Appeal No. UKEAT/0403/14/RN

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON, EC4Y 8JX

At the Tribunal
on 6th & 7th July 2015
Judgment handed down on 31 July 2015

Before

THE HONOURABLE MR JUSTICE LANGSTAFF

SITTING ALONE

MR D COLES — APPELLANT

MINISTRY OF DEFENCE — RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	MR DOUGLAS LEACH (of Counsel) Instructed by: MLM Cartwright Solicitors Pendragon House Fitzalan Court Newport Road Cardiff CF24 0BA
For the Respondent	MS JOANNE WILLIAMS (of Counsel) Instructed by: Government Legal Department One Kemble Street London WC2B 4TS

SUMMARY

AGENCY WORKERS

The Claimant argued that the Respondent was in breach of its obligations under Regulation 13 of the **Agency Workers Regulations 2010 (**"the Regulations"), and Articles 5 and 6 of the **Temporary Agency Worker Directive** (2008/14/EC) ("the Directive") by denying him the opportunity to apply for the position he had temporarily been occupying, as an agency worker, when he was told of the post but that existing permanent employees of the Ministry whose continued employment was at risk following restructuring, and who had for that reason been placed in a redeployment pool, would have preference. He claimed that important points of interpretation of the Regulations and Directive arose. It was held that they provide a right to be informed of vacant posts in the permanent workforce of an end-user undertaking, but not any further right to have preference over existing direct employees of the end-user, nor to have a guaranteed interview, and that to give preference to those in a redeployment pool which did not include the Claimant in these circumstances could not be said to be in breach of the Claimant's rights. The EAT declined to make a reference.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. The Claimant worked as a technical liaison officer under arrangements made between Giant Parkhouse Limited ("GPL") and Building Recruitment Company Limited ("BRC"). BRC was an agency worker business. It supplied the Defence Housing Executive ("DHE") (in effect the Ministry of Defence) at Barry in South Glamorgan with those services he had arranged through GPL to provide: estates management for RAF service personnel and service families' domestic accommodation. He was responsible for sites in Chepstow, Haverfordwest, Cardiff, Brecon and Hereford.

2. In 2013, DHE decided on a substantial restructure. 530 direct employees were placed into a redeployment pool as a result, to be given priority consideration for vacancies in the Ministry of Defence at their existing grade. Such employees had priority over other applicants for a vacant post on a level transfer within their department (under what is known as Stage 1 of the National Vacancy Filling Scheme).

3. On 31st May 2013 a post as SFA (that is, Service Family Accommodation) Estate Manager based at RAF St. Athan, which is where the Claimant had been working and which was in effect the post he had been filling, was advertised at Stage 1. As such, it would have been visible to any candidate internal to the DHE who wished to be considered for it: and, the Tribunal found, would have been visible to the Claimant had he chosen to look for it. It found he had ready access to the advertisement.

4. A Ms Gingell applied for the post and was appointed to it. Stage 1 applied to her. The Claimant did not apply.

5. Her qualifications were held not to be directly comparable to those of the Claimant. On first appointment in 2005 to a management grade within the Civil service she had passed a structured assessment of her management competence, whereas the Claimant had failed an assessment of the same competencies three years later at the same assessment centre. She had been selected for her post after a fair and open competition, whereas the Claimant had been selected at a one-to-one interview for appointment as a temporary agency worker.

6. There was a further distinction between the positions of the Claimant and Ms Gingell, quite apart from the fact that she was a permanent employee of the Ministry whereas the Claimant was a temporary agency worker. She was in a priority category, as being surplus and in the redeployment pool consequent upon the restructure, whereas the Claimant was not.

7. A consequence of her appointment was that DHE no longer had need for the Claimant's services, and he was given notice that his assignment to its service would cease on 2nd August 2013: Ms. Gingell was to take over on 5th August.

8. The Claimant complained in an originating application to the Employment Tribunal that in breach of Regulation 13 of the **Agency Workers Regulations 2010 (**"the Regulations"), and Articles 5 and 6 of the **Temporary Agency Worker Directive** (2008/14/EC) ("the Directive") the Ministry had failed to allow him access to details of the vacancy of his position, and had denied him the opportunity to apply for his position.

9. Regulation 13 of the Regulations provides:

"13.— Rights of agency workers in relation to access to employment

(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.

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

(a) both that individual 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;
(b) that individual works or is based at the same establishment as the agency worker; and
(c) that individual is an employee of the hirer or, where there is no employee satisfying the requirements of sub-paragraphs (a) and (b), is a worker of the hirer and satisfies those requirements.

…….

(4) For the purposes of paragraph (1) the hirer may inform the agency worker by a general announcement in a suitable place in the hirer's establishment."

10. The Directive provides at Articles 5 and 6, so far as material to the present case, as follows:

"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.

For the purposes of the application of the first subparagraph, the rules in force in the user undertaking on:

(a) protection of pregnant women and nursing mothers and protection of children and young people; and

(b) equal treatment for men and women and any action to combat any discrimination based on sex, race or ethnic origin, religion, beliefs, disabilities, age or sexual orientation; must be complied with as established by legislation, regulations, administrative provisions, collective agreements and/or any other general provisions.

2. As regards pay, Member States may, after consulting the social partners, provide that an exemption be made to the principle established in paragraph

1 where temporary agency workers who have a permanent contract of employment with a temporary-work agency continue to be paid in the time between assignments.

3. Member States may, after consulting the social partners, give them, at the appropriate level and subject to the conditions laid down by the Member States, the option of upholding or concluding collective agreements which, while respecting the overall protection of temporary agency workers, may establish arrangements concerning the working and employment conditions of temporary agency workers which may differ from those referred to in paragraph 1.

…….

5. Member States shall take appropriate measures, in accordance with national law and/or practice, with a view to preventing misuse in the application of this Article ……..

Article 6: Access to employment, collective facilities and vocational training

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. Such information may be provided by a general announcement in a suitable place in the undertaking for which, and under whose supervision, temporary agency workers are engaged."

The Tribunal Decision

11. The ET rejected the complaint. Though it held, contrary to the Ministry's position, that there was a "vacancy" within the meaning of the Regulations, and accepted the Claimant's submission that the Directive was directly applicable to the Ministry since it was an emanation of the State, it rejected his submission (recorded at paragraph 57) that these provisions did not permit the Ministry to form a redeployment pool of employees, such that those within that pool might be given priority over temporary agency workers for vacancies within its undertaking. It rejected his contention that what the Directive required was not simply information as to vacancies but also the right to be considered for such a vacancy on an equal footing with existing employees of the end-user. It accepted the Ministry's submissions that the Directive had been properly transposed into domestic law by Regulation 13, and that both the Directive and Regulations required the provision of information as to vacancies so as to confer an

opportunity for potential application, but did not confer the right to apply as such. The right to information was conferred with the aim of giving an agency worker the same opportunity to find permanent employment with the hirer as a permanent employee would have, but that was as far as it went.

12. The Tribunal accepted (paragraph 70) that the Claimant had to be able to make a comparison with an employee of the hirer who was in the same material circumstances as he was if he were to come within the Regulations, but held that Ms Gingell was not such a comparable employee because of the differences in her circumstances (as noted above), and added (paragraph 71):

> **"In short the claimant was properly informed of the vacant post and could have applied for that post even though his application would have been rejected on the basis he was ineligible because it was a Stage 1 advertisement for the post"**

13. It held that the Regulations and the Directive both permitted an employer to give priority to workers whose posts were redundant, who were at risk for that reason of losing their employment, and who had been placed in a redeployment pool with a view to giving them priority in the search for alternative work in the permanent employment of the employer.

14. It made the point that the Directive did not require the employer to displace existing permanent workers by offering temporary agency workers the right to compete with them for a permanent post, by saying:

> **"It is clear that the Directive recognises the need to respect industrial relations ([recitals] 12, 16, 17 and 19) and a fundamental working practice is to allow employers the right to protect permanent employees' positions in any restructuring exercise as happens frequently in practice."**

15. Having reached that view, and holding no real doubt as to the intention of the Directive, the Tribunal declined to make a reference to the European Court of Justice.

The Appeal and Cross-Appeal

16. Mr. Leach, for the Claimant, argues it was an error of law not to make a reference. Article 6 speaks of "the same opportunity as other workers in that undertaking…" whereas regulation 13 uses the phrase "the same opportunity as a comparable worker", going on to require there to be an actual comparator. He argues that "other workers" is not the same as "comparable workers".

17. Further, he submits that neither the Regulations nor the Directive can properly be construed so as to permit priority to be given to internal candidates by allocating them to a "surplus pool" for redeployment, which excludes agency workers who are at risk of losing their assignment.

18. As a second ground, he contends that even if the Regulations and Directive are compatible, the Tribunal was wrong to hold that Ms Gingell was not a comparable worker. The fact that she was an employee, and he was an agency worker, was irrelevant where the purpose of the provisions was to give the latter the rights of the former. The Claimant would have had an opportunity to complete an assessment if he had otherwise been appropriate for selection to post; and the fact that she was in a redeployment pool was unrelated to her qualifications for the post, or whether she did broadly similar work (the latter being the focus of Regulation 13(2)(a)(ii) of the Regulations).

19. Thirdly, he argues that being able to submit an application for a vacancy which it is known will immediately be rejected is not a meaningful right: it is no different in effect from not being told of the vacancy at all.

20. The Ministry resists these submissions, and cross-appeals on two grounds. It resists not only for the reasons given by the Tribunal, but also on the basis that the slight differences in wording between the Regulations and the Directive are neither substantial nor material. Both require a comparative exercise in order to fulfil the principle of equal treatment of agency and permanent workers. It was open to the Regulations to define a comparable worker. Furthermore, Ms Gingell's qualifications were not comparable: she had been recruited through fair and open competition, as the Claimant had not; and as to her Band D status, obtained by objective assessment, it was common ground that the Claimant did not have this at the time of his application, and it would be wrong to suggest that the fact he might be able to attain such a qualification in future eliminated the difference in qualifications as apparent at the time relevant to the application itself. The Directive does not restrict an employer's ability to set the qualifications which are relevant to the post being applied for.

21. As to the cross-appeal, the first ground is that it was wrong to hold that the right conferred by the Regulations and Directive extends any further than a right to information. It does not go so far as to amount to a right to apply for a post. Neither regulation 13 nor Article 6 expressly provides for this. The second ground challenges the conclusion that the post was "vacant" for the purposes of the Regulations: the Regulations were not designed to provide a right to temporary agency workers in situations where there is a genuine freeze on recruitment, where posts are ring-fenced for redeployment purposes in order to prevent the redundancy of

existing permanent staff. This is what the guidance to the Regulations produced by the sponsoring department suggests.

Discussion

22. During oral argument, Mr Leach accepted that a fundamental argument he was making was that an employer had no right when selecting whom to appoint to a vacancy to give priority to existing permanent employees who, because they were otherwise threatened with dismissal by reason of redundancy, had been placed in a redeployment pool. In circumstances such as the present where the "vacant" post was that currently occupied by a temporary agency worker, who therefore stood to lose his job too as a consequence of the restructuring, that worker should also have been placed in the pool. Similarly, it became an essential argument for the Respondent Ministry that neither the Regulations nor the Directive envisaged any more than a right to information, which was a valuable right on its own. Other arguments took on a lesser significance.

23. In order to determine whether the Regulations and Directive permit preference to be given to a person in a redeployment pool, it is necessary to understand the purpose of the Directive, and hence the purpose which, when implementing the Directive in domestic law, Parliament intended the Regulations to achieve. The aim of the Directive is spelt out in Article 2. That provides:-

> **"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 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, by 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."**

24. It should be noted that those specific aims reflect the recitals to the Directive, in particular that at recital 11:

> **"Temporary agency work meets not only undertakings' needs for flexibility but also the need of employees to reconcile their working and private lives. It thus contributes to job creation and to participation and integration in the labour market."**

25. The principle of equal treatment referred to in Article 2 is important to the discussion before me. The Tribunal appeared to think (see paragraph 72, penultimate sentence) that this was that agency workers were to be treated no less favourably than permanent workers. The concept is nowhere near as broad. Article 5 of the Directive, headed "The Principle of Equal Treatment" is set out above at paragraph 10. It seeks to equate the "basic working and employment conditions" of temporary agency workers and direct employees. The phrase "basic working and employment conditions" is defined by Article 3. It refers to working hours and to pay. There is no general right for a temporary agency worker to be treated no less favourably than a direct employee: instead, the principle of equal treatment is confined to working time and pay.

26. Both parties for their own purposes sought to compare the right given by the Directive with that in **Directive 1999/70/EC** concerning fixed term work. The purpose of that Directive was to put into effect a framework agreement on fixed term contracts which had been concluded in March 1999 between ETUC, UNICE and CEEB. The **Fixed Term Worker Directive** applied a principle of non-discrimination to "employment conditions". In Clause 6 of the agreement is a very similar provision in respect of information and employment opportunities as in the Directive. It provides:-

> **"Employers shall inform fixed-term workers about vacancies which become available in the undertaking or establishment to ensure that they have the same opportunity to secure permanent positions as other workers. Such information may be provided by way of a general announcement at a suitable place in the undertaking or establishment."**

Implementation of the Fixed Term Worker Directive in the domestic jurisdiction was effected by the **Fixed Term Employees (Prevention of Less Favourable Treatment Regulations 2002**). The central right is that in Regulation 3, which gives a fixed term employee the right not to be treated by his employer less favourably than the employer treats a comparable permanent employee

> **"…(a) as regards the terms of his contract; or**
> **(b) by being subjected to any other detriment by any act, or deliberate failure to act, of his employer."**

That right is said to include, "in particular" the right not to be treated less favourably than the employer treats a comparable permanent employee in relation to (amongst other matters) "the opportunity to secure any permanent position in the establishment." This leads on to Regulations 3(6) and (7) which are as follows:-

> **"In order to ensure that an employee is able to exercise the right conferred by paragraph (1) as described in paragraph (2)(c) the employee has the right to be informed by his employer of available vacancies in the establishment**
>
> **(7) For the purposes of paragraph (6) an employee is "informed by his employer" only if the vacancy is concerned in an advertisement which the employee has a reasonable opportunity of reading in the course of his employment or the employee is given reasonable notification of a vacancy in some other way."**

27. It is to be noted that the central right conferred by the Fixed Term Worker Directive, and hence the Fixed-Term Employees Regulations, is of a different character from that conferred by the Directive and the Regulations in the present case. They confer a general right not to be treated in a less favourable manner simply because the person concerned is a fixed term worker. Although Mr Leach points to this being in respect of "employment conditions", this phrase is not defined in the Fixed Term Worker Directive as the phrase "basic working and employment conditions" is defined in the Temporary Agency Worker Directive. I see no

reason for restricting its scope to pay and to hours. In short, the concept of equal treatment is much broader in the case of fixed term workers than it is in the case of temporary agency workers. I therefore do not accept that Mr. Leach can draw any support from the law relating to the prevention of less favourable treatment of fixed term workers.

28. For her part, Ms Joanne Williams, who appears for the Ministry, argues that it is significant that the width of the right enjoyed by a fixed term worker under **Directive 1999/70/EC** and the **Regulations of 2002** was not copied so far as agency workers are concerned in the Directive or by the Regulations. The distinction between the protection given to the two categories of worker is clear. She argues, also, that Regulation 3 of the **2002 Regulations** demonstrates that there is a distinction between a right to have information, on the one hand, and the further right (which having information is designed to help secure) which is to have an opportunity to secure a permanent position in the establishment. That is spelt out separately in the **Regulations of 2002,** and follows conceptually from Regulation 3(6) which provides that in order to exercise one right, the employee must have another. I accept these submissions.

29. She argues that the function of temporary agency workers is as recognised by Recital 12 to the Directive. Their engagement provides employers with a flexible response to the needs of their business. Their position is not to be equated with permanent employees, except in respect of hours of work and pay. I accept that too: it is in accordance not only with Recital 12, but also Recitals 9 and 11.

30. It is in the light of those considerations that Article 6 of the Directive must be approached. Here there is a marked difference between Mr Leach's submissions and those of

Ms Williams. He argues that there is no point in telling agency workers of vacancies in an end-user's undertaking if, upon application for the post, they are to be told they are ineligible. For him the right to have information about the vacancies can be no less than the right to apply for those vacancies, and have that application considered on a level footing with those of permanent employees and other workers within the undertaking. It must follow, in the circumstances of this case, that that means on the same footing as those in the redeployment pool. Ms Williams, by contrast, sees Article 6 as conferring a right which is valuable on its own terms. To quote from her skeleton argument:-

> **"…this right in itself places the agency worker on an equal footing with other workers in that by virtue of it, all workers have the ability to make an informed decision as to whether they should make an application for a particular post. It is submitted that without the right to information a temporary agency worker would not necessarily know of a particular post whereas once the worker has knowledge of it there is no barrier to him/her making an application which in the event may or may not succeed depending on whether the worker fits the selection criteria. It is therefore a substantive right."**

She argues that until the right was conferred, agency workers might easily have been disadvantaged by their ignorance of opportunities in the end-users' undertakings. In this way job creation and participation in the labour market is facilitated.

31. In Mr Leach's submissions the force of the words in Article 6 "…to give them the same opportunity as other workers in that undertaking to find permanent employment" does not simply express the purpose of providing the information: those words would be unnecessary unless something meaningful were being added, and should be read as conferring the right to have the same opportunity. Ms Williams argues by contrast that without the words "to give them the same opportunity…" the right to information would be rendered less valuable. Such a right without those added words could then be honoured by giving information to agency workers later than it was given to other workers, at a time or on an

occasion when those others in the undertaking had already secured an advantage in making in good time any applications which might follow from notification of the vacancy. For her, the purpose of "the same opportunity…" is to ensure that information is provided in just as useful a form, and at just as convenient a time, to the agency worker as it is to the permanent or other worker in the end users' undertaking. Accordingly, the words "to give....the same opportunity" do not confer an additional right (to have an interview, to be considered for employment, or whatever it may be) as Mr Leach would have it.

32. Although the heading in Article 6 is "Access to Employment", that covers all 5 paragraphs of the Article, and does not require a specific force to be given to Article 6(1) other than that which it would apparently bear when taken purposively in context.

33. I have little doubt that Ms Williams is right in her submissions. This is fortified, in my view, by the second sentence in Article 6(1). There would be no point in simply giving permission to provide information in a particular way unless it were thought that the provision of information in that way would satisfy the duty. In effect, the second sentence says that temporary workers will have the same opportunity as other workers in respect of the receipt of information if a general announcement is made in a suitable place in the undertaking. As observed in argument, that might be by the posting of a suitable notice or by the making of a suitable verbal announcement: however, the precise method of providing information is not the point for present purposes: it is that if indeed the second sentence provides that the duty expressed in the first may be satisfied by such means, the Article does not look further towards some additional step, such as that of conferring eligibility for interview on an equal basis with those who are in a redeployment pool.

34. The order in which matters are expressed in the Article and Regulations supports this. It does not first provide a general right to have the opportunity to find permanent employment, and then stipulate that in order to do so information is to be supplied about vacant posts: it is the other way round. Equal provision of information is what is stressed, rather than equality in the job application process. Both first and second sentences do that. The information is provided not to *secure* further employment, but is designed towards *helping to find* it. The Article says nothing about the terms on which the further permanent employment might be offered.

35. Mr Leach submitted that if Article 6(1) were not read as he submits it would then be open to an employer simply to exclude temporary agency workers from consideration for a post. The solemn farce would follow that such workers would have to be told of the vacancy, but as soon as they asked for details would be told that the post was not available to them because of their status. Though the point is raised forensically, I think its central weakness is its lack of reality. If an employer has an additional job over and above those currently filled within its undertaking, there is no obvious reason why that employer would wish to turn down the opportunity of having an employee suitably qualified and able to do the job as an applicant for it, merely because that worker was currently a temporary agency worker. (The other paragraphs in Article 6 prevent the agency which has arranged the assignment for the worker from prohibiting "poaching" by the end user of the agency worker, and preclude the agency charging the worker if he should obtain permanent employment: these provisions are consistent with the idea that if suitably qualified, and if the employer's needs would otherwise be satisfied by the recruitment of a current temporary agency worker, that person's status as such should not prevent it).

36. Ms Williams points out that on Mr. Leach's approach Article 6 could create a preferential status for the temporary agency worker over that enjoyed by permanent workers: no permanent worker, on her submission, would be eligible to be placed in the redeployment pool if their job was not otherwise at threat, whereas a temporary agency worker recruited to fulfil a temporary gap whilst the restructuring leading to the redeployment was carried out, would on Mr Leach's argument automatically be placed within that pool. The effect of the latter could only be to create a real chance that an existing permanent employee might be displaced in favour of a temporary agency worker. This would fly in the face of the approach which domestic law takes to the treatment of those subject to potential dismissal for redundancy, which is that suitable alternative employment should be sought by an employer. Both in European and domestic provisions emphasis is placed upon protecting the jobs of workers.

37. I accept that there is no basis in principle for protecting the job of a temporary agency worker (which by definition is to plug a gap, and which being temporary lacks the security enjoyed by those in permanent employment) in preference to that of an existing permanent worker. Particularly when the latter is subject to potential redundancy dismissal, it is the latter who should be protected.

38. Accordingly, the Employment Tribunal was right at paragraph 6 to draw attention to the recognition in the Recitals to the Directive of the need to respect industrial relations, and to recognise that to allow employers the right to protect the positions of permanent employees in any restructuring exercise is a fundamental employment practice.

39. I therefore reject this ground of appeal. The right to information is a meaningful right in itself, for the reasons Ms Williams gave.

40. Subject only to the question of whether to make a reference to the European Court of Justice that is sufficient to resolve the appeal as a whole, for whether the Tribunal was right or wrong in its conclusion that Ms Gingell was not a comparable worker to the Claimant would be irrelevant to the Claimant succeeding. However, the matter has been fully argued before me and since the matter may well go further I should express my view.

41. The Directive requires a comparison to be made for the purposes of information with "other workers in that undertaking". Regulation 13 of the Regulations provides a right to be informed of any vacant posts, "to give that agency worker the same opportunity as a comparable worker to find permanent employment with the hirer". It then defines "comparable worker" at Regulation 13(2) as follows:-

> **"For the purposes of paragraph (1) an individual is a comparable worker in relation to an agency worker if at the time when the breach of paragraph (1) is alleged to take place - (a) both that individual and the agency worker are – (1) working for and under the supervision and direction of the hirer and (2) engaged in the same or broadly similar work having regard, where relevant, whether they have a similar level of qualification and skills…"**

42. The test under Regulation 13(2)(a)(ii) is whether the Claimant and the comparator are engaged in the "same or broadly similar work". It is not whether they have the "same or broadly similar qualifications and skills". As Lord Hope said in his speech in **Matthews v Kent Fire Authority** [2006] ICR 365, considering virtually identical words in the **Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000** at paragraph 15:-

> **"It is important to appreciate that it is the work on which the workers are actually engaged at the time that is the subject matter of the comparison. So the question whether they have a similar level of qualification, skills and experience is relevant only insofar as it bears on that exercise. An examination of these characteristics may help to show that they are each**

> **contributing something different to work which appears to be the same or broadly similar with the result that their situations are not truly comparable. But the fact that they may fit them to do other work that they are not yet engaged in, in the event of promotion for example, would not be relevant."**

It may be that particular qualifications and experience render the job done by an individual very different from that which is nominally the same task but is performed by a person without those qualifications and that experience, but it is easier to think of examples where qualifications and experience count for very little if anything – the university graduate who earns some additional money by stacking shelves in a supermarket may be seen as performing exactly the same task as another person stacking shelves who has no academic qualification.

40 The Tribunal may be excused for focussing upon the differences in qualifications between the Claimant and Ms Gingell which are outlined above, since neither party made any reference to **Matthews**. Moreover, at paragraph 33, the Tribunal recorded the Claimant's own submission as being that he relied upon Ms Gingell as being a comparator because "she was doing the work that he effectively was doing as a grade D employee". The Claimant's focus appears to have been upon qualifications for the job and the level of post, rather than on the substance of what was done.

41 At paragraph 74 the Tribunal spoke more generally about "comparative workers" as if what was in issue was a claim under the discrimination provisions in the **Equality Act 2010** concluding that Ms Gingell was not a comparable worker because there were clear distinctions between her case and his. In doing so, it also lost sight of the fact that because the Ministry is a public authority, the Directive was directly effective. The wording of the Directive does not call so clearly for a comparison with an identified individual, so far as the right to information is concerned, but speaks more generally of "other workers".

42. In her reply, Ms Williams acknowledged the force of these points and did not actively seek to persuade me that the Tribunal was correct in its conclusion on this particular point. It did not matter for her argument, provided that I was of the view that the right was a right to information alone, albeit information which would facilitate the making of an application for a vacant post.

The Cross-Appeal

43. The Respondent cross appeals, first against the conclusion at paragraph 72 that the post to which Ms Gingell was appointed was a relevant vacant post at the time it was put on the Civil Service jobs website and, second, against the conclusion in paragraph 75 to the effect that the wording of the Regulation implied that a worker provided with information as to a vacant post must be permitted to apply for it.

44. Given my conclusion that the Directive and Regulations relate to the giving of information and offer no preferential right to be selected for interview or for a job which is vacant, it is unnecessary for me to resolve the cross appeal. However, the parties have argued the points, and in case the matter goes further I shall briefly express my views on it, just as I have in respect of the Claimant's ground as to the scope of the comparison. I see 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. It proved difficult, indeed, for Ms Williams to describe the post in contention in the present proceedings as anything other than "vacant": and as Mr Leach pointed out, the Respondent's scheme, into the parameters of which recruitment to the post fell, was described by it as the "National Vacancy Filling Scheme".

45. The point Ms Williams sought to make was, rather, that it was unhelpful to speak of "vacant" posts in an undertaking which was in the process of shedding staff. The idea, for instance, that an organisation reducing from 500 employees to 400, and in the process of that placing 150 people in a redeployment pool to compete for 50 places should be one in which any of the 50 posts should be described as vacant is understandable. But it seems to me that the resolution of this is not by altering the ordinary meaning of the word "vacant" but by recognising, as did the National Vacancy Filling Scheme itself, that workers in particular circumstances may be given priority over others for some posts. Neither the Directive nor the Regulations says anything to restrict the priority which may or may not be given to such workers. Though a temporary agency worker may be recruited to fill a short term vacancy, but, like the Claimant in the present case, continue after recruitment and in defiance of the initial expectations to serve, albeit as a so-called "temporary" agency worker for some years, this does not automatically qualify that individual to be placed in a redeployment pool, selection for which depends upon criteria chosen not by a court, but by the employer, for the employer's own purposes. Both Regulations and Directive fall far short of establishing a general right to parity of treatment: the right to equal treatment is in respect of pay and working time only, in addition to being told of vacant posts. Ms Williams is right to argue that they say nothing about the criteria that are to be applied in determining who should fill that post.

46. Though for the reasons I have given I do not consider the cross appeal was critical, I would have dismissed this ground in any event for the reasons just given.

47. As to the second ground of cross appeal, I consider this a mis-reading of that which the Tribunal was saying in paragraph 75. It said that a person who knows of a vacancy may make

an application. It may be thought that is the purpose of giving that individual information about the post, to facilitate his doing so if appropriately qualified. However, in repetition of the point just made in respect of the first ground of cross appeal, this is silent as to whether that application is likely to succeed. That must depend upon the criteria which the employer uses in selecting for the post. I would have rejected this ground of cross-appeal too.

Summary

48. In summary, it is clear that the Directive provides a right to information. The right is a valuable right in itself. The purpose of the Directive is to give temporary agency workers the same chance as other workers in the undertaking of the end user to find permanent employment with that end user. It has nothing to say about the terms upon which there should be recruitment for any post. If an employer wishes to give preference to those being redeployed, perhaps to satisfy his obligations to them as his permanent employees, he is entitled to do so, and will not in doing so break any duty imposed by the Regulations or the Directive.

49. Although the guidance produced by the Department of Business Innovation and Skills is merely that, I do not consider its expression of the law is wholly accurate: it suggests that the right to be told of a vacancy would not apply in the context of a genuine head count freeze (though why, if that were the case, there should be a vacancy at all, I am unclear) though I see no reason why this should be so. Nonetheless, the effect of my decision and the effect of the view taken by the Department is the same: even if, in my view, a temporary agency worker should be told of such a vacancy (if that is the right word for it) it is entirely open to the employer to give preference to those who are to be redeployed when filling that vacancy.

Reference

50. The first ground of appeal was that the Tribunal was wrong to refuse a reference. It thought the correct interpretation of the Directive so obvious that there was no room for any doubt.

51. Though by a slightly different process of reasoning, I have agreed with its conclusion as to the substance of the claim. Although I accept that the Tribunal erred in considering whether the Claimant had established a comparator, this error is not fatal to its conclusion.

52. The Appellant wishes me to refer to the European Court the true meaning of the phrase the "same opportunity as other workers in that undertaking to find permanent employment" and in particular whether the interpretation of those words permits priority to be given to internal candidates in a redeployment pool which excludes agency workers, or whether it means that an agency worker, whose assignment is to end in order that the post the worker has filled may thereafter be occupied by a permanent employee, is entitled upon a proper interpretation of the Directive to be placed in the redeployment pool as if he had been a permanent employee subject to the effects of restructuring.

53. The law as to making a reference is not in dispute. In **R v International Stock Exchange** [1993] QB534 it is well established that a reference is not needed where the conclusion as to the correct interpretation of the provision of EU law in question is inevitable or where the domestic court can have "complete confidence" in the answer (per Sir Thomas Bingham MR, at 551c). In **BLP Group v Customs and Excise Commission** [1994] SLT, C.A. where a ruling of the European Court of Justice would dispose of the matter, there had been no previous ruling on the provision of EU law in question, and the relevant facts had been

found by the Tribunal the only issue left to resolve would be whether the point at issue was of sufficient strength or substance to warrant a ruling. The court has to be convinced that the answer to the question raised would be equally obvious to the courts of other Member States (**BLP; and R v Pharmaceutical Society of Great Britain ex parte Association of Pharmaceutical Importers** [1987] 3 CMLR 952 at 965.

54. Founding his argument on the principles expressed in these cases, Mr. Leach submits that there is such a "veritable sea of uncertainty as to the intended meaning of Art. 6 …taking in fundamental questions as to the very scope of the right and the nature of its operation, including how exactly Member States may prescribe the necessary comparative exercise to be performed" that there should be a reference; that a preliminary ruling would be determinative of the case one way or the other; that there is no existing judgment of the European Court of Justice on the issue; that the facts have been found; and that a preliminary ruling would be of significance not only to agency workers, but also in relation to the Fixed Term Workers Directive, as to which there is yet no authority of which he was aware.

55. Once it is appreciated that the Directive seeks to provide equal treatment only insofar as basic working conditions are concerned, and that this definition could not and does not extend beyond working time and pay, there is no principled basis for supposing that the European Parliament and Council intended any more than that which Article 6 provides on a straightforward reading of its terms – namely a right to information as such, and not further rights in respect of recruitment pools or selection for post, or an unspecific right to make an application for a vacancy in preference to some other workers in the permanent employment of the undertaking. In company with the employment judge, I have expressed a firm conclusion as to this. The issue as to the identity of a comparator might have merited a reference if a

ruling could have been determinative of the appeal: but for the reasons I have set out above, it would not be. I can be confident as to the meaning of the Directive in respect of information. I do not propose to make any reference to the ECJ for a preliminary ruling.

56. It follows that for the reasons I have given, this appeal is dismissed.