EMPLOYMENT TRIBUNALS

Claimant: Mr M Binns

Respondents: 1. Umbrella Company Limited
2. Morgan Hunt UK Limited

Heard at: Manchester **On:** 13 and 14 March 2023
21 April 2023
(in Chambers)

Before: Employment Judge Slater
Mr G Pennie
Mr P Stowe

REPRESENTATION:

Claimant: In person
1st Respondent: Ms McGrath (Litigation Consultant)
2nd Respondent: Mr A Crow (Head of Support Services)

JUDGMENT

The unanimous judgment of the Tribunal is that:

Complaints against the first respondent

1. The complaint of unauthorised deduction from wages in relation to the deduction of "employment costs" from the hourly rate agreed between the claimant and the agency is well founded.

2. The complaint under regulation 30 of the Working Time Regulations 1998 in relation to a refusal to permit the claimant to exercise the right to paid annual leave contrary to regulations 13 and 13A of the Working Time Regulations is well founded.

3. The respondent was in breach of contract by not paying the claimant holiday pay calculated at the rate of 12.07% of the hourly rate of £25 (when working at Wakefield College) and £27.50 (when working with Trafford College) in addition to the hourly rate of £25 and £27.50.

4. The respondent was not in breach of clause 2.1 of the contract.

Complaint against the second respondent

5. The complaint of a breach of regulation 5 of the Agency Workers Regulations in respect of annual leave entitlement after 12 weeks working at Wakefield College and then Trafford College respectively is well founded.

Remedy

6. Remedy will be determined at a remedy hearing on 12 July 2023.

REASONS

Claims and Issues

1. The claims and issues had been discussed at two private preliminary hearings. The claim was initially brought against the first respondent only. At the second preliminary hearing the second respondent, Wakefield College and Trafford College were all added as further respondents. The claims against Trafford College and Wakefield College settled before this hearing.

2. The claim presented by the claimant on 24 March 2022 had made claims under the Working Time Regulations 1998 (WTR) about holiday pay, a complaint under the Agency Workers Regulations 2010 (AWR) about holiday entitlement and a complaint of breach of contract. At a preliminary hearing on 6 September 2022, following an application to amend included in the claimant's case management agenda, the claimant was given permission to amend his claim to include a complaint of unlawful deduction from wages.

3. We discussed the claims and issues at the start of the hearing. They were agreed to be as follows:

Claims against the first respondent

(1) Unauthorised deduction from wages in relation to the deduction of "employment costs" from the hourly rate agreed between the claimant and the agency. The issues in relation to this complaint were:

(i) What wages were properly payable on each occasion when the claimant was paid? Was it the hourly rate of £25 when working for Wakefield College and £27.50 when working for Stockport College or some lesser amount as agreed between the claimant and the respondent?

(ii) If the employment costs were deducted from the claimant's wages, was that deduction authorised?

(2) A complaint under regulation 30 of the Working Time Regulations 1998 that the claimant was deterred from taking annual leave by the pay arrangements. The claimant says that this was a refusal to permit him to exercise the right to paid annual leave contrary to regulations 13 and 13A

of the Working Time Regulations. The issues in relation to this complaint were:

(i) Did the pay arrangements amount to a refusal by the respondent to permit the claimant to take the annual leave to which he was entitled by:

(a) Rolling up holiday pay into the hourly charging rate, and/or

(b) Failing to pay holiday pay in addition to the hourly charging rate.

(ii) If the respondent did refuse to permit the claimant to exercise his right to paid annual leave, at what rate should he be compensated?

(iii) Can the respondent set off any portion of the hourly charging rate against the claimant's compensation on the ground that it was transparent rolled up holiday pay?

(iv) If so, how much should be set off?

(3) Breach of contract – whether there was a breach of the term "your holiday entitlement will accrue at the rate of 12.07% of your hourly rate for each hour worked, holiday pay will be paid at your normal hourly rate". The issue in relation to this complaint is what the words "hourly rate" meant.

(4) A second breach of contract claim – whether there was a breach of the term at clause 2.1 in the contract, "You will promptly notify us in writing immediately upon it coming to your notice that you may have grounds for complaint concerning any aspects of such entitlements as you may have under the Agency Workers Regulations 2010 in order that we have a proper opportunity to investigate and make any necessary changes". The claimant asserts that the respondent had an obligation to investigate any alleged breach of the Agency Workers Regulations which he brought to their attention and to make necessary changes, and that this was not done. The first respondent says there was no contractual obligation to investigate and make changes and there was no breach of the Agency Workers Regulations. The issues were:

(i) Was the first respondent under an obligation to investigate an allegation of a breach of the Agency Workers Regulations made by the claimant and make necessary changes?

(ii) If so, was the first respondent in breach of that obligation?

Claims against the second respondent

(5) This was a complaint of a breach of the Agency Workers Regulations, regulation 5. The claimant relies on a hypothetical comparator being a college lecturer in construction directly employed by either Stockport College or Wakefield College at the relevant time. The issues were:

(i) If the claimant had been directly recruited by the college, would he have been entitled to a greater annual leave entitlement?

(ii) If so, how much leave would he have been entitled to?

(iii) In respect of which dates would he have been entitled to this greater leave?

(6) The second respondent confirmed that it did not rely on the defence in regulation 14(3) of the Agency Workers Regulations.

Extension of time for second respondent to present response

4. The second respondent had not presented its response in time and they had written to the Tribunal seeking an extension of time. A Judge had ordered that the application be considered at the start of the hearing.

5. At this hearing, the claimant did not object to the second respondent being permitted to present its response out of time, a draft of this response having been sent to the Tribunal prior to the hearing. The Tribunal agreed in the circumstances to extend time for the response to be accepted. The second respondent did not renew its application previously made in correspondence for the hearing to be postponed.

6. Mr Crow told the Tribunal that the second respondent was able to deal with matters at this hearing. Mr Crow had not provided a written witness statement, so the Tribunal gave Mr Crow time to write a statement while the Tribunal was doing its reading. This was provided to the Tribunal and the other parties during the adjournment. The claimant and the first respondent confirmed, when we resumed the hearing with the parties, that they were in a position to continue and to deal with the evidence in Mr Crow's statement

Evidence

7. We heard evidence from the claimant himself, from Peter Langham (Director of the first respondent) and from Mr Crow (Head of Support Services at the second respondent). Each had produced a written witness statement.

8. We had a bundle of documents of 558 pages. During the course of the hearing, we were provided with some additional documents:

(1) The claimant's original contract of employment dated 3 December 2020 (the copy in the bundle not being the original contract);

(2) Guidance for employment businesses about providing a key information document for agency workers from the Department for Business, Energy and Industrial Strategy; and

(3) The second respondent's generic key information document which they said was available for the claimant to download before he signed up to the agency.

9. There was also a supplementary procedural bundle of 26 pages.

The Facts

10. The claimant has worked as a Teacher and College Lecturer for over 20 years. Prior to his assignment to Wakefield College, he had had a period out of teaching running his own business. His only prior experience of working through an agency was when he had been a student around 30 years before.

11. The second respondent is an employment agency which arranged for the assignment of the claimant to Wakefield College and then to Stockport College, which is part of the Trafford Group of Colleges. The first respondent is an umbrella company providing payroll and accountancy services. It was agreed that the claimant was employed by the first respondent under a contract of employment when he was assigned to work at Wakefield College and then Stockport College.

12. Around the end of November 2020, the claimant applied for a lecturing position with Wakefield College through the second respondent. When signing up to the agency through the second respondent's website, we accept that the claimant was invited to download and read the key information document. The claimant did not download this. We were told that the second respondent has subsequently changed its system so that the candidate is forced to click on the document and download it as part of the registration process. The claimant and the second respondent agreed a rate for the job. This was £25 per hour. There is a dispute as to whether the claimant was told by the second respondent that this was the amount to be paid per hour to the umbrella company and that the claimant would receive an amount calculated as £25 per hour less the umbrella company's profit and various other employer costs. There is also a dispute as to whether the claimant was given a choice of models of engagement. We accept the evidence of the claimant that he was not given a choice of models of engagement. He was told that they would pay through an umbrella company. We did not hear evidence from Mr Blake, who spoke to the claimant on behalf of the second respondent, about the conversation or see any notes or transcript of a recording of the telephone conversation (if a recording was made). We are supported in our acceptance of the claimant's evidence about this conversation by the fact that the claimant already had a limited company. Had he been aware that using this was an option, he would most likely have used this. We accept the claimant's evidence that he was told there would be a pay rate of £25 per hour. This was not described as an assignment rate. These findings are supported by the subsequent emails from the second respondent which all refer to a pay rate of £25 per hour and not an assignment rate. We accept the claimant's evidence that he was not told that £25 per hour was the rate that would be paid to the umbrella company and that his gross rate of pay would be something less than this, after deduction of the umbrella company's profit element and various employer costs.

13. On 27 November 2020 Mr Blake emailed the claimant a list of umbrella companies the claimant could use through the second respondent if successful. There is no mention in the email of using any other model of engagement.

14. The key information document contains information in relation to a number of different models, including engagement by the second respondent under a PAYE contract for services (not a contract of employment), employment via various different umbrella companies and engagement using the individual's own limited company. The claimant had a limited company since, prior to returning to teaching, he had been running his own business.

15. It is common ground that the second respondent gave the claimant a list of umbrella companies. He approached the first of the companies on this list, which was the first respondent. The claimant had a conversation with Billy Barnett of the first respondent. Phone calls are routinely recorded but we were told the recording no longer existed, since they are only retained for two years. This would suggest the recording was destroyed in or around the end of November or beginning of December 2022, about 8 months after proceedings were started against the first respondent and about 2 months after the preliminary hearing at which the unauthorised deduction from wages claim was added by way of amendment. There is a dispute as to whether Billy Barnett told the claimant that employer's costs would come out of the £25 per hour before the claimant was paid, less normal employee deductions. We accept that employees of the first respondent are trained to explain this to potential employees. The claimant accepted that the document "Your Payslip Explained" (545) was sent to him as an attachment to an email sent on 2 December 2020 (543). The sample reconciliation statement includes the statement "rate: Your contract rate of pay, given to you by your agency, which includes all employment costs." No personalised illustration of what the claimant would receive was provided to him in writing. Mr Langham told us that the first respondent's practice had now changed, and a personalised illustration was now routinely sent to potential employees. We find that it was not clearly explained to the claimant that the £25 an hour rate he was told by the second respondent was not the gross hourly rate to be paid to the claimant but that the gross hourly rate would be something less than this, arrived at after deducting the first respondent's profit or margin and employer's costs including employer's NICs**.**

16. On 3 December 2020, the claimant entered into a contract of employment with the first respondent. This contract was drafted so that it could cover a number of individual assignments whilst the claimant retained continuity of employment with the first respondent. The clause in relation to payment read as follows:

> "3.1 Your pay includes Salary and Commission; a Guarantee in relation to salary; and in addition, you may in certain circumstances be reimbursed eligible expenses, all as set out below.
>
> 3.2 Salary: We will pay you at the applicable National Minimum Wage (or, if applicable, the National Living Wage) rate, to commence when the first Client Assignment commences, for all hours actually worked on Assignment, subject in all cases to you complying with all applicable Company procedures and requirements.
>
> 3.3 You will be paid weekly or monthly in arrears, directly into your bank account, as indicated in your current Employee Assignment Schedule from your agency.
>
> 3.4 Guarantee: If at the end of any full 12 month period of employment commencing on the Start Date or an anniversary thereof we have not

offered you at least 336 hours of paid work, we will pay you at the Pay Rate for such number of hours as is represented by 336, less the number of hours in respect of which we have previously paid you during that we month period.

3.5 Commission: To the extent that your gross taxable pay (excluding holiday pay) exceeds your salary calculated at the applicable National Minimum Wage (or, if applicable, the National Living Wage) rate, it constitutes your commission which is identified separately on your payslip."

17. The contract of employment did not state how much in total the claimant's gross pay would be. The contract does not set out how "commission" is arrived at.

18. Mr Langham gave evidence that the claimant would understand what his rate of pay was because of the assignment schedule sent by the second respondent and through the conversation with the first respondent's representative.

19. The contract refers to an "Employee Assignment Schedule" from the employee's agency e.g. at clause 3.3 which states that the employee will be paid weekly or monthly in arrears, as indicated in the current Employee Assignment Schedule from their agency. We find that the document "Temporary Worker – Assignment Details" sent by the second respondent to the claimant on 9 December 2020 (see paragraph 25 below) is the document to which this description applies, in relation to work at Wakefield College; this accords with what Ms McGrath put to the claimant in cross examination. However, this document does not state whether payment will be weekly or monthly. We have not been shown a similar document in relation to the work for Stockport College.

20. Clause 4 of the employment contract deals with holiday pay. This states at 4.1:

"Your holiday entitlement will accrue at the rate of 12.07% of your hourly rate for each hour worked, holidays will be paid your normal hourly rate. The holiday element of your payments will be separately identified on your payslip. As holiday payments will be included each time you receive payment, you are strongly advised to set aside and save up the holiday element in order that you have funds to draw on at the time you take holidays. You will be expected to plan and to take your 5.6 weeks of holiday entitlement each year."

21. The contract does not define "normal hourly rate". Although clause 3.2 of the contract states that the employee will be paid at the applicable National Minimum Wage (NMW) rate for all hours worked, the holiday pay was not calculated on the basis of NMW but on NMW plus what is described in the payslips as "additional pay" (see paragraph 29).

22. Clause 2.1 in the contract provides: "You will promptly notify us in writing immediately upon it coming to your notice that you may have grounds for complaint concerning any aspects of such entitlements as you may have under the Agency Workers Regulations 2010 in order that we have a proper opportunity to investigate and make any necessary changes".

23. On 8 December 2020, Jonathan Blake of the second respondent emailed the claimant. He set out details about the claimant starting work at Wakefield College the next day and hours to be worked. The email included the statement: "Your rate of pay is £25 per hour". He wrote that the claimant's official contract would be sent out the next day.

24. On 9 December 2020 the second respondent emailed the first respondent with assignment details as follows:

> "Mr Matthew Binns has been placed and starting on December 9 2020 until July 1 2021 at Wakefield College. Job title: painter and decorator lecturer. The pay rate is £25."

25. On the same day the second respondent sent to the claimant a document entitled "Temporary Worker – Assignment Details" (286). This confirmed the claimant's temporary assignment working for Wakefield College as a painting and decorating lecturer starting 9 December 2020 for 19.5 hours per week. "Pay rate" was stated to be £25 per hour. Following the details of the assignment, the document directed the claimant, if operating through an umbrella company, to forward that company a copy of that email. The section of the document headed "Our standard terms" included the following:

> "If you are supplying your services through an umbrella limited company the umbrella limited company is engaged through the attached umbrella limited company's terms of engagement. These terms will apply to all assignments undertaken through Morgan Hunt by you whilst you remain engaged by the same umbrella limited company. The umbrella limited company will itself engage you directly under its own terms of engagement."

26. There is nothing in that document to inform the claimant that the rate of pay he would receive for the job would be less than £25 per hour. That rate is described as a "pay rate". The term "assignment rate" that was used in evidence by the respondents does not appear anywhere in that document. It is common ground that £25 per hour was the rate which the second respondent paid to the first respondent. The amount which Wakefield College paid the second respondent was £35.18 per hour.

27. The claimant started at Wakefield College on 9 December 2020 as an agency lecturer. His evidence as to his duties was unchallenged by the respondents. This included planning, preparation, teaching and assessment, attending meetings, CPD and keeping records. He was also involved in curriculum development.

28. In normal weeks, from the payslips, the claimant was working 21 hours a week.

29. The amount paid to the claimant by the first respondent was less than £25 per hour gross. The claimant received weekly payslips and reconciliation statements. These begin at page 428 of the bundle. The payslips showed payments for basic pay at the rate of the National minimum wage, holiday pay and additional pay. From the total of these amounts, was deducted tax and national insurance in the normal way for an employee. Whilst the basic pay was calculated in units representing hours worked, the additional pay was one unit of the total amount of that additional pay. For example, on the payslip for the week ending 13 December 2020, the additional pay was £148.35. The basic pay was £117.72, based on 13.5 hours worked at the rate of £8.72 per hour.

Holiday pay was £32.11, which is 12.07% of the total of the basic pay and additional pay. The reconciliation statement which accompanied that payslip starts with what was described as company receipts, being basic pay at 13.5 hours times £25 per hour, giving a total of £337.50. From that total was deducted what was described as company costs as follows:

company margin £20

expenses £0

employer's NIC £17.83

pension costs £0

holiday provision £32.11

apprenticeship levy £1.49

total deductions £71.43

30. After deducting £71.43 from the £337.50 this left £266.07, described as receipts less costs. The holiday provision of £32.11 was added back to this figure, giving a total gross for tax of £298.18. Whilst the reconciliation statement does not set out this calculation, it is apparent that the "additional pay" shown on the payslip is arrived at by deducting the holiday pay and the basic pay from the gross for tax.

31. The other payslips and reconciliation statements are in similar form.

32. The claimant's assignment to Wakefield College was extended and he continued working there until 23 September 2021. An email from the second respondent dated 6 April 2021 (357) records a placement from 5 April 2021 to 1 July 2021 and states "the pay rate is £25". Although Ms McGrath submitted that this document and the 9 December 2020 document clearly listed an assignment rate of £25 per hour, the term "assignment rate" is not used in either document.

33. The claimant became unhappy at Wakefield College and asked the second respondent if they could find him another assignment. The second respondent found him an assignment at Stockport College to start on 24 September 2021.

34. The claimant continued to be employed by the first respondent when he moved to work at Stockport College. The second respondent paid the first respondent £27.50 per hour for the hours the claimant worked at Stockport College. Trafford College paid the second respondent £42.28 per hour for the hours worked by the claimant. The claimant says, and we accept, that he verbally agreed with Alex Guy of the second respondent a pay rate of £27.50 per hour, later rising to £27.80 per hour for working at Stockport College. We were not shown an assignment document giving the rate of pay as we had for the assignment to Wakefield College. By the time he started with Stockport College the claimant must have known, based on his experience with the assignment at Wakefield College, that he was likely to be paid at a lower rate than the hourly rate of £27.50 per hour. The claimant was not given a figure for gross pay by the second or first respondent prior to receipt of the first payslip and reconciliation statement after he started work at Stockport College.

35. The claimant did not raise any issue with the respondents about not receiving £25 per hour and then £27.50 per hour gross until his agenda in preparation for the preliminary hearing on 6 September 2022. We find that the claimant, when he got his first payslip thought he was not getting as much as he had understood he would be getting and thought this unfair but some pay was better than none. He understood that colleges like using agencies and thought that, if he kicked up a fuss, he would not get work again. He did not form the view that it was unlawful until he did further research in preparation for the preliminary hearing.

36. From the payslips, the claimant's working hours at Stockport College fluctuated, from 7.5 to 22.5 hours per week.

37. In or around February 2022, the claimant became aware, by listening to the programme Moneybox on the radio, that rolled up holiday pay was unlawful. The claimant called Stockport College to discuss this. They told him to take it up with the second respondent. He tried contacting the second respondent who told him to raise it with the first respondent.

38. On 17 February 2022, the claimant sent Emily, in customer services at the first respondent, a formal grievance, following a conversation with her that day. He wrote that he believed he was not being paid holiday pay correctly. He included a link to information on the gov.uk website to which he said he had been referred by ACAS. He wrote:

> "The above is clear about rolled up pay.
>
> Secondly, my contract of employment with yourselves states that holiday will accrue at 12.07% of my hourly rate. It does not clearly state that it is included within my hourly rate (which would be rolled up pay, which is covered in the above information).
>
> In addition to speaking with ACAS, I have spoken to an employment Solicitor. Both believe that I have a genuine grievance relating to unfair deductions and/or breach of contract and/or breach of the working time directive.
>
> I believe that holiday pay should be calculated at 12.07% of my hourly rate and paid in addition to my hourly rate."

39. On 18 February 2022, the claimant sent a further email to Emily in which he asked her to ensure that the 12 week rule was being applied. He wrote that Stockport College paid full-time staff 43 days per year. He included in his email a link to the section on the ACAS website "agency workers - understanding your employment rights as an agency worker".

40. In the period 3 - 4 March 2022, the claimant had an email exchange with Peter Langham of the first respondent about holiday pay. The claimant asserted that it was not legal to include holiday pay in the pay rate and asserted that he was receiving less holiday allowance than he would do at the college, referring to the Agency Workers Regulations. Mr Langham, in the correspondence, accepted that the European Court of Justice had found that rolled up holiday pay was contrary to the Working Time Regulations but referred the claimant to the part of the judgment that said, if it was transparent and comprehensible that the sums in question were in respect of annual

leave, then those sums could be set off against the employer's holiday pay liability. In emails on the 3 and 4 March 2022, Mr Langham gave the claimant the opportunity to switch to a system of accruing holiday pay and it being paid at the claimant's request. The claimant refused, writing that the CAB had directed him to ACAS for early conciliation and he did not think it in his best interest to agree any change at that time.

41. The claimant began early conciliation with ACAS against the first respondent on 10 March 2022. The ACAS early conciliation certificate was issued on 18 March 2022.

42. In the period 18 - 24 March 2022, the claimant was in contact with the Freelancer & Contractor Services Association (FCSA), a membership body committed to raising standards and setting best practice in the employment services sector, in relation to his grievance against the first respondent. The FCSA ceased to be involved when the claimant informed them he had started early conciliation.

43. The claimant presented his claim against the first respondent on 24 March 2022.

44. The claimant ended his employment with the first respondent on 3 July 2022.

45. The second respondent was added as a respondent in November 2022.

46. We were shown some evidence about the employment terms of college lecturers employed directly by Wakefield and Stockport Colleges. We were shown an advert for a job with Trafford College as a lecturer multi-skills 17.5 hours per week, salary £29,658-£40,146. Benefits included 57 days annual leave inclusive of bank holidays. We assume that this is the holiday entitlement for someone working full time and assume full time hours to be 37 hours per week, equivalent to the full time working hours at Wakefield College. We were also shown an advert for a lecturer in early years at Wakefield College working 18.5 hours per week, actual salary for 18.5 hours for a qualified lecturer being £15,068 - £16,955. Benefits included 37 days annual leave (pro rata for part-time) plus bank holidays plus 5 college closure days.

47. The second respondent relied on what Trafford College and Wakefield College had written in the grounds of resistance. In both those responses, those respondents wrote that there were no individuals directly employed by the College on the same or substantially similar terms and conditions as the claimant and/or other teaching agency staff. They wrote that the role of teaching agency staff was separate and distinct from any role which existed within the College and they did not accept the College teaching staff were comparable to teaching agency staff given the differing and significantly broader range of duties that College teaching staff were required to carry out. No details were given as to how the range of duties carried out by directly employed college teaching staff was said to be significantly broader than that of agency teaching staff. Wakefield College wrote that College teaching staff were contractually entitled to 50 days paid annual leave in each holiday year, including bank holidays and closure days. Trafford College wrote that College teaching staff were contractually entitled to 57 days paid annual leave in each holiday year, including bank holidays and closure days. Both respondents asserted that, had the claimant been directly employed by those colleges, he would have received 5.6 weeks holiday in accordance with the Working Time Regulations 1998. No one from Trafford College

and Wakefield College gave evidence in these proceedings. As previously noted, they settled the claims brought by the claimant prior to this hearing.

48. In an undated letter to Suzanne Black of Wakefield College, Jonathan Blake of the second respondent asked Ms Black, to ensure compliance with the Agency Worker Regulations, to provide details of the pay, working hours and paid holiday entitlement which would apply to the agency worker if they had engaged him directly for the role of painter and decorator lecturer. The undated reply headed "AWR comparator information for the equivalent permanent employee in the same role" includes the information that the annual leave entitlement would be 37 days annual leave plus 5 days college closures and eight bank holidays.

49. As noted in paragraph 27, the claimant's evidence as to his duties was unchallenged by the respondents. This included planning, preparation, teaching and assessment, attending meetings, CPD and keeping records. He was also involved in curriculum development. We find, based on this evidence and the letter from Ms Black, that the claimant, as an agency worker, was doing substantially the same duties as he would have done had he been employed directly by the Colleges. The assertions of the Colleges in their responses in these proceedings, which the second respondent relies on, employed college lecturers have a differing and significantly broader range of duties to that of agency lecturers were of a generalised nature and we do not consider those generalised assertions to have sufficient weight to outweigh the evidence of the claimant and the letter of Ms Black.

50. During his employment with the first respondent, the claimant never requested annual leave. The college closed down at certain times, so he did not do paid work for the respondent during those periods. The claimant said that he worked on houses he owned during breaks from the college but, if he had been paid holiday pay at the time, he would have paid someone to do the work and would have rested.

Submissions

51. Ms McGrath relied on written submissions on behalf of the first respondent. Mr Crow made brief oral submissions on behalf of the second respondent. The claimant made brief oral submissions.

52. The first respondent submitted, in summary, that the £25 and £27.50 respectively were the assignment rates negotiated and agreed between the claimant and the second respondent and not the claimant's gross hourly pay. The assignment rate was the amount that Umbrella Company Ltd would invoice the second respondent for. The first respondent submitted that the first respondent explained to the claimant the deductions that would be made prior to calculating the claimant's gross taxable pay and the claimant agreed to a contract which provided for payment of NMW plus additional payments to the extent that the claimant's gross taxable pay, excluding holiday pay, exceeded his salary. His minimum hourly pay was guaranteed at NMW. The first respondent submitted that there was no deduction from wages.

53. The first respondent submitted that holiday pay entitlement was included in the assignment rate received from the second respondent. The payment of holiday pay was transparent. The claimant never requested annual leave so was never refused leave. The claimant was not deterred or prevented from taking annual leave.

54. In relation to clause 2.1 of the contract, the first respondent submitted it was not responsible for ensuring that 12 week rights under the AWR were complied with. Clause 2.1 did not impose an absolute obligation on the first respondent to investigate and make any changes.

55. The second respondent submitted that the claimant had agreed a rate, through an umbrella model, of £25 per hour. The claimant did not make any enquiry about the rate being different to his understanding when he first received his pay. Most people would expect an explanation if they did not receive the right amount.

56. In relation to the claim about a breach of the AWR in relation to holiday entitlement, the second respondent relied on the information provided in the responses of the Colleges about agency workers doing different roles to directly employed lecturers. The second respondent disputed it was in breach of the AWR.

57. The claimant submitted that the only model offered was the umbrella model. The respondents were not able to provide evidence of the pay rate. The claimant submitted that the pay rate was not an assignment rate; this was his gross pay.

58. The first respondent operated rolled up holiday pay when the government said this cannot happen. The claimant said this dissuaded him from taking breaks. Part of his gross salary was reallocated and called holiday pay.

59. The second respondent had comparator information from Wakefield College and did not act on it. The claimant questioned why the first respondent did not provide a recording of the call, if it helped their case, since the first respondent keeps recordings of calls for 2 years.

60. The parties did not refer the Tribunal to any case law, other than Ms McGrath providing to the Tribunal with copies of two decisions employment tribunals: **Mr D Holford v Umbrella Company Limited** case number 3300108/2022 and **Mr S Zajota v Umbrella Company Ltd** case number 2201575/2022. Mr Holford's case was a judgment only, without written reasons. Mr Zajota's case included written reasons. Decisions of other employment tribunals do not bind this Tribunal, although they may have persuasive effect. For the reasons we explain in our conclusions, we have reached a different decision to that reached in the Zajota case.

61. We have not had any assistance from the parties in deciding on the implications of legal authorities which may be of relevance.

The Law

Unauthorised deductions from wages

62. Section 13(1) of the Employment Rights Act 1996 provides that an employer shall not make a deduction from wages of a worker employed by him unless 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 the worker has previously signified in writing his agreement or consent to the making of the deduction. An employee has a right to complain to an Employment Tribunal of an unlawful deduction from wages pursuant to Section 23 of the Employment Rights Act 1996.

Working Time Regulations 1998 – right to paid annual leave

63. Regulations 13 and 13A of the Working Time Regulations 1998 (WTR) provide workers with a combined entitlement to 5.6 weeks' paid annual leave each year.

64. Regulation 30(1) provides that a worker may present a complaint to an employment tribunal that his employer has, amongst other things, "refused to permit him to exercise any right he has under (i) regulation…. 13 or 13A".

65. There has been case law about whether it is lawful for an employer to provide what is described as "rolled up holiday pay" i.e. an amount included in the hourly rate of pay for holiday, rather than paying the worker for holiday when taken. A number of domestic authorities resulted in a decision of the ECJ in **Robinson-Steele v R D Retail Services Ltd [2006] IRLR 386.** In that case, Mr Robinson-Steele was paid for annual leave by means of a payment together with and additional to his hourly rate at 8.33% of his hourly rate. The ECJ decided that Article 7 of Council Directive 93/104/EC precluded the payment for minimum annual leave within the meaning of that provision from being made in the form of part payments staggered over the corresponding annual period of work and paid together with the remuneration for work done, rather than in the form of a payment in respect of a specific period during which the worker actually takes leave. The ECJ also decided that, where payments have been made in respect of minimum annual leave, Article 7 does not preclude, as a rule, sums additional to remuneration payable for work done which have been paid, transparently and comprehensibly, as holiday pay, from being set off against the payment for specific leave. However, the ECJ said that Member States were required to take the measures appropriate to ensure that practices incompatible with Article 7 are not continued.

66. The Working Time Regulations 1998 were not amended, following this decision of the ECJ. However, government guidance on the gov.uk website states: "Holiday pay should be paid for the time when annual leave is taken. An employer cannot include an amount for holiday pay in the hourly rate (known as 'rolled-up holiday pay')." The guidance also states that "If a current contract still includes rolled-up pay, it needs to be re-negotiated."

67. Domestic case law has not resolved definitively whether a worker can claim that he or she has been 'refused' annual leave, for the purposes of regulation 30, if they have not made an express request for leave which has then been refused. Case law of the ECJ suggests that domestic law should provide an effective remedy for an employer's failure to afford an opportunity to take the basic 4 weeks' annual leave, regardless of whether the worker has expressly requested it: **Kreuziger v Land Berlin**

Case C-619/16, ECJ, and **Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV v Shimizu Case** C-684/16, ECJ. The implications of these decisions for domestic law, following the UK's departure from the European Union, may be the subject of full argument in future cases. We were not addressed on these matters by the parties but, given the basis for our conclusions on the holiday pay issue, we have not considered it necessary to grapple with the implications of the ECJ decisions for the WTR.

Regulation 5 of the Agency Worker Regulations 2010

68. Regulations 5 and 7 of these Regulations have the effect, amongst other things, that, after a qualifying period of work in the same role for a hirer for 12 continuous calendar weeks, an agency worker is entitled to the same basic working and employment conditions as the worker would be entitled to for doing the same job had they been recruited by the hirer other than by using the services of a temporary work agency and at the time the qualifying period commenced. Regulation 5(2) provides:

> "For the purposes of paragraph (1), the basic working and employment conditions are (a) where A would have been recruited as an employee, the relevant terms and conditions that are ordinarily included in the contracts of employees of the hirer."

69. Regulation 6(1) defines "relevant terms and conditions", which include annual leave.

70. Regulation 14(1) provides that a temporary work agency shall be liable for any breach of regulation 5, to the extent that it is responsible for that breach. A temporary work agency will have a defence to a claim if it establishes the matters set out in regulation 14(3). The second respondent does not rely on this defence so there is no need for us to set this out.

Case law relating to interpretation of contracts of employment

71. The written terms of a contract of employment may not always correctly record the agreement reached by the parties. The Supreme Court in **Autoclenz Ltd v Belcher and ors 2011 ICR 1157, SC,** held that 'the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part'. Whilst the Supreme Court was considering the issue of employment/worker status in that case, we understand the statement in relation to construction of the terms of an employment contract to have wider relevance in relation to the construction of contractual terms than simply in relation to terms relevant to employment/worker status.

Obligations on an employer to provide a written statement of employment particulars

72. Section 1 Employment Rights Act 1996 provides that an employer must give to the worker a written statement of employment particulars. Particulars which must be included in this statement include: "the scale or rate of remuneration or the method of calculating remuneration."

Conclusions

Unauthorised deductions from wages

73. The essential issue in relation to this complaint is, what was the hourly rate the claimant should have been paid? Was it £25 per hour, in respect of work for Wakefield College, then £27.50 per hour, in respect of work for Trafford College, or was it the amount arrived at after employer costs and the first respondent's profit element had been deducted from those hourly rates?

74. The written contract term about pay, clause 3, does not allow the claimant to understand his rate of pay or how this is to be calculated as is required by s.1 ERA. It is drafted in what appears to be a very complicated and artificial manner, which we consider does not accord with the reality of the agreement between the parties. Clause 3.2 provides for the payment of National Minimum Wage. However, clause 3.1 indicates that pay includes salary and what is described as commission. On a construction of the written contract terms alone, this indicates that the claimant's pay does not just consist of pay at National Minimum Wage rate. It also includes "commission". However, the clause dealing with "commission" (clause 3.5) sets out no mechanism for how this is to be calculated. It does not set out "the scale or rate of remuneration or the method of calculating remuneration" as required for a statement complying with section 1 Employment Rights Act 1996. We do not consider that this clause gives the first respondent the right to pay the claimant only at National Minimum Wage rate. It gives the claimant a right also to what is described as "commission" but does not allow the claimant to understand how that "commission" is to be arrived at.

75. We conclude, taking an **Autoclenz** approach to interpretation, that the reality of the bargain struck between the first respondent and the claimant does not mean that the respondent was contractually entitled to pay to the claimant only National Minimum Wage (NMW) and no commission. We conclude that neither of the parties to the contract could have believed this to be the case. The claimant was being engaged to work as a college lecturer. This was not a job which either party would expect to be paid at NMW rates. The claimant had been told by the second respondent that the pay rate was £25 per hour. The first respondent relied on the claimant understanding his pay rate from the assignment details provided by the second respondent. The document relied on as the Employee Assignment Schedule for the Wakefield College job, refers to a pay rate of £25 per hour but does not say this is the rate to be paid to the first respondent and that the claimant's pay rate is something less than this. We have not been shown a document for the Trafford College job but have accepted the claimant was told the pay rate was £27.50 per hour.

76. We found that it was not clearly explained to the claimant by either respondent that his gross hourly pay was to be a figure less than the hourly rate given to him by the second respondent, arrived at by deducting the first respondent's profit and other "employment costs". The written contract did not set out a mechanism, as used in the

reconciliation statement to arrive at a gross pay rate for the claimant. We do not reach any conclusion as to whether, if the contractual agreement was in a different form and the claimant had been provided with a proper explanation, the first respondent would have been entitled to deduct "employment costs" in arriving at the claimant's gross pay since that is not the situation before us.

77. We conclude that, in relation to the Wakefield College job, the agreement was that the claimant should be paid at the rate of £25 per hour. This was the only specific figure referred to by either respondent and the only "pay rate" that is set out in the documents sent to the claimant by the second respondent, on which the first respondent relies. The first respondent's submissions refer to this rate being the "assignment rate", arguing that this is different from the claimant's gross pay rate. None of the documents refer to an "assignment rate" and provide a different pay rate to be paid to the claimant. It would have been open to the first and second respondents to set up transparent arrangements, giving the claimant a gross hourly pay rate, and setting out a different, higher, rate, to be paid by the second respondent to the first respondent which would allow the first respondent to make a profit and pay the relevant employment costs. The respondents chose not to do this.

78. We conclude, in relation to the Trafford College job, that the agreement was that the claimant should be paid at £27.50 per hour.

79. We conclude that there were no relevant provisions of the claimant's contract or prior agreement in writing, complying with section 13(1)(a) or (b) that allowed the first respondent to make the deductions for its profit and "employment costs".

80. We conclude that the first respondent made unauthorised deductions from wages by not paying the claimant for hours worked at Wakefield College and then at Trafford College at the rates of £25 and £27.50 per hour respectively.

81. The complaints of unauthorised deductions from wages are well founded.

82. We have read the two employment tribunal judgments provided to us by Ms McGrath. The decision in the case of Mr Holford has no written reasons. We cannot tell, therefore, in what respects, if any, the factual situation is the same as in Mr Binns' case. We find this case of no assistance to us for this reason. The case of Mr Zajota has written reasons. The factual scenario in many respects seems to be similar, including the clause of the employment contract dealing with pay, although the element over NMW is described as "additional pay" rather than commission. We cannot tell whether the take home pay illustrations provided (paragraphs 9 and 17) showed Mr Zajota's take home pay on the basis of actual figures applicable to him or on other figures. The judge concluded that, in respect of a second period of employment with Umbrella Company Ltd (the claimant making no claim about unauthorised deductions in respect of the first), the claimant had agreed to terms by which the gross salary was the amount of an assignment rate less deductions. There was correspondence between Mr Zajota and the respondent in which the respondent explained how the gross and net pay were generated, although this appears to have been after Mr Zajota started work. We consider there may be factual differences between Mr Zajota's case and that of Mr Binns which led the judge to reach the conclusions which they did. However, even if the factual situations were similar in material respects, we consider that, for the reasons we have given, our conclusions should stand. Decisions of other employment tribunals are not binding on us, although

we they may be persuasive. The decision in Mr Zajota's case has not persuaded us that we are wrong in our conclusions.

WTR – holiday pay

83. The mechanism adopted by the first respondent for paying holiday pay was to pay an amount of 12.07% of NMW plus what is described in the payslips as "additional pay" in each payslip, rather than paying at the time leave was taken.

84. The total of NMW plus "additional pay" on which the 12.07% was calculated was less than what we have found to be the gross pay of £25 per hour for the Wakefield College job and £27.50 per hour for the Trafford College job. The holiday pay element was carved out of £25 or £27.50 hourly rate. We conclude, therefore, that the claimant was not paid anything for holiday in addition to his pay for hours worked.

85. Since the respondent was showing, on each payslip, that it was not going to pay the claimant for holiday on top of the pay calculated at £25 or £27.50 per hour, we conclude that the respondent was refusing the claimant his entitlement under the WTR to paid leave. We conclude that the first respondent was in breach of regulation 30 of the WTR by refusing the claimant paid leave.

Breach of contract

86. Holiday pay was calculated at the rate of 12.07% of £25 per hour (£27.50 per hour in respect of Trafford College work) less profit and employer costs. For example, the payslip on p.428 shows that the claimant received holiday pay of £32.11 when he had worked 13.5 hours. This is 12.07% of the total of "basic pay" of £117.72 and "additional pay" of £148.35 (both of which were arrived at after deduction of profit and employer costs from 13.5 x £25 = £337.50). 12.07% of 337.50 would be £40.73.

87. The contract provides for entitlement at 12.07% of the claimant's hourly rate. The hourly rate is not defined in the contract but, in accordance with our conclusion that the claimant's hourly rate of pay was £25 per hour, we conclude it was £25 per hour in respect of work at Wakefield College then £27.50 per hour when working at Trafford College. As shown in the example above, the claimant was not paid holiday pay calculated on the hourly rate but on the hourly rate less profit and employer's costs.

88. We conclude that the first respondent was in breach of contract by not paying the claimant at the rate of 12.07% of £25 per hour and then £27.50 per hour in addition to the £25 or £27.50 per hour gross pay.

Other breach of contract

89. We conclude that clause 2.1 did not put the first respondent under any obligation to investigate any alleged breach of the Agency Workers' Regulations which the claimant brought to their attention and make necessary changes. The clause put the claimant under an obligation to bring certain matters to the attention of the first respondent but the clause provides that this is "in order that we have a proper opportunity to investigate and make any necessary changes". This is not the wording of an obligation on the first respondent; it is to give them an opportunity to investigate and make changes, it does not require them to do so. Since we conclude there was

no contractual obligation on the first respondent to investigate any alleged breach of the Agency Workers' Regulations which the claimant brought to their attention and make necessary changes, we conclude that the first respondent was not in breach of contract by not carrying out an investigation and making changes.

AWR claim

90. The claimant, when with Wakefield College, worked normally 21 hours per week, 3 days a week. Converting his entitlement to 5.6 weeks' leave to days, that would give the claimant a holiday entitlement of 16.8 days.

91. The claimant when with Trafford College, worked hours varying from 7.5 to 22.5 per week. If he worked 3 days per week, this would have given him a holiday entitlement of 16.8 days per annum.

92. Based on the evidence of the claimant, the letter from Suzanne Black and the adverts, we conclude that the claimant was doing substantially the same duties as he would have done if engaged directly by the colleges. If the holiday entitlement for a directly engaged lecturer would have been higher, there is a breach of AWR once the claimant has completed the qualifying period of twelve weeks which the particular hirer.

93. After 12 weeks, the claimant was entitled with Wakefield College to a pro rata amount of holiday entitlement based on full time entitlement (37 hours) of 50 days per annum = 21/37 x 50 = 28.38 days per annum. This is higher than he was entitled to under his contract, so there was a breach of AWR after 12 weeks in not providing him with that higher entitlement. The claimant started with Wakefield College on 9 December 2020. The date 12 weeks' later is 3 March 2021. In the period 3 March 2021 to 23 September 2021 (the day he ended work for Wakefield College), the claimant was entitled to the increased holiday entitlement of 28.38 days per annum (calculated on a pro rata basis).

94. After 12 weeks with Trafford College, the claimant was entitled to annual leave of 21/37 x 57 = 32.35 days. This is higher than he was entitled to under his contract, so there was a breach of AWR after 12 weeks in not providing him with that higher entitlement. The claimant started with Trafford College on 24 September 2021. The date 12 weeks' later is 17 December 2021. In the period 24 September 2021 to the day he ended work for Trafford College, the claimant was entitled to the increased holiday entitlement of 32.35 days per annum (calculated on a pro rata basis).

Section 38 Employment Act 2002

95. For reasons we have given, we have concluded that the first respondent did not comply in all respects with its obligation to provide a written statement of employment particulars to the claimant. Since the claimant has succeeded in complaints listed in Schedule 5 to the 2002 Act, we are required, in accordance with section 38, to make an award of 2 weeks pay and may award 4 weeks pay, because of that failure, unless there are exceptional circumstances which would make that unjust or inequitable.

96. The Tribunal will invite submissions at the remedy hearing as to whether the Tribunal should make an award or additional award of 2 or 4 weeks' pay pursuant to section 38 Employment Act 2002.

Employment Judge Slater
Date: 2 May 2023

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
2 May 2023

FOR THE TRIBUNAL OFFICE

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