Appeal No. UKEAT/0181/17/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 6 February 2018
Judgment handed down on 23 February 2018

Before

THE HONOURABLE MR JUSTICE CHOUDHURY

MR H SINGH

MR D G SMITH

MR D KOCUR — APPELLANT

(1) ANGARD STAFFING SOLUTIONS LIMITED
(2) ROYAL MAIL GROUP LIMITED — RESPONDENTS

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant

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Free Representation Unit

For the Respondents

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SUMMARY

AGENCY WORKERS

The Tribunal erred in finding that there had been compliance with Regulation 5(1) of the **Agency Workers Regulations 2010** in circumstances where the agency worker was only entitled to 28 days' leave and 30 minutes paid rest breaks, whereas the hirer's employees were entitled to 30.5 days leave and one-hour paid rest breaks. These shortfalls in entitlement could not be compensated for by the payment of an enhanced hourly rate.

The Tribunal did not err, however, in finding that there was no requirement to provide an agency worker with precisely the same number of working hours as the hirer's employees. Such a requirement would deprive the relationship between hirer and agency/agency worker of the flexibility considered important by the **Directive**.

THE HONOURABLE MR JUSTICE CHOUDHURY

Introduction

1. The Appellant (to whom we shall refer as the Claimant) worked for the First Respondent, which is an employment agency supplying temporary workers to the Second Respondent. Pursuant to Regulation 5 of the **Agency Workers Regulations 2010** ("AWR"), the Claimant, as an agency worker, was entitled to "*the same basic working and employment conditions*" to which he would be entitled for doing the same job had he been recruited directly by the hirer of labour, in this case the Second Respondent. The Claimant alleged that the Respondents failed to comply with their obligations under the **AWR** by providing him with only 28 days' annual leave and 30 minutes of paid rest breaks whereas direct recruits were entitled to 30.5 days' annual leave and one-hour paid rest breaks. The Employment Tribunal sitting in Leeds ("the Tribunal") dismissed his claims and found that the differences in annual leave and rest breaks were compensated for by the Claimant's higher rate of hourly pay. The issue in this appeal is whether the Tribunal erred in law in looking at the Claimant's remuneration as a whole for the purposes of determining whether the requirements of **AWR** were met.

Factual Background

2. The Claimant initially worked for the Second Respondent from November 2014 until 15 January 2015 as a casual worker. During this period, he was engaged by the Second Respondent directly, and the **AWR** did not apply.

3. On 26 January 2015, the Claimant became an employee of the First Respondent. His services were supplied to the Second Respondent as an agency worker on a regular basis

thereafter at its mail centre in Leeds. The Second Respondent has around 1,050 employees at the Leeds mail centre. The First Respondent's employees are used to cover 300 shifts per week.

4. By the middle of June 2015, the Claimant had completed 12 weeks with the Second Respondent as an agency worker. This triggered his entitlements under Regulation 5 **AWR**. By October 2015, the Claimant had become dissatisfied with various aspects of his pay and conditions and raised a grievance with both Respondents. His complaints included that he was not being provided with the same length of breaks as direct recruits. That grievance led to changes to his entitlements to breaks. However, several of the Claimant's other concerns remained unresolved. These included the fact that he was not provided with a swipe card for accessing the premises and was not entitled to membership of the on-site fitness centre.

5. The relevant concerns for the purposes of this appeal were as follows:

a. For each eight-hour night shift worked he was given a one-hour break but was paid only for 30 minutes of that break, whereas the direct recruits were paid for the entire hour. The Tribunal described the payment arrangements for breaks as follows:

> **"11. The equivalent comparator employee of the second respondent was paid at an hourly rate of £9.60. The claimant was paid at an hourly rate of £10.50. For an afternoon eight hour shift that would mean that a first respondent employee would receive £78.75 (7.5 x £10.50) and the second respondent's employee would receive £76.80 (eight hours x £9.60). That would mean, therefore, that a first respondent employee, an agency worker, would be paid £1.95 more than a second respondent employee for the same shift. The came about by reason an [sic] unexplained allocation of 30 minutes of a paid break to the first respondent employee, as confirmed by their wage slips. The intention had been that by rounding up an amount into the hourly rate there would be equivalence of pay; that was because the second respondent employee was paid for the entire shift (such as eight hours) which would include all breaks, whereas the first respondent's employee was only to be paid for the hours worked. It was never clear to the Tribunal why in the calculation of payment for an eight hour shift 30 minutes was deducted from the pay as opposed to the entire hour, or alternatively 40 minutes, if relaxation breaks were to be ignored due to them being subject to local practice."**

b. The Claimant was entitled to 28 days' annual leave compared to the direct recruits' entitlement to 30.5 days. The Tribunal dealt with this entitlement as follows:

> **"16. In respect of holidays, second respondent employees are entitled to 6.1 weeks' annual leave under their contracts of employment (30.5 days). First respondent employees are entitled to 5.6 weeks (28 days) of annual leave under their contracts of employment. In order to redress the imbalance the first respondent pays to the agency staff it places with the second respondent an enhanced hourly rate. This can vary between 11p and 19p per hour depending on the particular rate the employee is entitled to (taking into account length of service, shift patterns, etc.). The employees of the first respondent are not entitled to take leave for that additional 2.5 days or its pro rata equivalent. They receive remuneration in the rolled up hourly rate of pay instead, to compensate.**
>
> **17. In respect of the calculation of holiday entitlement the first respondent adopts a different approach to that of the second respondent. This is because of the irregular work patterns undertaken by agency staff. 28 days' holiday entitlement will equate to 12.07% of wages earned. That is a computation which reflects the time worked in monetary terms. The first respondent's employees accumulate an individual fund based upon the financial equivalent of the hours they have worked over the holiday year. The first respondent then requires its employees to take holiday during the year in order for it to comply with the Working Time Regulations and to avoid the risk that the employee will not take leave which is for health and safety benefits, but choose to work that time. As most agency workers do not work for the same or greater periods than the second respondent's employees, the reality will be that they apportion a period of time as holiday when in fact they would never have been offered a shift and worked at all during that specified period. The employee will receive holiday pay for the period specified as holiday and it will be drawn down from the accumulated fund which was earmarked for holidays."**

6. It was in these circumstances that the Claimant lodged his complaint to the Tribunal alleging various breaches of **AWR**. It should be mentioned that whilst the complaints in respect of annual leave and rest breaks are set out, amongst other claims, in the Claimant's ET1, there is nothing complaining that he was entitled to work the same number of hours as any direct recruits.

The Tribunal's Judgment

7. Following a three-day hearing before Employment Judge Jones, sitting with lay members, the Tribunal declared that the Respondents had infringed the Claimant's rights under **AWR** in some respects including in relation to the provision of a swipe card and membership of the fitness centre. However, the complaints in respect of annual leave and payment for rest

A breaks were dismissed. There was a further claim which appeared to be that he was entitled to the same working hours as direct recruits. That was also dismissed.

B 8. As to holiday entitlement, the Tribunal held as follows:

> **"<u>Was the claimant provided with the same entitlement to the same basic working and employment conditions as employees of the second respondent in relation to his holiday entitlement?</u>**
>
> **42. The claimant's annual holiday entitlement was based on a full-time equivalent of 28 days. The second respondent's employees had a holiday entitlement based on a full-time equivalent of 30.5 days.**
>
> **43. Employees of either respondent received a pro rata equivalent entitlement to holiday if they do not work full time weekly hours of 39. In that respect the treatment was the same.**
>
> **44. There was plainly a disparity in principle of 2.5 days between the first and second respondent employees, assuming they had each worked 39 hours per week. The same disparity would arise, proportionately, for those who worked fewer hours during the week.**
>
> **45. That was compensated for by enhancing the hourly rate of the first respondent's employees. The second respondent's employees had been entitled to take the extra 2. 5 days as paid holiday in contrast to the first respondent's employees who could not take the extra 2.5 days as holiday, it already having been compensated for in the enhanced rolled up hourly rate they had received. However, parity would be achieved for a first respondent employee who chose not to put himself forward for work for that period of 2.5 days in the year. That employee would thereby receive the same time off work as the second respondent's employees and the same pay. We are satisfied this arrangement discharges the obligation under regulation 5."**

E 9. As to the claim in respect of rest breaks, the Tribunal said as follows:

> **"<u>In respect of those rest breaks, was the claimant provided with the same basic working and employment conditions as the second respondent provided for its employees in respect of remuneration?</u>**
>
> **35. We were satisfied that the inclusion of an enhanced hourly rate of pay to compensate for rest breaks created at least equivalence in respect of pay. In fact, as can be seen from the way this was operated by the first respondent, the claimant and agency workers were often financial beneficiaries, receiving more renewable remuneration than their second respondent comparators on an eight hour shift. … A second respondent employee worked an eight hour shift, was paid for an eight hour shift and within that time period had the benefit of one hour of rest break; so he was paid for the rest break. In comparison, the first respondent employees had the one hour rest break, but were remunerated for only 7.5 hours. The balance of 0.5 hours was not calculated as remunerated time but was compensated for in the enhanced rolled-up element of the hourly rate of pay.**
>
> **36. We do not accept the claimant's argument that this different way of remunerating first respondent employees constituted a breach of regulations 5 and 6. The claimant submitted that the regulations precluded the second respondent from remunerated agency workers in this different way and that they should not find themselves more favourably paid because of it. He contended the regulations demand the same means of remuneration of working time and any deviation from this would be an infringement of the right.**
>
> **37. The principle of equal treatment enshrined in Article 5 of the Directive provides that the basic working employment conditions of an agency worker shall be "at least" those as if he had been recruited directly to the job. It would appear more generous provision in the terms and conditions of an agency worker would be permissible under this principle. Although**

regulation 5 uses the term "the same", the domestic legislation must be read and construed as against the Directive, so far as it is compatible with its meaning. We agree with the BIS guidance that rolling up within the hourly rate of pay of an agency worker a sum which creates parity of remuneration, in this instance for rest breaks, is a permissible way of discharging the obligations under regulations 5 and 6. This approach accommodates for administrative convenience in circumstances in which the regularity of the provision of the agency labour may be very different to that of the comparator employee. The fact that in an 8 hour shift the claimant finds himself better off than a comparator employee does not infringe the regulations. The right applies to protect from being less well remunerated for the working day. He was not."

The Legal Framework

Directive

10. The EU Directive, which the **AWR** sought to implement, was the **EU Temporary Agency Workers Directive (No. 2008/104)** ("the Directive"). The recitals to the **Directive** include the following:

> **"Whereas:**
>
> **(1) This Directive respects the fundamental rights and complies with the principles recognised by the Charter of Fundamental Rights of the European Union. In particular, it is designed to ensure full compliance with Article 31 of the Charter, which provides that every worker has the right to working conditions which respect his or her health, safety and dignity, and to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.**
>
> **…**
>
> **(8) In March 2005, the European Council considered it vital to relaunch the Lisbon Strategy and to refocus its priorities on growth and employment. The Council approved the Integrated Guidelines for Growth and Jobs 2005-2008, which seek, inter alia, to promote flexibility combined with employment security and to reduce labour market segmentation, having due regard to the role of the social partners.**
>
> **(9) In accordance with the Communication from the Commission on the Social Agenda covering the period up to 2010, which was welcomed by the March 2005 European Council as a contribution towards achieving the Lisbon Strategy objectives by reinforcing the European social model, the European Council considered that new forms of work organisation and a greater diversity of contractual arrangements for workers and businesses, better combining flexibility with security, would contribute to adaptability. Furthermore, the December 2007 European Council endorsed the agreed common principles of flexicurity, which strike a balance between flexibility and security in the labour market and help both workers and employers to seize the opportunities offered by globalisation.**
>
> **…**
>
> **(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.**
>
> **(12) This Directive establishes a protective framework for temporary agency workers which is non-discriminatory, transparent and proportionate, while respecting the diversity of labour markets and industrial relations.**
>
> **…**

(14) The basic working and employment conditions applicable to temporary agency workers should be at least those which would apply to such workers if they were recruited by the user undertaking to occupy the same job.

…

(16) In order to cope in a flexible way with the diversity of labour markets and industrial relations, Member States may allow the social partners to define working and employment conditions, provided that the overall level of protection for temporary agency workers is respected.

…"

11. It is clear from these recitals that the intention was to ensure that a balance was struck between the flexibility afforded to both employers and workers by agency working and the protections necessary to provide security for temporary workers. The relevant substantive provisions of the **Directive** include the following:

"Article 1

Scope

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

…

Article 2

Aim

The purpose of this Directive is to ensure the protection of temporary agency workers and to improve the quality of temporary agency work by ensuring that the principle of equal treatment, as set out in Article 5, is applied to temporary agency workers, and by recognising temporary-work agencies as employers, while taking into account the need to establish a suitable framework for the use of temporary agency work with a view to contributing effectively to the creation of jobs and to the development of flexible forms of working.

Article 3

Definitions

1. For the purposes of this Directive:

…

(e) "assignment" means the period during which the temporary agency worker is placed at the user undertaking to work temporarily under its supervision and direction;

(f) "basic working and employment conditions" means working and employment conditions laid down by legislation, regulations, administrative provisions, collective agreements and/or other binding general provisions in force in the user undertaking relating to:

(i) the duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays;

(ii) pay.

…

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.

…

4. 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.

The arrangements referred to in this paragraph shall be in conformity with Community legislation and shall be sufficiently precise and accessible to allow the sectors and firms concerned to identify and comply with their obligations. …

…

Article 9

Minimum requirements

1. This Directive is without prejudice to the Member States' right to apply or introduce legislative, regulatory or administrative provisions which are more favourable to workers or to promote or permit collective agreements concluded between the social partners which are more favourable to workers."

AWR

12. The **AWR** sought to implement the **Directive**. Pursuant to the entitlement under Article 5(4) of the **Directive** to include arrangements for a qualifying period for treatment, the **AWR** introduced a qualifying period of 12 weeks before certain rights were triggered. This meant that the **AWR** created two sets of rights: one set applicable from the commencement of any temporary work assignment, referred to in the Departmental Guidance ("the Guidance") as "Day 1 rights"; and another set which only arose once the 12-week qualifying period had ended ("12-week rights"). The relevant provisions of the **AWR** for present purposes include the following:

"2. *Interpretation*

In these regulations -

A

…

"assignment" means 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;

…

B

5. ***Rights of agency workers in relation to the basic working and employment conditions***

(1) Subject to regulation 7, an agency worker (A) shall be entitled to the same basic working and employment conditions as A would be entitled to for doing the same job had A been recruited by the hirer -

(a) other than by using the services of a temporary work agency; and

(b) at the time the qualifying period commenced.

C

(2) For the purposes of paragraph (1), the basic working and employment conditions are -

(a) where A would have been recruited as an employee, the relevant terms and conditions that are ordinarily included in the contracts of employees of the hirer;

(b) where A would have been recruited as a worker, the relevant terms and conditions that are ordinarily included in the contracts of workers of the hirer,

D

whether by collective agreement or otherwise, including any variations in those relevant terms and conditions made at any time after the qualifying period commenced.

(3) Paragraph (1) shall be deemed to have been complied with where -

(a) an agency worker is working under the same relevant terms and conditions as an employee who is a comparable employee, and

(b) the relevant terms and conditions of that comparable employee are terms and conditions ordinarily included in the contracts of employees, who are comparable employees of the hirer, whether by collective agreement or otherwise.

E

(4) For the purposes of paragraph (3) an employee is a comparable employee in relation to an agency worker if at the time when the breach of paragraph (1) is alleged to take place -

(a) both that employee and the agency worker are -

(i) working for and under the supervision and direction of the hirer, and

F

(ii) engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification and skills; and

(b) the employee works or is based at the same establishment as the agency worker or, where there is no comparable employee working or based at that establishment who satisfies the requirements of sub-paragraph (a), works or is based at a different establishment and satisfies those requirements.

(5) An employee is not a comparable employee if that employee's employment has ceased.

G

(6) This regulation is subject to regulation 10.

6. ***Relevant terms and conditions***

(1) In regulation 5(2) and (3) "relevant terms and conditions" means terms and conditions relating to -

(a) pay;

H

(b) the duration of working time;

(c) night work;

(d) rest periods;

(e) rest breaks; and

(f) annual leave.

(2) For the purposes of paragraph (1)(a), "pay" means any sums payable to a worker of the hirer in connection with the worker's employment, including any fee, bonus, commission, holiday pay or other emolument referable to the employment, whether payable under contract or otherwise, but excluding any payments or rewards within paragraph (3).

…

(5) In this regulation -

…

"working time", in relation to an individual means -

(a) any period during which that individual is working, at the disposal of the employer of that individual and carrying out the activity or duties of that individual,

(b) any period during which that individual is receiving relevant training, and

(c) any additional period which is to be treated as working time for the purposes of the Working Time Regulations 1998 under a working time agreement; …

…

7. *Qualifying period*

(1) Regulation 5 does not apply unless an agency worker has completed the qualifying period.

(2) To complete the qualifying period the agency worker must work in the same role with the same hirer for 12 continuous calendar weeks, during one or more assignments.

…"

The Grounds of Appeal

13. The Claimant was permitted to proceed with three out of his original eight grounds of appeal following a Rule 3(10) Hearing before HHJ Eady QC. Those three grounds of appeal are that the Tribunal erred in its application of Regulation 5(1) **AWR**:

a. *Ground 1*: in finding that the Claimant's lower annual leave entitlement could be compensated for by a higher rate of pay in the form of a rolled-up payment.

b. *Ground 2*: in rejecting the Claimant's claim to be entitled to the same number of weekly hours as a direct recruit; and

c. *Ground 3*: in finding that the difference in payment for rest breaks between the Claimant and direct recruits was compensated for by his higher rate of hourly pay.

14. We shall deal with Grounds 1 and 3 first as they raise similar issues.

Ground 1

Submissions - Ground 1

15. Mr Caiden appears on behalf of the Claimant through the Free Representation Unit. We are most grateful to Mr Caiden for his helpful assistance both in writing and in oral submissions. He submits that the Tribunal's approach in accepting that an enhanced hourly rate of pay could compensate for the difference in annual leave entitlement was wrong because it fails to give effect to the plain words of the **AWR**. He makes the following seven points in support:

a. Regulation 5(1) **AWR** is clear in that it entitles agency workers to "*the same*" basic terms and conditions. He submits that in those circumstances it was not open to the Tribunal to water down the effect of the word "*same*" by reference to the apparently less stringent requirements of the **Directive** that the agency worker be provided with terms and conditions which are "*at least those that would apply*" to direct recruits;

b. The **AWR** requires a term-by-term approach (whereby each term applicable to the agency worker is at least that which applies to the employee) and not a package-based approach (whereby a less favourable term can be balanced by another more favourable one);

c. Pay and holiday are distinct concepts and it is not permissible to make payments in lieu of holiday entitlement. In this regard Mr Caiden relies upon the decision of the ECJ in **Robinson-Steele v RD Retail Services Ltd** (Cases C-131/04 and C-257/04) [2006] IRLR 386:

> **"60. Furthermore, account must be taken of the fact that, under Article 7(2) of the Directive, the minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated. That prohibition is intended to ensure that a worker is normally entitled to actual rest, with a view to ensuring effective protection of his health and safety (see, to that effect, *BECTU* [[2001] IRLR 559] cited above, paragraph 44, and case C-342/01 *Merino Gómez* [2004] IRLR 407, paragraph 30).**
>
> **…**
>
> **63. It follows from all the foregoing considerations that the reply to the first question referred in each of cases C-131/04 and C-257/04 and to the fourth question referred in case C-257/04 must be that Article 7 of the Directive precludes the payment for minimum annual leave within the meaning of that provision from being made in the form of part payments staggered over the corresponding annual period of work and paid together with the remuneration for work done, rather than in the form of a payment in respect of a specific period during which the worker actually takes leave."**

d. The Tribunal failed to give effect to the requirement that terms and conditions *relating to* annual leave be the same;

e. Insofar as the Tribunal relied upon the Guidance, it was wrong to do so as that Guidance is itself incorrect in suggesting that payment for annual leave in excess of statutory minimum could be rolled-up into the hourly rate of pay;

f. The approach approved by the Tribunal lacks transparency in that it is not clear from the outset that any part of the Claimant's remuneration was in order to compensate him for the fewer days of annual leave;

g. Finally, the Tribunal was simply wrong to conclude that the Claimant could achieve parity in terms of the number of days of annual leave by choosing not to put himself forward for work for the additional 2.5 days' leave to which his employed colleagues were entitled.

16. The Respondent, represented here by Mr Gorton QC, submits that:

a. The **AWR** and the **Directive** provide for a floor in respect of entitlements and not a ceiling;

b. The **AWR** and the **Directive** are concerned with substantive outcomes, namely parity; and are not concerned with the specific mechanism used to achieve such parity;

c. In the present case, the Claimant could achieve parity in respect of holiday entitlement by taking 2.5 days as "holiday" during any period when he was not working for the Second Respondent;

d. As for pay, parity was achieved by reason of the enhanced hourly rate, which the Tribunal found applied to agency workers;

e. Providing payment for accrued holidays in addition to the **Working Time Regulations 1998** ("WTR") minimum of 28 days would create a highly demanding administrative burden on agencies whose accounting systems are conditioned to the 28-day minimum. That burden was recognised in the Guidance which provides:

> **"There will be many differing entitlements to paid holiday leave provided by hirers and a possible way of simplifying the administration of this entitlement could be to deal with any additional entitlement - over and above the statutory entitlement - as a one off payment at the end of the assignment or as part of the hourly/daily rate. Such arrangements would only relate to additional, contractual leave which is in excess of the statutory minimum.**
>
> **It is important to remember that payment of the statutory entitlement to annual leave should be made when the leave is taken to ensure that individuals do take the leave to which they are entitled. There will be no change to the existing law in this respect."**

f. Rolled-up holiday pay provision does not offend any fundamental rights given that the agency worker's minimum statutory entitlement to leave is fully preserved.

Analysis and Conclusions - Ground 1

17. The wording chosen by Parliament to confer the 12-week rights differs from that in the **Directive**. Whereas Article 5 of the **Directive** provides that the basic working and employment conditions of temporary agency workers shall be "*at least those that would apply if they are being recruited directly*", Regulation 5 of the **AWR** provides that an agency worker shall be entitled to "*the same basic working and employment conditions*" that the agency worker would be entitled to had he been recruited by the hirer. The **Directive** clearly permits Member States to provide enhanced rights which go beyond those set out in the **Directive** (See Article 9(1)). It could be said that the use of the word "*same*" has an enhancing effect in that any rights which are the same as those of direct recruits will always be "*at least*" those of such recruits. However, a literal interpretation of the phrase "*the same*" could result in an agency worker being prevented from earning a higher rate of pay than direct recruits. In our view, it cannot have been the intention of Parliament to create a situation whereby agency workers were precluded from doing better in some respects (e.g. hourly rates of pay) than employees. Far from protecting agency workers, an insistence that terms and conditions are literally the same as employees could render agency work less attractive for some workers, given that the higher rates of pay could be said to compensate to some extent for the unstable and irregular nature of such work.

18. It is notable that the 12-week rights only apply in respect of a small set of terms and conditions. If employers did not have the flexibility to make at least some of these terms and conditions more attractive - in particular, rates of pay - then that might make it more difficult to obtain the services of agency workers. Mr Caiden sought to argue that the levelling down of entitlements that should result from a literal interpretation of the phrase "*the same*" need not trouble us because, "*in the real world*", an agency worker receiving a higher rate of pay than

A the employees of the hirer would be unlikely to bring a complaint. That does not seem to us to be an adequate answer to the real limitation on flexibility that a literal approach would create. In our judgment, the correct approach is to construe Regulation 5(1) having regard to the **Directive**. Thus, the phrase "*the same*" means "*at least*" those of employees. That construction provides for a minimum level of entitlement, and sets the floor, but does not impose a ceiling on entitlements.

C 19. The question here is whether, in respect of the entitlement to annual leave, the Claimant's position was at least equivalent to that which he would be entitled for doing the same job had he been recruited by the Second Respondent.

D 20. Regulation 5(1) entitles an agency worker to the "*same basic working and employment conditions*". By Regulation 5(2) the "*basic working and employment conditions*" are, where the agency worker would have been recruited as an employee, the "*relevant terms and conditions that are ordinarily included in the contracts of employees of the hirer*". Regulation 6 provides that the "*relevant terms and conditions*" are those "*relating to*" (a) pay; (b) the duration of working time; (c) night work; (d) rest periods; (e) rest breaks; and (f) annual leave. Terms and conditions relating to annual leave would include terms both as to the amount of leave and the remuneration for it. Both terms would have to be at least those he would have had had he been directly recruited by the Second Respondent in order to avoid a breach of Regulation 5.

G 21. We deal first with the amount of leave.

H 22. There is clearly a disparity as to the amount of leave. Employees of the Second Respondent are contractually entitled to 30.5 days a year, whereas agency workers are only

entitled to the statutory minimum of 28 days. Is a breach of Regulation 5 avoided by the fact that the agency worker can (as the Tribunal found) nominally take 2.5 days' leave during any period when he is not working for the hirer? We do not consider that a breach can be avoided in this way. We say that for the following reasons:

a. The nominal allocation of 2.5 days as leave out of any period of non-working cannot count towards the agency worker's total annual leave entitlement. A voluntary allocation of leave by the worker does not amount to an "entitlement" within the meaning of Regulation 5(1) of the **AWR**. We note here that by Regulation 8, the Regulation 5 right would cease to apply where there is a break between assignments, to which Regulation 7(8) does not apply. That would mean, for example, that the agency worker would cease to have any entitlement to the same annual leave where the break between assignments exceeded six weeks. An agency worker in that position could not even assert that he still has an "entitlement" to allocate 2.5 days of the period between assignments as "leave";

b. It is difficult to see how this voluntary nominal allocation could be enforced. If the agency worker were to seek a break from assignments in order to allocate 2.5 days of non-assigned time as leave, he may render himself less likely to obtain further assignments. The difficulty for the agency worker would be even more acute where the disparity in leave is greater than it was in this case. It was not clear to us how a voluntary allocation of say 7 or 10 days' additional leave could actually work;

c. The system is not transparent. There were no findings by the Tribunal that the Respondents in this case kept any record of time which was voluntarily allocated by agency workers as leave. The lack of transparency in such an arrangement

renders it unlikely, in our view, that an agency worker would in fact ever have the 'benefit' of those 2.5 days. The Tribunal therefore erred in finding that the voluntary allocation system meant that the agency worker would "*thereby receive the same time off work as the second respondent's employees …*" (Reasons paragraph 45). In our view, he would not;

d. If the **AWR** were concerned only with ensuring that the statutory minimum of 28 days' annual leave was taken, then there would have been little need for Regulation 5 to be in terms that the agency worker shall be entitled to the same terms and conditions as are ordinarily included in the contracts of employees. Where those contracts provide for leave in excess of the statutory minimum the agency worker is entitled to at least the same;

e. There may be good industrial relations and/or health and safety reasons why the employer is required to ensure that employees' entitlement to leave should exceed the statutory minimum. It would be contrary to the protections conferred by the **Directive** and the **AWR** if agency workers satisfying the 12-week qualifying period were to be deprived of that additional entitlement.

23. The failure to provide the 2.5 days' additional leave means that Regulation 5(1) is breached insofar as it relates to the amount of annual leave. We do not consider that the failure to confer this additional leave can be "compensated for" by an enhanced hourly rate. The amount of leave, as stated above, is one of the terms and conditions relating to leave and must satisfy the requirement that it be at least equivalent to the amount of leave to which employees are entitled. There is nothing in the **Directive** or the **AWR** that enables the agency or the hirer to offset a failure to confer a specific entitlement with a higher rate of pay. For that reason, we consider that the Regulations do not permit the employer to make a payment in lieu in respect

of a specific entitlement to annual leave if such payment in lieu could not be made to employees.

24. We note here that the Guidance (which is not in any sense binding) suggests that payment in lieu *is* permissible in respect of any leave in excess of the statutory minimum. However, it seems to us that the Regulations are intended to confer an entitlement on agency workers which is based, not on **WTR** minima, but on that to which employees of the hirer would ordinarily be entitled. It would undermine that entitlement if employers or agencies could simply make a payment in lieu irrespective of whether such a payment could be made to employees. Payment in lieu for holidays can of course legitimately be made in respect of unused holiday entitlement upon the termination of the assignment or where payment in lieu may ordinarily be made to employees in accordance with their contracts.

25. However, what if the agency worker was entitled to 30.5 days' annual leave but was only paid for 28 days? In that scenario, the Respondents would have conferred on the agency worker an entitlement as to the amount of leave which is the same as the employee, but the agency worker is not paid for the full amount of that leave. Would it be open to the Respondents in those circumstances to ensure parity in terms of remuneration by paying the agency worker at a higher hourly rate?

26. Mr Caiden's submission is that compensatory rates of pay would not comply with the **AWR** because they fail to satisfy the requirement that the term as to remuneration be the "same", and they would also involve a "package-based" approach instead of a term-by-term approach. Mr Gorton QC accepts that a term-by-term approach is required in this context.

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27. We agree with both counsel that a term-by-term approach is required by the **AWR**. The structure of the **AWR**, whereby only a few stipulated terms and conditions are required to be the same for the agency worker and the employee, and where there is nothing to suggest that the employer or agency can offset the shortfall in respect of one of those terms (e.g. annual leave) by conferring a greater entitlement in respect of another (e.g. rest periods), drive one to that conclusion. However, when considering what remuneration an agency worker obtains in respect of annual leave, one is only concerned with a particular term, namely the term dealing with remuneration for annual leave. The Regulations do not prescribe that the mechanism by which parity is achieved must be identical. Thus, an agency worker may be paid for his identical holiday entitlement by means of a lump sum at the end of the assignment, or by means of a higher hourly rate into which an amount for holiday pay has been rolled-up. These methods of payment might differ from that applicable to employees. However, if the result is that the agency worker is paid at least that which is paid to the employee in respect of the same holiday entitlement then there would not be a breach. That approach is not a package-based one, but one which focuses on the term as to remuneration for annual leave.

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28. However, the analysis in the preceding paragraph is subject to an important caveat. That is that the payment mechanism deployed must be transparent and the agency worker must be able readily to ascertain precisely what aspect of his remuneration relates to annual leave. In our judgment, if it is clear on the facts that an agency worker receives remuneration in respect of annual leave which is at least that which employees receive, then, notwithstanding that this may be achieved by a different mechanism, the requirement under Regulation 5(1) **AWR** would be met.

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29. Mr Gorton QC submits that transparency is only a requirement in respect of the statutory minimum entitlement. He relies upon the following passage in the ECJ's decision in **Robinson-Steele v RD Retail Services Ltd** (C-131/04) [2006] IRLR 386:

> **"69. The answer, therefore, to the second question referred in case C-131/04 and the third question referred in case C-257/04 must be that Article 7 of the Directive does not preclude, as a rule, sums paid, transparently and comprehensively, in respect of minimum annual leave, within the meaning of that provision, in the form of part payments staggered over the corresponding annual period of work and paid together with the remuneration for work done, from being set off against the payment for specific leave which is actually taken by the worker."**

30. Mr Caiden relies upon the general aim of transparency as set out in recital (12) of the **Directive**. In our view, the decision in **Robinson-Steele** does not mean that payment mechanisms in respect of other entitlements should not be transparent. But in any case, the minimum entitlement of agency workers pursuant to the **Directive** and the **AWR** is that which employees enjoy. It seems to us that, applying the approach in **Robinson-Steele**, the sums paid in respect of that minimum entitlement, if paid by a different mechanism than for employees, should also be transparent and comprehensible.

31. In the present case, the payment said to compensate for the 2.5 days' leave was neither transparent nor readily comprehensible. It was not clear precisely how the enhanced hourly rate compensated for the 2.5 days' shortfall in leave. The Tribunal found that the enhanced hourly rate comprises between 11p and 19p per hour depending on the particular rate to which the individual is entitled. However, that does not specify whether all or part of the enhancement is in respect of holiday entitlement, and it is not clear how that enhancement translates to 2.5 days. No calculation appears to have been done to establish whether the enhanced hourly rate in fact amounted to 2.5 days' worth of pay. There was no finding that there was anything on the agency worker's wage slip to indicate what proportion, if any, of the enhancement was attributable to the difference in entitlement to annual leave. Had the compensation for the 2.5

days been calculated on the same basis as for the 28 days' statutory minimum period then that might have satisfied the requirement of transparency and comprehensibility.

32. We do not consider that the administrative burden of having to deal with varying leave entitlements in excess of the statutory minimum justifies an approach which fails to comply with the Regulations. There was no evidence before the Tribunal, or any finding, that the administrative difficulties are insurmountable. As the lay members point out, there does not seem to be any particular reason why the method of accruing holiday entitlement for the period up to 28 days cannot simply be adapted to account for the additional 2.5 days to which employees of the Second Respondent are ordinarily entitled.

33. It follows that ground 1 of the appeal is upheld. There was a breach of Regulation 5(1) **AWR**, both in respect of the amount of leave and as to the payment for such leave.

Ground 3 - Rest breaks

34. The Tribunal found that the Claimant did get the same one-hour rest break as employees for an eight-hour shift. There was, therefore, no disparity as to the duration of the break. However, whereas the employee was paid for the whole of the break, the Claimant was only paid for 30 minutes. The Tribunal found that the enhanced hourly rate of pay, which resulted in the Claimant earning £1.95 more over the course of the whole shift, meant that Regulation 5(1) was not infringed.

Submissions - Ground 3

35. Mr Caiden's submissions on this ground overlap with those in respect of ground 1. He submits that there was an infringement in that:

a. The term relating to pay for the rest breaks was not the same as for employees. Looking at pay over the whole shift means that one is not comparing like with like and the focus should be on pay for the rest break;

b. The failure to pay for half of the break discourages the agency worker from taking the full break which could be detrimental to Health and Safety;

c. The Tribunal's reliance upon the Guidance was misplaced given that it only related to rolling up payment for annual leave;

d. There was in any case a lack of transparency in the arrangement;

e. The Claimant's higher rate of pay has more to do with market rates and the fact that the agency worker's position is more precarious, and little to do with compensating for an unpaid part of the rest break;

f. This is another example of the Tribunal wrongly applying the package-based approach to equivalence.

36. Mr Gorton QC made similar submissions as in his response to ground 1. He submits that:

a. There cannot be an infringement of the Claimant's rights where he is paid more for the whole shift and it is misconceived to suggest otherwise;

b. The Claimant's complaint is based on the incorrect notion that the **AWR** requires that employers must use the same mechanism to bring about parity as between agency workers and employees;

c. If the Claimant were correct, an agency worker could never receive more favourable treatment in respect of any of the specified terms and that would be contrary to the **Directive**.

Analysis and Conclusions - Ground 3

37. Here, there is no disparity as to the duration of the rest break. Both agency worker and employee get an hour during an eight-hour shift. We do not accept that there is any realistic prospect of the agency worker failing to take his rest break, as it would appear that this break is enforced by the Second Respondent. However, the agency worker and employee are paid differently for that hour. The question is whether, as the Respondents contend, the difference is merely one to do with the mechanism of payment, or, as the Claimant contends, the difference is one of substance.

38. In our judgment, the difference is one of substance, which means that there is a breach of Regulation 5(1) in relation to rest breaks. We say that for the following reasons:

a. Regulation 5 requires that the terms and conditions relating to rest breaks be the same. That would include the terms as to payment for the rest break. In this case there is an immediate disparity in that the Claimant was only paid for half of the rest break. The Tribunal was not given any satisfactory explanation as to why the agency worker went without pay for half an hour in the shift;

b. That meant that for that rest break, the Claimant was paid only £5.25, whereas his employed colleague was paid £9.60;

c. The fact that the Claimant was paid more overall for the whole shift does not change the fact that he was paid significantly less for the one-hour rest break;

d. The Respondents' suggestion that one must look at the whole shift to determine whether there was a disadvantage seems to us to ignore the specific requirements of the **AWR** that terms and conditions *relating to rest breaks* be the same (or at least as good) as those he would have enjoyed if employed. Focusing on the pay

for the whole shift would not enable one to ensure that those terms and conditions were compliant with the Regulations;

e. The Tribunal's conclusion (at paragraph 37 of the Reasons) that the Regulation 5 right "*applies to protect him from being less well remunerated for the working day*" is too narrow in our judgment. The Claimant is also entitled to protection against terms and conditions which are not at least those of employees in respect of rest breaks. It seems to us that focusing on the overall pay for a shift diminishes the scope of the statutory protection and would enable hirers to give with one hand (in the form of a slightly higher hourly rate) only to take away with the other (by e.g. not paying for all or part of a rest break);

f. Compliance with Regulation 5 does not mean that the Claimant's pay must be reduced. Compliance could be achieved by paying him for the whole hour of the rest break at his hourly rate, or at least at the rate that applied to employees;

g. Payment for the whole rest break could be rolled-up into hourly pay, but only if this is done in a transparent way and so that such payment amounts to at least £9.60 for the rest break. On the facts found by the Tribunal, it is far from clear that that was the case. Indeed, on the face of it, the Claimant only received £5.25 for 30 minutes of the break and nothing for the remaining 30 minutes. His wage slip, rather than setting out any precise figures showing how the enhanced rate included an amount for the rest break, appears merely to have confirmed that there would be 30 minutes of paid rest break (Reasons, paragraph 11).

39. Ground 3 is therefore upheld. There was a breach of Regulation 5(1) **AWR** in that the Claimant did not receive at least the same pay for the rest break as employees.

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Ground 2 - Working hours

40. The contention here is that if a standard direct recruit would have had a 39-hour working week, the agency worker doing the same job following the 12-week qualifying period should be entitled to the same hours. That is not how the claim was put before the Tribunal (see Reasons, paragraph 47). The Tribunal rejected the claim on the basis that any arrangement whereby the hirer did not have the freedom to engage agency workers according to changing demand would be unworkable and not what was intended by the **Directive** or **AWR**.

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Submissions - Ground 2

41. Mr Caiden submits that the Tribunal allowed itself to be too concerned by the notion of rapidly changing requirements when, in reality, any agency worker satisfying the qualifying period would continue to be engaged pursuant to fairly stable needs on the part of the hirer. In those circumstances, says Mr Caiden, there is no reason why there should not be equivalence in respect of the "*duration of working time*", which he says is clearly a reference to the number of hours worked. It is further submitted that the Tribunal erred in its approach to comparators.

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42. Mr Gorton QC submits that there is a difficulty with the Claimant's claim in that he has never actually identified the number of hours he should have had. In those circumstances, one cannot say that there has been any infringement at all. In any case, the Claimant's argument would turn the nature of the agency worker/hirer relationship on its head and would denude it of the flexibility which the **Directive** sought to preserve and enhance.

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Analysis and Conclusions - Ground 2

43. On this issue, we prefer Mr Gorton QC's submissions.

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44. The Claimant has failed to identify any specific alleged infringement in respect of hours worked, whether before the Tribunal or the EAT. As such, it cannot be said that the Tribunal erred in law in concluding that there was no infringement. That alone would be sufficient to dispose of this ground of appeal. Even if that were not so, we consider that the Tribunal's analysis of the potential consequences of the Claimant's argument to be correct:

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a. Whilst a strict literal interpretation of the phrase, "*duration of working time*", could include the number of hours which an employee doing the same work might do, that would produce an absurd or unworkable outcome as the Tribunal identified:

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> **"48. We do not consider that the directive or AWR had such a far reaching intention as suggested. This would fundamentally change the relationship between hirers and temporary work agencies if it were what had been intended. The basis upon which the second respondent engages agency workers is, in common with the majority of industry, to supplement its own workforce as and when demand requires. As such the agency workers will always be secondary, in terms of call upon their services, to that of the workforce of the hirer.**
>
> **49. The AWR must be read so as to give effect to the European Directive. As is apparent from the language of Article 5, the principle of equal treatment is to provide that the basic working and employment conditions of a temporary agency worker are at least those that would apply if they had been recruited directly by that undertaking to occupy the same job "for the duration of their assignment at a user undertaking". The relevant term and condition relating to "the duration of working time" therefore relates to the particular assignment. It could involve, for example, not requiring employees of the temporary work agency to have to work longer shifts than those of the hirer. It cannot, however, sensibly be construed so as to equate the entitlement to hours of work to that of the employee of the hirer.**
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> **50. The problem is illustrated by posing the question who is the appropriate comparator for the purpose of regulation 5(3) and (4) of AWR? In the present case, we had provided contracts of employment for operative postal grades employed by the second respondent who worked 39 hours and who worked 8 hours. Under the claimant's proposal, which is the appropriate comparator? If the agency worker were entitled to opt any number of different comparator employees, he could select his own weekly minimum working hours. Could the agency worker then change his mind and choose another comparator with more or fewer hours? Given the number of agency [workers] used by the respondent, such an arrangement would be unworkable.**
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> **51. Furthermore, the revised submission of the claimant demonstrated the artificiality of this aspect of his claim. It would simply not be possible for the first respondent to give effect to the principle of equivalence if the supply of work was determined in the first instance by the hirer. Demand for agency work waxes and wanes. It is difficult to conceive how a temporary work agency could share the work out appropriately and achieve the equivalence in respect of terms and conditions with all its agency employees who demanded their regulation 5 rights of a minimum number of hours work per week by reference to any number of comparator employees. The first respondent has at its disposal 7,000 employees to fulfil second respondent staff orders. Not only would the number of employees have to be dramatically reduced if the claimant's submission is correct, but the ability to provide the flexibility and fluidity necessary to cope with the frequently**

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changing demand, at the same time as guaranteeing equivalence of hours of a second respondent employee, would be impossible."

That analysis appears to us to be correct.

b. In our view, bearing in mind that the **Directive** seeks to achieve a balance between flexibility and security, the better interpretation of the phrase, "*duration of working time*", is, in this context, that the agency worker's working time should not exceed that which would ordinarily apply to employees. Thus, by way of example, if there is a maximum of a six-hour shift for some shifts (e.g. a night shift), an agency worker should not be required to work eight hours.

c. The requirement cannot be that there be precise equivalence between the agency worker's hours and those of the employees of the hirer. Any such requirement would entirely remove the flexibility inherent in the agency/hirer relationship.

d. The Tribunal's reference to comparators at paragraph 50 of the Reasons is not inapt. Regulation 5(3) **AWR** identifies the circumstances in which Regulation 5(1) will be deemed to have been complied with. However, if the number of hours worked were the relevant factor, then any comparable employee identified by the hirer for the purposes of Regulation 5(3) could be immediately displaced and countered by the agency worker pointing to another employee on different hours. As the Tribunal found, that would create an unworkable outcome.

45. Ground 2 of the appeal is therefore not upheld.

Conclusion

46. For the reasons set out above, grounds 1 and 3 of the appeal are upheld. The Tribunal erred in concluding that there was no breach of Regulation 5(1) of the **AWR** in relation to annual leave and rest breaks.