EMPLOYMENT TRIBUNALS

Claimants: 1. Mr Dominic Kocur
2. Miss Christine Roberts

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

HELD AT: Leeds **ON:** 7 November 2017

BEFORE: Employment Judge D N Jones
Mr R Grasby
Mr G Corbett

REPRESENTATION:

Claimants: Mr D Kocur, first claimant, by written representations
Respondents: Mr J McArdle, Legal Executive, by written representations

JUDGMENT

1. The second respondent shall pay to the first claimant exemplary damages of £8,000 for its breach of regulation 12 of the Agency Workers Regulations 2010 (AWR) by which it treated him less favourably than a comparable worker in failing to provide him with a swipe card to access the Leeds Mail Centre from 15 September 2016 to 16 May 2017. The infringement constituted a series of failures to act after the conclusion of the first proceedings and to the date of the application for an amendment to bring this claim. It fell within a category of exemplary damages whereby the second respondent calculated that it would generate a greater profit by its continuation of this legal infringement than it would have to pay in compensation to the first claimant.

2. To obviate and reduce the adverse effect on the first claimant of the infringements of regulation 12, the Tribunal recommends that the second respondent shall, by 1 January 2018:

> [i] facilitate the first claimant with the same means of access to the premises at the Leeds Mail Centre as employees of the second respondent; and
> [ii] allow the claimant membership of the on-site fitness centre at the Leeds Mail Centre in accordance with the terms of the Judgement sent to the parties on 15 September 2016 as further

clarified the Judgement and Reasons sent the parties on 9 February 2017.

3. The application of the first claimant for reconsideration of the Judgment sent to the parties on 2 October 2017 is refused as it is not necessary in the interests of justice to allow the application.

REASONS

Exemplary damages

1. In a statement of Mr Christopher Matson, plant manager based at the Leeds Mail Centre, the second respondent advanced reasons for not issuing the claimant with a swipe card following the decision of this Tribunal, sent to the parties on 15 September 2016. He said that there were 500 employees of the first respondent to whom swipe cards would have to be issued and that would cost £8 each. This would have an immediate cost of approximately £4,000. In addition, he contended that there was a high level of attrition of recruits to the first respondent, some 15,000 per year. This would increase the cost to the business to £120,000 per annum if swipe cards were issued to all. "*That is simply not an additional cost the business could reasonably accommodate, particularly bearing in mind the increasingly competitive market in which it operates*". Mr Matson also referred to problems this would have in respect of posing a security risk, although he did not elaborate in what way. Although Matson was not called to give evidence, the second respondent did not seek to dispute or contradict the statement which had both been served on the claimants and submitted to the Tribunal. Mr McArdle initially indicated he would call Mr Matson in the remedy part of the hearing, but subsequently decided only to call Mrs Trenoweth.

2. In the light of this evidence the Tribunal rejected the written submission of Mr McArdle insofar as he argued there was no evidence that the continuing infringement arose by reason of conduct calculated to make a profit which might exceed the compensation payable to the first claimant. The evidence which we have cited of Mr Matson expressly had regard to the significant cost he believed complying with Regulation 12 would have had. Although he does not use the language of profit it is axiomatic that this consideration would affect the financial success of the second respondent. This was one of the two reasons he gave for not issuing the first claimant with a swipe card. The other reason related to security considerations, although that was little more than an assertion unsupported by detail. We addressed this in our reasons in our decision of 15 September 2016, and decided that in the circumstances it was not sufficient to discharge the defence under Regulation 12(2) of the AWR.

3. One could be forgiven for assuming Mr Matson had not read the earlier judgment and reasons. The consequence of it was not, as he seems to suggest, that the second respondent would necessarily have to issue swipe cards to all who would access the Leeds Mail Centre to work, whether agency workers or Royal Mail employees. Rather, an alternative system of allocation of this means of access was

required, which may restrict the provision of swipe cards to particular workers who could establish sustained and continued attendance over a reasonable period which could be anticipated to continue. The alternative system would still be able to differentiate between agency workers and Royal Mail employees in terms of their means of access, if it did so by a means which were proportionate to the stated aims. Whilst many agency workers would be infrequent and irregular attenders at the Royal Mail Centre, many others worked frequent and extensive shift periods; even to the extent that some such agency workers would be attending more frequently than some part-time employees of Royal Mail.

4. The evidence produced in these proceedings sharply demonstrates the point. The agency worker who was engaged for the most substantial period between 23 July 2016 and 7 April 2017 worked for 873.5 hours, what would be an average of 24 hours per week. In contrast, the Tribunal had heard evidence that one employee of Royal Mail was engaged on a contract for 8 hours per week. All employees and agency workers are vetted for security purposes. Some agency workers will have demonstrated a level of attendance far greater than that of employees of Royal Mail and yet they are denied a more beneficial means of access not by reason of posing a greater security risk or being an infrequent attender but solely by reason of their status as agency workers. A blanket ban on the provision of swipe card keys to agency workers was disproportionate to the stated aims.

5. In taking time to formulate a proportionate policy which met the legitimate aims the second respondent could have issued a swipe card to the first claimant alone with minimal cost, £8. Only he had brought a successful claim in this regard and he continued to draw attention to the infringement, even to the extent of seeking a recommendation from the Tribunal after the earlier proceedings had been concluded. The second respondent chose not to do so, presumably because, as Mr McArdle said in closing submissions, it was concerned about the precedent effect that would establish. It would appear to have been this concern which led to such a heavily reliance on the costs to the business in the statement of Mr Matson.

6. Exemplary damages are rarely awarded. It was not suggested by Mr McArdle that they could not, in principle, fall within an award we could make under Regulation 18(8) of the AWR and that would seem compatible with earlier authority regarding other employment rights, see **Virgo Fidelis Senior School v Boyle [2004] IRLR** 268. Rather, he contended that none of the three circumstances in which the common law allows the making of such compensation, as defined **Rookes v Barnard [1964] AC 1129,** arose.

7. Only the second of those categories could be applicable. It was explained by Lord Morris in **Broome v Cassell Co [1972] AC 1027:**

> *"There may be exemplary damages if a defendant has formed and been guided by the view that, though he may have to pay some damages or compensation because of what he intends to do, yet he will in some way gain (for the category is not confined to money-making in the strict sense) or may make money out of it, to an extent which he hopes and expects will be worth his while. I do not think that the word 'calculated' was used to denote some*

> *precise balancing process. The situation contemplated is where someone faces up to the possibility of having to pay damages for doing something which may be held to have been wrong but where nevertheless he deliberately carries out his plan because he thinks that it will work out satisfactorily for him."*

8. For the reasons we have set out, we are satisfied that cost was fundamental to the reasoning in maintaining the infringement. The compensation to be paid to the claimant for the continuing breach is not substantial. The second respondent reasoned that the cost of compliance would be large and prohibitive.

9. In **Rookes v Barnard,** Lord Devlin explained the policy rationale for including this second category as an exemption to the rule that exemplary damages cannot be recovered. When a party *"with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity".* We are satisfied that, in the very unusual circumstances prevailing in this case, such an award is appropriate and necessary.

10. The second respondent had opposed the first claimant's application to amend his claim to address this continuing breach on the ground the need for further evidence would have delayed the case, only to concede liability when its response was filed. It resisted the first claimant's application for a recommendation that it should provide him with a swipe card as long ago as February 2017 and so was on notice of his continuing objection to their policy. As late as September 2017 there had been no apparent progress. The Tribunal regards exemplary damages as necessary to penalise the second respondent for perpetuating its wrongdoing for financial and profit considerations.

11. We do not take the same approach to the breach of Regulation 12 in respect to gym membership. In her statement, Mrs Trenoweth explained that the reason for declining the claimant's application for gym membership was principally related to administrative complexities. The limited circumstances in which exemplary damages may be ordered would not arise in those circumstances.

12. As to the amount of such an award, in **Ministry of Defence v Fletcher [2010] IRLR 25**, the Employment Appeal Tribunal drew attention to the guidance of the Court of Appeal in **Thomson v The Commissioner of the Metropolitan Police.** The appropriate range for exemplary damages was between £5000 and £50,000, but updated for inflationary considerations, the lowest award in 2010 would be £6,000. In **Fletcher** the EAT considered that on the facts, had it been appropriate to have made an award, it should have been at the lower end of the scale at £7,500. Giving further recognition to inflationary factors we consider the appropriate sum in this case is £8,000. This was a significant disregard of a legal requirement following a judicial determination and it continues after its anniversary. The second respondent is a substantial employer with access to its own human resources department and legal advice. We have set out the events over the year which should have caused the second respondent to treat this matter seriously and with expedition, namely the reconsideration application and amendment. Having regard to the nature of the

disadvantage to the claimant arising from the breach, which is not substantial, the penalty falls at the lower end of the **Thomson** guidelines.

Recommendations

13. In contrast to the earlier proceedings, in which the first claimant sought only a declaration, and neither compensation or a recommendation, he now pursues all remedies. We are prepared to make two recommendations, as set out in the judgment.

14. Having regard to when the judgment will be received we consider that for practical purposes the second respondent will be able to facilitate the claimant access to membership of the gym, to allow its use during assignments and with a swipe card to access the premises by the beginning of the New Year. We are not prepared to allow three months as suggested by the second respondent given the lengthy period of its failure to comply with its obligations to date.

15. We reject the extensive recommendations requested by the first claimant in his written submissions. In respect of a number, they concern changes to the practice of the second respondent countrywide. The provisions of Regulation 18(8) of the AWR, concerning recommendations, are restricted to such action we consider to be reasonable for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the complaint relates. We are satisfied the recommendations set out above are reasonable and will have the effect envisaged by the provision.

Application for reconsideration

16. By email of 16 October 2017 the first claimant applied for reconsideration of the judgement. The application concerns the restriction of the detriment complaint to 10 October 2016. The first claimant contends that in respect of both claimants the period considered should have been to 7 April 2017. In addition, the first claimant argues that the computation of loss in respect of the opportunity to have obtained any of the vacancies which had not been advertised was inaccurate, at 10%, but should be substituted with 0% or 48%.

17. Under rule 78 a Tribunal may reconsider its judgement if it is necessary in the interest of justice to do so. That will include consideration of those factors set out within rule 2 and applying the overriding objective. In dealing with cases fairly and justly the Tribunal will have regard, as far as practicable, to ensuring the parties on an equal footing, dealing with cases in ways which are proportionate to the complexity and importance of the issues, avoiding unnecessary formality and seeking flexibility in the proceedings, avoiding delay so far as is compatible with proper consideration of the issues and saving expense.

18. The first claimant contends, firstly, that the period of time to which the detriment claim related was extended by the Order of Employment Judge Brain, sent to the parties on 6 March 2017. That is not what the Order states.

19. Secondly he contends that by accepting the further and better particulars in a letter to the parties dated 30 March 2017, the extended period which had been

referred to in the correspondence submitted by the first claimant on the 24 February 2017, had the consequence of substituting 10 October 2016 with the later date. He suggests that because disclosure was to be completed by 7 April 2017 that it was implicit that this alleged breach covered up until then.

20. That is a misunderstanding of the Tribunal procedure. The acceptance of further and better particulars does not equate with allowing an amendment. As we pointed out in our reasons, the later events may have shed light on a pattern of work for the purposes of the period subject to the claim. The acceptance of those particulars did no more than recognise that, insofar as subsequent events were significant, they would be considered by the Tribunal. That is quite different to considering and allowing an amendment.

21. The Tribunal had allowed the parties time to consider what compensation should be paid for the lost opportunity which arose from the failure of the respondents to notify the claimant of vacancies, the infringement of Regulation 13. The Tribunal pointed out to the parties, before they broke to discuss this issue, that it would have to calculate an appropriate salary to reflect a variety of different jobs which the claimants had not been able to apply for, as well as to quantify the prospects of success each claimant had in obtaining such employment had they applied.

22. After the break, the first claimant and Mr McArdle informed the Tribunal that they had agreed an hourly rate and during discussion with the Tribunal Mr McArdle indicated that the respondent quantified the lost chance at 10%. The first claimant's representative agreed that was an accurate and fair assessment.

23. The application to reconsider is no more than an attempt to re-argue this aspect of the claim. An important principle of litigation is finality. It is not in the interests of justice, save in exceptional circumstances, to allow parties to return to raise further points which they had the opportunity to advance, but chose not to do so. The claimants were under no compulsion to agree to these calculations. It is said by the first claimant that the second claimant was pressurised in the circumstances. Neither she nor the first claimant expressed to the Tribunal any concern at the time. We do not consider it fair to allow the claimants to withdraw this concession and to reargue the case on a different basis. The proposition that there was a 0% or 48% chance of success in obtaining one of these posts is novel and had never been canvassed before. To allow this application would occasion further expense and delay.

Other issues

24. At the hearing, when addressing remedy issues, the Tribunal informed the parties that it was precluded from making an award for injury to feelings by virtue of Regulation 18(15) of the AWR. The parties made no observations to the contrary. In our deliberations concerning remedy, it is apparent that the prohibition on awarding compensation for injury to feelings, under Regulation 18(15) of the AWR does not apply to a breach of Regulation 17. Given the parties may have acted in reliance on the Tribunal's incorrect statement, and given the claimants do not have the benefit of legal assistance, we are satisfied it is necessary in the interests of

justice to allow the claimants the opportunity to say whether they pursue such compensation.

25. In addition we are not satisfied that the written representations adequately address what specific written particulars of employment need to be included in our determination. It is necessary for this to be considered with the attendance of the parties.

26, For the purpose of considering these matters further, a preliminary hearing in private shall be arranged with the parties and the Employment Judge. That shall be accommodated by telephone.

Employment Judge Jones

Date 15 November 2017