Appeal No. UKEAT/0274/13/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 3 December 2013
Judgment handed down on 13 December 2013

Before

THE HONOURABLE MR JUSTICE SINGH

(SITTING ALONE)

MR C MORAN & OTHERS — APPELLANTS

(1) IDEAL CLEANING SERVICES LTD
(2) CELANESE ACETATE LTD — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR IAN SCOTT (of Counsel) Instructed by: Thompsons Solicitors City Gate (East) Tollhouse Hill Nottingham NG1 5FS
Acting jointly on behalf of both Respondents	MR ED WILLIAMS (of Counsel) Instructed by: Browne Jacobson LLP Mowbray House Castle Meadow Road Nottingham NG2 1BJ & MS CATRIONA STIRLING (of Counsel) Instructed by: K & L Gates LLP One New Change London EC4M 9AF

SUMMARY

JURISDICTIONAL POINTS – Agency relationships

The Appellants were employed for many years by the first Respondent but placed to work as agency workers at the premises, and under the supervision, of the second Respondent or its predecessor. They sought to argue that they qualified for protection under the **Agency Workers Regulations 2010**. They contended first that the Employment Tribunal had misconstrued the word "temporary" in the Regulations to mean "short term" rather than "not permanent." They also contended that, in any event, all agency workers who meet a 12 week qualification period fall within the scope of the Regulations and that this interpretation was required in order to give effect to **Directive 2008/104/EC**.

Held,

(1) The Employment Tribunal had not erred in its interpretation of "temporary" and had correctly understood it to mean "not permanent." It had been entitled on the evidence before it to conclude that the Appellants were all placed permanently with the second Respondent and were not temporary agency workers.

(2) The Appellants' submission that all agency workers who meet the 12 week qualification period fall within the scope of the Regulations was wrong because it would give no meaning or effect to the word "temporary" at all. Far from giving effect to the purpose of the underlying Directive, that approach would be contrary to that purpose.

THE HONOURABLE MR JUSTICE SINGH

Introduction

1. This is an appeal from the decision of the Employment Tribunal at Nottingham (Employment Judge Britton, sitting alone) dated 18 March 2013, which was sent to the parties on 26 March.

2. The decision of the Employment Tribunal arose out of a pre-hearing review. The Tribunal held that the claims must fail because the Claimants (now the Appellants) did not fall within the meaning of "agency workers", as defined in the **Agency Worker Regulations 2010** ("the 2010 Regulations").

Factual background

3. The Appellants were all employed for many years by the first Respondent, Ideal Cleaning Services Limited. 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 way 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.

4. After the 2010 Regulations came into force on 1 October 2011, all of the Appellants made claims that they were agency workers within the meaning of those Regulations. Since those claims were rejected, the issue came before the Employment Tribunal.

5. At a case management discussion held on 13 December 2012, Regional Employment Judge Swann decided that there should be a preliminary hearing to determine whether or not the first Respondent was covered by the relevant provisions of the 2010 Regulations such as to be a "temporary work agency." At that time it was envisaged that there would be argument about whether the first Respondent was providing "a managed service arrangement" rather than fulfilling the role of a temporary work agency.

6. However, as things transpired, at a pre-hearing review on 28 February 2013, having heard evidence from Mr White on behalf of the Appellants concerning the managed service argument, Employment Judge Britton determined that it had become otiose. As the Employment Judge observed at para 2 of his judgment, the issue which in fact had to be determined at that stage was whether the Appellants were agency workers within the meaning of the 2010 Regulations.

7. As the judge said at the end of para 1 of his judgment:

> **"Instead historically over many years, in the case of Mr White at least six in terms of his second period in employment, and with one of the others at least 25 years, they had been supplied by Ideal to work on the production process at Spondon alongside Celanese workers. Ideal invoiced for their services and in turn paid the Claimants each week for the work which they had done."**

The Employment Tribunal's judgment

8. At para 2 of his judgment the Judge said:

> **"The contention of Ideal is that put simply and by reference to Regulation 4, such was the length of the arrangement that it cannot be temporary. Therefore Ideal does not fall foul of Regulation 4."**

9. At this appeal hearing, Mr Williams was at pains to stress that the argument he advanced had not necessarily been accurately recorded by the judge at para 2. He told me that his argument was not based on the length of the arrangement but rather on the fact that it was

indefinite. He drew my attention to the Respondent's grounds of resistance in the Employment Tribunal proceedings, para 5, which stated that:

> **"The Claimants are not working temporarily. They are appointed for an indefinite period by the Respondent to work at Celanese's premises…"**

10. At para 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."**

12. At para 6 of the judgment the Judge continued:

> **"The counter to that put forward by Mr Williams [Counsel for the second Respondent and now Counsel for both Respondents] is what in reality happened. These ten Claimants have been ensconced at Spondon for many years. Whatever might have been the intention of Ideal and Celanese and whatever might have been the underlying premise as to what could occur, nevertheless what had occurred cannot be conceivably described as temporary given the longevity of the arrangement."**

13. At para 7 the Judge continued:

> **"This in turn, in terms of understanding the intention of all the parties requires that I also consider the contractual relationship between the Claimants and Ideal. The written particulars of employment between Mr White and Ideal … has all the features of a contract of employment. It states that the Claimant's place of work will be at Acetate Products Limited. That is the forbear of Celanese and we are talking about the same plant namely at Spondon. It gives a start date for the employment of 27 September 2006. It provides hours of work. For further provisions it cross references to the company handbook … it contains all the provisions that I would expect to see an experienced employment judge in a contract of employment. It is not a temporary contract. It provides ongoing accruing rights to notice which mirror the statutory notice of entitlement. It includes a disciplinary process, a grievance procedure, provisions for attendance, timekeeping, and sickness provisions. Insofar as anything is permanent in the employment world, this contract provides the kind of protection that one would expect to see."**

14. At para 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 para 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.

16. At para 20 of his judgment the Judge said:

> **"The word temporary is not defined in the interpretation provisions or elsewhere in the agency regs. Mr Scott has endeavoured to help me by finding some assistance from the BIS guidance. It is no disrespect to him if I say that I find none whatsoever and because the guidance does not deal at all with situations such as the one with which I am dealing. So I fall back on the dictionary definition; and for the purpose of this adjudication, … I have referred myself to Collins English Dictionary and Thesaurus 21st Century Edition. However I can draw comfort from the fact that neither counsel disagrees with the definitions as contained therein. So temporary is defined as:-**
>
> ***i)*** ***not permanent; provisional***
>
> **ii)** ***lasting only a short time*:- and cross referencing to the thesaurus temporary is defined as *briefly, fleetingly for a little while, for a moment, for a short time, for a short while, for the nonce, for the time being, momentarily potent, brief, ethereal… here today and gone tomorrow, interim, momentary, passing, protem, provisional, short lived, transient and transitory*."**

17. The crucial part of the Judge's reasoning appears at paras 21-22 of his judgment:

> **"21. I am with Mr Williams that it not for me to draft a passage into the Regulations to assist this type of scenario. The Regulations were made under the Health and Safety at Work Act and therefore it appears to me that given there is a clear lacuna it must be for Parliament to address it. What is the lacuna? I am well aware from my experience as a long serving Employment Judge that there are arrangements operating in the United Kingdom whereby significant numbers of workers may be placed by an agency with an end user, working to all intents and purposes on a permanent assignment but employed by the supplier ie the agency, who work alongside employees of the hirer but on less attractive terms and conditions and in particular lower wage rates, and which is of course at the heart of the claim of Mr White and his colleagues. It is unfortunate that the agency regulations, clearly intended as they were to provide some equality of treatment appear to have ignored such long term arrangements. Whether or not that was the intention of the draughtsman is not for me to second guess.**

> **22. Accordingly I fall back on the literal meaning of the word temporary and the fact that the Claimants all had contracts of indefinite duration with Ideal whereby they had been placed long-term at Celanese. It follows that I therefore must find, and this is really the be all and end of it, that the Claimants were not agency workers as defined in Regulation 3 because they were not supplied by Ideal to Celanese to work temporarily. It equally follows applying Reg 4 that Ideal cannot be a temporary work agency because it was not supplying the Claimants to work temporarily at Celanese."**

The Agency Workers Regulations

18. The relevant domestic legislation is contained in the **Agency Workers Regulations 2010** (SI 2010 No. 93).

19. The core provision is set out in Regulation 5, which, subject to Regulation 7, provides that 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. By virtue of Regulation 7, the qualifying period is 12 continuous calendar weeks during one or more assignments.

20. Regulation 3 defines "agency worker" to mean an individual who – "(a) is supplied by a temporary work agency to work temporarily for and under the supervision and direction of a hirer; and (b) has a contract with a temporary work agency which is – (i) a contract of employment with the agency or (ii) any other contract to perform work and services personally for the agency." The latter provision has been amended by Regulations in 2011 (SI 2011 No. 1941), which amend the definition in Regulation 3 to substitute the words "any other contract with the agency to perform work or services personally." It was common ground on this appeal that that amendment has no bearing on the issues before me.

21. Regulation 4(1) of the Regulations provides that "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 and under the supervision and direction of hirers; or (b) paying for, or receiving or awarded payment for, the services of individuals who are supplied to work temporarily for and under the supervision and direction of hirers."

22. The interpretation provision in Regulation 2 defines "assignment" to mean "a period of time during which an agency worker is supplied by one or more temporary work agencies to a hirer to work temporarily for and under the supervision and direction of the hirer". It defines "hirer" to mean "a person engaged in economic activity, public or private, whether or not operating for profit to whom individuals are supplied, to work temporarily for and under the supervision and direction of that person".

23. The inclusion of the qualifying period of 12 weeks in Regulation 7 was the product of an agreement between the Confederation of British Industry (CBI) and the Trades Union Congress (TUC) dated 20 May 2008. That agreement was reached pursuant to a provision in article 5.4 of **Directive 2008/104/EC** on temporary agency work (the Directive).

The European Union Directive

24. Directive 2008/104/EC was enacted by the European Parliament and the Council on 19 November 2008.

25. The scope of the Directive is set out in Article 1.1: it 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.

26. Article 2 sets out the aim of the Directive in the following terms: 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.

27. The definition provisions of Article 3, so far as material, provide as follows. "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. "Temporary-work agency" means any natural or legal person who, in compliance with national law, concludes contracts of employment or employment relationships with temporary agency workers in order to assign them to user undertakings to work there temporarily under their supervision and direction. "Assignment" means the period during which the temporary agency worker is placed at the user undertaking to work temporarily under its supervision and direction.

28. The core protection conferred by the Directive is to be found in Article 5. Article 5.1 provides that:

> **"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 an undertaking to occupy the same job."**

29. Derogation from that principle is permitted pursuant to the provisions of Article 5.4, which provides, so far as material:

> **"provided that an adequate level of protection is provided for temporary agency workers, Member States in which there is either no system in law for declaring collective agreements universally applicable or no such system in law or practice for extending their provisions to all similar undertakings in a certain sector or geographical area, may, after consulting the social partners at national level and on the basis of an agreement concluded by them, establish arrangements concerning the basic working and employment conditions which derogate from the principle established in paragraph 1. Such arrangements may include a qualifying period for equal treatment."**

30. As I have already indicated, the United Kingdom has included a qualifying period in the 2010 Regulations pursuant to that provision, with an agreement having been reached in 2008 by the CBI and the TUC.

31. Article 6.1 of the Directive provides that:

> **"temporary agency workers shall be informed of any vacant posts in the user undertaking to give them the same opportunity as workers in that undertaking to find permanent employment…"**

Article 6.2 provides that Member States shall take any action required to ensure that any clauses prohibiting or having the effect of preventing the conclusion of a contract of employment between the user undertaking and the temporary agency worker after his assignment may be declared null and void.

32. Various recitals in the preamble to the Directive were drawn to my attention. First, recital (2) cross-refers to the **Community Charter of the Fundamental Social Rights of Workers (1989)**.

33. Secondly, recital (13) cross refers to **Council Directive 91/383/EEC** of 25 June 1991 relating to health and safety at work of workers with a fixed-duration employment relationship or a temporary employment relationship. It makes those measures applicable to temporary agency workers.

34. Thirdly, recital (15) provides that:

> **"employment contracts of an indefinite duration are the general form of employment relationship. In the case of workers who have a permanent contract with their temporary-work agency, and in view of the special protection such a contract offers, provisions should be made to prevent exemption from the rules applicable in the user undertaking."**

35. Finally, recital (22) cross refers to the **Posted Workers Directive 96/71/EC** of 16 December 1996 considering the posting of workers in the framework of the provision of services.

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.

The Appellants' first submission

40. The first submission advanced for the Appellants was that the Employment Judge fell into error because he interpreted "temporary" to mean "short term." In support of this submission Mr Scott drew attention to the fact that the Judge set out the dictionary definition of "temporary" at para 20 of his judgment and referred to the "literal" meaning of that word at para 22. Mr Scott submitted that the Judge must have thought that the word meant "short term" because he drew a contrast with the arrangements for the Appellants being "long term" at para 22 of his judgment.

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.

42. On behalf of the Respondents Mr Williams did not seek to suggest that the word "temporary" in the present context should be interpreted to mean short term. Rather he submitted that the Judge had not erred in this way. I accept that submission. In my judgement, when the Judge's reasoning is read fairly and as a whole, he did not fall into the error of interpreting "temporary" to mean short term. After all, the dictionary definition he set out at para 20 of his judgment itself gave another meaning to the word, that is "not permanent." In my view, what the Judge was saying in the end was that the arrangements under which the Appellants worked were indefinite in duration and therefore permanent and not temporary.

43. The Judge's summary of the evidence given by Mr White at the hearing before him, in particular his answer to a question put in cross-examination, supports this view, that the Judge was of the clear view that the Appellants were working at the second Respondent's premises on a permanent and not temporary basis.

The Appellants' second submission

44. The second submission advanced for the Appellants was that, in any event, they had to be regarded as falling within the protection of the Regulations on their correct construction and that the Judge erred in law by deciding to the contrary. This was a fundamental submission and has potential importance going beyond the facts of the present case.

45. When pressed at the hearing as to the effect of his submission, Mr Scott did not shrink from suggesting that all agency workers would fall within the scope of the Regulations provided they meet the 12 week qualification period in Regulation 7. He submitted that

interpretation was necessary in order to give effect to the purpose of the Directive which the Regulations were intended to implement in domestic law. Such a purposive approach to interpretation is well-established in the context of EU law: see e.g. **Case C-106/89 Marleasing SA v La Comercial Internacional de Alimentacion SA** [1990] ECR I-4135. Mr Scott submitted that such an interpretation should be adopted also because it would fulfil the underlying "social justice" aims of the Directive, in particular the principle of equal treatment as between agency workers and those who work alongside them but are directly employed by the undertaking where they work.

46. I am unable to accept that submission. It seems to me to give no meaning or effect to the word "temporary" at all. The Regulations and the Directive could simply have said "agency workers" and they would have had exactly the same meaning and effect as, on Mr Scott's submission, they currently have.

47. Furthermore, and adopting the purposive approach which is clearly right in this context, the interpretation advanced by Mr Scott would, in my judgement, in fact fail to give true effect to the underlying purpose of the Regulations and Directive. In particular the legislative history of the drafting of the Directive seems to me to support Mr Williams' submission that there was an important amendment made to the original proposal by the Commission. Even if, as Mr Williams fairly accepted, the original proposal would have had the effect for which the Appellants contend in this case, 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.

48. In so far as that may be thought by some to leave a lacuna in the scope of protection of the legislation that is a lacuna that was deliberately left by the legislative organs of the EU,

which in this context included the Parliament, which of course is the only directly elected institution of the EU.

49. Reference to the social justice aims of the Directive would not necessarily point in only one direction. As I have already said, Article 2 of the Directive, which sets out its purpose, refers to 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.

50. In my judgement the concept of "temporary" in the Regulations and the Directive means not permanent. On the facts as found by the Employment Judge in this case, which were well supported by the evidence given before him, in particular Mr White's evidence as summarised at para 8 of the judgment, the Appellants were placed by the first Respondent with the second Respondent on a permanent and not a temporary basis. They therefore fell outside the scope of the Regulations. The Employment Judge was correct, as a matter of law, in reaching that decision.

Conclusion

51. For the reasons I have given this appeal is dismissed.