Case Nos. 1805244/2018
1805245/2018

EMPLOYMENT TRIBUNALS

Claimants: 1. Mr D Kocur
2. Ms C Roberts

Respondents: 1. Angard Staffing Solutions Limited
2. Royal Mail Group Limited

HELD AT: Leeds **ON:** 12 to 15 November 2018

BEFORE: Employment Judge JM Wade
Mrs J Maughan
Mrs L Hill

REPRESENTATION:

Claimants: Mr D Kocur, first claimant
Respondents: Mr J Boyd (of counsel)

Note: A summary of the written reasons provided below were provided orally in extempore Judgments delivered on 15 November 2018, the written record of which was sent to the parties on 16 November 2018. A request for written reasons was received from the Claimant at the hearing on 15 November 2018. The reasons below are now provided in accordance with Rule 62 and in particular Rule 62(5) which provides: In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how the law has been applied to those findings in order to decide the issues. For convenience the terms of the Judgment given on 15 November 2018 are repeated below:

JUDGMENT

The unanimous judgment of the Tribunal concerning the claimants' alleged infringements of rights conferred by Regulations 5 and 13 of the Agency Workers Regulations 2010 ("the Regulations") and Section 1 of the Employment Rights Act 1996 is that:

1. Complaint A: The late payment of the 2017 Christmas bonus (Regulation 5) is well founded.

2. The Tribunal makes the following recommendation for the purpose of obviating the effect of the infringement on the claimants:

The first respondent shall pay the claimants' 2018 Christmas Bonus entitlement by no later than the date on which the second respondent's OPG grade employees at the Leeds Mail Centre are paid their entitlement.

3. We further order Royal Mail Group Limited (being the controlling party) to pay a financial penalty to the Secretary of State of £100 per claimant in respect of this infringement.

4. Complaint 1 (the late payment of the collectively agreed 2018 5% pay increase) is not well founded.

5. Complaint 2: exclusion of the claimants from work time learning sessions on 4 June 2018 and 15 June 2018 as an infringement of Regulation 5 is not well founded.

6. Complaint 3: exclusion of the claimants from applying for internal vacancies on 14 May and 8 June 2018 (Regulation 13) is well founded and the Tribunal shall determine the remedies in relation to this infringement at a separate hearing.

7. Complaint 4: exclusion of the claimants from the system of issuing overtime in operation at Leeds Mail Centre between 18 and 24 June 2018 (Regulation 5) is not well founded.

8. Complaint 5: on 4 June issuing both claimants with a shift that was 12 minutes longer than a comparable Royal Mail employee (Regulation 5) is well founded. The Tribunal makes no financial award or recommendation.

9. Complaint 6: on 9 June 2018 deducting work breaks from both claimants' overall duration of shift working time (Regulation 5) is well founded. The respondents (the second respondent being in control of the first respondent) shall pay to the claimants the following sums amounting to two weeks' pay in respect of this infringement: Mr Kocur £868.64; Ms Roberts £1008.92.

10. Complaint 7: paying rolled up holiday pay in respect of 2.5 additional days' holiday pay in respect of a shift worked on 9 June 2018 (Regulation 5) is well founded. The Tribunal makes no financial award or recommendation.

11. Complaint 8: averaging the claimants' pay on payslips dated 27 April 2018 (Regulation 5) is not well founded.

12. Complaint 9: on 14 May and 15 June 2018 scheduling shorter break times for the claimants than a permanent colleague on shift (Regulation 5) is not well founded.

13. Complaint 10: Angard not including adequate particulars of employment in the claimants' contracts compliant with Section 1 of the Employment Rights Act 1996 in four respects (remuneration; holiday pay/entitlement; hours of work (including rest breaks); and applicable collective agreements): The Tribunal has found that due to changes and other relevant matters written particulars provided by the Angard and to some extent those declared by the Tribunal on 8 January 2018 do not now comply with Section 1 (to the extent of representing the claimants' particulars either at the commencement of these proceedings or today) and a separate Order addresses the means for their determination.

14. Complaint 11: during 23 to 29 April 2018 allocating to the second claimant four night shifts when a royal mail employee worked five night shifts (Regulation 5) is not well founded.

15. Complaint 12: during 4 June to 10 June 2018 to the first claimant 38.5 hours' night shift work when a royal mail employee worked 39 hours (Regulation 5) is not well founded.

REASONS

Introduction

1. This hearing has been the third trial at first instance of issues between the parties concerning the rights of the claimants as "12 week qualified" agency workers. The issues have been more complex than the claimants' list of complaints would suggest. The facts have not been in dispute, but applying the 2010 Regulations to those facts is not straightforward. Many of the complaints concern matters to be heard in the Court of Appeal next year arising out of the 2016 proceedings.

2. Complaint A in our Judgment above was presented in an originating application on behalf of both claimants on 20 April 2018, and the remaining complaints were presented in an amendment application granted by the Employment Judge on 26 June 2018. There were subsequent exchanges concerning the pursuit of the complaints (whether all were pursued and the basis on which they were pursued). This Tribunal directed that the claimants' written communication in relation to Complaint A could not be taken as an unequivocal statement that the complaint was no longer being pursued, because it was clear, in terms, that the position proceeded on a misunderstanding of the effect of an earlier dismissal Judgment.

3. A previous Tribunal made the findings below which we adopted with the parties' consent. The respondents were named in a different order in these proceedings and for clarity we adopt "Angard" and "Royal Mail" in these reasons. The difference below is apparent from the context.

3. The second respondent is a national company involved in the collection and delivery of mail and the first respondent is an employment agency which is owned by the second respondent and provides it with agency staff.

4. The claimant worked for the second respondent from November 2014 until 15 January 2015 as a casual worker.

5. On 26 January 2015 the claimant became an employee of the first respondent. He was supplied by the first respondent to the second respondent as an agency worker on a regular basis to work in the Leeds Mail Centre as an operational post grade. At the Leeds Mail Centre there are 1,050 employees of the second respondent. The first respondent's employees are used to cover 300 shifts per week.

6. In the week ending 12 June 2015 the claimant had achieved 12 weeks' of qualifying service with the second respondent as an agency worker.

7. On 19 October 2015 the claimant raised a grievance with both respondents. He complained that he was not being given the same shifts as permanent staff of the second respondent such as a 20 minute break during a four hour shift. He said the signing in sheets did not differentiate between the length of service of employees of the first respondent such that the same breaks were being given to those who had worked more than 12 weeks as less than 12 weeks.

4. We learned in this Tribunal that Ms Roberts achieved the 12 week qualifying service on or around the same date as Mr Kocur. We also heard Angard was set up in or around 2011 to address the need of Royal Mail for flexible workers in the newly regulated environment. In having its own vehicle, rather than using an arms length agency, Royal Mail has sought to keep control: its lawyers provide contracts for Angard workers, and Royal Mail directs any pay or other changes in terms and conditions. Angard has no operations or direct employees: its functions are outsourced to Reed Specialist Recruitment Limited ("Reed"), which finds flexible resourcing employees to be employed by Angard on behalf of Royal Mail. Hence there were no witnesses employed by Angard.

5. We also note that since the first case was heard in the summer of 2016, as a result of which the findings above were made, the number of Royal Mail employees at the Leeds Mail Centre have reduced to approximately 780.

Evidence

6. The oral evidence in this Tribunal was from both claimants and then Mr Kellett, Mrs Trenoweth and Mr Rees, all Royal Mail employees, and Mr Slatter, employed by Reed. We had documents running to over five hundred pages. All these witnesses gave evidence in the earlier proceedings (but we note a different spelling of Mr Rees' name was then recorded).

The relevant history

7. The brief history is this. The first claimant presented a claim on 6 November 2015, heard over three days with a reserved Judgment issued on 16 September 2016 ("the first claim"). The Tribunal upheld some Regulation 5 infringements in relation to the length of rest breaks and some Regulation 12 infringements concerning equal treatment in access to amenities. Some complaints were dismissed, in particular, payments for rest breaks and other supplements, entitlement to the same working hours as permanent Royal Mail employees, and Regulation 17 detriment (victimisation).

8. The claimants then promptly brought two claims, which were combined, and heard in September 2017 over five days with an extempore judgment including remedy sent to the parties on 3 October 2017 ("the second proceedings"). That Judgment addressed rest breaks (Regulation 5), less favourable access to amenities (Regulation 12), Regulation 17 detriment, and entitlement to the 2016 Christmas bonus. The bonus issue had been resisted by the respondents applying an interpretation of Regulation 6 (3)(f) but that was determined against them, and the claimants were awarded a pro rata calculation of that bonus. There was no appeal against that determination.

9. Further, following a concession as to liability by the respondents, the Tribunal decided a remedy for breach of Regulation 13, in that Royal Mail had failed to inform and allow the claimants to apply for permanent posts.

10. The Tribunal subsequently awarded exemplary damages against Royal Mail in January 2018 in relation to one of the successful amenity claims, and a recommendation it had made in relation to that. Evidence had been led by Royal Mail that its reason for not complying with the recommendation was a calculation of the cost of so doing. That decision has not been appealed, nor any others of the second proceedings.

11. In October 2016 the first claimant had appealed the decision in the first claim to the Employment Appeal Tribunal. That appeal was determined by the Honourable Mr Justice Choudhury, in a Judgment handed down on 23 February 2018 ("the EAT Judgment"). All parties submitted grounds of appeal and permission to appeal was granted to both sides. The respondents did not then pursue an appeal.Mr Kocur's appeal is not due for hearing until 2019, but an Employment Judge decided that this case should proceed nonetheless, not least to establish the underlying facts.

12. The claimant's contention in his grounds of appeal are that agency workers should be entitled to work the same hours as direct recruits. The reasons for granting permission to appeal record that this contention may be correct, on a literal interpretation (of the Regulations), and if so, would have wide reaching effects. The reasons for granting permission to the respondents were for similar reasons, including that the EAT Judgment was the first consideration of these issues at appellate level.

13. The Tribunal raised with the parties in this hearing of its own motion that issue estoppel may apply in relation to the claimant's Regulation 13 complaint (exclusion from internal vacancies). Mr Boyd made oral submissions to the effect that an estoppel against the respondents would be unjust not least because the previous

decision arose in circumstances of a concession where different solicitors advised, and this Tribunal had heard no evidence about the underlying facts in the second proceedings.

14. It was also arguable that many of the complaints brought by the claimants could be the subject of issue estoppel, or the rule in Henderson v Henderson [1943] 3 Hare 100, which could bind both claimants' and respondents' to the outcomes on various issues in the previous cases. That was discussed with the parties and Mr Boyd helpfully addressed these matters in written submissions. The Tribunal explained to the claimants that there was a fundamental principle in English law by which parties in litigation are entitled to finality and they are not therefore permitted to litigate the same issues twice, beyond their rights of appeal and reconsideration.

Further findings of fact

The claimants' terms and conditions of employment

15. The claimants were provided with written contracts of employment with Angard in 2015 which they signed.

16. Those were held in the second proceedings to be deficient in four respects: rates of pay; hours of work; holiday pay and entitlement; collective agreements. The Tribunal said this at paragraph 50.9 of its reasons:

"50.9 The written particulars wrongly state there are no collective agreements affecting the terms and conditions of the first respondent employees. It is acknowledged that is an error. Both the Way Forward Agreement and some unidentified local agreements directly affect the terms and conditions of the first respondent's employees. It is a matter of no little concern that first respondent's employees will be wholly ignorant of these collective agreements if they do not have the diligence and endeavour of the first claimant. They may well be denied their contractual rights as a consequence of that lack of information."

17. The "Way Forward" is the name for the national collective agreement between Royal Mail and the Communication Workers Union ("CWU") which contains terms and conditions affecting the relevant bargaining groups ("the WFA"). It contains agreements on employment security, pay and grading, the shorter working week, annual leave, meal breaks, ways of working, working time regulations and deployment. It prescribes terms for "OG" (operational grade) employees of Royal Mail, and a "new operational support grade" ("OSG"). OG and OSG, it was accepted, are the direct employees of Royal Mail who carry out the same sorting work as the claimants at the Leeds Mail Centre. The Way Forward introduced a 40 hour working week and weekly pay based on that working week. It was in place before 2000.

18. In January of 2018, in a Judgment on remedy, the Tribunal held this:

> "2 The Tribunal determines that, in addition to those provided, the written particulars of employment between the first respondent and the claimants ought to read as follows.

2.1 Paragraph 4.1 should be substituted and amended to state:

"*4.1 You will only be entitled to be paid under this contract in respect of any period during which you are working on an engagement. The hourly rate of pay for each engagement will be specified in writing as part of the engagement confirmation."*

2.2 In paragraph 7.1 the 28 day period shall be substituted with 30.5 days.

2.3 Paragraph 7.3 will be substituted, in its entirety, as follows:

"*2.5 days of the 30.5 days will be paid in an element of your hourly rate. The balance of 28 days will be calculated by the application of a percentage of past earnings of 12.07% in that holiday year which is converted to an hourly rate which will be paid when you take holiday.*"

2.4 Paragraph 24 shall be substituted as follows:

"*The collective agreements which directly affect your terms and conditions of employment are available from documents which will be supplied to you on request from the personnel unit."*

The Christmas Bonus

19. Before 2000 then, the WFA provided this as to Christmas Supplement for OG employees: "*The existing Christmas Supplement will continue at its current value (between £42 and £100 maximum, pro rata to conditioned hours) for all employees, but the payment date will be moved earlier than currently to the last payment date before Christmas each December. Elligibility will be linked to paid employment across the four week December bonus period used for PBS. From December 2001 the minimum full time supplement will increase to £60."*

20. In October 2017 Royal Mail's directions about the Christmas Supplement or "bonus", as we and the parties have referred to it, recorded that it was to paid on or around Sunday 24 December 2017. The directions had removed a qualification in the 2016 direction that "*flexible resource staffs are ineligible for payment*". Nevertheless Royal Mail did not instruct Angard to pay the Christmas bonus on a pro rata basis to AWR qualified workers in October 2018 when it made arrangements for payment to OG direct recruits. Mr Rees calculated the amounts payable for the claimants and sent them to Reed in late January. Still no payment was made.

The new collective agreements

21. On 26 January 2018 Royal Mail agreed a "Negotiators' Agreement" with CWU, ("the NA"), a shorter agreement than the WFA, but addressing specific matters including pensions changes and the shorter working week. The introduction said this: "*This agreement has been reached within the spirit and principles of the Agenda for Growth, Stability and Long Term Success Agreement and its Legally Binding Contract".*

22. The respondents did not put these further collective agreements before the Tribunal. The NA recorded this about them: "*In 2014 RMG and CWU made a new Agreement, the Agenda for Growth. This Agreement describes itself as :- This is a ground breaking agreement which for the first time in the UK incorporates unique legal elements into a collective agreement demonstrating our joint commitment to delivering long term success in the interests of customers, employees and the company".*

23. The 2018 NA recorded that there would be a gradual move to a 35 hour week; with new full time recruits in the "core OPG grade" contracted to those hours on current conditioned pay terms. A pay agreement involved a 5% increase, backdated to October 2107 and a further 2 % increase due in April 2019.

The use of Agency workers and the recruitment model

24. The NA said this in relation to Agency workers: "*Both parties will reaffirm that they will deploy legally binding commitments to part time workers and the use of agency workers"*. Further they agreed:

"Agency Workers are intended to cover short term or unforeseen resourcing needs expected to last for periods of no more than 12 weeks, which cannot be covered by offering additional hours to existing employees whilst maintaining quality of service. In the rare circumstances employment exceeds 12 weeks the provisions of the Agency Workers Regulations 2010 (as amended) will apply. Both parties also commit to jointly review the use and conversion of agency staff in a way which recognises their continuous service and complements and reaffirm[s] the principles contained in the Agenda for Growth agreement."

25. The impression created by the first sentence above has an Alice in Wonderland quality about it. The reality in Mr Kellett's statement is very different and this is reflected in the Angard Guide for Royal Mail Managers dated 21 February 2018 (pages 207 a to o, a late entry to our bundle).

26. Royal Mail operates a CWU agreed resourcing model such that its recruitment of direct employees to address wastage occurs every six months or when vacancy levels rise above 5%. The reality in its resourcing arrangements are that there is a weekly need for flexible employees (agency workers) of up to 5% of capacity, after direct employees' overtime is allocated. There is a regular flow of new flexible resourcing employees of up to 10% of depot headcount (see 207e); there is an acknowledgement that experienced flexible employees are desirable and form most of that flexible workforce. It follows that Royal Mail, through Angard, operates a permanent and considerable bank of AWR 12 week qualified staff, which is far from the impression created by the NA .

27. The resourcing model agreed in the WFA is such that when new Royal Mail OPG employees are required, they are recruited as "reserves", that is they are not allocated a fixed shift or duty, but are used as a first tier of flexible resource. In contrast permanent duty vacancies, as advertised on the Leeds notice board on 14 May and 8 June of this year (see complaint 3) are filled in accordance with the WFA resourcing model at page 451, that is, solely **on the basis of seniority**.

The respondents' reactions to the ET and EAT Judgments

28. In February 2018 the respondents were clear in management guidance that AWR qualified workers at OPG would be paid for meal breaks and take the same breaks as employees of Royal Mail, but that only the longer break on a shift would be recorded on time sheets. There was a mechanism for payment for both longer and shorter breaks. The previous Tribunal had recorded this in its reasons in the second proceedings:

"*21 The objection of the first claimant was that he felt the agency workers were being segregated by being required to take their breaks at different times to those colleagues employed by the second respondent. He contends that this is contrary to Regulation 5. 22.We reject that:*

> *22.1. There is no term or condition in the contracts of employment, written or implied, to entitle the second respondent's employees to take a break at a specific time of day. The fact that the rest breaks are scheduled in duty sheets which are compiled by managers of the second respondent does not convert those into contractual terms but is a matter of practice. We do not accept the proposition that the second respondent would be in breach of contract if it shifted the rest break of the permanent duty staff to a different time of the shift. The fact that permanent employees of the second respondent have invariably a fixed time for their break is down to work planning. Variations in demand are catered for by the provision of overtime or agency staff and it is practicable for their breaks to be fitted in and around the known working patterns of the regulars.*
> *21.2. The different allocation of breaks concerned not only agency staff, but agency staff as well as staff of the second respondent who were undertaking overtime, as opposed to permanent staff of the second respondent. Were the claimants' argument about the contractual effect of timed breaks correct, the second respondent would also be in breach of contract with its own staff who worked overtime. They were not.*"

29. By the end of March 2018 the respondents had decided not to appeal the EAT Judgment that Angard worker shortfalls in breaks and holiday could be compensated by an enhancement in hourly rates.

30. The claimants were aware that Angard workers were omitted from payment of the Christmas bonus in December 2017 and they commenced ACAS conciliation. A certificate confirmed their request for Early Conciliation on 22 March 2018. On 5 April 2018 Angard paid the claimants their Christmas bonus, but did not pay other Angard workers their entitlements. The claimants presented their complaint on that issue on 20 April 2018.

31. Royal Mail employees in Leeds Mail Centre received their back pay arising from the January NA pay deal on or around 4 May 2018.

32. In or around May 2018 Royal Mail also commenced a review of agency terms, which resulted in a report and communication to all agencies, including Angard, to instruct changes to bring its practice in line with the legal decisions emerging following the claimants' efforts. These changes have not, today, been fully implemented, in part because of the various agencies needing time to change their pay and administrative systems. Royal Mail considers those changes need to be implemented simultaneously by all suppliers. That exercise has become even more complicated by the January NA, including the pay improvements and changes in working hours, all of which impact pay calculations across a complex and extensive list of grades and roles, and the accompanying financial models which support them.

33. By June various working practices had continued despite the changes, and the allegations made by the claimants in their complaints above are matters of fact, in respect of which we provide some further findings below.

34. Their 5% pay increase was paid in two tranches, contained in an instruction in July 2017 from Royal Mail to its agencies. The first payment date was the end of July and the second date the end of September. Both dates were subject to slippage but the claimants had both received their backdated 5% pay increase by the end of October.

35. There will be further changes in the pay models (or rate cards as they are known) as a result of the 38 hour working week from 1 October 2018, and the 2 % rise due in April 2019.

The Law

36. The Regulations provide as follows:

> "***5 Rights of agency workers in relation to the basic working and employment conditions***
>
> *(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.

(3) 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.

(4) For the purposes of paragraph (3) an employee is a comparable employee in relation to an agency worker if at the time when the breach of paragraph (1) is alleged to take place—

(a) both that employee and the agency worker are—

(i) working for and under the supervision and direction of the hirer, and

(ii) engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification and skills; and

(b) the employee works or is based at the same establishment as the agency worker or, where there is no comparable employee working or based at that establishment who satisfies the requirements of sub-paragraph (a), works or is based at a different establishment and satisfies those requirements.

(5) An employee is not a comparable employee if that employee's employment has ceased.

(6) This regulation is subject to regulation 10."

37. The Directive sets out 23 detailed recitals covering the detailed history of its development and the difficulties in securing member state agreement and including:

"*Whereas:*
(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.

(2) The Community Charter of the Fundamental Social Rights of Workers provides, in point 7 thereof, inter alia, that the completion of the internal market must

lead to an improvement in the living and working conditions of workers in the European Community; this process will be achieved by harmonising progress on these conditions, mainly in respect of forms of work such as fixed-term contract work, part-time work, temporary agency work and seasonal work.

(5) In the introduction to the framework agreement on fixed-term work concluded on 18 March 1999, the signatories indicated their intention to consider the need for a similar agreement on temporary agency work and decided not to include temporary agency workers in the Directive on fixed-term work.

(9) In accordance with the Communication from the Commission on the Social Agenda covering the period up to 2010, which was welcomed by the March 2005 European Council as a contribution towards achieving the Lisbon Strategy objectives by reinforcing the European social model, the European Council considered that new forms of work organisation and a greater diversity of contractual arrangements for workers and businesses, better combining flexibility with security, would contribute to adaptability. Furthermore, the December 2007 European Council endorsed the agreed common principles of flexicurity, which strike a balance between flexibility and security in the labour market and help both workers and employers to seize the opportunities offered by globalisation.

(10) There are considerable differences in the use of temporary agency work and in the legal situation, status and working conditions of temporary agency workers within the European Union.

(12) This Directive establishes a protective framework for temporary agency workers which is non-discriminatory, transparent and proportionate, while respecting the diversity of labour markets and industrial relations.

(14) The basic working and employment conditions applicable to temporary agency workers should be at least those which would apply to such workers if they were recruited by the user undertaking to occupy the same job.

(15) Employment contracts of an indefinite duration are the general form of employment relationship. In the case of workers who have a permanent contract with their temporary-work agency, and in view of the special protection such a contract offers, provision should be made to permit exemptions from the rules applicable in the user undertaking.

> *(21) Member States should provide for administrative or judicial procedures to safeguard temporary agency workers' rights and should provide for effective, dissuasive and proportionate penalties for breaches of the obligations laid down in this Directive.*
>
> *(23) Since the objective of this Directive, namely to establish a harmonised Community-level framework for protection for temporary agency workers, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the action, be better achieved at Community level by introducing minimum requirements applicable throughout the Community, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective."*
>
> Article 5 provides:
>
> ***"The principle of equal treatment***
> *1. 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.*

38. The Directive does not contain a direct equivalent of Regulation 5(2), but enables national regulations to cater for jurisdictions where employment terms are a matter of contract and where collective agreements and basic terms are not enshrined in law, as they are in some member states.

39. The Regulations also adopt the Directive definitions of "basic working and employment conditions" and these appear at Regulation 6. They are: terms and conditions relating to pay, the duration of working time, night work, rest periods, rest breaks and annual leave. "Pay" means any sums payable to a worker of the hirer in connection with the worker's employment, including any fee, bonus, commission, holiday pay, or other emolument referable to the employment, whether payable under contract or otherwise, but excluding any payments or rewards within paragraph (3). Paragraph (3) excludes, for example, occupational pensions and sick pay and pay not directly attributable to the worker's work, for example long service awards. Harvey (see below) at A1 208.01, when discussing this definition says that "the aim is to exclude from the regime of equal treatment terms and conditions which are quite simply inappropriate for short-term hirings". What is meant by "the duration of working time" is not defined but "working time" is defined to include time spent receiving relevant training.

40. There are few cases applying the Regulations save for the EAT Judgment between these parties and Coles v Ministry of Defence [2015] IRLR 872, concerning Regulation 13. Prior to submissions the Tribunal provided the parties with copies of the direction it was likely to give itself as to the law, including having regard to Harvey on Industrial Relations and Employment Law [R2418-2429 and A1 206-210]. The first extract included extracts from Guidance issued by the Department for Business Innovation and Skills about the Regulations ("the Bis Guidance").

41. The Harvey commentary about Regulation 5 at R2418 says this: "Paras (1) and (2) allow a hypothetical comparison, looking at what the agency worker would have had the benefit of if taken on permanently. However, paras (3) to (5) then permit the use of an actual comparator if there is one, this in reality is likely to be in the nature of a defence for the agency or hirer".

42. The Bis Guidance that follows then sets out various examples as follows:

"Where a hirer has pay scales or pay structures

A hirer has various pay scales to cover its permanent workforce, including its production line. An agency worker is recruited on the production line and has several years' relevant experience". However the agency worker is paid at the bottom of the pay scale. Is this equal treatment?
Yes if the hirer would have started that worker at the bottom of the pay scale if recruiting him or her directly. But if the worker's experience would mean starting further up the pay scale if recruited directly, then that is the entitlement. Starter grades which apply primarily, or exclusively, to agency workers may not be compliant if not applied generally to direct recruits."

"Where there are no pay scales or structures or comparable permanent employees.

A company engages an agency worker as a receptionist for the first time. The company does not have anyone doing the same job and does not have pay scales or collective agreements. The agency worker is paid at the same rate before and after the 12 week qualifying period. Is this allowed?

Yes; there are no pay scales or collective agreements, or a "going rate", so in relation to pay, there are no relevant terms and conditions ordinarily included in the contracts of employment of employees in the hirer. However, if say, the company gives all its permanent employees 6 weeks paid annual leave and paid time off for bank and public holidays, the agency worker should be entitled to the same treatment on these points."

43. At A1 206 Harvey says this about the language of paragraph 5(1): "Thus, in contrast to the Regulations on part-time and fixed-term working, there is no need for a comparator in the sense of a fellow worker; the "comparison" is with himself or herself, had it been ordinary employment." The commentary goes on to explain the use of a comparator as a defence through paragraph 5(3).

Discussion and conclusions

Preliminary issue: are the parties subject to issue estoppel or the rule in Henderson v Henderson?

44. The claimants' causes of action in these proceedings arise from allegations about matters from 23 December 2017 onwards (and mostly in 2018). There is clearly no cause of action estoppel because those events were not addressed by the earlier proceedings.

45. Time for our deliberations being short, and these parties being best served by decisions drawing these matters to a conclusion, it cannot be decided by us that either parties' conduct in bringing or defending the proceedings in the way that they have is an abuse of process. That strikes us as impermissible of our own motion and without either party wishing it in these circumstances: the evidence for so holding would require exploration and there is not the time. It was not discussed in case management as a preliminary issue.

46. It may be that issue estoppel could be said to apply, but as our decisions broadly accord with those made earlier, and there is no prejudice or injustice to either party, it is not in the interests of justice to decide the point.

Preliminary matter raised in the respondents' submissions

47. During the course of the evidence it was apparent from the Tribunal's questions that its focus was on a comparison of the claimants' Angard contracts with terms contained in the applicable collective agreements and the template contract for a direct recruit of Royal Mail (its Long Term Contract for Operational Postal Grade).

48. The respondents cautioned the Tribunal about making findings that **collective** terms were incorporated into Royal Mail OPG employees' contracts without the kind of analysis of incorporation envisaged by the relevant case law including Alexander v Standard Telephones & Cables Ltd [1990] IRLR 55.

49. There was a danger of injustice, it was suggested, by the term by term comparison approved in the EAT Judgment (paragraph 27), where the incorporation analysis might not be sufficiently robust, or evidentially anticipated by the parties ("telegraphed"), it was said.

50. This Tribunal has to apply the law, that is the term by term comparison with the hypothetical direct recruit required by Section 5(1) and telegraphed by the Harvey analysis. The parties had the opportunity and obligation to disclose relevant collective agreements, not least because the fact that collective terms did apply to the claimants' conditions formed part of an earlier decision which was not challenged. Equally there were frequent references to the collective terms in all parties' statements.

51. In the event, given the the type of terms to which we had regard above, it might be thought unlikely that there would be any dispute about incorporation.

Complaint A

52. It was not in dispute that the 2017 Christmas bonus was paid late. The reason for the late payment was said to be a matter of legal privilege rather than oversight. The calculation was done in January and payment was not made until April and after the claimants had approached ACAS.

53. The Regulation 5 right is to the same basic working and employment conditions as to pay, had the claimants been direct recruits. There was no suggestion that the Christmas Bonus would not have been paid to direct recruits of Royal Mail at OPG doing Leeds Mail Centre sorting work.

54. The only basis to dismiss the complaint was said to be that the claimants have received payment, that is they have received the pro rata amount of bonus and there can therefore be no infringement.

55. We disagree. A Christmas bonus in this sector is self explanatory and contained in the WFA. It rewards peak time work at a time when employees have additional expense. Our industrial experience tells us that it is a term properly to be incorporated. Payment more than three months' late is more akin to an "Easter" supplement.

56. This is not a "journey" versus "destination" example (see the EAT Judgment at paragraph 27 A to E and in particular: "*The Regulations do not prescribe that the mechanism by which parity is achieved must be identical***").**

57. If the claimants had been paid the Christmas Bonus in cash, or by cheque, or by special payment in the Christmas week or slightly later because of Agards' payroll providers, we agree there would be no infringement; but to pay the claimants more than three months' late is a clear infringement of the right to the same basic conditions as to pay and is not parity. The complaint is self evidently well founded.

58. Sadly for the claimants (for it is a source of some considerable distress for them) there is no right in Regulation 18 to present a representative complaint on behalf of other AWR qualified workers. Mr Kocur tells us that he informed the CWU on the last occasion when the complaint was upheld but nothing has come of it, and that adds to his sense if injustice for others.

59. We cannot address this unhappiness for the reason below other than by recording that our industrial knowledge tells us that Angard and Royal Mail colleagues will know of this case (and the previous cases).

60. Mr Kocur said he had no financial loss from this infringement. No compensation falls to be ordered pursuant to Regulation 18(8). The claimants sought two recommendations; the first that the 2018 Christmas bonus entitlement be paid on time; and secondly that the 2017 bonus be paid to other workers.

61. Regulation 18 (15) prevents an award of injury to feelings for a Regulation 5 infringement (and therefore an award of aggravated damages). It does not therefore appear to us permissible within Regulation 18 8(c) to make a recommendation which goes to obviate the effect on the claimants feeling that others should also have the Christmas Bonus.

62. That said, the first recommendation was not resisted by the respondents and we are encouraged that this reflects their intention in any event to comply with the Regulations vis a vis all qualified and entitled Angard workers.

63. The claimants also sought exemplary damages and that we order a penalty be paid to the Secretary of State pursuant to Section 12A of the Employment Tribunals Act 1996 (as amended).

64. We are satisfied that there are aggravating features within Section 12A as follows: a Tribunal had held the Christmas Bonus was pay as defined within Regulation 5 after argument; the respondents did not appeal that decision; the respondents did not pay the bonus to any other Angard workers despite recognising in internal documentation that it could not be said that it was not payable; and although calculations were done for the claimants they were paid far later than those calculations were done; the reason for late payment, we were told by two witnesses, was a matter of legal privilege; the reasons were not oversight.

65. The minimum penalty is £100 per claimant and the maximum is £5000 per claimant. We consider that a penalty of £5000 is disproportionate to the infringement concerning the claimants, and as there are no other claims before us from other Angard workers we consider it would be disproportionate to decide upon a higher fine, but we repeat our comments concerning the recommendation we make, above. We consider it just and equitable to impose a penalty of £100 per claimant.

66. As to the exemplary damages sought by the claimants, exemplary damages are by nature punitive. They are permitted only when oppressive, arbitrary or unconstitutional action is undertaken by the state, or where a defendant's conduct has been calculated to make a profit which may well exceed the compensation payable to the claimant.

67. The Tribunal may speculate as to the reasons why the claimants were not paid in December with Royal Mail workers, or January when the calculations were done, on the basis of legal advice, but speculation is not evidence. There has been a recent decision confirming legal privilege cannot be a cloak for illegality, but there is no evidential basis in this case for us to seek to go behind the privilege that was relied upon. We also take into account that, as our findings above illustrate, the industrial relations dynamics are complex and shifting. Rather than calculating a profit from not paying the claimants on time, the respondents may have had more fundamental challenges to address on this occasion. The requirements for an award of exemplary damages are not made out. On the other hand the different requirement of "aggravating features", for the purposes of a Section 12A penalty, has been established on this occasion.

<u>Complaint 1: the late payment of the collectively agreed 2018 5% pay increase</u>

68. Complaint 1. It was not in dispute that a direct OPG recruit of royal mail would have had the benefit, from late January, or thereabouts of knowing that the collectively agreed pay rise had been agreed and that it would come, together with the other changes agreed. The claimants were therefore entitled to that increased pay rate as

a “same basic term” as to pay. Unlike the collective term as to Christmas supplement, there was no agreement in the January NA as to the date when backdated payments would be made, albeit we know they were was paid to Royal Mail employees in early May.

69. It seems to us, firstly, that in the context of a far reaching pay agreement, the date for payment of a back dated pay rise, is properly to be described as a mechanism for parity rather than parity itself. Secondly, the entitlement is to the same basic terms that are ordinarily included in the OPG staff contracts (including any collectively agreed and included terms). It appears that the date of back payment of an increase was not such a term. This complaint is not well founded.

Complaint 2: exclusion of the claimants from work time learning sessions on 4 June 2018 and 15 June 2018 as an infringement of Regulation 5

70. At the start of the hearing we discussed the claimants’ position on this complaint. The Tribunal asked whether the complaint could more sensibly be argued as a Regulation 12 infringement, possibly, because the Directive provides in Article 6 for access to vocational training. The claimants wanted to pursue their case as they had pleaded it, as an Article 5 infringement.

71. At the Leeds mail centre there are job descriptions or “duty sheets” for virtually every Royal Mail OPG post on different shift patterns including “earlies”, “lates”, “nights” and “days”. The seven hundred or so duties set out with precision where the employee is working at a particular time, when he or she should take applicable breaks, and once a week, when he or she should go to weekly “Work Time Listening and Learning” of 30 minutes (WTLL). A job description for each post was part of the WFA.

72. When new OPG employees are taken on, they are not allocated a permanent duty but are used as “reserves”. From week to week they attend work to find they are allocated a particular duty to cover an absent permanent duty holder, and they then go to find that duty sheet to know what to do for the week or shift, including any WTLL time allocated to that duty.

73. The half hour weekly WTLL may or may not be part of collectively agreed terms and may or may not properly fall to be incorporated into Royal Mail employees’ contracts (bearing in mind the Tribunal did not have the 2014 collective agreement), but in our Judgment the term by term comparison is not necessary in respect of this complaint, as it has been put.

74. When Angard employees arrive on site, they are told of their work location by a signing in sheet which tells them about break time, but does not contain WTLL. In practice this means that on any shift, and for the claimants on the dates above, Royal Mail colleagues departed from the work area to attend WTLL while the Angard employees continued with their work.

75. The claimants’ case was this. Regulation 6(5) relevantly provides: “working time in relation to an individual means ..(b) ..any period during which that individual is

receiving relevant training". The claimants say they have a Regulation 5 right to the same basic terms and conditions as to the duration of working time as would be included in the direct recruit's contract. They therefore have the right to be allocated to the same WTLL time as the direct recruits on any particular shift at Leeds: on the two dates they cite where direct recruits were undertook WTLL at the prescribed time, they had the right, pursuant to Regulation 5, not to be excluded from WTLL.

76. In our judgment the claimants are not seeking parity in the **duration** of their working time, but rather that they be deployed to precisely the same work or duties. They accepted that attending training was working. They had not shown that on this shift the duration of their working time was greater than it would have been had they been recruited by Royal Mail directly in 2015. This complaint is not well founded.

Complaint 3: exclusion of the claimants from applying for internal vacancies on 14 May and 8 June 2018 (Regulation 13)

77. On 14 May 2018 the respondent placed a notice on its Leeds notice board for "Leeds Mail Centre Internal Duty Vacancies". The notice said, "applications are invited from existing Permanent Full Time Processing Employees, who wish to take up the following Vacant Duties". The posts were 39 hour posts. The notice further said: "please note that Duty Contents are subject to change as agreed with the CWU".

78. Similar notices were posted on 8 June save that they referred to applications being invited from existing Permanent Part Time Processing Employees and the posts were 20 hour posts.

79. The claimants were ineligible to apply and were told this. The gist of Mr Kellet's evidence was that these were not really vacancies because appointments were made from existing employees, and there was therefore no increase in headcount. The scenario he describes requires (unless there is a subsequent external recruitment) a gradual reduction in numbers. Albeit numbers have reduced by more than three hundred in Leeds (2016 to 2018), Mr Kellet's evidence also reflected that if posts were unfilled and the shortfall of capacity hit 5%, there was external recruitment every six months.

80. The posts which arose in May and June were because of retirements or other reasons for colleagues leaving. The agreement with CWU was, as recorded above, internal advertisement only first. This permitted Royal Mail OPG employees who had been taken on as "reserves" to apply for a permanent duty, and for others who wished a change in duty to seek that change. Our industrial experience tells us that in this type of work there will be some duties which are more genial, or less physical, then others. This system of seniority allows those with longer service to seek out more genial posts without external competition.

81. Angard workers on the other hand, however long they have worked with Royal Mail, can only apply for vacancies which are advertised externally and when they do so they are in competition with external applicants. Indeed this had happened when Ms Roberts had applied as an external applicant in the past. She had not been appointed.

82. Regulation 13 relevantly provides: "(1) An agency worker has during an assignment the right to be informed by the hirer of any relevant vacant posts with the hirer, to give that agency worker the same opportunity as a comparable worker to find permanent employment with the hirer". Sub paragraph (2) goes on to set out a "comparable worker" for these purposes.

83. In our Judgment a comparable worker is a reserve OPG, an employee of Royal Mail yet to be allocated a permanent duty consisting of sorting work, but deployed to cover the absence of permanent such duty holders.

84. The Directive says at Article 6:1 Temporary agency workers shall be informed of any vacant posts in the user undertaking to give them the same opportunity as other workers in that undertaking to find permanent employment…".

85. The facts of Cole differ from those we record above. The comparable employees, the reserve OPGs, were not at risk of losing their jobs. Royal Mail was operating a system of excluding Angard workers from vacancies which arise (although that may be changing if the reference to "conversion" in the 2018 NA is given its natural meaning).

86. Cole confirmed "There is no reason why the word "vacant" should not be given its ordinary and natural meaning which in context describes a post which no permanent employee currently occupies." The 14 May and 8 June vacancies were "relevant vacant posts with the hirer" and there was no submission to the effect that they were not.

87. The respondent's submission is that the only duty is to inform, and it complied with that duty. That is the plain meaning of the regulations. It has freedom to set conditions of application: permanent employees only can apply. That position is said to be supported by the relevant guidance from BIS which provides: "Access to vacancies is not…how they treat qualifications".

88. We do not accept the respondents' submissions. The right is the right to be informed **to give that agency worker the same opportunity…".**

89. Further, the BIS Guidance at page 17 goes on: "This Right will not apply in the context of a genuine "headcount freeze" where posts are ring fenced for redeployment purposes or internal moves which are a matter of restructuring and redeploying existing internal staff in order to prevent a redundancy situation". We heard no evidence that avoiding redundancies was the position at Royal Mail and indeed the regular recruitment cycle for OPG employees suggested the contrary.

90. The right was clearly infringed and this is the second occasion on which a Tribunal has held that to be the case, albeit on the last occasion it followed concession.

91. As Mr Boyd points out, the seniority model means that in order to determine remedy for this infringement, there will need to be a seniority ranking undertaken afresh inserting the claimants as applicants. To do so would require their expression of interest as they would have completed it, had they been able to apply at the time.

We therefore adjourn remedy on this matter and make orders to enable that to be determined at a later date. We also note in this context that the BIS Guidance reports: "Regulation 13…does not constrain hirers' freedom regarding: any qualification or experience requirements such as time in service with the organisation". There is no guidance as to how time in service with an organisation is to be addressed for Agency Workers, bearing in mind this is a day 1 right.

Complaint 4: exclusion of the claimants from the system of issuing overtime in operation at Leeds Mail Centre between 18 and 24 June 2018 (Regulation 5)

92. An issue decided in the first claim was this:

"Have the respondents not provided the claimant with the same basic working and employment conditions as the second respondent had to its employees in respect of making work available?".

93. That Tribunal found the following facts:

"When [Royal Mail] allocates overtime it invites it employees to express an interest and then provides a working rota upon which it is allocated to them. It would typically seek to meet other demands by requesting agency work in a bulk appointment/request on the Thursday before the week the work was required. Occasionally demand for labour increases on the day, for example for reasons of sickness, late arrival of deliveries, etc. In those instances if a [Royal Mail] employee has placed his name on the overtime list, but has not been allocated overtime, he will be given first refusal. In the event that there is no such [Royal Mail] employee, the [Angard] employees will be given the opportunity to work extra or extended shifts on the day.

94. We further learned in this hearing that Royal Mail employees who wish to undertake overtime put themselves in an overtime pool, arranged by a 2001 local collective agreement: "An agreement on the allocation of processing overtime at the new Leeds Mail Centre, between Royal Mail Leeds, the CWU Leeds No1 Branch, Section 3 (Processing). They become "volunteers" under the agreement. Equally they can become "non-volunteers". The general principle records all overtime is voluntary and will be within applicable working time limits, but staff can be called upon exceptionally for involuntary overtime, for example in circumstances of sickness epidemic. The collective agreement terms are a development of, and to some extent the mechanism by which, the OPG personal employment contract term is put into practice. That provides, "…**it is a condition of your employment that you are liable to work overtime and to attend at varying times on any day (including weekends, Bank and Public Holidays) as the needs of the service demand**."

95. The context is a public service, undertaking a universal delivery requirement and seven day working week, where "a measure of overtime working is necessary". There are therefore particular "pressure hours" when overtime is the subject of forecasting, (pre-scheduled") and at times there is unpredicted overtime ("ad hoc"), as the Tribunal found above.

96. The most relevant terms in the claimant's contracts provided:

"You are employed by Angard but you shall be seconded to the Royal Mail Companies during any period of engagement (an"Engagement")….

9.1 Hours of Work: You have no normal hours of work, and your hours will vary according to the needs of Angard and the availability of work, during an Engagement. Angard is under no obligation to provide you with work, or to provide you with a minimum number of hours work each day or week and you are not obliged to accept any work that is offered. For the avoidance of doubt, this may result in there being days during your employment or during an Engagement where there will be no work for you to perform. However, Angard will endeavour to allocate suitable work to you when it is available….

23.1 Working Time: You may from time to time be requested to work in excess of the current "48-hour" limit under the Working Time Regulations 1998. Details are set out in the Schedule".

97. The Schedule referred to was a short agreement to opt out of the 48 hour working time limit in the usual format and with the usual caveats which Mr Kocur had signed on 26 January 2015.

98. There was no provision in the claimants' terms and conditions concerning overtime, albeit there was management guidance on rates to be paid for hours in excess of 35 hours and forty minutes (overtime rates).

99. As the claimants observed, in the week of 18 to 24 June 2018, their direct recruit volunteer colleagues were given, in accordance with the Leeds collective agreement, first refusal on the available overtime, unless they had opted out.

100. The question for the Tribunal was whether the requirement to undertake overtime and the collective agreement arrangement of opting in and first refusal on available overtime, were terms and conditions relating to the duration of working time ordinarily included in the Royal Mail OPG contracts in the summer of 2015.

101. It is clear that determining this question involves an issue decided in the first claim, and upheld on appeal: namely, what is a term relating to "the duration of working time"? Applying the claimants' literal and broad approach would involve their contracts of employment with Angard containing fundamentally inconsistent terms: a contract with no guaranteed hours, necessary to operate a bank of flexible resource of this kind, and an obligation, not only to undertake overtime but to have first call on that overtime, or at least equal call with Royal Mail employees, if the claimants have indicated they wish to undertake it. The first Tribunal said this:

"*The AWR 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 construed, equate the entitlement to hours of work to that of the employee of the hirer"

102. Overtime working involves, inherently, working beyond the duration of any assignment or in this case, engagement. The Honourable Mr Justice Choudhury said that the claimants' literal approach to terms relating to the duration of working time in Regulations 5 and 6, would: "*turn the nature of the agency worker/hirer relationship on its head and would denude it of the flexibility which the Directive sought to preserve and enhance"* at paragraph 42 F to G of the EAT Judgment.

103. At paragraph 44, endorsing the decision of the Employment Tribunal in the first claim he said: "*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 (eg a night shift), an agency worker should not be required to work eight hours."* In this case the Tribunal has found that there are such collective agreements on limiting working time and the working week, giving context to where this particular parity might have application.

104. In relation to parity of opportunity to work overtime, this Tribunal has also asked the comparative and hypothetical question required by Regulation 5. We have to divine the same basic working and employment conditions had the claimants been employed directly by Royal Mail in 2015. Angard was developed by Royal Mail specifically for the purpose of providing flexible resource. In these circumstances, for all the reasons inherent in operating a flexible bank of employees employed in an OPG capacity, Royal Mail would not have included in such employees' contracts the right to volunteer for overtime alongside contracted hours employees, had the claimants been direct recruits in 2015.

105. For all these reasons this complaint is not well founded.

<u>Complaint 5: on 4 June issuing both claimants with a shift that was 12 minutes longer than a comparable Royal Mail employee (Regulation 5</u>

106. Applying the same principles as those applied above, this complaint is well founded. Royal Mail has negotiated a shorter working week with its OPG employees and as a result shift lengths have reduced to enable a 39 hour working week, rather than forty hours, and had done so from before June 2018. As with other matters it has taken some time for the flexible resourcing practices to "catch up", such that Angard workers are now contracted to the shorter shifts.

107. Had the claimants been recruited directly by Royal Mail as flexible employees in 2015, they would have had the immediate benefit of the shorter (39 hour week), and would not have worked the 12 minutes longer shifts on 4 June. This complaint is well founded but as the claimants accept there was no loss arising from the infringement, we award no compensation. Nor did they seek any recommendations because matters had now moved on to give them parity in this respect.

Complaint 6: on 9 June 2018 deducting work breaks from both claimants' overall duration of shift working time (Regulation 5).

108. The effect of the EAT Judgment in Mr Kocur's appeal (that he was entitled to the same paid meal breaks as directly recruited OPG colleagues), was the subject of the review of agency workers terms undertaken by Royal Mail. The new regime, to give parity for paid breaks, was not communicated to Angard or other agencies until July 2018. That meant that there had been a deduction of the claimants' time from the record of working time for 9 June, albeit this was compensated by rolling up pay. The claimants told us about other similar instances before practices were changed. The respondents conceded that this infringement was well founded.

109. There were three main reasons for delays in implementing the changes. Firstly, there were the technical difficulties in changing the electronic payroll systems of many suppliers (for these matters also applied to Royal Mail's arms length suppliers providing agency drivers and so forth); secondly there was the need for all suppliers to do so at the same time otherwise there would not be a level playing field (the Tribunal was told); thirdly if instructions were given not to deduct time for breaks from the claimants' timesheets at the Leeds Mail Centre before the pay systems had bee changed, the claimants would, in effect be paid more than their direct recruit colleagues.

110. The claimants rightly pointed out that the Regulations provide a floor not a ceiling in relation to basic terms and there are many reasons why it makes sense for them to be paid more than their direct recruit colleagues. The continuation of deducting their time such a long time after the matter had been declared an infringement (which the respondents had accepted by the end of March) did therefore result in financial loss to them of, on this occasion, 40 minutes' pay.

111. We accept that remedy case and consider that they have suffered a loss on the one occasion relied upon of around £7.98 each, given an agreed hourly rate at the time of £11.95. The Tribunal considered that it was just and equitable, in all the circumstances of this case, to order the payment of compensation in accordance with Regulation 18(8)(b).

112. We then had regard to Regulation 18(12) and (13) and decided that it was just and equitable to award to the claimants two weeks' pay each, calculated in accordance with Regulation 19. A week's pay we determined summarily was that appearing on the claimant's payslips for the week of the assignment in question, namely £434.34 and £504.36 respectively.

113. As to justice and equity, we do consider that while the claimants admirably focussed their case on the precisely dated and demonstrable infringement, they did tell us about this practice continuing and we consider they were affected on a number of further occasions. We also take into account that Mr Kojur has had to spend a great deal of time seeking disclosure on relevant matters, which have not been readily provided to him, in order to prepare his case and even now, there may be matters of disclosure and information which have not been put before the Tribunal. In fact there was a full briefing available to the agencies in July on these matters and yet the information provided to the claimants at that time was woefully scant, on the direction of the Royal Mail. Relevantly it said this: "In early September, the pay rates will be amended to reflect the 5% pay increase and there will be a further change in the manner that you are compensated for your meal breaks and holiday pay to give greater transparency. There will be a further communication shortly to explain these changes."

114. We do take into account that the respondents have now conducted their review, and are in some respects addressing matters, but in others they are not and matters are delayed. "Shortly" has become "longly". The Regulations came into force in 2011 but were foreshadowed long before that, and Angard started operating shortly thereafter. In all respects when we consider the conduct of the respondents and the claimants as the Regulations require in subparagraph 13, we consider there is nothing in the claimants' conduct to suggest less than the two weeks' minimum shall apply. We also use our industrial knowledge to infer that the respondents' conduct in these matters is at strategic and national level and not the conduct of any of the witnesses before us, who have to implement decisions made by others.

115. The respondents (the second respondent being in control of the first respondent) shall therefore pay to the claimants the following sums amounting to two weeks' pay in respect of this infringement: Mr Kocur £868.64; Ms Roberts £1008.92.

<u>Complaint 7: paying rolled up holiday pay in respect of 2.5 additional days' holiday pay in respect of a shift worked on 9 June 2018 (Regulation 5).</u>

116. In similar circumstances to those above, the respondent conceded this alleged infringement was well founded because the position arising from the EAT Judgment has not been fully addressed The claimants did not prove any financial loss arising but did seek the greater clarity and transparency that has been promised.

117. An entitlement to take paid holiday must be on the same basis as the hypothetical direct recruit employed in 2015. How that is to be achieved must be transparent and the respondents do not appear to have settled the position. While the claimants did not seek a recommendation, the Tribunal has indicated the holiday provision it considers determinable in accurate Section 1 particulars on the evidence it has heard. It is for the respondents to address the position, which may be far more complex, and sustain any explanation if necessary in evidence from decision makers.

118. For these reasons this infringement is well founded The Tribunal makes no financial award or recommendation.

Complaint 8: averaging the claimants' pay on payslips dated 27 April 2018 (Regulation 5)

119. Royal Mail provides payslips to its employees by post. Its multiplicity of pay grades and rates mean that it can set out most hourly rates and hours, but sometimes the extent of information means matters have to be compressed. Angard's payroll system differs: payslips are provided electronically to the claimants and there is simply not the capacity to provide all the underlying pay rates and hours information; instead an average pay rate appears on the payslip.

120. This complaint is not well founded. There is not a term which would have been included (nor was) in the contracts of Royal Mail direct recruits either in 2015 or now entitling a particular level of detail in a payslip. Section 8 of the Employment Rights Act 1996 permits the provision of an average rate of pay.

121. We do not underestimate the difficulty for the claimants in understanding whether they have been paid correctly, but we consider that their right to pay rate information is properly to be delivered by an accurate Section 1 statement and timely updates to that statement when pay rates change.

Complaint 9: on 14 May and 15 June 2018 scheduling shorter break times for the claimants than a permanent colleague on shift (Regulation 5).

122. This is an example of a complaint about a means of contractual delivery rather than a contractual term. The claimants were entitled on these dates to the same duration of paid breaks as they would have been had they been recruited directly by Royal Mail as OPG reserves in 2015, and had benefitted from the gradually improving terms as a result. The difference in delivery of that basic term as to the duration of working time was that the claimants' shorter break time was not scheduled on their signing in sheets, whereas the time for the break was notified to their direct recruit colleagues on their duty sheets. The result was that Angard workers were told by managers when to take their shorter break, and Royal Mail employees could simply go on their breaks at the appointed time unless asked to stay back. There are clearly practical reasons why this difference in approach persists. It does not amount to an infringement of Regulation 5 and this complaint is not well founded.

Complaint 10: Angard not including adequate particulars of employment in the claimants' contracts compliant with Section 1 of the Employment Rights Act 1996 in four respects (remuneration; holiday pay/entitlement; hours of work (including rest breaks); and applicable collective agreements):

123. The Tribunal has made further findings of fact above concerning the extent to which Angard has operated to the particulars determined by Employment Judge Jones (it has not), or provided updated employment particulars reflecting all the change underway (it has not). The EAT Judgment has also resulted in the respondents need to change their approach.

124. As a result the written particulars provided by Angard to the claimants and to some extent those declared by the Tribunal on 8 January 2018 do not now comply with Section 1 (to the extent of representing the claimants' particulars either at the commencement of these proceedings or today) and a separate Order addresses the means for their determination.

Complaint 11: during 23 to 29 April 2018 allocating to the second claimant four night shifts when a royal mail employee worked five night shifts (Regulation 5)

125. Ms Roberts had identified during this week a direct recruit colleague holding a permanent night shift post. Failing to give her parity in the duration of her working time that week, she said, was an infringement of Regulation 5, making the same argument as was made in respect of overtime allocation. For reasons explained in relation to complaint 4 above, and by the first Tribunal, and in the EAT Judgment, this complaint is not well founded.

Complaint 12: during 4 June to 10 June 2018 to the first claimant 38.5 hours' night shift work when a royal mail employee worked 39 hours (Regulation 5)

126. This is Mr Kocur's clone complaint of complaint 12. The facts are not disputed. For the same reasons it is not well founded.

Employment Judge JM Wade
Date 29 November 2018