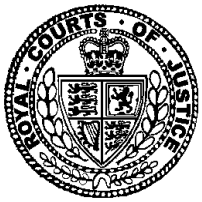

Neutral Citation Number: [2019] EWCA Civ 1185

Case No: A2/2018/1073

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM Employment Appeal Tribunal
Mr Justice Choudhury, Mr H Singh & Mr D G Smith

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/07/2019

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal, Civil Division))
LORD JUSTICE LEWISON
and
LADY JUSTICE KING

- -

Between :

DOMINIK KOCUR	**Appellant**
- and -	
(1) ANGARD STAFFING SOLUTIONS LIMITED	
(2) ROYAL MAIL GROUP LIMITED	**Respondents**

- -
- -

Mr Caspar Glyn QC and **Mr Nathaniel Caiden** (instructed by **Cubism Law**) for the **Appellant**
Mr Thomas Linden QC (instructed by **DAC Beachcroft Llp**) for the **Respondents**

Hearing date: 2nd April 2019

- -

Approved Judgment

Lord Justice Underhill :

INTRODUCTION

1. The workforce at Royal Mail's Leeds Mail Centre is made up of approximately 1,050 of its own employees, who form the permanent core, supplemented by workers supplied, on an as-required basis, by a wholly-owned subsidiary called Angard Staffing Solutions Ltd. The agency workforce is typically used for about 300 shifts per week.

2. The Claimant has been employed by Angard since January 2015 and worked at the Leeds Mail Centre most weeks thereafter. Although there were variations in his pattern of working he was typically allocated less than twenty hours work per week.

3. In November 2015 the Claimant brought proceedings in the Employment Tribunal against both Angard and Royal Mail alleging various breaches of the Agency Workers Regulations 2010 ("the Regulations").

4. By a Judgment and Reasons sent to the parties on 16 September 2016 an ET sitting at Leeds, chaired by Employment Judge Jones, upheld the claim in part, but it dismissed claims (a) that he did not receive the same rest breaks as Royal Mail employees and (b) that he was entitled under the Regulations to be allocated equivalent hours of work to them.

5. The Claimant appealed. By a judgment handed down on 23 February 2018 the Employment Appeal Tribunal (Choudhury J, Mr Harminder Singh and Mr Desmond Smith) allowed his appeal as regards the rest breaks claim but dismissed it as regards equivalence of hours.

6. The Claimant appeals, with the permission of the EAT itself, against the dismissal of his appeal on the equivalent hours issue. He was represented before us by Mr Caspar Glyn QC, leading Mr Nathaniel Caiden. The Respondents, Angard and Royal Mail, were represented by Mr Thomas Linden QC. In the ET the Claimant appeared in person and the Respondents were represented by Ms Aileen McColgan of counsel. In the EAT the Claimant was represented by Mr Caiden (acting pro bono) and the Respondents by Mr Simon Gorton QC.

7. At the conclusion of Mr Glyn's submissions we decided that the appeal should be dismissed and we did not hear from Mr Linden. These are my reasons for reaching that decision.

THE REGULATIONS AND THE DIRECTIVE

8. The Regulations are the implementation in domestic law of the requirements of EU Directive 2008/104/EC, generally referred to as the Agency Workers Directive ("the Directive"). We were referred in detail to the terms of the Directive as well as the Regulations, and I will take them first.

9. Article 2 of the Directive is headed "Aim" and reads:

> "The purpose of this Directive is to ensure the protection of temporary agency workers and to improve the quality of temporary agency work by ensuring that the principle of equal

> treatment, as set out in Article 5, is applied to temporary agency workers, and by recognising temporary-work agencies as employers, while taking into account the need to establish a suitable framework for the use of temporary agency work with a view to contributing effectively to the creation of jobs and to the development of flexible forms of working."

10. Article 3.1 contains the definitions. I need only set out the definitions at (e) and (f), which read:

> "(e) 'assignment' means the period during which the temporary agency worker is placed at the user undertaking to work temporarily under its supervision and direction;
>
> (f) 'basic working and employment conditions' means working and employment conditions laid down by legislation, regulations, administrative provisions, collective agreements and/or other binding general provisions in force in the user undertaking relating to:
>
> (i) the duration of working time, overtime, breaks, rest periods, night holidays and public holidays;
>
> (ii) pay."

The phrase which is at the heart of the present appeal is "the duration of working time" under (f) (i).

11. Article 5 states "the principle of equal treatment" which is the core provision of the Directive. Sub-paragraph 1 reads, so far as material:

> "The basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job."

Sub-paragraphs 2-5 provide for various potential qualifications to that provision. The only one to which I need draw attention is sub-paragraph 4, which allows member states to provide for "a qualifying period for equal treatment".

12. Article 6 is headed "access to employment, collective facilities and vocational training". The only sub-paragraph which I need quote is 4, which reads:

> "Without prejudice to Article 5(1), temporary agency workers shall be given access to the amenities or collective facilities in the user undertaking, in particular any canteen, child-care facilities and transport services, under the same conditions as workers employed directly by the undertaking, unless the difference in treatment is justified by objective reasons."

13. Our attention was also drawn to some of the recitals. The general approach of the Directive is sufficiently clear from recitals (1), (11) and (12), which read:

> "(1) This Directive respects the fundamental rights and complies with the principles recognised by the Charter of Fundamental Rights of the European Union. In particular, it is designed to ensure full compliance with Article 31 of the Charter, which provides that every worker has the right to working conditions which respect his or her health, safety and dignity, and to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.
> …
>
> (11) Temporary agency work meets not only undertakings' needs for flexibility but also the need of employees to reconcile their working and private lives. It thus contributes to job creation and to participation and integration in the labour market.
>
> (12) This Directive establishes a protective framework for temporary agency workers which is non-discriminatory, transparent and proportionate, which respecting the diversity of labour markets and industrial relations."

14. I turn to the Regulations. The primary operative provision is regulation 5, which gives effect to article 5.1 of the Directive. It is headed "Rights of agency workers in relation to the basic working and employment conditions". Paragraphs (1) and (2) read:

> "(1) Subject to regulation 7, an agency worker (A) shall be entitled to the same basic working and employment conditions as A would be entitled to for doing the same job had A been recruited by the hirer —
>
> (a) other than by using the services of a temporary work agency; and
>
> (b) at the time the qualifying period commenced.
>
> (2) 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;
>
> (b) where A would have been recruited as a worker, the relevant terms and conditions that are ordinarily included in the contracts of workers of the hirer, whether by collective agreement or otherwise, including any variations in those relevant terms and conditions made at any time after the qualifying period commenced."

15. Paragraph (3) of regulation 5 provides that paragraph (1) shall be deemed to have been complied with where:

> "(a) an agency worker is working under the same relevant terms and conditions as an employee who is a comparable employee, and
>
> (b) the relevant terms and conditions of that comparable employee are terms and conditions ordinarily included in the contracts of employees, who are comparable employees of the hirer, whether by collective agreement or otherwise."

"Comparable employee" is defined in paragraphs (4) and (5), but nothing turns on the definition for our purposes.

16. Regulation 6 (1) defines "relevant terms and conditions" for the purpose of paragraphs (2) and (3) of regulation 5 as:

> "terms and conditions relating to –
> (a) pay;
> (b) the duration of working time;
> (c) night work;
> (d) rest periods;
> (e) rest breaks; and
> (f) annual leave."

That list broadly derives from, though it does not precisely reproduce, the definition of "basic working and employment conditions" in article 3.1 (f) of the Directive: see para. 10 above.

17. The remaining paragraphs of regulation 6 define some of the terms used in paragraph (1). For our purposes I need refer only to paragraph (5), which defines "working time", "night work" and "rest period". Those phrases, and indeed each of the terms at (c)-(f) in paragraph (1), appear also in the Working Time Regulations 1998 ("the WTR"), which implement EU Directive 2003/88/EC, the so-called Working Time Directive ("the WTD"): the WTR provide for various limitations on the periods for which a worker may be required to work – specifically "maximum weekly working time" (regulation 4), "length of night work" (regulation 6), "rest periods" (regulations 10 and 11), "rest breaks" (regulation 12) and "annual leave" (regulation 13). The definitions of "working time", "night work" and "rest period" in regulation 6 (1) correspond to the definition of the equivalent terms in the WTR; and although "rest break" and "annual leave" are not defined in the Agency Workers Regulations there is no reason to suppose that they have a different meaning from that of the WTR. I should set out the definition of "working time" in full, namely:

> "(a) any period during which that individual is working, at the disposal of the employer of that individual and carrying out the activity or duties of that individual,
>
> (b) any period during which that individual is receiving relevant training, and

> (c) any additional period which is to be treated as working time for the purposes of the Working Time Regulations 1998 under a working time agreement."

18. Regulation 7 provides for the qualifying period permitted by article 5.4. Paragraphs (1) and (2) read:

> "(1) Regulation 5 does not apply unless an agency worker has completed the qualifying period.
>
> (2) To complete the qualifying period the agency worker must work in the same role with the same hirer for 12 continuous calendar weeks, during one or more assignments."

THE CLAIMANT'S CASE

19. The claim with which we are concerned on this appeal was not part of the complaint advanced in the Claimant's ET1. It was first raised at a preliminary hearing, where he was given permission to amend his claim in terms recorded in the ET's order as follows:

> "6.2 Mr Kocur has not been treated equally with Royal Mail staff in relation to the following two issues which he says falls within Regulation 6 (1)(b) as relating to 'the duration of working time':
>
> 6.2.1 Royal Mail has failed to make work available to Mr Kocur on the same basis as to its own staff
>
> 6.2.2 …"

20. The precise respect in which Royal Mail was said to have made work available on a different "basis" does not appear from that formulation. At the hearing in the ET the Claimant initially said that he was entitled to be offered 39 hours per week, being what he said were the standard hours of work of Royal Mail's own employees. But that was qualified in his closing submissions, which the ET at para. 47 of its Reasons recorded as being that

> "… [Angard] was required to provide the equivalent [working hours] of [Royal Mail's] employees provided that [Royal Mail] had made available sufficient hours and requested such work from [Angard]."

The Claimant was not of course at that stage represented, and Mr Glyn made it clear before us that he did not pursue that revised version of the Claimant's original submission.

21. In the EAT the case advanced by Mr Caiden was, as summarised by Choudhury J at para. 40 of his judgment, that "… if a standard direct recruit would have had a 39-hour working week, the agency worker doing the same job following the 12-week qualifying period should be entitled to the same hours."

THE DECISIONS OF THE ET AND THE EAT

22. The ET addressed this part of the Claimant's claim at paras. 47-51 of its Reasons. I have already set out the relevant part of para. 47. The remaining paragraphs read:

> "48. We do not consider that the directive or [the Regulations] had such a far reaching intention as suggested. This would fundamentally change the relationship between hirers and temporary work agencies if it were what had been intended. The basis upon which [Royal Mail] engages agency workers is, in common with the majority of industry, to supplement its own workforce as and when demand requires. As such the agency workers will always be secondary, in terms of call upon their services, to that of the workforce of the hirer.
>
> 49. The [Regulations] must be read so as to give effect to the European Directive. As is apparent from the language of Article 5, the principle of equal treatment is to provide that the basic working and employment conditions of a temporary agency worker are at least those that would apply if they had been recruited directly by that undertaking to occupy the same job 'for the duration of their assignment at a user undertaking'. The relevant term and condition relating to 'the duration of working time' therefore relates to the particular assignment. It could involve, for example, not requiring employees of the temporary work agency to have to work longer shifts than those of the hirer. It cannot, however, sensibly be construed so as to equate the entitlement to hours of work to that of the employee of the hirer.
>
> 50. The problem is illustrated by posing the question who is the appropriate comparator for the purpose of regulation 5(3) and (4) of [the Regulations]? In the present case, we had provided contracts of employment for operative postal grades employed by [Royal Mail] who worked 39 hours and who worked 8 hours. Under the claimant's proposal, which is the appropriate comparator? If the agency worker were entitled to opt any number of different comparator employees, he could select his own weekly minimum working hours. Could the agency worker then change his mind and choose another comparator with more of fewer hours? Given the number of agency workers used by [Royal Mail], such an arrangement would be unworkable.
>
> 51. Furthermore, the revised submission of the claimant demonstrated the artificiality of this aspect of his claim. It would simply not be possible for [Angard] to give effect to the principle of equivalence of the supply of work was determined in the first instance by the hirer. Demand for agency work waxes and wanes. It is difficult to conceive how a temporary work agency could share the work out appropriately and achieve the equivalence in respect of terms and conditions with all its agency employees who demanded their regulation 5 rights of a

> minimum number of hours work per week by reference to any number of comparator employees. [Angard] has at its disposal 7,000 employees to fulfil [Royal Mail] staff orders. Not only would the number of employees have to be dramatically reduced if the claimant's submission is correct, but the ability to provide the flexibility and fluidity necessary to cope with the frequency changing demand, at the same time as guaranteeing equivalence of hours of [Royal Mail] employee, would be impossible."

23. In the EAT Choudhury J recorded the Claimant's case at para. 40 of his judgment (see para. 21 above) and briefly summarised the parties' submissions at paras. 41-42. He gives the EAT's reasons for dismissing the appeal at para. 44. He starts by observing that the Claimant had failed, either in the ET or the EAT, to identify any specific infringement of the right alleged, which was fatal to his claim in any event. However, he goes on to consider the issue as to the effect of regulation 6 (1) (b). He makes four points, denominated as (a)-(d).

24. Point (a) begins:

> "Whilst a strict literal interpretation of the phrase, '*duration of working time*', could include the number of hours which an employee doing the same work might do, that would produce an absurd or unworkable outcome ..."

In support of that conclusion he simply quotes paras. 48-51 of the ET's Reasons, saying that its analysis appeared to be correct.

25. Point (b) reads:

> "In our view, bearing in mind that the Directive seeks to achieve a balance between flexibility and security, the better interpretation of the phrase, '*duration of working time'*, is, in this context, that the agency worker's working time should not exceed that which would ordinarily apply to employees. Thus, by way of example, if there is a maximum of a six-hour shift for some shifts (e.g. a night shift), an agency worker should not be required to work eight hours."

26. Point (c) reads:

> "The requirement cannot be that there be precise equivalence between the agency worker's hours and those of the employees of the hirer. Any such requirement would entirely remove the flexibility inherent in the agency/hirer relationship."

27. Point (d) addresses a particular point made by Mr Caiden. I return to it at para. 39 below.

THE APPEAL

28. Mr Glyn's core submission, pleaded as ground (1) of the Grounds of Appeal and amplified by certain particular points pleaded as ground (2), was that the ET and the

EAT had erred in law by failing to give regulation 6 (1) (b) what he said was its literal, natural and correct meaning. He contended that the phrase in regulation 6 (1) "terms and conditions relating to … *duration of working time*" naturally refers to any term dealing with the amount of time that a worker works and accordingly naturally covers the term in a contract that specifies the amount of work that the worker is both entitled and required to work. Accordingly, if the term of a comparator's contract of employment specified a 39-hour week the Claimant's entitlement under regulation 5 (1) to "the same … conditions" meant that he was entitled to work that number of hours. He submitted that that construction was consistent with the purpose of the Directive and in particular with the principle of equal treatment stated in article 5.

29. I do not accept either that that construction represents the natural meaning of the phrase "duration of working time" in regulation 6 (1) (b) or that it is consistent with the purpose of the legislation. My reasons are as follows.

30. I start with the words themselves. If one writes the definition of "working time" from paragraph (5) (a) into paragraph (1) (b), it reads:

> "… the duration of any period during which [the] individual is working, at the disposal of [his or her] employer … and carrying out [his or her] activity or duties".

There are elements of repetition or overlap in that definition and for present purposes I can shorten it to "the duration of any period during which the individual is working". (It would be possible to add in the other kinds of "working time" specified at paragraph 5 (b) and (c), but that would unnecessarily complicate the exercise.)

31. Even without any statutory context, I do not think it is natural to describe a term specifying the number of hours in the working week as relating to the "duration" of the "period" during which an individual is working. Mr Glyn referred us to the definition of "duration" in *Black's Law Dictionary* as "the length of time something lasts" or "the length of time; a continuance of time" and offered his own paraphrase "the time during which something continues". We need not be pinned to a specific definition, but I agree that "duration" connotes the length of a period of time. It seems to me to follow in the ordinary case that the period in question should be continuous, and indeed both the *Black's* definition and Mr Glyn's incorporate that concept. That would mean that in this context the "periods" of time to whose duration regulation 6 (1) (b) refers are periods during which the worker is working continuously (ignoring rest-breaks), such as the working day or shift. Outside such a period the worker is neither working nor at the disposal of his or her employer nor carrying out any activity or duties. Regulation 5 (1) would accordingly not apply to a term specifying a 39-hour working week, which will necessarily involve several discrete periods of work. Not only is that a correct use of language but it is in accordance with ordinary usage: you would not describe someone working full-time as working for a "period" of (say) 39 hours. At para. 14 of his skeleton argument Mr Glyn summarises his position by adopting the shorthand "a quantity of time". But that is not accurate, because it does not incorporate the notion of a continuous period. It allows Mr Glyn to advance the apparently obvious proposition that 39 hours is "a quantity of time": no doubt in one sense it is, but it is not necessarily, and is not in this context, the duration of a period.

32. The position becomes clearer still when one takes into account the wider context. I have noted at para. 17 above the correlations of heads (b)-(f) in regulation 6 (1) with the subject-matter, and language, of the WTR. In the light of that, it seems to me plain (subject to para. 34 below) that regulation 6 (1) (b) is intended to refer to terms which set a maximum length for any such period, as the WTR does. (It is not an answer to say that such a term would be unnecessary because the WTR provides for such maxima: the model of the WTR is that maxima should be set by agreement, with the legislation only providing a floor, or default.) It is no doubt literally possible to read the statutory language as referring also to a term specifying the minimum length of a shift or a working day – as Mr Glyn put it, providing for a cuff as well as a collar – but the close relationship with the WTR makes it very unlikely that that was what the draftsman intended. Even if that were the intention, I am not sure that it would assist Mr Glyn, because the right for which he contends does not relate to particular periods of work but to the entire working week.

33. That is how both the ET and the EAT read it: see para. 49 of the ET's Reasons and para. 44 (a) and (b) of the EAT's judgment. I believe that they were right; and on that basis the Regulations do not entitle agency workers to work the same number of contractual hours as a comparator.

34. The foregoing reasoning requires a slight gloss. As appears from para. 17 above, each of the other items listed under regulation 6 (1) (with the exception of (a), pay) correlates to a particular provision, or group of provisions, in the WTR: specifically, item (c) correlates to regulation 6, item (d) to regulations 10-11, item (e) to regulation 12, and item (f) to regulations 13-16. That being so, it would be natural to expect regulation 6 (1) to cover the only other substantive provision of the WTR, regulation 4, which (to over-simplify a complex provision) sets a "maximum weekly working time of 48 hours". In order to achieve that it would be necessary to construe the phrase "the duration of working time" as covering not only periods of continuous work such as a shift but also the group of such periods which constitutes the working week. For the reasons which I have given above, I think that that is difficult as a matter of language. It might nevertheless be possible if it were sufficiently clear from the broader context that that must have been the statutory intention. I need not reach a view about that, however, because even if the phrase were to be construed as covering the number of hours in the working week it would not assist the Claimant. If the only basis for adopting such a construction was in order to achieve a closer fit with the WTR, that would only apply to terms setting the maximum period which a worker could be required to work: it would have nothing to do with any entitlement on the part of the worker to work a particular number of hours, which is not the subject-matter of the WTR.

35. That conclusion is reinforced by a consideration of the purpose of the Regulations, and the underlying Directive, and of the practical consequences of the Claimant's construction. The purpose of the Directive is plainly to ensure the equal treatment of agency workers and permanent employees while at work, and in respect of rights arising from their work; but there is nothing in either the preamble or its actual provisions to suggest that it is intended to regulate the *amount* of work which agency workers are entitled to be given. And of course a provision with the effect contended for by the Claimant would be contrary to the whole purpose of making use of agency workers, which is to afford the hirer flexibility in the size of workforce available to it from time

to time – a purpose which the Directive expressly recognises and endorses (see in particular recital (11)). Both the ET and the EAT – in each case incorporating lay members – recognised this, and full weight must be given to their specialist expertise. The essential point is made at para. 48 of the ET's Reasons and para. 44 (c) of the judgment of the EAT. But the ET was also right to point out at para. 51 that the Claimant's revised submission (see para. 20 above) recognised an essential difficulty in his case but failed to offer any workable solution to it. The fact that Mr Glyn, no doubt prudently, chose to abandon that submission evades rather than answers the underlying difficulty.

36. Mr Glyn submitted that, to the contrary, his construction conformed to the purpose of the Directive. He acknowledged that if he is right employers will no longer be able to address peaks and troughs in their demand for labour by offering variable hours of work for agency workers, and that flexibility would thereby be substantially reduced; but he said that that simply reflected the operation of the principle of equal treatment in article 5 and the recitals underlying it. However, reference to article 5 does not advance the argument, because the principle of equal treatment applies only to the "basic working and employment conditions", as defined in the Directive and translated into the Regulations, and the question which we have to decide is what those basic conditions comprise. In making that decision it is not only legitimate but necessary to have regard to the interest in maintaining flexibility which is the rationale for the use of agency workers, and whose legitimacy and importance the recitals expressly acknowledge. Mr Glyn also emphasised that the recitals to the Directive make clear that the interests of flexibility have to be balanced against the protection of the interests of agency workers. But, again, that does not advance the argument. The question is whether the Directive and the Regulations have struck that balance in the way that the Claimant says; and it is in my view clear that they have not.

37. Mr Glyn attached some importance to the fact that workers do not acquire the rights conferred by regulation 5 (1) during the first twelve weeks of any assignment, by virtue of regulation 7. I can only say that I cannot see how that affects the issue of what those rights cover at the point at which they do kick in.

38. That disposes of Mr Glyn's core submission. Although the Claimant, by his ground 3, challenges the first basis on which the EAT rejected the appeal, namely that he had never identified a specific breach of the alleged rights (see para. 23 above), it is unnecessary to consider that question since the reasons relied on by the ET for its decision were in any event correct.

39. The final pleaded ground of appeal, ground 4, challenges para. 50 of the ET's reasoning, namely that the variety of different weekly hours worked by Royal Mail's permanent employees meant that an agency worker would have a variety of different comparators available under regulation 5 (3) and could accordingly simply choose his or her working hours. It is said that that misunderstands the role of paragraph (3). Mr Glyn pointed out that the right under regulation 5 (1) depends on a hypothetical rather than an actual comparator, and that the effect of paragraph (3) is to afford the employer what is, in effect, a defence if he can point to an actual comparator enjoying the same terms as the agency worker in the circumstances provided. I am inclined to agree that para. 50 of the Tribunal's Reasons is not entirely accurately expressed, for the reason given by Mr Glyn. But that does not affect the substance of the point being made, which was succinctly summarised by the EAT at para. 44 (d) of its judgment:

> "The Tribunal's reference to comparators at paragraph 50 of the Reasons is not inapt. Regulation 5(3) … identifies the circumstances in which Regulation 5(1) will be deemed to have been complied with. However, if the number of hours worked were the relevant factor, then any comparable employee identified by the hirer for the purposes of Regulation 5(3) could be immediately displaced and countered by the agency worker pointing to another employee on different hours. As the Tribunal found, that would create an unworkable outcome."

In any event, para. 50 of the ET's Reasons was not essential to its reasoning, and it is still less so to mine.

DISPOSAL

40. I would dismiss the appeal.

Lord Justice Lewison:

41. I agree.

Lady Justice King:

42. I also agree.