Appeal No. UKEAT/0187/16/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 13 December 2016

Before

THE HONOURABLE MR JUSTICE MITTING

(SITTING ALONE)

MS A AMISSAH & OTHERS APPELLANTS

(1) TRAINPEOPLE.CO.UK LTD (DISSOLVED)
(2) LONDON UNDERGROUND LTD RESPONDENTS

Transcript of Proceedings

JUDGMENT

Amended

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APPEARANCES

For the Appellants	MR DAVID MITCHELL (of Counsel) Instructed by: Waring & Co Solicitors 6B Ocean House Bentley Way New Barnet EN5 5FP
For the First Respondent	No appearance or representation by or on behalf of the First Respondent
For the Second Respondent	MS LYDIA SEYMOUR (of Counsel) Instructed by: Eversheds LLP Kett House Station Road Cambridge CB1 2JY

SUMMARY

JURISDICTIONAL POINTS - Agency relationships

Principles on which compensation to be assessed to be paid by hirer in circumstances in which it has been held liable for infringement of Regulation 5(1) **Agency Workers Regulations 2010**.

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THE HONOURABLE MR JUSTICE MITTING

1. Thirty-one individuals were employed by trainpeople.co.uk Ltd ("TP") to work at London Underground stations until 16 January 2013. They performed the same tasks as two grades of station staff directly employed by London Underground Ltd ("LUL"). They were all "agency workers" as defined by Regulation 3 of the **Agency Workers Regulations 2010** ("AWR"), which came into force on 1 October 2011.

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2. By virtue of Regulation 7, as from 24 December 2011 all who had worked in the same role continuously since 1 October 2011 were, under Regulation 5(1), entitled to the same basic working and employment conditions as a directly employed member of LUL's staff doing the same job. All or virtually all of the Claimants qualified for that right on that date. Subject to losing that entitlement by reason of absence from work for a continuous period of more than six weeks, or of 28 weeks if the absence was wholly due to sickness or injury, they remained so entitled until their dismissal by TP on or soon after 16 January 2013 when the contract between TP and LUL came to an end. TP did not alter the terms and conditions of employment of the Claimants until 15 October 2012 by, as the Employment Tribunal found, sending correct payslips to Sajit Chellappan on that date and by paying the correct wage to the Claimants as from that date. From 24 December 2011 until 15 October 2012 the Claimants' express terms and conditions of employment did not reflect the basic working and employment conditions to which Regulation 5 entitled them.

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3. On 3 September 2012 the Claimants presented a claim against both TP and LUL to the Employment Tribunal seeking a declaration as to their rights and compensation. Mr Chellappan and Sanjay Parekh were, by agreement, chosen as lead Claimants. A number of

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issues of principle were determined by Employment Judge Snelson following a seven-day hearing in a Reserved Judgment sent to the parties on 27 March 2015. He held that the Claimants' complaint in respect of hourly rates of pay was well founded from the date on which

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each Claimant qualified for protection under the **Regulations** - in almost all cases, therefore, 24 December 2011 - until their claim was presented on 3 September 2012 and was not rectified until 15 October 2012. He determined that TP and LUL were equally liable for the breach of Regulation 5(1) from 24 December 2011 until it was rectified on 15 October 2012. He

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adjourned questions of remedy to a hearing that took place on 14 and 15 October 2015. In a Reserved Judgment sent to the parties on 13 January 2016 he determined that subject to factors peculiar to an individual Claimant each Claimant was entitled to an award of two weeks' pay

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against LUL calculated in accordance with Regulation 5. He also determined that Mr Parekh had been continuously absent from work from 28 April 2012 for more than six weeks and that that break during his assignment was not wholly due to the fact that he was incapable of working in consequence of sickness or injury.

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4. By the time of both hearings TP had gone into insolvent liquidation. It was the subject of a compulsory winding up order on 19 November 2013. The effective dispute was therefore

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between the Claimants and LUL. The effect of the Employment Tribunal's order was that LUL was liable to pay two weeks' pay to each of the Claimants but nothing more. The Claimants appealed the Employment Judge's Judgment on compensation, and Mr Parekh appeals against a

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particular finding in his case.

5. Mr Parekh's appeal can be dealt with shortly. Judge Snelson found him to be an

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unimpressive witness, principally for two reasons: first, his second witness statement explaining the reasons for his absence from work from 28 April 2012 until the week ending 25 August

2012 was inconsistent with his first witness statement, when he said that he worked exclusively "and without a break" for the whole period from 24 September 2007 until 16 January 2013; secondly, he had no convincing explanation from him as to why the sick notes issued by his general practitioner between 28 April 2012 and the week ending 25 August 2012 covered only part of the period and for his own omission to claim statutory sick pay throughout the period. He was entitled to reach those findings, and there is no basis upon which I could properly upset them.

6. The Claimants' general grounds of appeal raise important questions as to the interpretation of Regulation 18(8)-(11). They provide:

> **"(8) Where an employment tribunal finds that a complaint presented to it under this regulation is well founded, it shall take such of the following steps as it considers just and equitable -**
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> > **(a) making a declaration as to the rights of the complainant in relation to the matters to which the complaint relates;**
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> > **(b) ordering the respondent to pay compensation to the complainant;**
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> > **(c) recommending that the respondent take, within a specified period, action appearing to the tribunal to be reasonable, in all the circumstances of the case, for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the complaint relates.**
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> **(9) Where a tribunal orders compensation under paragraph (8)(b), and there is more than one respondent, the amount of compensation payable by each or any respondent shall be such as may be found by the tribunal to be just and equitable having regard to the extent of each respondent's responsibility for the infringement to which the complaint relates.**
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> **(10) Subject to paragraphs (12) and (13), where a tribunal orders compensation under paragraph (8)(b), the amount of the compensation awarded shall be such as the tribunal considers just and equitable in all the circumstances, having regard to -**
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> > **(a) the infringement or breach to which the complaint relates; and**
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> > **(b) any loss which is attributable to the infringement.**
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> **(11) The loss shall be taken to include -**
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> > **…**
> >
> > **(b) loss of any benefit which the complainant might reasonably be expected to have had but for the infringement or breach."**

7. The infringement to which the complaint relates is the infringement of Regulation 5(1) and (2)(a):

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"(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.

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(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;

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8. The approach that the Tribunal is required to take in assessing compensation is in principle straightforward:

(1) It must identify the infringement. In this case, the infringement was of Regulation 5(1) and (2)(a).

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(2) It must identify the responsibility of the hirer and the temporary work agency for the infringement. Under Regulation 14(1) and (2):

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"(1) … a temporary work agency shall be liable for any breach of regulation 5, to the extent that it is responsible for that breach.

(2) … The hirer shall be liable for any breach of regulation 5, to the extent that it is responsible for that breach."

(3) It must decide whether to order either the temporary work agency or the hirer to pay compensation (see Regulation 18(8)(b)).

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(4) When it does, it must determine what amount of compensation it would be just and equitable to award. It must have regard to (a) the infringement and (b) the loss attributable to the infringement. That loss should be taken to include the loss of any benefit that the Claimant might reasonably be expected to have had but for the infringement (see Regulation 18(10) and (11)(b)).

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9. Applying those principles to the facts, the infringement here as found by the Employment Tribunal was the failure of TP to include in the Claimant's terms and conditions of employment the basic working and employment conditions enjoyed by LUL's directly

employed comparable staff. The loss attributable to that infringement includes the benefit of the payment of wages at the higher level enjoyed by LUL's directly employed comparable staff. The Employment Tribunal would then have to ask what compensation it would be just and equitable to require LUL to pay to the Claimants having regard to that loss. It is only at that point once the amount of compensation that LUL should pay to the Claimants is known that they would have a directly enforceable right to payment of any sum against LUL. Until that time their right was to the payment of wages by their employer. The claim for compensation against LUL is not therefore in principle a claim for wages or for unlawful deduction from wages but a claim for statutory compensation.

10. As I shall demonstrate, on the facts of this case the application of those principles may not be straightforward. The facts as found by Judge Snelson included the following, one hopes unusual, circumstances: (1) TP did not pay the difference between the contractual rate before the coming into force of the **Regulations**, between £7.50 and £9.50 an hour, and the LUL rate, about twice that, until 15 October 2012; (2) from December 2012 until May 2013 LUL calculated and paid at least the sum that was due under the adjusted terms to TP, as apparently they were required to do under their contract with TP, which the Employment Judge saw but I have not; and (3) despite promises to LUL and perhaps others to pay made by the Managing Director of TP, no payment was made, in circumstances that Judge Snelson characterised as suggestive of fraud.

11. On those unusual facts, the starting point for the calculation of the loss for which LUL are liable must be the traditional one, namely to ask what would have happened but for the infringement for which LUL was responsible. What would have happened but for that infringement is that TP should have, and may well have, issued compliant terms and conditions

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of employment to the Claimants on or very soon after 24 December 2011. In the case of an employer who has in circumstances suggestive of fraud deliberately withheld money that the employer knew was due to its employees, the Employment Tribunal may have to go on to ask a series of questions to be able to answer the basic question of what would have happened but for the infringement.

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12. For example, on the facts of this case the Tribunal would and should have asked itself what would have happened if, as may have been the case, TP had issued compliant terms on or soon after 24 December 2011. Would TP have paid the sums due under those compliant terms to the Claimants, or would they, as they later did, have received money from LUL but not paid it on to the Claimants? If they had not paid, would the Claimants have made complaints against them, both to them and to LUL, and in due course to an Employment Tribunal? Would they have brought a claim for unlawful deduction from wages? Would the employer - on the facts I have indicated, the unscrupulous employer - have thought it worthwhile to continue with the contract and to do so by maintaining the workforce essential to fulfil the contract and so pay its workforce what it was due? If, as may well have happened, payment of the due sums was continued but only up until a date before the contract terminated, would that period have been within the eight weeks provided for in section 184 of the **Employment Rights Act 1996** within which the employees would have had a statutory claim against the state for unpaid arrears of wages?

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13. If the traditional approach is adopted to assessing loss, as I suggest it should be, all of those questions and perhaps others may need to be addressed and to be addressed by reference to evidence. Once they are answered, then the calculation of loss becomes more straightforward, because what actually happened is known. The traditional method of

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calculating loss is to compare what actually happened with what should have happened but for the infringement or breach; it is the difference between those two figures that amounts to the loss that is attributable to the infringement. Ms Seymour, for LUL, submits that that approach is on the facts as found by Judge Snelson not one that would produce any loss claimable by the Claimants. She submits that the loss is caused by the conduct of TP, suggestive of fraud, and not by the failure to include appropriate terms and conditions with effect from 24 December 2011. I do not accept that submission. It is possible to envisage all sorts of circumstances, not necessarily involving conduct suggestive of fraud, that could give rise to such a submission. Suppose, for example, an entirely honest employer had been overwhelmed suddenly by an event for which he was in no way responsible. The Claimants would lose in those circumstances wages to which they were entitled, subject to the statutory claim under section 184, but it would be erroneous to conclude that the loss that they sustained was solely or even principally caused by the unforeseen event that had befallen their employer.

14. In a case such as this, it is necessary to start at the beginning to compare what should have happened with what did happen. It is not right in principle to start at the end. That is what Judge Snelson did. I pay tribute to the clarity of his reasoning and to the care with which his conclusions were explained, but he did not adopt the approach that I am satisfied as a matter of law he should have done. His approach is set out in paragraphs 32 to 34 of his Judgment on remedy:

> **"32. The first question has been answered in my first decision. There I held that the infringement (or breach) of reg 5 consisted of [a] failure by TP, between the date of qualification (if any) and 15 October 2012, to accord or extend to the Claimants terms as to pay equal to those of their comparators … I explained quite fully … why, in my view, AWR serve to impose an obligation on the temporary work agency ('TWA') to equalise terms, but do not provide a cause of action based on its failure to honour terms once equalised, let alone a right to claim at one further remove for the end user's 'failure' (a) to compel the TWA to make due payments to the agency workers or (b) to pay to the agency workers whatever the TWA owes them. I will not repeat what I said there, which has not been the subject of any upward challenge.**
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> **33. I turn to the second question. I remind myself that reg 18(10) is directed to loss attributable to the *infringement* (not, as Ms Seymour appeared to submit in her skeleton, para 34, to the part which LUL played in the infringement). Mr Mitchell submitted that Mr**

Parekh should be compensated for the lost back pay and associated expenses, together with interest. What basis is there for attributing that loss to the infringement identified in my answer to the first question, namely the failure to equalise terms until October 2012? As found in my first reasons, TP paid wages in accordance with the equalised terms from October 2012 onwards. …

34. In my judgment it cannot sensibly be said that loss of the back pay (or any associated expenditure) is 'attributable' to the failure (by TP, contributed to by LUL) timeously to equalise pay terms. I am satisfied that the loss for which Mr Mitchell sought compensation is entirely attributable to the facts that (a) in circumstances suggestive (as I held in my initial reasons …) of fraud, TP did not pay the Claimants what, by October 2012, they admittedly owed them (despite receiving, by May 2013 (not that their liability to pay the Claimants depended upon it), a greater sum from LUL); and (b) the Claimants did not (despite having the benefit of professional legal advice) enforce their right to recover the sums due; and (c) ultimately, through the liquidation of TP some 13 months after the debt crystallised, they lost the chance of doing so. In reaching this view I do not resort to common law reasoning. The concepts of remoteness and foreseeability forged and refined over centuries are not applicable. Nor is a 'but for' test appropriate. My task is simply to interpret and apply the straightforward language of reg 18(10) in a manner which accords with practical reality and common sense. It is not difficult to imagine factual circumstances in which Mr Mitchell might have found himself on firmer ground. If, for example, TP had become insolvent much earlier, it would no doubt have been easier to make out the required nexus between the loss and the infringement. But on the facts which confront me the Claimants are, in my view, a long way from making out that link. Accordingly, I conclude that no substantial loss is attributable to the infringement."

15. For the reasons that I have explained, and with respect to a careful Judgment, that approach to the calculation of loss was based upon the false premise that that calculation must be started at the end and not at the beginning of the process that gives rise to the loss. If he had asked himself the questions that I have posed earlier in this Judgment and perhaps others that may prove to be relevant, he could not have approached the task that he set himself in that way, nor could he sensibly have arrived at the conclusion that there was no loss attributable to the infringement for which LUL were responsible.

16. If the matter had stopped there, I would have had the straightforward task of allowing the appeal and remitting it for further determination once the facts had been found. However, he went on to ask the further statutory question whether it was just and equitable that LUL should be required to pay compensation to the Claimants above the statutory minimum of two weeks' pay. He set out his reasons at paragraph 35:

"35. … It seems to me, however, that the requirement for the award against any respondent to be 'just and equitable' dictates a discretionary assessment which takes account of all relevant circumstances. The circumstances of the instant case are, in my view exceptional and justice and equity require them all (not just the responsibility of the individual respondents for the

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infringement) to be taken into account. The additional points of particular importance have already been referred to. They are: (a) the fact that LUL paid to TP more than they owed to the Claimants; and (b) the fact that the Claimants failed (despite having the benefit of legal advice) to enforce their right to back pay against TP; and (c) owing to TP's insolvency, the fact that they lost that right. The logic of the Claimants' case is that LUL must pay twice in respect of the back pay. I do not accept that a proper application of AWR dictates that bizarre outcome. I do not know whether the Claimants have any separate remedy in respect of the failure to enforce against TP, or whether they have been advised in that regard. But whether or not a professional negligence action may lie, and despite my considerable sympathy for the Claimants, who have suffered an obvious injustice, I do not consider that, on the remarkable facts of this case, it would be just and equitable to order LUL to pay any compensation to them in respect of the back pay or any consequential losses."

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17. There is some force in that reasoning. The fact that LUL have paid TP at the amount that is owing to the Claimants by TP is plainly an important factor, and it would be an error of approach not to take it into account and to give it proper weight. However, there are counterbalancing factors; first, LUL's own responsibility for the situation in which the Claimants found themselves. LUL chose to recruit agency workers. Even allowing for an element on account of the profit enjoyed by TP on the supply on agency workers, the agency workers were cheaper to LUL than was the cost of directly employing their own staff up until 24 December 2011.

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18. Secondly, they were in part responsible for the situation that arose, which put the Claimants in the position of not receiving on the due date from their employer, TP, the sums to which they were entitled. Hence the Employment Tribunal's finding that they were 50 per cent responsible for the infringement of Regulation 5.

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19. Thirdly, criticising the Claimants and their legal advisors for not suing TP is an unjust criticism. No person is obliged by way of mitigation of loss to embark on costly litigation. Even though the outcome of litigation against TP would have been certain, the cost of enforcing any award in the County Court or in the Queen's Bench Division would have been not insignificant, and the outcome in terms of recovery given what happened later would have been

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A uncertain. Requiring someone to sue an employer whose finances were, to put it as neutrally as possible, doubtful, managed by somebody whose conduct was, in the words of the Employment Tribunal, suggestive of fraud, is not something that a reasonable individual who has been B wronged by the actions of a third party can reasonably be expected to undertake.

20. Fourthly and finally, as Judge Snelson recognised, these Claimants, very much in the weakest bargaining position of the three parties to these events, through no fault of their own C have lost wages that were unquestionably due to them. Balancing all of those factors together, it seems to me that Judge Snelson's conclusion that it would not be just and equitable to require LUL to pay significant compensation to them is at best open to question. If it had stood alone D and had not been founded as it was, on an erroneous approach to the calculation of the loss in the first place, it might have been possible to sustain it on appeal, but, taken together with the undoubted error of approach in relation to the basic loss, it cannot stand. The only means of E resolving these Claimants' claims for compensation is, I regret to say, to remit the remedy hearing, the assessment of compensation against LUL, to be determined by another Tribunal Judge. I do not order that it be returned to Judge Snelson, because he has already expressed F himself in cogent terms about the critical issues on which I have held that he has been in significant part in error. It is desirable that a fresh mind is brought to this far from straightforward problem. Given that in any event more evidence is going to be required to enable the position to be justly determined, it should be determined by a new mind and another G Employment Judge.

21. For the reasons given, I allow this appeal, save in respect of the ground peculiar to Mr H Parekh, and I order that the case is remitted to another Tribunal Judge to determine the amount of compensation that LUL should pay to the Claimants.