EMPLOYMENT TRIBUNALS

Claimant:	Mr R Easton
First Respondent:	Exact Education Ltd
Second Respondent:	Choice Contracting Services Limited (in liquidation)

HELD AT:	Sheffield	**ON:**	16 and 17 July 2019

BEFORE: Employment Judge Cox
Ms B R Hodgkinson
Mr L Priestley

REPRESENTATION:

Claimant:	In person
First Respondent:	Mr Shanks, Director
Second Respondent:	No attendance or representation

JUDGMENT

1. The claim of unauthorised deductions from holiday pay succeeds against the First Respondent only.
2. The First Respondent shall pay the Claimant £3,976 (which may be subject to the deduction of income tax and National Insurance contributions) in respect of that holiday pay.
3. The claim of unauthorised deduction from wages for the week beginning 16 July 2018 fails and is dismissed.
4. The claim of breach of the Agency Workers Regulations 2010 fails and is dismissed.

REASONS

1. Mr Easton claims that either the First Respondent Exact Education Limited ("Exact") or the Second Respondent Choice Contracting Services Limited (in liquidation) ("Choice") has failed to pay him holiday pay, made an unauthorised deduction from his wages for the week beginning 16 July 2018 and failed to respect his rights under the Agency Workers Regulations 2010 (AWR). His claim originally named two other Respondents, Wise Move Consulting Limited ("Wise Move") and RNN Group Limited ("RNN") but he withdrew his claims against those Respondents at a Preliminary Hearing for case management on 12 April 2019 and they were dismissed.
2. Mr Easton's claims related to the period between October 2017 and September 2018 when he was working as an engineering lecturer at Worksop and Rotherham Colleges, both owned by RNN.
3. At the Hearing, the Tribunal heard oral evidence from Mr Easton and Mr Shanks, who is a Director of Exact. Choice is in liquidation. It did not present a response to the claim and did not attend the Hearing. The Tribunal also referred to documents that the parties produced, some of which were not provided until during the course of the Hearing. The First Respondent relied on some documents that were produced by RNN and Wise Move for the purposes of the Preliminary Hearing on 12 April 2019.
4. Much time was spent during the course of the Hearing in identifying, copying and paginating relevant documents that were not provided until the Hearing and taking relevant evidence from Mr Easton and Mr Shanks that was not contained in their witness statements. As a result, the Tribunal had time to give only a summary of the reasons for its decision, which it considered preferable to reserving its decision to another date. The Tribunal explained that the written reasons for its decision, if requested, would provide a fuller account of its findings of fact and law. Mr Easton requested written reasons and these are therefore now provided.
5. Many of the relevant facts were agreed by Mr Easton and Mr Shanks, including the number of hours and days on which he worked during his assignment with RNN.

Who was the employer?

6. Mr Easton's right to holiday pay, which arose under the Working Time Regulations 1998 (the WTR), depended upon him being able to establish that during the period in question he was working under a contract of employment or "any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the worker". Likewise, his right to complain of unauthorised deductions of holiday pay or other wages under Section 13 of the Employment Rights Act 1996 (the ERA) depended upon him being able to establish that he was working under one of those types of contract. His employer, against whom these rights arose, was the person by whom he was employed under that contract (Regulation 2(1) WTR; Section 230(4) ERA).

7. The preliminary issues that the Tribunal needed to address in relation to Mr Easton's claims for holiday pay and unauthorised deductions were, therefore, whether Mr Easton was a worker during the period in question and, if he was, whether his employer was Exact or Choice or neither of them. From the evidence the Tribunal heard from Mr Easton and Mr Shanks and the documents that were produced at the Hearing, the Tribunal made the following findings relevant to these issues.

8. Exact is a business that sources labour for educational institutions. It has access to a large library of CVs of individuals wanting to work as lecturers. It contacts colleges to see whether they have work to be filled and individuals to see whether they are interested in working. The contact it had with RNN that led to Mr Easton's placement at the Colleges was the first time it had worked with RNN.

9. Exact was unable to produce any documentation relating to the contract it made with RNN in particular, but it did produce its standard "terms of business with a hirer for the supply of a limited company contractor who has not opted out of the conduct regulations (within IR35 and under SOC)". Mr Shanks said this would have been the terms on which it worked with RNN. This document did not define what it meant by "limited company contractor". There was no evidence before the Tribunal that Mr Easton contracted with any of the Respondents through a limited company. The Tribunal was nevertheless prepared to accept that these standard terms of business reflected the agreement between Exact and RNN on how Mr Easton's service would be provided.

10. Under these terms, Exact agrees to supply the hirer with an "intermediary" to provide "Intermediary Services". The "intermediary" is defined as the person introduced to carry out an Assignment and includes, save where otherwise indicated, an agency worker. The "Assignment" is "the Intermediary Services to be performed by the Agency Worker for a period of time during which the intermediary is supplied by the Employment Business to provide Intermediary Services to the Hirer". Mention is made of an "assignment details form", which is written confirmation of the assignment details agreed with the Hirer prior to commencement of the Assignment. No such form was produced in evidence to the Tribunal but the Tribunal accepted Mr Shanks's evidence that there would have been one for Mr Easton's assignment with the Colleges, setting out his start date, the anticipated end date, the rate of pay, any health and safety considerations that applied and the expected times and duration of working time.

11. Under these standard terms, the hirer agrees to sign the intermediary's timesheet each week to confirm the number of hours they have worked. The hirer agrees to pay the charges. The charges are the intermediary's "fees" and Exact's commission. Exact is responsible for paying the intermediary.

12. Exact is a small company with only four employees in addition to Mr Shanks, the company's director. It works with a number of "umbrella companies" who provide payroll services. One of the companies it worked with was Wise Move. Exact was unable to produce the contractual documentation relating to its dealings with Wise Move, but it did produce a document setting out what it said were its standard terms of business with the umbrella companies it works with. In this document, the umbrella company is the "intermediary". The document does not define what services the umbrella company is providing to Exact. It

does say, however, that the intermediary will indemnify Exact for any liability or obligation arising from the fact that the agency worker is an employee or worker of Exact or the hirer. The intention appears to be to shift the legal liabilities attached to being an employer of the agency worker from Exact (and the ultimate user of the agency worker's services) to Wise Move.

13. The pay of agency workers who worked through Exact at the relevant time, including Mr Easton, was administered as follows. The workers would fill out a timesheet online on Exact's website. This would then be emailed automatically to the person within the hirer's business with authority to approve or decline payment for those hours. Once the hours were approved, Exact would invoice the hirer for the worker's pay plus its commission and charges and send an email to Wise Move, or whatever other umbrella company was being used, to pay the worker for the approved number of hours at the agreed hourly rate.

14. Unbeknownst to Exact until Mr Easton made his Tribunal claim, Wise Move entered into a "supply and services agreement" with Choice on 10 October 2017. Under that agreement, Choice would provide a contract of employment to Mr Easton and pay him in return for a fee.

15. The hirers with whom Exact worked did not necessarily know that any other company was involved. There was no evidence before the Tribunal that in Mr Easton's case RNN knew of the existence or involvement of Wise Move or Choice.

16. The events that led to Mr Easton's working relationship with Exact and RNN began with a telephone call out of the blue one evening from Ms Price. Most of Mr Easton's dealings with Exact were with Ms Price, who worked as a Recruitment Consultant for Exact for most of the relevant period. She has since left Exact's employment and did not give evidence at the Tribunal Hearing.

17. Mr Easton frequently receives calls from agencies asking him if he is interested in work as a lecturer but had not had contact with Exact before. Ms Price asked him if he was interested in a lecturing job "Sheffield way" and he eventually agreed to speak to Steve Paton-Eeley, a lecturer employed by RNN, with whom he would be working, to discuss the job. Mr Easton and Mr Paton-Eeley agreed Mr Easton would work 18 hours a week over 3 days.

18. Exact initially offered Mr Easton £25 an hour for the work, which he was inclined to accept. An agency who had previously been in touch with him about a lecturing post contacted him again and offered him £29.50 an hour. Mr Easton let Ms Price know about this offer in the hope that it would put pressure on her to agree an increase in the hourly rate he was being offered to work at the College. She increased the offer to £28 an hour, which Mr Easton accepted. Nothing was said about any part of this rate being attributable to holiday pay. RNN agreed to pay Exact £39 an hour for the supply of Mr Easton's services.

19. On 21 September 2017 Ms Price sent Mr Easton an email saying: "In order for you to be compliant to work for Exact Education, please complete and return the following forms along with the supporting documents". She attached an application form, a form for reference contact details, a form relating to disqualification by association and a document entitled "Terms of engagement for agency workers (contract for services)" to which Exact and Mr Easton were the intended parties. Mr Easton completed the first three documents at once because they were only a page or so long and sent them back to Ms Price. The

last one was much longer, at 10 closely-typed pages, and he needed time to consider it.

20. On 27 September Ms Price emailed Mr Easton again, asking him to fill out and return this last document. He signed the document electronically on 27 September 2017 but forgot to send it back to Ms Price. It was not until 14 February 2018 that Ms Price followed this up, asking him to complete the terms and conditions form and return it. He did so on 20 February. These terms of engagement provided for the worker to be given a written confirmation of the assignment details on acceptance of the assignment, but Mr Easton was never given this. The terms referred to Mr Easton as being a worker and acknowledged that he was entitled to 5.6 weeks' annual leave under the WTR.

21. Mr Easton began working at RNN's North Notts College in Worksop in the week beginning 9 October. On 13 October Ms Price emailed him to say: "When working through an agency you have to be paid through an umbrella company". Ms Price sent him the contact number for an umbrella company which she said was called Wise Move. On 25 October Mr Easton telephoned this number and spoke to somebody called Tom who explained how Wise Move operated. Tom confirmed the conversation by email later that day. He explained that Wise Move operated a same day payment service, so that when funds had been sent across from Mr Easton's agency he would be paid the same day. He would be allocated a Personal Relationship Manager who would be on hand to answer any queries. He would receive payslips to show the tax and National Insurance contributions being paid. He was asked to complete an application form if he wanted to move forward with this arrangement. The application form had a "Choice" logo. It asked for, amongst other things, Mr Easton's personal information and details of his work. Mr Easton was not concerned that the form said "Choice" rather than "Wise Move" because, as far as he was aware, he was just applying to have his payroll administered through an umbrella organisation. He completed the form and sent it in.

22. On 25 October Mr Easton was also sent a document headed "Contract of employment" which said that it was between Mr Easton and Choice Contracting Services Limited. This said that Mr Easton was "employed to provide the Services to Clients and End Users that we may reasonably require from time to time in light of your skills set." Mr Easton was to "undertake the Services professionally promptly and efficiently" and "follow the reasonable directions and instructions of the Company as to the Services to be provided" by him. The Services were those described in the Assignment Schedule. The Schedule included the words "Services description: Lecturer". It also said under "special terms": "Robert Easton [sic] will use every endeavour to assist Wise Move Consulting Ltd with the execution of its contract with Exact Eductaion [sic] for Educatopn [sic] Services".

23. The contract provided for the employee to be paid on an hourly basis at "the Pay Rate". The "Pay Rate" was defined as "a sum per hour equivalent to the minimum rate allowed by the National Minimum Wage Act". The contract provided for 28 days' paid holiday during each holiday year and a payment in lieu of any accrued but unused holiday on termination of 1/260th of salary for each untaken day.

24. Mr Easton downloaded this document and put it in a folder. He did not sign it. It was in PDF format and could not be signed. He was sent a further copy for his signature at some point during the following month and was asked to sign and

return it. The return address was in the Isle of Man. The contract itself gave a London address for Choice. Mr Easton thought it strange that the address being given was now the Isle of Man and it worried him somewhat. He decided not to sign the paper document. He was also concerned that he had not chosen to deal with Right Move or Choice until 25 October 2017, whereas the contract was saying that the start date of his employment was 10 October 2017. He did not know what the significance of the document was.

25. The copy of the document produced in evidence at the Tribunal Hearing has what appears to be an electronic signature on it. The signature is indecipherable but, as it is not Mr Easton's signature, it seems likely to have been someone signing on behalf of Choice. On the following page are these words in typeface: "Executed by: Mary Meadows on 25/10/17". Below that in exactly the same format are these words: "Executed by: Robert Easton on 25/10/17". These entries are not signatures although they purport to reflect the fact that the document has been signed by both parties. The Tribunal accepted Mr Easton's evidence that he did not sign this document and could not have done so because of the format it was sent in. The terms of engagement document he was sent by Exact was in a different format and he was able to sign it by typing in his name. The Tribunal accepted that he was in the habit of appending "BEng Hons" when he signed a document in this way. There is no "BEng Hons" after the record of his purported execution of the Choice contract, giving a further reason to accept his evidence that he did not sign it.

26. The pay slips Mr Easton was sent during the course of his employment at the Colleges were headed "Choice Contracting Services Limited". They showed basic pay but made no mention of holiday pay, either as an element of basic pay or a separate figure.

27. In December 2017, Mr Easton did not receive his pay. On 5 January 2018 he telephoned a contact number he had for Choice and spoke to a woman who said that they were entitled not to pay him because he had not signed the contract and they were his employer. Mr Easton said he would rectify that straight away and on 8 January he emailed Ms Price. He said "Wise consulting services are no longer required and another umbrella organisation will be used. From Friday 5/1/18 they have 14 days to pay me in full all outstanding monies". He concluded "Can you pass this on directly to who you deal with as I only appear to have an info@choice etc. email address and action is needed quickly". Later that day Ms Price confirmed to Mr Easton that he had been paid. Mr Easton asked if they could remove Wise Move anyway but she said that Wise Move had made a mistake and it would not happen again.

28. From January 2018 Mr Easton also worked at Rotherham College.

29. During his time working at the Colleges, Mr Easton completed timesheets online which were then authorised by Mr Paton-Eeley or RNN's Human Resources function. On occasions, Mr Easton was unable to access the online timesheets and texted Ms Price to ask her to enter his claim for him.

30. The document headed "Contract of employment" that Choice sent to Mr Easton contained no mention of timesheets. The "Terms of engagement" sent to him by Exact provided for him to send in a timesheet each week of hours worked, signed by an "authorised representative" of the hirer. The terms said that, if the Agency Worker failed to submit a properly "authenticated" timesheet, Exact would "in a timely fashion, conduct further investigations into the hours claimed

by the Agency Worker and the reasons that the Hirer has refused to sign a timesheet in respect of those hours. This may delay any payment due to the Agency Worker. The Employment Business shall make no payment to the Agency Worker for hours/days not worked."

31. Mr Easton's work would normally end at the end of the Colleges' academic term but in July 2018 he had some outstanding marking to do. RNN authorised him to work some hours in the week beginning 9 July 2018 so that he could complete this. In the week beginning 16 July 2018, he worked a further 38 hours. Mr Paton-Eeley, who normally authorised his hours, was on holiday at that time. When Mr Easton asked Ms Price to put through those hours she was unable to invoice for them as they had not been authorised by RNN. As a result, Mr Easton was not paid for them by Choice. He sent emails to Ms Price chasing payment but got no reply from her. She left Exact's employment sometime in August.

32. Ms Price did not give evidence to the Tribunal, so it could make no precise findings on what steps she took to obtain authorisation for the hours from elsewhere, such as from RNN's Human Resources function (who did authorise hours for Mr Easton on an occasion later in 2018). Nevertheless, Exact had a vested interest in Mr Easton's hours being authorised, as its own income depended upon it being able to invoice for them. The Tribunal is therefore prepared to accept that it was more likely than not that Exact made reasonable attempts to obtain authorisation for the hours Mr Easton had worked but was unable to do so.

33. After Ms Price left Exact, Mr Easton negotiated a new hourly rate of £29 an hour with Mr Tester, another Exact employee, for the new term. Mr Easton claimed for 12 hours' work in the week beginning 10 September. Mr Tester entered this on his time sheet as 10 hours, apparently due to an administrative error. On 24 September Mr Easton wrote to Ms Godfrey, Assistant Principal for RNN, Ms Hooper, Human Resources Business Partner for RNN and Mr Tester saying he had lost trust and confidence in the agreement originally made and so would not be continuing after 28 September and they needed to cover the teaching units he had been assigned. That was the end of his work at the Colleges.

Analysis of the facts

34. Mr Shanks argued that Mr Easton was not employed by Exact, as a worker or an employee. Exact had contracted with Wise Move to take on the liabilities of Mr Easton's employer. Until this litigation, Exact did not know that Wise Move had reached an agreement with Choice to pay Mr Easton and Exact did not know the terms of any contract between Choice and Mr Easton.

35. Mr Shanks's evidence was that Mr Easton was sent the Exact terms of engagement document not because Exact intended to enter into any form of contract with him but in case he was ever employed directly as a worker by Exact. He said that Exact very rarely employs workers directly. He said that Ms Price would have followed up with Mr Easton to obtain a signed version of the terms in order to comply with the requirements of the Conduct of Employment Agencies and Employment Businesses Regulations 2003.

36. From the evidence the Tribunal heard, however, it was apparent that, whatever the relationships that existed between Exact and Wise Move and between Wise

Move and Choice, Mr Easton was not party to them, did not know their terms and for all practical purposes had no interest in them. His working relationship was with Exact only. In September 2017, before he started working at RNN's Colleges, Exact sent him a written contract that acknowledged he was a worker employed by it. He accepted its terms and started work on that basis. He signed the document in September, although he did not return it to Exact until Ms Price chased it up in February 2018.

37. Although Ms Price later told Mr Easton that he had to be paid through an umbrella company, she did not say he had to agree to be employed by an umbrella company. Choice sent him a document, purporting to be a contract of employment, to sign but he had already started work by that date under the agreement he had reached with Exact and he never signed that document. His pay appears to have been administered through Wise Move and Choice and his wage slips had Choice's name on them but he never agreed to be employed by either of these companies. Indeed, he had little contact with Choice in any form. He had an initial telephone call with "Tom" but it is not clear whether Tom was a Choice employee. He then had one further telephone call with a person, who may or may not have been employed by Choice or Wise Move, to query why his December pay had not been paid. All his other dealings were with Ms Price and Mr Tester at Exact. It was they who negotiated and agreed his pay rate with him and Ms Price who loaded his hours onto the website for him and dealt with any disputes that arose between him and the Colleges about his hours of work. It was Mr Tester to whom Mr Easton wrote when he decided to end his work at the Colleges.

38. Mr Shanks asked the Tribunal to take into account a letter that Exact had been sent by a Mr Vause, on notepaper headed with a Choice logo. This was undated but was sent some time after 6 February 2019 as it referred to an offer of settlement made to Mr Easton by Choice on that date. The letter said that it was "a courtesy email on behalf of Choice Contracting whom I represent in my capacity as an external consultant and mediator in the discussions between Mr Easton and Choice following his claim". In the letter, Mr Vause said that Mr Easton was employed by Choice and that he had attempted to settle Mr Easton's holiday pay claim on Choice's behalf.

39. The Tribunal notes, however, that Choice did not make that concession in the context of Mr Easton's claim, not having entered a response. It was also not clear that Mr Vause had authority to make that concession on Choice's behalf. By the date of the letter, Choice was in liquidation and even directors of Choice could therefore not act for or represent the company without the liquidators' authorisation. In any event, the Tribunal finds it unsurprising that Choice was prepared to accept that it was Mr Easton's employer, given that the services it had agreed to provide, for which it had no doubt been paid, included providing Mr Easton with a contract of employment. In these circumstances, Choice's assertion that it was Mr Easton's employer did not make it so.

40. The Tribunal accepts that Exact intended through its agreement with Wise Move to pass on any liabilities it may have as Mr Easton's employer to Wise Move. The agreement between Exact and Wise Move, however, itself contemplates that there may be circumstances where Exact is found to be the agency worker's employer, in which case Wise Move is required to indemnify Exact against that liability. Mr Easton's employment status, however, has to be analysed on the basis of the nature of the agreement he made and who he

made it with. On the Tribunal's findings, his agreement was with Exact. As a Recruitment Consultant for Exact, Ms Price had authority, whether actual or ostensible, to enter into a "worker's" contract with Mr Easton on Exact's behalf and the Tribunal finds that she did so.

41. In summary, the Tribunal was satisfied on the basis of the evidence it heard that Mr Easton had agreed with Ms Price on behalf of Exact to provide his services personally as an engineering lecturer at the Colleges. Exact's status under that agreement was not a client or customer of a profession or business undertaking carried on by Mr Easton. Mr Easton had agreed with Choice that his pay would be administered through them, but nothing more. He was therefore a worker employed by Exact for the purposes of his claims for holiday pay and unauthorised deduction from wages.

Holiday pay

42. Under the WTR Mr Easton was entitled to 5.6 weeks' paid leave in each holiday year. The Tribunal found that the contract for services that Ms Price sent Mr Easton and he accepted was a "relevant agreement" that provided for a leave year beginning on 1 January (Regulations 2(1) and 13(3)(a) WTR). Mr Easton worked a five-day week. On the basis of his time sheets, his employment began on 9 October 2017. In the holiday year beginning on 1 January 2017 he was entitled to 11/52 x 5.6 = 1.18 weeks' leave. He took that leave in the full week beginning 23 October 2017 and on 25 December 2017, but he was not paid for it. Exact therefore made an unauthorised deduction from his holiday pay for the week beginning 23 October 2017 and a further unauthorised deduction from his holiday pay for the 25 December 2017.

43. In the holiday year beginning on 1 January 2018 Mr Easton was entitled to 39/52 x 5.6 = 4.2 weeks' holiday. He took full weeks' leave in the week beginning 1 January 2018 and the weeks beginning 23 and 30 July and 6 August and 13 August 2018. He was not paid. There were therefore unauthorised deductions from his holiday pay for those weeks.

44. A claim of unauthorised deduction from wages, including holiday pay, must be presented before the end of the period of three months beginning with the date of payment of the wages from which the deduction was made or, if there has been a series of deductions, within three months beginning with the last deduction in the series (Section 23(2) and (3) ERA). In Fulton and Baxter v Bear Scotland Limited UKEATS/0010/16, the Employment Appeal Tribunal has decided that deductions that fall more than three months apart cannot form part of the same series. There was a gap of more than three months between the deductions from Mr Easton's holiday pay in October and December 2017 and January 2018 and those in July and August 2018. The effect of that is that the claim for holiday pay for October and December 2017 and January 2018 should have been brought within three months of January 2018, that is, by April 2018. The claim was not in fact presented until 27 November 2018.

45. A Tribunal may nevertheless hear a late claim if it is satisfied that it was not reasonably practicable for the claim to have been presented within the usual time limit and it has been presented with a further reasonable period (Section 23(4) ERA). Having heard evidence from Mr Easton on the timing of his claim, the Tribunal was not satisfied that it was not reasonably practicable for him to have presented his claim in respect of those earlier deductions within three

months. He raised the issue of holiday pay with Mr Paton-Eeley at RNN and Ms Price at Exact from around April 2018 onwards and they had both denied liability to pay him any. He later spoke to ACAS because he did not know what he was due for holiday pay and ACAS told him that if he did not know who to claim against he should name all four organisations he knew of – RNN, Exact, Wise Move and Choice – and let the Tribunal decide who was liable.

46. The Tribunal was satisfied that Mr Easton could and should have sought advice from ACAS and brought his claim within the time limit. By April 2018 he had all the relevant documentation and he knew that neither Exact nor RNN was accepting that he was due holiday pay, although he was not being prevented from taking leave.

47. As it was reasonably practicable for Mr Easton to present his claim for holiday pay in respect of October and December 2017 and January 2018 within the three-month time limit and he did not do so, that element of his holiday pay claim failed and was dismissed because the Tribunal had no power to hear it.

48. The Tribunal then considered what deductions were made in respect of Mr Easton's holiday in weeks beginning 23 and 30 July and 6 August and 13 August 2018. Four weeks' leave in any holiday year represent a worker's entitlement to paid holiday under the Working Time Directive, and so must be remunerated in line with the case law of the Court of Justice of the European Union on the calculation of holiday pay. That means that holiday pay must be at the same level as the worker's normal pay (British Airways plc v Williams and others (2012) ICR 847).

49. The Employment Appeal Tribunal in Bear Scotland indicated that the first four weeks' holiday in any holiday year should be viewed as a worker's leave entitlement under the Directive. In Mr Easton's case, in the holiday year beginning on 1 January 2018, the holiday he took in weeks beginning 1 January, 23 and 30 July and 6 August should have been paid at his normal rate of pay. The Tribunal needed to choose a reference period for calculating Mr Easton's normal pay and decided that the most appropriate period would be the 12-week period running up to the beginning of his holiday beginning on 23 July. Mr Easton's average weekly hours of work in that period were 538/12 = 44.8. 44.8 hours at £28 an hour gives a figure for holiday pay of £1,254.40 a week.

50. For the first three weeks which the Tribunal has power to deal with, namely 23 and 30 July and 6 August 2018, Exact made deductions from holiday pay of £1,254.40 x 3 = £3,763.20.

51. For the remaining 0.2 of a week's leave to which he was entitled, which he took on 13 August 2018, Mr Easton was entitled to be paid at the same rate as would be payable for working his normal working hours in a week (Section 221(2) ERA). On the basis of Mr Easton's evidence, the Tribunal finds that he had normal working hours of 38 hours a week (albeit that he sometimes worked longer) giving a weekly figure of £1,064. He was therefore owed £1,064 x 0.2 = £212.80 for that day's leave.

52. The total amount of unauthorised deductions that have been made from Mr Easton's holiday pay is therefore £3,976. Exact may be obliged to deduction income tax and National Insurance contributions from that sum.

Unpaid wages

53. Mr Easton alleges that an unauthorised deduction was made from his wages for the week beginning 16 July 2018.

54. The Tribunal accepts Mr Easton's evidence, which was unchallenged, that he did work for 38 hours in that week. Under Section 13(3) ERA, where "the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion", the amount of the shortfall is treated as a deduction. The issue for the Tribunal was whether any amount was "properly payable" to Mr Easton in that week.

55. Clause 5.1 of the contract between Exact and Mr Easton clearly contemplates that he was required to submit time sheets authorised by the hirer before he was paid (albeit that, from the evidence the Tribunal heard, in practice workers working through Exact did not submit paper time sheets, they completed a form on the company's website that was only then sent to the hirer for authorisation).

56. Mr Easton accepts that he had not been given prior authorisation by anyone at RNN to work 38 hours in the week of 16 July. The Tribunal accepts that in practice RNN on occasion gave its authorisation retrospectively. There was a time in May 2018, for example, where that appears to have happened. The Tribunal nevertheless accepts that it must have been an implied term between Mr Easton and Exact that it would pay only for the hours the hirer, RNN, had authorised: Mr Easton must have understood and accepted that Exact would not pay him for hours for which it would not itself be paid by RNN because they had not been authorised. There was no evidence before the Tribunal that RNN ever authorised Mr Easton to work those hours.

57. In summary, while the Tribunal accepted that Mr Easton carried out 38 hours' work in the week of 16 July, because he did so without authorisation no wages were "properly payable" for those hours under his contract with Exact. For those reasons, his claim of an unauthorised deduction from wages in respect of that week fails.

Claim under the Agency Worker Regulations 2010

58. Applying the same analysis as it used to conclude that Mr Easton was a worker for the purposes of his holiday pay and unauthorised deduction claims, the Tribunal was satisfied that Mr Easton was as an agency worker within the coverage of the AWR. He was an individual supplied by a temporary work agency (Exact) to work temporarily for and under the supervision and direction of a hirer (RNN) and he had a contract with Exact to perform work or services personally (Regulation 3(1) and (2) AWR).

59. After completing a qualifying period of 12 weeks, an agency worker is entitled to the same basic working and employment conditions as he would be entitled to for doing the same job, had he been recruited by the hirer other than by using the services of a temporary work agency and at the time the qualifying period began (Regulation 5 and 7(1) AWR). The relevant terms and conditions in Mr Easton's claim were those relating to pay (which includes holiday pay – Regulation 6(2) AWR) and annual leave (Regulation 6(1) AWR).

60. Regulation 14(1) AWR provides that both a temporary work agency and the hirer can be liable for any breach of Regulation 5 to the extent that it is responsible for that breach. The hirer is a person to whom individuals are supplied to work temporarily for and under the supervision and direction of that person. It was common ground that the hirer in Mr Easton's case was RNN. The definition of a temporary work agency in Regulation 4(1) AWR covers those who supply individuals to work temporarily for and under the supervision and direction of hirers and also those who pay for, or receive or forward payment for, the services of individuals who are supplied to work temporarily for and under the supervision and direction of hirers. In Mr Easton's case this definition covered Exact.

61. Mr Easton's qualifying period began on 9 October 2017 and ran until 14 January 2018. Mr Easton's claim was therefore that from 15 January 2018 he was entitled to the same terms and conditions relating to pay including holiday pay and annual leave as if he had been directly recruited by RNN as an engineering lecturer on 9 October 2017.

62. The Tribunal looked first at the length of Mr Easton's holiday entitlement. Mr Easton and Exact agreed that a lecturer recruited directly recruited by RNN was entitled to 10.4 weeks' leave. Mr Easton's entitlement under the WTR was only 5.6 weeks' leave. If Mr Easton had been employed directly by RNN his holiday year would have begun on 1 September. He began work on 9 October 2017 so for the leave year from 1 September 2017 to 31 August 2018 he would have been entitled to 48/52 x 10.4 = 9.6 weeks' leave. He admitted in evidence that in that period he was allowed that amount of time off work. The Tribunal therefore finds that there was no breach of his right to parity in the length of his annual leave entitlement under the AWR.

63. The Tribunal then considered Mr Easton's entitlement to holiday. As holiday pay for lecturers employed by RNN is at the same rate as their normal salary, the Tribunal first needed to decide what salary Mr Easton would have been entitled to, had he been directly recruited by RNN. Mr Easton said that he would have been paid £35,000 if he had been directly recruited by RNN in October 2017, because that was the salary of two of the other teaching staff he was working with, Mr Paton-Eeley and Mr Young. The Tribunal was not prepared to accept that. It did not have sufficient evidence to conclude that these individuals were employed on the same or broadly similar work to that of Mr Easton. Mr Easton himself accepted that Mr Paton-Eeley taught a broader range of students than he did. The Tribunal considered that more reliable evidence of the pay rate of directly recruited lecturers could be found in an email Ms Hooper, a Human Resources Business Partner for RNN, sent Mr Tester of Exact on 13 September 2018, which confirmed that the College paid their lecturers an annual salary of £27,663.

64. If Mr Easton had been employed directly by RNN his weekly rate of holiday pay would certainly have been lower, because his annual income from his lecturing work for RNN was substantially more than £27,663. For completeness, however, the Tribunal also assessed the total amount of holiday pay that Mr Easton would have received had he been directly employed by RNN for the period of his assignment at the Colleges.

65. For the holiday year ending on 31 August 2018, he would have been entitled to 9.6 weeks' holiday pay at £531.98 (£27,663/52) a week, which equals £5,107. He was employed for only four weeks in the holiday year beginning on 1

September 2018 and so he would have been entitled to 10.4 x 4/52 weeks' holiday pay at £531.98 a week = £425.58. That means he would have been entitled to £5,532.58 in total during his period of employment, had he been a lecturer directly employed by RNN.

66. Drawing on the Tribunal's conclusions in relation to Mr Easton's claim for holiday pay, his actual entitlement was 1.29 weeks in 2017 and 4.2 weeks in 2018, totalling 5.49 weeks. Even taking the lower, ERA rate of calculation for his holiday pay (namely, £1,064 a week), that results in a higher figure for total holiday pay (£5,841.36) than he would have been entitled to had he been directly employed.

67. For those reasons Mr Easton's claim under the AWR failed and was dismissed.

Employment Judge Cox
Date: 21 August 2019