# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr T Jones & others**

**Respondent:** **Birds Eye Limited (R1)**
**GI Group Recruitment Ltd (R2)**

**HEARD AT:** **Bury St Edmunds**

**ON:** **18th January 2017**
**19th January 2017**
**20th January 2017**
**23rd January 2017**
**24th January 2017**
**(25 & 26 January 2017 in chambers)**

**BEFORE:** **Employment Judge Laidler**

**MEMBERS:** **Ms S Stones**
**Ms M Lee**

**REPRESENTATION:**

**For the Claimant:** Ms I Omambala, Counsel

**For the Respondent:** Mr C Jeans, Queens Counsel (R1)
Ms S Bewley, Counsel (R2)

# JUDGMENT

1. **The Claimant's were not working temporarily for Birds Eye within the meaning of the Agency Worker Regulations (the Regulations) and therefore all claims are dismissed.**

2. **In the event the Tribunal were found wrong in the above decision, the Claimants have been afforded the same basic working and employment conditions as they would have been entitled to had they**

**been recruited by Birds Eye at the time their qualifying periods commenced.**

3. **A flexible worker is a comparable employee for the purposes of Regulation 5(3) and was not a device/sham designed to avoid the application of the Regulations.**

4. **All claims brought for the period of employment with Adecco are out of time and dismissed.**

# REASONS

1. These are the claims of Terry Jones and 87 other Claimants arising out of their work as agency workers for the second Respondent at the site of the first Respondent. In a claim form received on the 16th October 2015 the Claimants' brought claims that they had been treated less favourably as agency workers contrary to the Agency Workers Regulations 2011 (AWR).

2. In the Response of the first Respondent, it denied the claims. It relied on the case of *Morran -v- Ideal Cleaning EAT/0274/13* in asserting that the Claimants were not supplied to work "temporarily" within the meaning of the AWR. If the Claimants were agency workers within the meaning of the Regulations, then each Claimant has been employed on precisely the basic working and employment conditions he/she would have been entitled for doing the same job had they been recruited by Birdseye within the meaning of Regulation 5(1) AWR. Further, they were employed on the same basic working and employment conditions as flexible workers who were "comparable employees" under Regulation 5(3) and (4) AWR.

3. The first Respondent provided two different schedules of Claimants. It asserted that those in schedule A were out of time in their entirety and those in schedule B who were previously employed by Adecco were out of time in relation to the previous period of employment with Adecco relying upon the TUPE decision in *Sodexo v Gutridge [2009] ICR 1486.*

4. The second Respondent also defended the claims again raising time points against some of the Claimants. It was also submitted that the Claimants were working in an "open ended" relationship with the first Respondent and were not temporary workers within the meaning of the definition in the AWR.

5. The matter came before Employment Judge Morron on the 15th January 2016 and in a Judgment issued after that hearing sent to the parties on the 27th January 2016, the Tribunal held that 11 claims as identified in the Judgment were out of time and that it was not just and equitable to extend time. Those matters have therefore not been before this Tribunal.

6. Issues were agreed at that hearing which appeared in the bundle for this hearing at page 62A. It was agreed at this hearing that there was no dispute

as to the date upon which each Claimant's qualifying period commenced and that was therefore removed as an issue for determination. The following were therefore the issues for this Tribunal which it was agreed would deal with matters of liability and not remedy: -

***Issues***

1. *Are/were the Claimants working "temporarily" for Birds Eye?*

2. *Have the Claimants been afforded the same basic working and employment conditions as they would have been entitled to had they been recruited by Birds Eye at the time their qualifying periods commenced? Reg 5(1).*

3. *Whether a "Flexible Worker" is a comparable employee for the purposes of Regulation 5(3)?*

4. *The Claimants will also seek to argue that the introduction of the Flexi Workers was a device/avoidance mechanism/an abusive practice or a sham, designed to avoid the application of the Regulations.*

5. *With whom does any liability rest?*

6. *Are the Claimants entitled to claim for actions which took place during a period of employment with Adecco (or earlier agency) against either or both Respondents?*

7. The Tribunal read the witness statements and related documents on the first day of this listing and then started hearing the evidence on the second day having conducted a further clarification of the issues. The Tribunal heard from the following on behalf of the Claimants: -

    i) Steve Harley, Unite Regional Officer
    ii) Robert Hodges
    iii) Gary Jacob
    iv) Terry Jones
    v) Dale Hewett
    vi) Phillip James

    On behalf of the first Respondent:-

    i) Andrew Cole, Operations and Supply Chain Manager at the first Respondent in Lowestoft
    ii) Ashley Reynolds, HR Manager at the first Respondent in Lowestoft

    For the second Respondent:-

    i) Valerie Anderson
    ii) David Thurley, Regional Manager

iii) Joanne Young, General Manager for the food division within the SMS Division

8. The Tribunal had a bundle of documents running to 395 pages although it is true to say it did not have to go to a number of those documents. There was also a supplemental bundle of documents produced on the first day which ran from 396 to 466.

9. From the evidence heard, the Tribunal finds the following facts.

**The Facts**

10. The Birds Eye site at Lowestoft is a frozen food factory producing around 120,000 tons of frozen food each year. It has been operating there since 1949 and as at May 2016 there were approximately 500 employees and 200 agency workers working at the site.

11. The factory comprises four different manufacturing departments called Denes, 1, 2, 3 and 4. Each of these produces five categories of frozen foods. Each of the four departments is housed in a separate building and run relatively independently of each other with independent managers reporting to Mr Cole who has oversight of managing manufacturing obligations including supply planning in all four factories.

12. The demand for the first Respondent's products constantly fluctuates and there are peaks and troughs all year round. This can be seasonal but not always. The four departments might be running at between 30 and 100% capacity and producing between 1 and 4 product lines at any one time. The factory therefore needs a great degree of flexibility within the workforce particularly at the lower end of technical ability. They need both flexibility with duties and with the workforce, eg they need to be able to manage the number of staff on site so that there are as many or as few as demand requires at any given time.

13. The Union Unite is recognised by the first Respondent and all the witnesses to this Tribunal gave evidence that there was a good constructive dialogue and relationship between the Union and management. It was quite clear in the evidence heard that neither party sought to do anything to jeopardise that relationship.

14. From the evidence of Mr Cole, the Tribunal accepts that the first Respondent had sought to find the best way to address the needs of the business and over the years had tried a variety of staffing and production models. Using solely its own employees did not provide the level of flexibility they required. The employees were contractually tied to work in certain departments and on specific shift patterns and evidence was heard that up to 2 months' notice would be required to change such on a permanent basis.

15. Since the late 1990's the first Respondent had supplemented its workforce with agency workers. Initially these had been provided by Manpower but in 2008 the contract moved to Adecco. The majority of Manpower employees transferred to Adecco under TUPE provisions. There was a subsequent transfer to the second Respondent on the 1st May 2012 and again the Adecco employee's transferred to GI under TUPE.

16. Prior to 2011 the first Respondent employed five grades of employees at its Lowestoft factory. These were referred to as Grades 1's, 2's, 3's, 4's and Grade 4 A's respectively. The Grade 1 tasks required the lowest level of technical skill and for example that could include inspection and hand picking of produce, basic machine operation and sanitation duties.

17. Grade 2 tasks required a higher level of skill including machine operation and set up, stock control and dealing with minor machine faults.

18. Grade 3 tasks were similar to Grade 2 but the employees were trained as single skilled engineers so they could deal with more serious machine faults and they also have some team leadership responsibility.

19. Grade 4 employees are multi-skilled maintenance engineers (with a Grade 4 being a trainee engineer and a Grade 4A being a fully proficient engineer) and spend the majority of their time working on machine maintenance.

20. All four levels of employees are present in the four different factories but they would usually work regularly in only one of the departments and they are contracted to work on particular shift patterns.

21. The Tribunal accepts the evidence of both Mr Reynolds and Mr Cole, that Grade 1 employees had not been recruited after the 8th September 2008. This is confirmed on a spreadsheet which appeared in the bundle at page 363. It is accepted that the one person shown on page 365 as a Grade 1 employee was in fact an error as set out in Mr Reynold's statement at paragraph 14. That worker was in fact hired in February 2009 on a Grade 2 contract.

22. There has been much dispute in this hearing as to when the decision was taken to no longer use Grade 1 employees. The Tribunal saw a note of a company and Trade Union joint forum for 17th February 2010 which was attended by seven Trade Union members in which a question was raised as to "why are the company seemingly not replacing Grade 1 or job share people?" The Tribunal therefore accepts that as early as 2010 it was acknowledged by the Union that Grade 1's were not being recruited. Mr Harley when cross examined, although stating he did not believe he had seen this document before, accepted that they were aware of the non replacement of Grade 1's although it was not a position that they accepted. They may not have accepted it but it does appear to have been known by them that they were no longer being recruited.

23. By 2011 the first Respondent were using approximately 250 agency staff and 340,000 agency hours a year**.** Many of the agency workers had worked for the first Respondent for many years, some over 10 years. Unlike its own employees, the agency workers were not tied to a specific shift pattern or department and did not have a minimum number of guaranteed hours per week so they provided an effective way to meet the ever growing need for flexibility of both skills and people. Many of the agency staff worked exclusively at the first Respondent for many years. The planning cycle has been the same for a number of years and certainly is the same now as it was in 2011. The first Respondent plans each week's production in detail one week in advance and by Thursday they convert that to a head count. They then notify the agency on Thursday or Friday morning how many workers they will need, what skill level they will need them to work at and which shift pattern they need them to work. They do not ask for agency workers by name but skills. The Claimant's gave evidence that they would invariably receive a text at the end of each week telling them whether and how they were required the following week.

24. The Tribunal saw a blank form of specific employment details (SED) issued by Manpower which provided basic details of employment by Manpower UK Ltd. This provided a minimum hourly rate which would vary from assignment to assignment and referred to a company handbook which, with this form, formed the contract of employment.

25. The Tribunal also saw a blank form of letter confirming transfer of Manpower's contract for the supply of staff to the first Respondent for the Lowestoft contract to Adecco UK with effect from 28th April 2008. The letter set out how the transfer was covered by the TUPE Regulations and that the employee's employment would transfer automatically to Adecco UK on 28th April 2008 with continuous service being maintained and with the employee continuing to enjoy the benefits of their existing terms and conditions. The employee was, however, advised that they may object to being transferred to work for Adecco UK and Manpower UK Ltd would then endeavour to find alternative work for them, although that could not be guaranteed.

26. The Tribunal also saw a standard form of contract of employment issued by Adecco UK Ltd to its employees. This provided that the employee would not have a permanent place of work but would work at different temporary locations which would usually comprise of the premises of the clients of Adecco to which the employee is assigned from time to time. Adecco undertook to provide the employee with a minimum of 400 hours on paid assignment in any 12-month period. There were provisions with regard to pay and paid annual leave and that the employees were subject to Adecco's disciplinary rules and procedures.

27. The Tribunal saw a similar contract of employment issued by GI Group Recruitment Ltd to its employees and company handbook.

**Consultation with Trade Union**

28. The consultation with the Union in connection with the implementation of the AWR commenced with a meeting on the 15th March 2011 and the Tribunal saw the presentation prepared for that occasion. This was drafted by Ashley Reynolds and it could be seen on the 14th slide, the various options being put forward to achieve equal treatment. There were: -

    1. Pay all Adecco workers the same hourly rate as permanent employees.
    2. Pay all our permanent Grade 1 – 2 employees the same as Adecco workers.
    3. Pay all new recruits into both permanent and agency grade 1 – 2 positions the equivalent of £7.50 and £9 per hour starting rate from 1st October 2011.
    4. TUPE transfer all permanent Grade 1's and 2's to Adecco.
    5. Operate a system called "Swedish Derogation".

29. Notes of the meeting were seen at page 256. The meeting was attended by Ashley Reynolds and Andy Cole for Birds Eye and Billy Doran, Kevin Mitchell and David Heath, Senior Union Representatives. The first entry by Mr Reynolds notes that "option 3 is legally water tight as the AWR is not retrospective". Mr Mitchell stated that there was a "moral issue for 70 Grade 1's and I believe potentially a legal issue".

30. Mr Mitchell further noted that they had had a Union meeting recently at which an employment solicitor attended and he thought option 3 "would be shot down quickly". Mr Cole believed it was a question of "legal interpretation and case law will decide".

31. Mr Mitchell noted further on in the meeting that option 3 was "a concern". The prime concern of Mr Heath was the permanent Birds Eye workers' protection.

32. The meeting concluded with Mr Reynolds asking whether all were agreed that options 1, 2, 4 and 5 were not worth pursuing and they all agreed. Mr Cole asked them to "get a further legal view on our option 3". There is no further reference to a legal opinion having been obtained by the Union at that point.

**August 1st 2011 meeting**

33. There were no further formal meetings between March and August. A further slide presentation was prepared for the August meeting (page 258) Notes of the meeting were produced and seen at page 277. This time Steve Harley attended the meeting with Billy Doran, David Heath and Michael Cook and again Ashley Reynolds and Andy Cole attended for Birds Eye

34. Mr Harley questioned why the pool only referred to 30 flexible workers and not 50 and stated they needed guarantees with regard to volume and labour

level/head count. They did, however, "buy in to permanent employment and your proposal" and could see that there was "logic" in the proposal.

35. It was at this meeting (to which reference has already been made) that Mr Cole said they did not intend to recruit permanent Grade 1's going forward.

36. Mr Harley noted that the progression from Adecco agency workers to flexible Birds Eye permanent workers was attractive.

37. The Tribunal heard from Valerie Anderson that Adecco had provided references for loan purposes for its employees and there is reference to Michael Cook asking "what would happen if there was no work for a flexible worker in a particular week Mr Heath how would they get a mortgage?" Mr Reynolds replied "pay slips plus follow up letter from Birds Eye confirming nature of employment". This goes to confirm the evidence of Valerie Anderson that letters were produced for loan purposes to assist the agency workers as would be the case with the flexible workers.

38. The Union raised the issue of a minimum number of hours for the proposed flexible workers and suggested 1,000 and Mr Reynolds said that the issue would be they would have to potentially offer the same to Adecco workers. He would gain a legal view on the minimum number of hours.

39. Mr Harley noted that flexible workers would get the hours first and that was a "positive". He would like to take the proposal to the legal team and then said that he needed "to ask the question, and don't take this the wrong way, is it "a sham arrangement?".

40. He was asked about this in cross examination. He stated that the way it was put in the notes was not his perception of the dialogue at the meeting. He had made it very clear that as far as Unite were concerned they were supportive of full implementation of the AWR but as Birds Eye had made its position clear in favour of option 3, they would not simply walk away but try and shape option 3 to be as beneficial to agency workers as they could. This was a question he had to pose. He was never sent these notes as formal minutes for approval.

41. The meeting closed with Mr Reynolds asking for a response by the 15th August as they would be communicating to the factory the week commencing the 22nd.

**Letter from Unite 9th August 2011**

42. This letter was sent by Mr Harley after he stated he had had the opportunity for further discussion with a wider group of Unite site representative and their Adecco representatives. They were of the opinion that the proposals by Birds Eye tabled at the meeting on the 1st August "do not address the company's legal obligations to implementing the AWR in both its provisions and spirit".

43. He had given a commitment to read further company proposals to the Union's legal department for a review, however, in order to conduct that process he wished to have the proposals viewed by Unite's National Officer for food, drink and tobacco sector. That person was currently on annual leave but he had forwarded the proposal document and minutes of the meeting to her office requesting an urgent review. He went on: -

"in the interim I am informing you that Unite the Union cannot accept the proposals put forward and (pending further review) is concerned that the proposals may constitute a breach of the AWR, in that those proposals tabled by the company on 1st August 2011 are simply an avoidance under the employer's obligations to implementing the intended terms of the AWR".

44. Mr Reynolds responded on the 17th August stating he was "somewhat surprised by the apparent change in position from a Unite perspective".

**Review Meeting 23rd August 2011**

45. This was a further meeting at which Mr Reynolds and Mr Cole were present together with Steve Harley and he believed Billy Doran, Stuart Coxan, and David Heath, union representatives. Some handwritten notes were seen in the bundle at page 289. These were prepared by Mr Reynolds.

46. The notes record there was "mixed bag of opinions". In his witness statement at paragraph 43, Mr Reynolds records that the unions main concern related to the ratio of permanent staff to agency staff which he saw as a separate issue to the implementation of the flexible worker role and compliance with AWR. The union wanted the first Respondent to commit to a regular review of head count against volume. The notes record that it was agreed there would be quarterly consultations and that Mr Cole and Mr Reynolds would indeed share the anticipated volumes and worker numbers for the Lowestoft factory with the union.

47. At this meeting Mr Reynolds also shared the "Future Recruitment Plans" draft note that he proposed to issue.

48. There is much reference to the obtaining of legal advice on behalf of the union at this time in 2011 but Mr Harley was not able to confirm when the advice was taken, whether it was in 2011 or 2012. He told this tribunal that they did encourage Adecco employees to bring claims but they could not advise them as there was no legal precedent for them to give the employees any firm direction. They were not authorised to give them legal advice. They could only refer the members to the union solicitors and that is what he believed he was doing constantly and continued to do from 2011. There was no further information before this Tribunal as to the steps taken.

**Announcement – Future Recruitment Plans**

49. On 24th August 2011 an announcement was put out to the workforce at the Lowestoft factory of the company's future recruitment plans. In setting out the background with regard to Grade 1 employees it went on: -

*"With this in mind, the factory will be recruiting a pool of permanent "flexible workers" with no fixed crew or department. They will be employed in a similar way to current Adecco agency temporary staff, with no permanent shift pattern but with periods following crews, mixed with shifts helping other departments in need of labour. These "flexible workers" may work a mixture of 8 and 12 hour shifts, providing skills that meet our fluctuating production demands.*

*Once recruited, it is anticipated that the majority of our highly skilled Grade 2 work that is currently undertaken on a needs basis by Adecco agency workers will be done by the pool of permanent Birds Eye "flexible workers". On occasion, some of this work may still be done by Adecco agency workers if it is necessary to provide the flexibility/cover that the factory requires.*

*The company would, however, still recruit future permanent Grade 2 employees at current salary levels as demands dictated."*

**Flexible Workers Internal Advert**

50. On 30th August 2011 the internal advert was released. This provided for flexible workers being paid at an hourly rate of £7.50 for Grade 1 duties, flexing to £9 per hour if and when required to do Grade 2 duties. The main job purpose was described as: -

*"to undertake routine production duties (Grade 1) to supplement the department/sites core requirements and to provide higher skilled (Grade 2) support, if and when needed".*

51. Other details of the terms and conditions were in particular that there would be no fixed shift pattern or standard working hours but that full flexibility would be required around hours and place of work including a level of standby cover where business dictates. The minimum guaranteed hours per annum would be 400 but there would be periods when no work was available. Applications were invited by the 14th September 2011.

52. In an email of 4th October 2011 Ashley Reynolds notified that they had had 130 applicants, most of whom were Adecco employees. They had arranged to interview 53 candidates from the week commencing the 10th October with the aim of people starting in role by the 7th November 2011.

53. The up to date position as of the 12th January 2016 was confirmed by Mr Reynolds to David Thurley of GI in an email. The figures were as follows: -

| | |
|---|---|
| Permanent flexible workers | 76 |
| Permanent Grade 1 and 2 | 242 full time equivalent |

111 flexible workers had been recruited since November 2011 with the majority being recruited via GI the second Respondent but some externally.

54. As at the date of Mr Reynolds' statements on 29th July 2016, the figures were 500 Birds Eye employees at Lowestoft, 301 of those were Grade 1 and Grade 2 of which 74 were flexible workers.

55. The Agency Worker Regulations (AWR) came into force on the 1st October 2011.

**Transfer to GI**

56. In February 2012 Birds Eye reviewed the provision of its agency services and went through a tender process with a few different agencies. The contract was awarded to GI, the second Respondent and the Adecco employees transferred to GI under TUPE on 1st May 2012.

57. The key local manager at Adecco, Val Whyborn also transferred under TUPE and GI took over Adecco's office on site. No claims were brought by any of the agency workers employed by Adecco including any of the Claimants at the time of the transfer or during the 3-month period following the transfer date.

58. The flexible workers are recruited on the same terms and conditions as when the role was first introduced in 2011. The hourly pay rates have increased as a result of salary reviews. The current hourly rate at the date of Mr Reynolds' statement was £8.28 with a higher rate of £9.93 when a flexible worker is required to perform duties at Grade 2 level.

59. All of the agency workers at the Lowestoft factory continue to carry out the same role as a flexible worker and are subject to the same terms and conditions with regard to pay and annual leave as the flexible worker including, in particular, being paid at the same rate.

**Relevant Law**

Agency Workers Regulations 2010

*60. Regulation 3. – The meaning of agency worker*

*(1) In these Regulations "agency worker" means an individual who -*

*(a) is supplied by a temporary work agency to work temporarily for and under supervision and direction of a hirer; and*

*(b) has a contract with the temporary work agency which is –*

*(i) a contract of employment with the agency, or*

*(ii) any other contract with the agency to perform work or services personally.*

61. Regulation 4. - The meaning of temporary work agency

*(1) In these Regulations "temporary work agency" means a person engaged in the economic activity, public or private, whether or not operating for profit, and whether or not carrying on such activity in conjunction with others, of –*

*(a) supplying individuals to work temporarily for an under the supervision and direction of hirers; or*

*(b) paying for, or receiving or forwarding payment for, the services of individuals who are supplied to work temporarily for and under the supervision and direction of hirers.*

*(2) Notwithstanding paragraph (1)(b) a person is not a temporary work agency if the person is engaged in the economic activity of paying for, or receiving or forwarding payments for, the services of individuals regardless of whether the individuals are supplied to work for hirers.*

62. Regulation 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.*

Directive 2008/104/EC on Temporary Agency Work

63. The Directive established a *"protective framework for temporary agency workers which is non-discriminatory, transparent and proportionate while respecting the diversity of labour markets and industrial relations."* (paragraph 12)

64. In paragraph 14 of the pre-amble it was made clear: -

*"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."*

*65.* The specific Articles in the Directive relevant to these proceedings are as follows: -

Chapter 1 – General Provisions

Article 1
Scope

This Directive applies to workers with a contract of employment or employment relationship with a temporary-work agency who are assigned to user undertakings to work temporarily under their supervision and direction.

Article 2
Aim

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.

Article 3
Definitions

…(c) 'temporary agency worker' means a worker with a contract of employment or an employment relationship with a temporary-work agency with a view to being assigned to a user undertaking to work temporarily under its supervision and direction;

Article 5
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.

"Temporary" Issue - *Moran v Ideal Cleaning Services Ltd* [2014] IRLR 172

66. This decision has been referred to by both parties and is important with regard to the meaning of temporary worker.

67. The EAT held that the concept of "temporary" in the Agency Workers Regulations and the Directive meant "not permanent". The factual background was described in paragraph 3 of the Judgment by Mr Justice Singh as follows: -

> *"3. Factual background*
>
> *The appellants were all employed for many years by the first respondent, Ideal Cleaning Services Ltd. However, from the start of their employment they were placed by the first respondent with the second respondent or its predecessor. This is illustrated, by ways of example, by the statement of principal terms and conditions of employment in respect of Mr Moran, the first appellant. That statement gave as his job description that of cleaner. It said that his starting date was 23 November 1987. It also said that his place of work was Courtaulds Acetate (now Celanese Acetate, the second respondent), at Spondon in Derby. He and the other appellants worked there for many years until they were made redundant in late 2012.*
>
> *. . .*
>
> *10. [referring to the Employment Tribunal decision]*
>
> *At paragraph 4, the judge stated:*
>
> > *'Mr Scott [counsel for the claimants] contends that fatal to the respondent's argument, even before I look at the Agency Regulations, is a statement made by Mr Benning, a witness for Ideal, and whose statement I have read. The relevant extract is to be found in paragraph 18 of his statement:*
> >
> > *"We operate on an invoice basis. Ideal cleaning services have provided managed contract cleaning and other industrial services to Celanese for many years (for that read the Spondon plant) but there would be nothing to stop Celanese deciding to curtail these services, or to take over all or part of those services. If this occurred, we would have to try to redeploy those staff with Ideal cleaning or transfer of employment to Celanese under TUPE. If there were no available roles and it was found that TUPE did not apply, they would then be redundant and we would pay redundancy pay."*

*11. Two sentences were omitted from the end of the quotation of paragraph 18 of Mr Benning's witness statement. They state as follows:*

> *"This has occurred in the past on this site over the years. The last time this happened was in March 2010 when the requirement of Ideal by Celanese was reduced. It is the management at these services that has been invaluable to Celanese over the years, and this is clearly demonstrated by the number of years our services have been retained."*

*…*

*14. At paragraph 8 the judge continued:*

> *"As to the intention point, the reliance of Mr Scott on para 18 of Mr Benning's statement is somewhat countered by a crucial passage from the evidence of Mr White. Under cross-examination and then as confirmed to me he said:*
>
> > *"Yes I agree, in reality a permanent placement. I never expected to be moved elsewhere as per a temporary contract".*
> > *He is a UNITE official.'*

*15 At paragraph 9 of his judgment the judge said that he did not find the statement of Mr Benning to be fatal to the case for the first respondent. He did not find the mixed evidence as to intention and understanding as to what was in the minds of the parties, coupled with the reality of what occurred historically, such as to be persuasive either way. He then turned to the relevant legal provisions. I will set those out later in this judgment.*

*…*

*36 The legislative history of the drafting of the 2008 Directive is, in my view, important. The proposal for such a Directive was made by the Commission of the European Communities on 20 March 2002. In the original proposal the draft Directive envisaged, in Article 1, that the scope of the Directive would be to apply 'to the contract of employment or employment relationship between a temporary agency, which is the employer, and the worker, who is posted to a user undertaking to work under its supervision.' The definition provision in the draft Article 3 envisaged (at paragraph c) that 'posting' would mean the period during which the worker is placed at the user undertaking.*

*37 It will be seen that, as things then stood, the concept used was one of 'posting'; and importantly there was no reference to a worker being posted to a user undertaking 'temporarily'.*

> *38. This was amended on 23 October 2002. Amendment number 27 proposed that Article 3.1 should include a new provision referring to 'temporary agency worker' and defining that to mean:*
>
> > *"any person who enters into a contract of employment or employment relationship of indefinite or fixed duration with a temporary work agency, to be assigned temporarily in a user undertaking to work under the direction and supervision of that user undertaking'.*
>
> *39. It will be seen that the definition had now been altered in two material ways: first, the concept of 'posting' was replaced with the concept of 'assignment' and, secondly, the word 'temporarily' had been introduced.*
>
> *. . .*
>
> *41. I see some force in that criticism but in the end I do not accept it. It is not entirely clear what interpretation the judge was giving to the word 'temporary' in the Regulations. It was not helpful, in my view, to say, as he did, that he was adopting the dictionary definition because the dictionary he quoted from in fact gives two different meanings. The word 'temporary' can mean something that is not permanent or it can mean something that is short term, fleeting etc. The two are not necessarily the same: for example, a contract of employment may be of a fixed duration of many months or perhaps even years. It can properly be regarded as temporary because it is not permanent but it would not ordinarily be regarded as short term. I should add that by permanent I do not mean a contract that lasts forever, since every contract of employment is terminable upon proper notice being given. What is meant is that it is indefinite, in other words open-ended in duration, whereas a temporary contract will be terminable upon some other condition being satisfied, for example the expiry of a fixed period or the completion of a specific project.*

68. The decision is also of assistance to the Tribunal in regards to the interpretation of the Regulations and the adoption of a "purposive approach". At paragraph 47 the court made clear that the amendment which introduced the concept of "temporary" into the scheme of the Directive, strongly suggests that the introduction of that word was intended to have legal significance and should be given effect.

*Autoclenz Ltd v Belcher & Others [2011] ICR 1157*

69. In view of some of the submissions made the Tribunal has gained assistance from the decision of the Supreme Court in *Autoclenz Ltd v Belcher & Others* [2011] ICR 1157 when it held that it was necessary to determine the parties

actual agreement by examining all the circumstances, of which the written agreement was only a part, and identifying the parties actual legal obligations. The Employment Tribunal it held had been entitled to disregard the terms of the written documents insofar as they were inconsistent with those findings when it held that the Claimants were workers.

'Sham'

70. The Claimants seek to argue that the "flexible worker" position was a 'sham or device' to defeat the Regulations and therefore cases dealing with how the court should identify such a sham are relevant.

71. The earliest case the Tribunal was referred to was that of *Snook v London and West Riding Investments Ltd* [1967] 2 AB 786. Diplock LJ stated at page 802 paragraph C to E as follows: -

> *"As regards the contention of the plaintiff that the transactions between himself, Auto Finance and the defendants were a "sham." it is, I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the "sham" which are intended by them to give to third parties or to the court the appearance of creating between the parties' legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. But one thing, I think, is clear in legal principle, morality and the authorities (see Yorkshire Railway Wagon Co. v Maclure and Stoneleigh Finance Ltd. V Phillips), that for acts of documents to be a "sham" with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating. No unexpressed intentions of a "shammer" affect the rights of a party whom he deceived. There is an express finding in this case that the defendants were not parties to the alleged "sham." So this contention fails."*

72. In *Bankway Properties Ltd v Pensfold-Dunsford* [2001] 1 WLR 1369 the Court of Appeal gave guidance with regard to the definition of a "sham" in relation to an agreement under the Housing Act 1988. The court stated as follows: -

> *"52 The question whether a document is a sham or a pretence or in substance an unlawful contracting out or evasion of an Act of Parliament is a pure question of fact. As regards the evidence the judge in effect confined himself to the agreement and did not consider the surrounding circumstances, including subsequent conduct. In this regard, in my judgement, he fell into error for, as I have explained, all such evidence is relevant to the question of sham, pretence or whether in substance there was an unlawful contracting out of the 1988 Act. I must therefore consider whether, in the light of the*

*evidence as to the surrounding circumstances, the appropriate conclusion which the judge should have reached was that the agreement was in substance an unlawful contracting out of the 1988 Act."*

*…*

*"55 In my judgment, when the facts of this case are examined as a whole, it is clear that, as the judge found, clause 8 (b)(iii) was merely a device. It was in reality a provision which would enable the landlord to obtain possession of the premises. As such, clause 8 (b)(iii) masqueraded as a provision for an increase of rent: it was not in substance a provision for the payment of rent. It was introduced to enable the landlord to bring the assured tenancy to an end when it chose. In some cases the tenant might be expected to leave voluntarily. In other cases such as this the landlord would have to make an application to the court but, subject to the outcome of this appeal, that would only be formality since the rent was much higher than a tenant could be expected to pay. The landlord, therefore, did not have to give the tenants the last opportunity which they obtain in the usual way to pay the rent arrears at the door of the court to avoid an order for possession. The landlord may, as Miss Padley submitted, have intended to demand rent but it had no genuine expectation that it would ever receive any rent under clause 8 (b)(iii)."*

*"56 As I see it, the effect of the 1988 Act is that where a tenant is in a position to pay the sum genuinely reserved as rent at the time provided in the tenancy agreement or at such later date as Parliament allows, he should be free to do so and not lose possession. In my judgment, the effect of this agreement is that the tenant is prevented from paying the genuine rent by a provision for payment of a sum which was never expected to be paid and which is not on its true analysis rent at all. That provision, in my judgment, offends against the mandatory scheme of the 1988 Act and is unenforceable. I differ from the judge in that, in my judgment, this device, as he fairly called it, is not permissible."*

73. Counsel for the Claimant also relied upon *Astall v HMRC* [2010] EWCA CIV 1010 where Arden LJ described the approach at paragraph 44 as follows: -

*"44 Is a purposive interpretation of the relevant provisions possible in this case? In my judgment, there is nothing to indicate that the usual principles of statutory interpretation do not apply and accordingly the real question is how to apply those principles to the circumstances of this case. In my judgment, applying a purposive interpretation involves two distinct steps: first, identifying the purpose of the relevant provision. In doing this, the court should assume that the provision had some purpose and Parliament did not legislate without a purpose. But the purpose must be discernible from the*

*statute: the court must not infer one without a proper foundation for doing so. The second stage is to consider whether the transaction against the actual facts which occurred fulfils the statutory conditions. This does not, as I see it, entitle the court to treat any transaction as having some nature which in law it did not have but it does entitle the court to assess it by reference to reality and not simply to its form."*

74. The Tribunal was also referred to another landlord and tenant case of *Ghadian v Godin-Mendoza* [2004] 2 AC 557. This is particularly relevant with regard to the manner in which the Tribunal should read legislation that is implementing a Directive. The court stated at paragraph 66: -

*"In the second place, section 3 requires the court to read legislation in a way which is compatible with the Convention only "so far as it is possible to do so". It must, therefore, be possible, by a process of interpretation alone, to read the offending statute in a way which is compatible with the Convention.*

*67 This does not mean that it is necessary to identify an ambiguity or absurdity in the statue (in the sense of being open to more than one interpretation) before giving it an abnormal meaning in order to bring it into conformity with a Convention right: see R V A (No 2) [2002] 1 AC 45, 67, 87, per Lord Steyn and Lord Hope of Craighead. I respectfully agree with my noble and learned friend, Lord Nicholls of Birkenhead, that even if, construed in accordance with ordinary principles of construction, the meaning of the legislation admits of no doubt, section 3 may require it to be given a different meaning. It means only that the court must take the language of the statue as it finds it and give it a meaning which, however unnatural or unreasonable, is intellectually defensible. It can read in and read down; it can supply missing words, so long as they are consistent with the fundamental features of the legislative scheme; it can do considerable violence to the language and stretch it almost (but not quite) to breaking point. The court must "strive to find a possible interpretation compatible with Convention rights" (emphasis added): R v A [2002] 1 AC 45, 67, para 44, per Lord Steyn. But it is not entitled to give it an impossible one, however much it would wish to do so.*

*68 In my view section 3 does not entitle the court to supply words which are inconsistent with a fundamental feature of the legislative scheme; nor to repeal, delete, or contradict the language of the offending statute. As Lord Nicholls said in Rojas v Berllaque (attorney General for Gibraltar intervening) [2004] 1 WLR 201, 208-209, para 24: "There may of course be cases where an offending law does not lend itself to a sensible interpretation which would conform to the relevant Constitution." This is more likely to be the case in the United Kingdom where the court's role is exclusively interpretative*

*than in those territories (which include Gibraltar) where it is quasi-legislative.*

*…*

*118 When Parliament provided that, "so far as it is possible to do so", legislation must be read and given effect compatibly with Convention rights, it was referring, at the least, to the broadest powers of interpreting legislation that the courts had exercised before 1998. In particular, Parliament will have been aware of what the courts had done in order to meet their obligation to interpret domestic legislation "so far as possible, in the light of the wording and the purpose of the [Community] Directive in order to achieve the result pursued by the latter": Marleasing SA v La Comercial Internacional de Alimentación SA (Case C-106/89) [1990] ECRI-4135, 4159 para 8 (empasis added). Both Pickstone v Freemans plc [1989] AC 66 and Litster v Forth Dry Dock & Engineering Co Ltd [1990] I AC 546 show, how, long before 1998, this House had found it possible to read words into domestic regulations so as to give them a construction which accorded with the provisions of the underlying Community Directive. As Lord Oliver of Aylmerton noted in Litster, at p 577A – B, Pickstone had established that:*

> *"the greater flexibility available to the court in applying a purposive construction to legislation designed to give effect the United Kingdom's Treaty obligations to the Community enables the court, where necessary, to supply by implication words appropriate to comply with those obligations …"*

*Lord Oliver was satisfied that the implication which he judged appropriate in that case was entirely consistent with the general scheme of the domestic regulations and was necessary if they were effectively to fulfil their purpose of giving effect to the provisions of the Directive.*

Time Limits

75. Having heard the submissions, it does not appear that there is any dispute that the time limit for putting in the claim in relation to earlier periods of employment with Adecco ran from the time of the transfer. In case that was in any way in dispute the relevant decision was *Sodexo Ltd v Gutridge* [2009] ICR 1486 in which it was held that the Claimants could not have any greater rights against the transferee employer than they had had against the transferor trust, since the Transfer of Undertakings (Protection of Employment) Regulations 1981 (TUPE) ensured that employees had the same rights, merely shifting the burden of the liability. In that case the Claimant's rights to equal pay under what was then the Equal Pay Act 1970 had to be brought within 6 months of the termination of their employment with the transferor and those were the rights that transferred in relation to their

employment by the transferee. In that case the Claimants' claims for arrears of pay during the pre-transfer period were out of time and time barred.

76. There have been and it is relevant that there were various transfers under TUPE in this case and the wording of Regulation 3 is particularly relevant.

> "3. A relevant transfer
>
> (1) These Regulations apply to-
> …
>
> (b) a service provision change, that is a situation in which—
>
> (i) activities cease to be carried out by a person ("a client") on his own behalf and are carried out instead by another person on the client's behalf ("a contractor");
>
> (ii) activities cease to be carried out by a contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person ("a subsequent contractor") on the client's behalf; or
>
> (iii) activities cease to be carried out by a contractor or a subsequent contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by the client on his own behalf,
>
> and in which the conditions set out in paragraph (3) are satisfied."
>
> …
>
> (3) The conditions referred to in paragraph (1)(b) are that—
>
> (a) immediately before the service provision change—
>
> (i) there is an organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client;

(ii) the client intends that the activities will, following the service provision change, be carried out by the transferee other than in connection with a single specific event or task of short-term duration; and

(b) the activities concerned do not consist wholly or mainly of the supply of goods for the client's use.

**Submissions**

77. All representatives handed up detailed written submissions which it is not proposed to set out again in these reasons. They supplemented them orally.

**Conclusions**

78. Dealing with each of the agreed issued in turn.

*Issue 1 – were the Claimant's working "temporarily" for Birds Eye?*

79. The Tribunal has concluded that it is bound by the decision in *Morron* and does not agree with the submissions made on behalf of the Claimant at paragraph 24 of her written submissions that the case is distinguishable from that before it. Paragraph 41 of the decision clearly refers to an assignment being open-ended and the Tribunal is satisfied that that is what occurred in this situation with the placement of the Claimants at Birds Eye. They were not employed for a fixed term or for a particular project (for example for a season or for a particular event). In fact, it can be seen that the arrangement has been open-ended with the length of service of all of the Claimants. This Tribunal is bound by the decision in *Morran* and has to find that the Claimants were not temporary workers within the meaning of the AWR and therefore their claims under the AWR must fail and are dismissed.

80. In reaching that decision the Tribunal takes into account the evidence of Valerie Anderson with regard to the ongoing nature of the contract with Birds Eye. The Claimants were only interviewed for Birds Eye work. Letters were produced for them for mortgages and loans confirming that they were in such an arrangement. Although the Tribunal has to note this was not in her witness statement, and not put to the Claimants it is noted in one of the sets of minutes as set out in the facts above.

81. It also has to be taken into account that each time the agency transferred under a TUPE transfer, the agency workers transferred to the new provider. They would not have done so if the new provider believed they were only "temporarily" assigned to Birds Eye. They therefore have been prepared to

accept that they were permanently assigned to have the benefit of the TUPE transfer but seek to argue otherwise under the Regulations. There is no evidence adduced that any Claimant or employee objected to being transferred. The end result was on each TUPE transfer that they continued to work at Birds Eye as they had always done.

*Issue 2 – Have the Claimant's been afforded the same basic working and employment conditions as they would have been entitled to had they been recruited by Birds Eye at the time their qualifying periods commenced (Regulation 5(1)).*

82. If the Tribunal were wrong in its above conclusion and the Claimant is entitled to claim under the AWR, the Tribunal is satisfied that they have indeed been afforded the same basic working and employment conditions as if they had been recruited by Birds Eye. They would have been recruited as flexible workers and they are paid exactly the same as the agency workers.

*Issues 3 & 4 – Whether a "flexible worker" is a comparable employee for the purposes of Regulation 5(3) and the Claimants seek to argue that the introduction of the flexi workers was a device/avoidance mechanism/an abusive practice or a sham designed to avoid the application of the Regulations.*

83. The Tribunal is satisfied that the flexible worker is a comparable employee for the purposes of Regulation 3 and does not accept the arguments advanced on behalf of the Claimants that this was a "sham".

84. It is clear from the case of *Bankway* (paragraph 52) that this is a pure question of fact for this Tribunal. On the evidence heard by this Tribunal it is satisfied that there was no sham or abusive practice. The flexible worker was a real role. It is filled by real employees performing genuine work that is required by Birds Eye. It is not a "mere device".

85. Counsel for the Claimant took the Tribunal to the case of *Astall* (paragraph 52 of her submissions) but the Tribunal believes this case actually assists it in that the reality on the facts is that the flexible workers were doing real jobs as set out above.

86. The Tribunal further finds that it must accept the submissions made on behalf of Birds Eye that a business must be entitled to arrange its workforce to comply with the Regulations and to do such cannot be said to be a device and be disregarded.

87. Counsel for the Claimant argues at paragraph 56 onwards that the Tribunal should in some way disregard aspects of the Regulations. This is, however, predicated on the success of her argument that the flexible worker was a sham device and that is an argument that is not accepted. The Tribunal accepts the submissions made on behalf of the first Respondent that it is not required to read the Regulations in the way that has been suggested.

*Issue 6 – Are the Claimants entitled to claim for actions which took place during a period of employment with Adecco (or earlier agency) against either or both Respondents?*

88. It has been accepted that the claims brought by Adecco workers were issued out of time as they were not issued within 3 months of the date of the TUPE transfer. The Claimants say that it is just and equitable to extend time. The Tribunal does not accept that position.

89. It is clear that from the March 2011 meeting that the Union was talking about legal advice and that it had its doubts about the proposed option 3. Advice never seems to have been taken at that time. Further, they had access to the National Officer and the Trade Union lawyers. No evidence has been heard as to when advice was received or the steps taken other than each of the Claimants' saying that the matter was with their union and/or lawyers. If that is the case and no action was taken then that is an issue between the individual Claimants and their union and/or lawyers. Nothing has been put forward to this Tribunal to show that it would be just and equitable to extend time.

90. In relation therefore to the period of employment with Adecco, those claims are out of time.

91. It follows from those conclusions that all claims are dismissed

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Employment Judge Laidler, Bury St Edmunds

Date: 23 February 2017

JUDGMENT SENT TO THE PARTIES ON

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FOR THE SECRETARY TO THE TRIBUNALS