-taker [pages 171-173]. The Claimant began by confirming that we could deduct money from his wages and that he wanted to pay the rest back himself without help from ARM. He confirmed he paid his performance bonus to his friend and that repayment of this back to him had got stuck in India, so he had not received that. The Claimant confirmed that he understood that any repayment plan with the Respondent would need to be on a short time period. The Claimant said that he had reduced his pension to further accommodate the clawback from wages and it was agreed we would look at taking more off his final wages. There was no discussion at this meeting of offsetting the repayment against his additional hours worked. I proposed a three-month repayment plan spanning August – October 2021, which the Claimant said he felt was 'reasonable.'

43 On 27 May 2021, the Claimant invited Stephen Roe and I for a call about clawback terms and also to discuss his last date at the Respondent [page 175]. This meeting was arranged for 2 June 2021.

44 On 27 May 2021 I emailed the Claimant confirming the outstanding sums owed at that point in time, given that we could use accrued but unused annual leave to make further set offs. I asked for confirmation from him on the three-month proposal we had raised, in the absence of any other suggestions being put forward by the Claimant. I also confirmed we were prepared to bring his leaving date forward from 4 August 2021 to 30 July 2021 [page 178].

45 The Claimant responded on 1 June 2021 to say that he thought there was a discussion still to be had following his last email to me on 17 May 2021 [see paragraph 36 above]. He did not agree with my summary of our last meeting and repeated that he did not have enough money in his bank account to meet his monthly bills because he had lent money to his friend. There was no mention by the Claimant about the money that his friend had ready to return to him that had got stuck in India and to this date this has been no further mention of this by the Claimant [page 177].

46 In the email, he asked us not to deduct money. He then said that if we did not respond to his previous email within his chosen timeframe that he would consider we were authorising him to 'look for options to meet [his] financial needs.' It is unclear to me what the Claimant meant by this.

47 The next day, I responded to the Claimant confirming that if he were not able to propose a viable alternative to payroll deductions to sort his repayments that we would continue to make those [pages 180-181]. I confirmed that the reason for not responding to his last email of 17 May 2021 was because the content had been followed up in emails and in the various meetings since that date. I explained that if he did choose to move forward to a complaint that would not stop his contractual obligation to repay.

48 On 2 June 2021, Stephen Roe, the Claimant and I met. Stephen Roe opened the meeting by saying that he was not in a position to discuss the clawback or payroll deductions as that is a HR policy but that he was able to discuss work related matters including the Claimant's last day. The Claimant agreed that he did not want to discuss clawback but wanted to talk about what work he had carried out. The Claimant proceeded to share his screen to show us the applications and tickets that he had worked on. The Claimant's position was that there was too much work to do and not enough resource across the team. He essentially said that he was leaving due to the workload and Mark Humphrey. He said he had not spoken to Mark Humphrey about this. Stephen Roe asked him to clarify his complaint was. The Claimant said it was about the amount of work he had on and how many hours he worked. He also confirmed that he was giving informal feedback and would not take formal action unless we continued to make deductions. I then interjected to confirm that Stephen Roe could not change HR policy. The Claimant again shared his screen, this time sharing information about an employment case where the employer had taken deductions from an employee for immigration and other items. Stephen Roe had left the meeting by this point.

49 I did not retain a copy of that case but have since had an opportunity to locate what I believe to be the case to which the Claimant referred and it does not support the Claimant. In that case, the employee had been found liable to repay immigration costs, a proportion of which had become payable because of the employee's resignation. The Immigration Skills Charge had wrongly been deducted but that had been immediately rectified and the Employment Tribunal had found that was a genuine mistake because the employer was not an immigration expert. The repayment clause was considered valid and so the employee's claim failed.

50 The Claimant and I continued to discuss the clawback. I stated that he had committed to repaying the monies. I explained that the extra hours he may have worked were covered in his contract and he is not hourly paid or someone who receives overtime pay. I highlighted the Respondent's commitment to the Claimant by way of making exception to sponsor his dependents and said that he was breaking his commitment by not repaying the monies. The Claimant called me a 'sinner' because his religion and culture meant he was loyal whereas I would not pay him for the extra hours and continued to make deductions. He requested I reduce the amount owed based on the extra hours he worked, and threatened that if I did not, he would raise a grievance. I explained that he was contractually obliged to make repayments and that he was not doing so, which was immoral. I said that if he had a proposal of how he could repay the monies by way of transferring money to the business, we were open to considering that. I highlighted that so far he had refused our proposals and so we had no choice but to make deductions from his pay. I explained that he was not being treated any differently to other employees on sponsored visas who left within two years. I said that this was a standard procedure and to treat him differently to others by letting him off the repayment would be unfair.

51 Following that meeting, I emailed the Claimant to confirm the options for him to sort the repayments owed and sent a copy of the Grievance policy [pages 190 and 68-73].

52 The Claimant responded the next day, 3 June 2021, acknowledging that he owed the clawback sums [page 189] but said that he did not want us to make further deductions from payroll and that he wished to raise an informal grievance.

53 I acknowledged his request to no longer deduct from payroll but confirmed it was not possible to agree to this, that the grievance should be dealt with formally and arrangements would be made for this to be heard by Stephen Roe [pages 188-189].

54 The Claimant, in response, again confirmed that he knew clawback was due but that he had no way of paying this and proposed again that we write off what he owed by electing to refer to it as time off in lieu of his approximation of all hours worked outside normal business hours. [Page 188].

55 I confirmed yet again the contractual position to the Claimant, by copying the specific parts of his contract into my response. I then summarised where we were at [pages 186-187].

56 The Claimant next emailed Stephen Roe stating that he was going to elect to take annual leave for certain days in July. He asked Stephen Roe how he wished to compensate for hours worked outside normal business hours [page 186]. Stephen Roe responded that time off in lieu was at the discretion of the manager and asked for evidence that this has been rejected by Mark Humphrey, if raised by the Claimant at said times. Stephen Roe highlighted that the Claimant's hours were standard for the business and in line with his contract. Stephen Roe also highlighted that holiday dates needed to be agreed with Mark Humphrey and that the idea had been to use outstanding holiday to help the Claimant repay what was owed and so taking holiday would impact the amounts due to the Respondent [page 194].

57 The Claimant then said that he was going to make an Employment Tribunal claim and that he wished to raise a grievance. We confirmed we had passed the clawback repayment side of discussions to our legal representatives and that we would await his grievance [page 203 and 213].

58 The Claimant raised a grievance on 7 June 2021 [pages 221-224]. Within the grievance, the Claimant referenced that he was unaware of any part of his contract that required him to work 'non-business days without compensation time-off or extra money for such activities'. We had repeatedly through our conversations with the Claimant explained the meaning of the relevant parts of his contract. The crux of the matter in my view was that the Claimant was unhappy that we had not agreed to his suggestion to write off the money he owed by setting it off against additional hours worked, despite him being fully aware that additional hours worked did not attract any commitment from the Respondent to pay anything additional to him. There had been no evidence that I had seen that he had been forced to do excessive hours.

59 I was involved in the handling of the grievance by way of explaining process and providing templates for interview notes and the grievance report. The grievance investigation was chaired by Stephen Roe [page 221]. Stephen Roe asked for additional information from the Claimant [page 227-229], which the Claimant provided [pages 231-232], which gave Stephen some background information on the Claimant's concerns.

60 Stephen Roe met with line managers, team members, the Claimant and I individually as part of his investigation. The minutes of those meetings are at pages 234-237, 241-247, 250-273. The line managers were in agreement that 1) additional hours were part of the job, 2) that line managers tried to resolve any outside hours' urgent jobs

themselves before reaching out to their team to ask who could help] and 3) that compensation for time off in lieu had never been asked for by the Claimant [pages 234-237].

61 When Stephen Roe met with the Claimant as part of the grievance investigation [pages 241-247], the Claimant said he was unaware he had a contract to repay monies or that salary deductions were therefore the only viable method the Respondent had to recover this [page 242]. This was frustrating when I saw this. This was patently untrue as the Claimant had admitted he owed these sums and been told both these points on several occasions in email and verbally most recently in the 2 June 2021 meeting.

62 The Claimant went on to say that there were no deadlines to tasks that he was treated equally within his team, and that he had not specifically been asked by Mark Humphrey to work evenings. He then said that there was no consequence if work was overdue if he did not elect to work additional hours to complete a task and that if he had issues with workload he would speak with Mark Humphrey who would adjust his workload [pages 243-246].

63 The Claimant had made reference in his grievance to a time in July 2020 when he had felt overloaded with work. However, the Claimant then confirmed that had all been sorted [page 246] and that since then, being July 2020, that, if he were given a task, he could decline it with reasons or ask for more time to complete it. [247]. It is therefore unclear to me why he was then suggesting that he was compelled to do additional hours that he did not feel he could accommodate.

64 On 15 June 2021, the Claimant emailed Stephen Roe and copied me into that email. He explained that he saw setting off his additional hours as a win-win for the Respondent. As the Claimant had no right to payment for additional hours there was no benefit for the Respondent in agreeing to this [page 248].

65 During Lucy Bedford's interview with Stephen Roe [pages 256-258], she reconfirmed that the Claimant had admitted he owed money to the Respondent. She explained that she was involved with the Claimant in July 2020 because Mark Humphrey had raised mental health wellbeing concerns because the Claimant had not been coping at work because of personal and work reasons. Lucy Bedford is one of the Respondent's mental health first aiders and she met with the Claimant and worked through this with him until the Claimant was satisfied it had been resolved.

66 During my interview with Stephen Roe [page 259-264], I confirmed that at no point did the Claimant deny he owed money to the Respondent and I summarised what had happened to date. In terms of the Claimant's pay arrangements I explained that he received an annual salary and that staff regularly work over basic hours. When making an offer of employment we look at: the individuals skill set and experience; the benchmark data for that role and; others in the team, to ensure any offer does not create an outlier. This all contributes to why the Respondent's salaries are considered competitive. I explained that time off in lieu is not a usual offering. I explained that a line manager can request but cannot force an employee to work outside their contracted hours or in weekends. It would be expected that staff would work additional hours if that were necessary for their role, given that it was clear in their contract that additional hours could be required. I said that no staff received additional remuneration for this.

67 In the interviews, one team member confirmed that during his time working in DevOps, the priority of tasks could move quickly which was normal in an R&D DevOps environment. That team member also confirmed that he had never been forced to work additional hours and had chosen to do those. He confirmed time off in lieu was never requested but that he could take time off here and there as Mark Humphrey was flexible with the team's time. This team member then confirmed that he mainly worked his contracted hours on average. He considered that he was fairly compensated for the hours that the role required and that management were flexible [pages ages 265-267]

68 Another team member interviewed, who was new to the team, explained that Mark Humphrey would assign work and 'we will ask for help if we need from the team'. In terms of prioritising tasks, they confirmed 'if I have any questions, I contact Mark immediately'. They went on to explain that when maintenance required working outside normal business hours this was part of a team discussion and Mark Humphrey would specifically ask if the team were ok with the proposed time/dates. This individual said that Mark Humphrey is very flexible and that there was not a 'command' to do additional hours and that staff would be asked if it was ok for them [page 268-270].

69 Another team member mentioned that they had never brought up their number of hours with Mark Humphrey because they did not consider it relevant saying 'it's about getting the job done' [page 273].

70 Following the interviews, Stephen Roe sent an invitation to the Claimant for his Grievance meeting and I advised him of his right to be accompanied [page 274, 278-280]. The Claimant declined to be accompanied [page 283]. A minute of that meeting is at pages [285-288]. In that meeting, the Claimant confirmed yet again that he agreed he needs to pay the clawback amount and that the only way he could find to do this was to look at his employment contract and suggest it was applied against extra hours worked. He then said that he wanted the money back that had been deducted over May and June [pages 287-288].

71 The grievance investigation report [page 289-320] had concluded that the Claimant had worked additional hours (which was never disputed by the Respondent), and that these were done voluntarily by the Claimant with knowledge at the time that there was no additional remuneration for those [page 304 The conclusion reached at the investigation stage was that the contract was clear that the Claimant owed monies to the Respondent and that this was not disputed. It was determined that the deductions made to payroll were permitted and fair. [Page 308]. The conclusion was also made that it was normal practice to work additional hours in the Respondent and in the wider industry and that additional hours during the week were never directly requested of the Claimant by Mark Humphrey [page 311-312]. It concluded that there was no contractual requirement for the Claimant to be given time off in lieu under his employment contract [page 314]. Lastly, it concluded that the contract was 'extremely clear that any extra hours worked would not be paid' [page 318]. The Claimant's grievance was not upheld.

72 The Claimant appealed this finding on 1 July 2021 [page 321]. The appeal was heard by Rajinder Gawera. The Claimant corresponded with Rajinder Gawera regarding information he wanted to be considered as part of his appeal [pages 323-324]. I was copied into the correspondence for arrangements for the appeal hearing [page 328-333]. The appeal hearing was recorded and a transcript is provided at pages 334--353.

73 During the appeal hearing on 8 July 2021, the Claimant said that he was requested to do additional hours indirectly but that this could be refused [pages 337-338]. He confirmed he had refused a couple of times and there was no consequence [page 338, 340, 344, 345]. He then provided an example of being forced to work additional hours. When questioned on whether this actually happened. It turned out that a deadline was set for a task which required additional hours to be worked but the choice of when it was done was up to the Claimant [pages 339-340]. The Claimant understood that

additional hours would be required by the nature of the role. He again accepted he owed clawback monies [page 341]. When additional hours were carried out, he admitted the timings of the additional hours were his choice [page 348].

74 Following that meeting on 12 July 2021 the Claimant emailed Rajinder Gawera and I to provide more information on the extra hours he worked. That information gave details on the type of work that the Claimant worked on and some examples of the volume of work in DevOps, as well as a summary on some major tasks he had achieved. Before the appeal outcome decision was reached, Rajinder Gawera corresponded with the Claimant to try to understand why he was unable to repay the monies when he had elected to send large sums of money to family and friends [page 354-369].

75 The appeal outcome was sent to the Claimant on 14 July 2021 and the original decision to not uphold the Claimant's grievance was confirmed [page 370-373]. The decision was made on the basis that the Claimant was in control of the additional hours worked. That additional hours were accommodated for in the contract and it was clear no additional remuneration would be paid. It acknowledged that the Claimant had said that the volume of his additional work was unreasonable but this did not correlate with his acknowledgement of that being his choosing, despite there being no punishment or consequence if he could not routinely work additional hours. It was also noted by Rajinder Gawera that, following exchanges with the Claimant on whether there was any financial hardship, the Claimant had failed to provide evidence during the appeal process that he had could not pay what was owed to the Respondent.

76 On 16 July 2021, the Claimant was sent a leavers letter [pages 374-376], which referenced that there still remained outstanding sums due to the Respondent. A P45 followed in due course [377-379].

77 On 21 July 2021, the Claimant emailed to say he was going on sick leave for the rest of his notice period. He said there was a reported case of COVID and he did not want to come into work that week. No Fit Note was provided at that point. One was requested, which was then provided and cited work workplace stress [pages 383-385]. I acknowledged this and, given the reason stated on the Fit Note, offered the support of the mental health first aider and Employee Assistance Program, but this was declined [page 381].

78 As at the date of leaving his employment the Claimant had repaid £8,000 of the clawback monies via deductions from wages as follows:

(a) 21/05/2021 £2,000 [page 174]

(b) 21/06/2020 £2,200 [page 281]

(c) 21/7/2021 £3,800 [page 380]

Leaving £3,356.61 owed to the Respondent.

79 On 9 August 2021, Mills & Reeve, the Respondent's legal representatives, wrote to the Claimant post-employment requesting repayment of the outstanding.

80 Despite the Claimant leaving nearly 12 months ago the Respondent received no further payments from the Claimant to pay back what was owed.

81 The Claimant said in his appeal meeting that 90% of his work was recorded in tickets [page 337]. As part of locating documents relevant to the case, we agreed to correlate information we had of tickets logs and other applications the Claimant worked on. On review of these, we considered by the Respondent that the documents were irrelevant because they did not show the hours that the Claimant was working. Instead they only showed points of contact that the Claimant had within the Respondent's systems. For example, if two time entries on the same ticket are recorded and those are a couple of hours apart, it does not mean that the Claimant has consistently worked during those points. Also, as it was not disputed that additional hours were part of the job and the timing of additional hours would have been down to the Claimant, it was difficult to see how the total of hours would assist either side's case.

82 Given the Claimant's insistence that he wished to add up the hours, it was agreed we would use a summary for the bundle. As the parties could not agree on a summary document, both are included.

83 The Claimant's summary [pages 399-432] provides a record of:

(a) Ticket logs (Jira) [pages 399-411] – 237.5 recorded as extra hours.

(i) The green highlight has been added for an out of normal business hours entry. The Claimant has then recorded how much time has passed between that and the start or end of normal business hours. This has been done to capture what sits outside of normal business hours.

(ii) It should be noted that the Claimant has provided a rounding up principle. For example, in the very first entry, on 30 January 2020 one minute has passed since an entry of 8.59 and the starting time of 9.00, yet it is recorded as 0.5 hours [page 399].

(iii) Where a date appears in red writing, this means this day was a weekend day.

(iv) Rows highlighted yellow appear to refer to dates in his notice period.

(v) The Respondent and Claimant have said ticket logs constitute 90% or 95% of the Claimant's work, respectively.

(vi) The spreadsheet shows many weeks where the ticket logs have not had any additional entries outside of normal business hours. Whilst the Claimant talks about his average weekly hours outside of normal business hours, it can be seen in his summary that it is not a constant.

(vii) The Claimant has added up the total as hours 'worked'. This is misleading. There is no evidence that the time between entries has been spent working. Otherwise, the Respondent would be permitted to say that the Claimant must not have been working all of his normal business hours where his time entries do not cover all hours between 9.30-5 or 5.30.

(b) Emails sent by client – 89.5 extra hours [pages 412-422]

(i) The same colour coding rules apply.

(ii) We can see that emails sent by the Claimant outside of normal working hours are far less frequent. The time spent preparing that email is unknown, yet the Claimant purports that it took the same as the difference between the time the email has been sent and the start or end of his normal business hours that day. That is not going to be accurate as it does not take 0.5, 1 or 1.5 hours to write emails. Many will be a matter of a few minutes.

(c) The Claimant has included personal emails that were sent to himself, such as the sending of payslips, emails relating to his grievance, requests for HR meetings and a request for time off for vaccinations. I do not believe these

should be considered as “hours worked” as they are not working activities [420-421]. Extra hours from Gerrit – 90 extra hours [pages 423-430]

(i) Gerrit is a wrapper around Git, which is a source code management system. It means that software developers can review each other’s modifications on their source code before it is submitted to the main code base. DevOps use some of the code in the Gerrit system for their tools which is why the Claimant would use the system.

(ii) Again, the rounding up exercise creates a distorted figure, making the duration of tasks in nearly all cases overstated.

(d) Scheduled Maintenance – 35.5 additional hours [page 431]

(i) These tasks are infrequent and would have constituted part of the additional hours expected from the role.

(ii) They would not have taken the time specified by the Claimant. On 19 December 2020 [page 166] the work appeared to have been completed by 10.45am that morning and taken approximately 2 hours, yet the Claimant records it as 7 hours on their summary document.

(iii) The Claimant has included standard working days and hours in the total for the scheduled maintenance tasks. This relates to 24 & 31 March 2021 and 28 April 2021, where he has included normal contractual working hours in his “total extra hours”. Only the hours outside of normal contractual hours should be included which would amount to 2 hours on each of those days not 2.5 as the Claimant states.

84 The Claimant’s spreadsheet does not give recognition where the Claimant has been on more than one system during the same period. Instead, the Claimant has created totals that deal with each application separately, which means the same time is counted twice. For example on 7 July 2020, the Claimant has an entry at 8.09am which he cites as one hour worked before he starts normal business hours at 9.00am [page 402]. He then says that he has done 2 hours on Gerrit following an entry on 6.03am before starting at 9.00am [page 424]. Both cannot be counted as they record the same time.

85 The Claimant’s summary provides a total of 452.50 hours worked [page 432]. As explained in paragraph 82 above, adding up the hours between points of contact with

the system is not an accurate way of working out the additional hours the Claimant worked. This is because the time between points of contact, even if on the same matter, do not mean that the Claimant was consistently working between those times. This is the reason why the Respondent has repeatedly advised the Claimant that the summaries are not relevant to the claim. The Claimant has not attempted to prove otherwise. The Respondent's position is that additional hours were part of the job, that the Claimant understood this and that the level of additional hours was only in part down to the Respondent. The Respondent does not believe the number of additional hours ever went beyond what was reasonable.

86 The Respondent's summary has been collated from the same data and provides a comparison with a colleague in DevOps [pages 386 -397]. When establishing what hours were worked outside the Claimant's normal working hours, a 15-minute buffer was applied at each end of the day to cover off what the Respondent considers to be normal spill over if an employee only had set hours. The Claimant's timeframe of concern was from when lockdown commenced, around 18 March 2020, and this is the starting point when creating totals. Rather than breakdown the Claimant's hours of work per application he was working on, that information has been collated to provide total hours worked over the course of his employment from those applications.

(a) From his start of lockdown, around 18 March 2020, until his last day of work, the Claimant had 168 days where he worked outside the normal business hours.

(b) It can be seen that there are a number of occasions where the system is showing that the Claimant was not active on the systems for a total of all the normal business hours for that day – referred to as 'Under'. This goes to show that the working hours were flexible in less busy times and there was a give and take culture but, should the Claimant disagree with this assessment, it shows that relying on the data summaries for conclusive proof of the volume of additional hours worked is unreliable.

87 The Claimant's additional hours are considerably less than that of another full-time DevOps colleague [pages 396-397]. The total of days working outside of normal working hours was determined as 243.09, in comparison to the Claimant's total of 452.5. The particular colleague chosen for comparison was a Staff Engineer at the same level as the Claimant whose job role and description was very similar to that of the Claimant. Neither individual was on an extended absence during the time in which

the Claimant was employed by the Respondent. There were others in DevOps that could not be used for an appropriate comparison because their roles were too different. This statement is true to the best of my knowledge and belief

Signed:

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Dated: 18/07/2022