THE EMPLOYMENT TRIBUNAL

SITTING AT: **CROYDON**

BEFORE: **EMPLOYMENT JUDGE MORTON**
Mr N Aziz
Ms C Oldfield

BETWEEN:

Mr M Scott **Claimant**

AND

FRCE Recruitment (1)
Reed Specialist Recruitment (2)
London Borough of Lewisham (3) **Respondents**

ON: **11 and 12 October 2017**

Appearances:

For the Claimant: In person

For the First Respondent: Ms H Rogers, Director
For the Second Respondent: Ms C Jennings, Counsel
For the Third Respondent: Mr L Harris, Counsel

JUDGMENT

The unanimous Judgment of the Tribunal is that the Claimant was not an agency worker within the meaning of Regulation 3(1)(a) Agency Workers Regulations 2010 ("AWR"). The Claimant's claims under Regulations 5 and 16 are therefore dismissed.

REASONS

1. By a claim from presented on 8 February 2017 the Claimant brought various claims under the AWR. He complained of "multiple infringements" and specifically referred to Regulations 5 and 16.

2. The Claimant had worked for the Third Respondent over a prolonged period, having worked at its Mulberry Day Centre Challenging Needs Service as an agency worker from October 2009 until his assumption of a permanent post. The Third Respondent had engaged the Second Respondent to manage its overall requirements for agency workers and the Second Respondent had subcontracted some of its responsibilities to the First Respondent. The First Respondent was responsible for placing the Claimant in his role with the Third Respondent.

3. At the hearing we heard evidence from the Claimant himself and also from Mr MacDonald on the Claimant's behalf. The First Respondent's evidence was given by Craig Springett. The Second Respondent's witness, Ms Hooper, gave no substantive evidence and the Third Respondent's evidence was given by Ms Brown, Service Manager and Ms McLaughlin, Co-ordinator. There was a bundle of agreed documents.

4. The issues in the case were identified at a preliminary hearing for case management before Judge Siddall on 7 April 2017.

    a. The primary issue was whether the Respondents or any of them breached Regulation 5 of the Agency Workers Regulations 2010 ("AWR") by failing to pay the Claimant the same rate of pay, increments and pay awards that were paid to any comparable employee.
    b. There was also an allegation by the Claimant that there had been a failure by one or more of the Respondents to provide information requested by the Claimant under Regulation 16.

    Ms Jennings, on behalf of the Second Respondent also submitted that the Claimant was not an agency worker within the meaning of the AWR as his employment was not temporary. She relied on the case of **Moran and others v Ideal Cleaning Services Ltd and another [2014] IRLR 172**.

5. At the start of the main hearing it was drawn to our attention the Claimant had two applications outstanding in respect of additional claims. He had sent an email to the Tribunal on 1 October 2017 referring to the question of training and whether he had been treated differently from comparable permanent employees by having to undergo training in his own time. He also raised a separate matter about whether he had been subjected to a breach of Regulation 13 AWR at various times during his employment and indicated that he had raised this particular concern through ACAS. The Tribunal declined to permit Mr Scott to pursue these additional matters. His application to amend his claim in respect of matters concerning training had already been refused by Judge Siddall. As for the complaint under Regulation 13, this was an entirely new matter and had not been mentioned at all prior to the start of the hearing. We considered that if Mr Scott wished to pursue it he would need to bring a fresh claim.

6. The relevant law is set out in various provisions of the AWR. Regulation 3(1)(a) provides as follows:

    3.—(1) In these Regulations "agency worker" means an individual who—

(a) is supplied by a temporary work agency to work temporarily for and under the supervision and direction of a hirer;

Regulation 5 provides:

5.—(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.

(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,

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.

(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

(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.

Regulation 14 provides for the liability of temporary work agencies and hirers for breaches of Regulation 5.

Regulation 16 provides:

16.—(1) An agency worker who considers that the hirer or a temporary work agency

may have treated that agency worker in a manner which infringes a right conferred by regulation 5, may make a written request to the temporary work agency for a written statement containing information relating to the treatment in question.

(2) A temporary work agency that receives such a request from an agency worker shall, within 28 days of receiving it, provide the agency worker with a written statement setting out—

(a) relevant information relating to the basic working and employment conditions of the workers of the hirer,

(b) the factors the temporary work agency considered when determining the basic working and employment conditions which applied to the agency worker at the time when the breach of regulation 5 is alleged to have taken place, and

(c) where the temporary work agency seeks to rely on regulation 5(3), relevant information which—

(i) explains the basis on which it is considered that an individual is a comparable employee, and

(ii) describes the relevant terms and conditions, which apply to that employee.

(3) If an agency worker has made a request under paragraph (1) and has not been provided with such a statement within 30 days of making that request, the agency worker may make a written request to the hirer for a written statement containing information relating to the relevant basic working and employment conditions of the workers of the hirer.

(4) A hirer that receives a request made in accordance with paragraph (3) shall, within 28 days of receiving it, provide the agency worker with such a statement.

(5) An agency worker who considers that the hirer may have treated that agency worker in a manner which infringes a right conferred by regulation 12 or 13, may make a written request to the hirer for a written statement containing information relating to the treatment in question.

(6) A hirer that receives such a request from an agency worker shall, within 28 days of receiving it, provide the agency worker with a written statement setting out—

(a) all relevant information relating to the rights of a comparable worker in relation to the rights mentioned in regulation 12 or, as the case may be, regulation 13, and

(b) the particulars of the reasons for the treatment of the agency worker in respect of the right conferred by regulation 12 or, as the case may be, regulation 13.

7. The Tribunal first considered carefully whether Mr Scott was precluded from bringing claims under the AWR by reason of his not being a temporary worker within the meaning of Reg 3(1)(a). We took into account the decision of the Employment Appeal Tribunal in **Moran.** All three Respondents, their relevant witnesses and even Mr Scott himself in cross examination, confirmed that his employment was ongoing. There was no evidence in the bundle of a series of contracts with clear start and end dates. There was only one document, at page 103 that referred to an end date at all. That was dated May 2011 and preceded the coming into force of the AWR in October 2011. There was no such document for any period after that date. There was some reference in the evidence to "rolling contracts" and Mr Scott gave evidence that until the REMAS scheme was

introduced, it was necessary to input details of his assignments at intervals. He was unable to back up this assertion with any documentary evidence, but even if we accepted it at its highest, we do not think such an arrangement would be inconsistent with someone being employed on an indefinite basis. In that respect Ms Scott's position was somewhat different from that of the claimants in **Moran**, who had contracts that contained terms very similar to those that would ordinarily be found in permanent contracts of employment – that fact was relied upon by the tribunal that determined the case. But we were satisfied on the facts of this case that the reality was that Mr Scott was employed on an indefinite basis, not a temporary basis. Whatever the documents said and whatever the HR systems might have suggested, the witness evidence was clear – that Mr Scott's work was ongoing. Ms Brown said that the employment of agency workers was tied to the funding associated with the care of service users. We found this to be a persuasive indicator that in fact Mr Scott's employment was not temporary, any more than the needs of service users were temporary. These were individuals requiring long term care who needed to form relationships with the staff caring for them. Agency workers were, we find, employed to deliver that care on an indefinite basis. They were not therefore temporary workers within the meaning of Regulation 3(1)(a) AWR. Mr Scott cannot therefore claim the protection of the remainder of the AWR or bring any claims under them.

8. However in case we are wrong about this conclusion we will make our findings about Mr Scott's complaints under Regulations 5 and 16. The issue under Regulation 5 was whether the appropriate comparator was used in determining Mr Scott's pay. Mr Scott said that he should have been compared to a Scale 5 employee whilst he was actually compared to a Scale 3 employee. The period for which this was live issue was between June and December 2015 as a result of concessions made by Mr Scott during the course of the hearing. We find that although there was a great deal of overlap between the Scale 3 and Scale 5 roles, there were a few key differences. In particular the Scale 5 role involved duties at a higher level and additional responsibilities which Mr Scott did not undertake. These included home visits, school visits, attendance at external meetings, meetings with commissioners and social workers and overseeing the work of Scale 3 staff. Clearly Mr Scott was a highly regarded and valued member of the team who was very skilled at what he did. He remains employed in the service, now as a permanent member of staff. However he did not show that at the material time he was consistently discharging all the duties and responsibilities of a Scale 5 staff member and we conclude that the appropriate comparator was therefore a comparator at Scale 3. It follows that even if we had found for Mr Scott on the question of his status, there would have been no breach of Regulation 5 for which the Third Respondent could be liable under Regulation 14(2) and there is therefore no need for us to determine whether the First or Second Respondent took reasonable steps under Regulation 14(3).

9. On the issue of the Claim under Regulation 16 we take the view on the basis of Mr Springett's evidence that the First Respondent was diligent in raising the issue with the Second Respondent but that the Second Respondent delayed for an unacceptably long period in dealing with the issues raised. This must have caused the Claimant considerable frustration and he should not have had to wait until the disclosure exercise in these proceedings to obtain the information that

he had first sought in May 2016. We are not convinced that the Second Respondent had a reasonable excuse for the delay. Hence we would have found that there had been a breach of Regulation 16 in the Claimant's case by the Second Respondent if we had found in his favour on the issue of his status.

10. However it follows from our finding on the status issue that the Claimant is not entitled to any remedy in this case.

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Employment Judge Morton

Date: 3 November 2017