Appeal No. UKEAT/0309/17/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 26 April 2018

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

BROOKNIGHT GUARDING LIMITED — APPELLANT

MR A MATEI — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR BERNARD WATSON (Representative) Croner Group Ltd Croner House Wheatfield Way Hinckley Leicestershire LE10 1YG
For the Respondent	MR AUREL MATEI (The Respondent in Person)

SUMMARY

AGENCY WORKERS

Agency worker - ***Agency Workers Regulations 2010*** - *meaning of "agency worker"*

The Respondent security company had employed the Claimant as a security guard on a 'zero-hours' contract for some 21 months. His contract had included a flexibility clause enabling the Respondent to assign him to different sites as required, although the Claimant was generally (although not exclusively) supplied by the Respondent to Mitie Security Ltd, providing security services at the Citi Group site in London. The ET found the Claimant was being used as a "cover security guard" and concluded that he was an agency worker for the purposes of the **Agency Workers Regulations 2010**. The Respondent appealed, contending that the ET had failed to apply the correct test and had wrongly treated the 'zero-hours' contract and the Claimant's relatively short period of service as determinative.

Held: *dismissing the appeal*

In determining whether the Claimant was an agency worker for the purposes of the **Agency Workers Regulations 2010**, the question for the ET was whether he had been supplied by the Respondent to work temporarily for Mitie, i.e. that he was working on a temporary and not a permanent basis (**Moran & Others v Ideal Cleaning Services Ltd & Another** [2014] IRLR 172 EAT applied). In answering that question, the ET had to have regard to the work carried out by the Claimant as a matter of practice. Although the ET had considered the nature of the Claimant's contract and relatively short period of employment to be relevant, it had not treated those factors as determinative; it had, rather, looked at the nature of the work for which the Claimant had been supplied and had found that it was to provide cover for Mitie as and when required. That was a finding supported not only by the Claimant's evidence but also by Mitie's description of the services provided. The ET had thus applied the correct legal test and reached a permissible conclusion that the Claimant was an agency worker.

HER HONOUR JUDGE EADY QC

Introduction

1. This appeal concerns the definition of an "agency worker" for the purposes of the **Agency Workers Regulations 2010** ("the Regulations"). In this Judgment, I refer to the parties as the Claimant and Respondent, as below. This is the Full Hearing of the Respondent's appeal from a Reserved Judgment of the East London Employment Tribunal (Employment Judge Hallen, sitting alone on 22 August 2017, with a further day in chambers on 11 September; "the ET"), sent out on 15 September 2017. The Claimant was self-represented then, as he is today; Mr Watson, who now represents the Respondent, did not appear below.

2. By its Judgment, the ET held that the Respondent was a temporary work agency and the Claimant was an agency worker for the purposes of the **Regulations**. Further, the Claimant having completed 12 weeks' continuous service up to the date of his dismissal, the ET held that he was entitled to the same basic working conditions as the security officers employed by Mitie Security Limited (the end user of his services) at the same site at which the Claimant was working. The Respondent contends that the ET's approach to the determination of the Claimant's agency worker status was wrong as a matter of law, in that it failed to apply the proper test for the question of temporary work as laid down by the EAT in **Moran & Others v Ideal Cleaning Services Ltd & Another** [2014] IRLR 172.

The Relevant Background and the Employment Tribunal's Decision and Reasoning

3. The Respondent is a security company which employs security guards on what are described as 'zero-hour contracts' to guard premises at a variety of sites in London. As the ET recorded, most are supplied by the Respondent to Mitie Security Limited ("Mitie") at the Citi

Group site in London, although there was evidence that the Respondent also supplied guards on an 'as-and-when-needed' basis to another company called Wilson James (which utilised them at the Google site in London) and to the Swiss Embassy.

4. In looking at the nature of the relationship between the Respondent and Mitie and the service provided in that regard, the ET referred to a letter dated 31 May 2017 sent from Mitie's Operations Director to the Respondent, in which the Respondent's position was described as that of:

> **"… subcontractor of security services to Mitie on an ad hoc basis only … The use of your service is based on a required only basis as and when requested by an authorised Mitie manager. This requirement would usually be connected to additional cover that our customer base has requested whereby we choose to deliver our service through one of our approved vendors such as yourselves." (ET Judgment, paragraph 5)**

5. The Claimant was employed by the Respondent as a security officer on a zero-hour contract, from 27 December 2014 until his dismissal on 6 October 2016. Before the ET, the Respondent accepted the zero-hour contract suited its business needs and gave it flexibility. The ET considered that was also evidenced on the facts, with the Claimant not being required to attend at the Citi Group site between 21 and 28 September 2015 - when he was not paid by the Respondent - and not required to do any work for the two-week period from 1 to 13 June 2016. The Respondent also accepted the contract gave it flexibility to move the Claimant to alternative assignments other than working for Mitie at the Citi Group site, and the ET cited an example of this arising from the assignment of the Claimant to work for Wilson James, at the Google site, as holiday cover one weekend. More generally, the ET accepted the Claimant's case that he worked as cover and was a temporary worker, finding he was "*at the "beck and call" of the Respondent*" and could be placed at any one of its sites, as and when required.

6. The Respondent contended before the ET that it was not a temporary work agency as defined by Regulation 4 of the **Regulations** but the ET rejected that argument, finding it was clear that the Respondent was a company engaged in the economic activity (operating for a profit) of supplying individuals - namely the Claimant and others - to work temporarily for, and under the supervision and direction of, a hirer. The ET further considered that the fact that the Respondent's security guards were provided to clients - which included Mitie, Wilson James and the Swiss Embassy - on an *ad hoc* basis, was confirmed in the letter from Mitie, cited above. On that basis, the ET had little difficulty concluding that the Respondent was a temporary work agency.

7. As for the Claimant's position, the Respondent submitted that he had worked permanently for Mitie at Citi Group in London but the ET found that was not supported by the facts: the Claimant had been employed under a zero-hour contract that gave the Respondent complete discretion as to the hours he could undertake, and he could be placed at any of the sites for which the Respondent had contracts, as and when the Respondent considered it appropriate. Specifically, the ET accepted the Claimant's evidence that "*he always viewed himself as cover to be available at any of the Respondent sites*" (ET paragraph 15) and referred to the weekend that he had been assigned to work at the Google site. It further observed that, in contrast with the **Moran** case, the Claimant had been employed for "*just 21 months on a 'zero hour' contract as a cover security officer to give the Respondents complete flexibility to use [his] services as and when it chose to*".

The Legal Framework

8. The Employment Tribunal was concerned with the Claimant's claim made under the **Agency Workers Regulations 2010** (SI 2010/93). By Regulation 5, it is provided that:

> **"(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."**

9. Pursuant to Regulation 7, the right afforded by Regulation 5 is subject to a continuous 12-calendar-week qualifying period during one or more assignments.

10. "Agency worker" is defined by Regulation 3 to mean:

> **"(1) … an individual who -**
>
> **(a) is supplied by a temporary work agency to work temporarily for and under the supervision and direction of a hirer; and**
>
> **(b) has a contract with a temporary work agency which is -**
>
> **(i) a contract of employment with the agency, or**
>
> **(ii) any other contract with the agency to perform work or services personally."**

11. As for "temporary work agency," that is defined by Regulation 4(1) to refer to:

> **"(1) … a person engaged in the economic activity, public or private, whether or not operating for profit, and whether or not carrying on such activity in conjunction with others, of -**
>
> **(a) supplying individuals to work temporarily for and under the supervision and direction of hirers; or**
>
> **(b) paying for, or receiving or forwarding payment for, the services of individuals who are supplied to work temporarily for and under the supervision and direction of hirers."**

12. Regulation 2 of the **Regulations** defines "assignment" to mean:

> **"… a period of time during which an agency worker is supplied by one or more temporary work agencies to a hirer to work temporarily for and under the supervision and direction of the hirer."**

It then defines "hirer" to mean:

> **"… a person engaged in economic activity, public or private, whether or not operating for profit, to whom individuals are supplied, to work temporarily for and under the supervision and direction of that person."**

13. In considering the extent of the protection afforded under the **Regulations** - read in light of the underlying **EU Directive** (2008/104/EC), which they are intended to implement - in **Moran**, Singh J (as he then was) concluded that the term "temporary" (which is what was plainly meant by the various uses of the adverb "temporarily") meant "not permanent" (see paragraph 50 of that judgment). I return to the guidance provided in **Moran** in the conclusion section of my Judgment below.

The Appeal and the Respondent's Submissions in Support

14. The Respondent's appeal has been pursued on the basis that the ET erred in law in its approach to the determination of the question whether the Claimant was working temporarily, failing to properly apply the guidance provided in **Moran**. Specifically, the Respondent argues that the Claimant was a permanent worker for the end user - Mitie - to which he had been subcontracted to work on an indefinite basis. In rejecting that case, the Respondent contends that the ET erred:

(1) in determining that the Claimant could not be a permanent worker if working on a zero-hour contract when that was neither determinative nor the relevant test;

(2) in focusing on what the contract stated rather than the looking at what the employee actually did (see by analogy **Murray v Foyle Meats Ltd** [2000] 1 AC 51 HL);

(3) in giving weight to the Claimant's relatively short service (21 months), which contrasted with the far longer years of service of the employees in the **Moran** case, when that was not determinative: the question was whether the Claimant's service was of indefinite duration not whether it had lasted for any particular length of time.

15. The Respondent further took issue with the ET's apparent finding that the Claimant was supplied on an ad hoc basis to Mitie, arguing that he consistently worked there and knew this

would be the case; although on a zero-hour contract, the Claimant had sufficient certainty to know that Mitie was where he worked.

The Claimant's Case

16. For his part, the Claimant contends that to be a permanent worker a mutual obligation should exist between employer and employee; the obligation of the employer being to offer work, the obligation of the employee being to accept that work and to work regularly for some minimum number of hours. Had he really been a permanent worker, he would have been given a minimum number of hours each week (drawing an analogy with the ET case of **Bray & Others v Monarch Personnel Refuelling (UK) Ltd** [2012] 1801581/2012) - those obligations were not in existence between the parties in the present case.

17. The Claimant further described how he could be waiting each day to find out whether or not he was to be used, which would depend on whether someone at Mitie at Citi Group had "blown out", so cover would be needed. More particularly, he contended that the present case could be distinguished from the facts of **Moran**; here the 'zero-hour contract' made clear that no minimum number of hours could be provided by the Respondent. Further, the contract included an express flexibility clause which provided:

> **"1.9. It is important that each security officer understands that the site where he/she is assigned and employed should not be considered as his permanent place of work. The Company has the right to place any security officer at any site that the Company sees fit and the security officer should not [reasonably] refuse.**
>
> **The reason that the Company must retain this flexibility is that it is common practice that the security officers within the industry will be placed on different sites in order to gain valuable experience and to become familiar with various sites." (EAT supplementary bundle, page 6)**

As the ET found as a fact, the Claimant had also been placed at the Google site under the hirer company Wilson James and he was available for other sites as and when the Respondent

wanted him to undertake such shifts; that was different to the contractual provision in the **Moran** case, which specified the employee's place of work.

Discussion and Conclusions

18. The issue raised by this appeal is whether the ET adopted the correct approach to the question whether the Claimant was an agency worker, so as to fall under the protection of the **Regulations**. To be an agency worker, the Claimant had to (a) be supplied by a temporary work agency to work temporarily for, and under the supervision and direction of, a hirer, and (b) have a contract with the temporary work agency that was a contract of employment with the agency or any other contract to perform work or services personally; see Regulation 3(1).

19. For completeness I note that the condition at Regulation 3(1)(b) is not in dispute in this case: the Claimant may have been employed on a zero-hour contract, but it is common ground that it was sufficient to meet this requirement. As for Regulation 3(1)(a), both conditions required under that provision were in issue before the ET, albeit only the second remains live on the appeal, specifically: whether the Claimant was supplied to work temporarily. In this case, that question has been directed at the supply of the Claimant to the hirer - Mitie - which used his services as a security guard at the Citi Group site in London.

20. The word "temporarily" is not defined in the **Regulations** or in the **EU Directive** they implement. In **Moran**, the EAT concluded that term is to be understood essentially by what it is not; that is, as being supplied to work *not* on a temporary basis. Thus, employment by an agency is not sufficient to mean that the employee is an agency worker for these purposes; the question is whether the work in issue is properly to be understood as having been temporary.

21. In **Moran**, the Claimants were employed by an agency but were so employed to work solely for one client as cleaners. Their contract specified that the client's premises were their place of work and the Claimants had worked for that client - and only that client - for between 6 and 25 years. When the ET rejected their contention that they were agency workers under the **Regulations**, the Claimants appealed on the basis that the ET had wrongly focused on the question whether their work was short term. The EAT disagreed, holding that was not a fair reading of the ET's reasoning taken as a whole. In reaching that conclusion, the EAT allowed that "temporary" could mean both something that is not permanent *or* something that is short term or fleeting - the two were not necessarily the same. Ultimately, however, it concluded that the key question was whether the work could properly be regarded as temporary because it was not permanent.

22. By distinguishing between work that is temporary and work that is permanent, the EAT in **Moran** was not suggesting that work in the latter case would last forever - after all, every contract of employment is terminable upon proper notice being given; "permanent" in this sense, means that the work is open-ended in duration. In distinction, temporary means "*terminable upon some other condition being satisfied, for example the expiry of a fixed period or the completion of a specific project*" (see **Moran** at paragraph 41). On the facts in that case, the ET had found that the arrangements under which the Claimants worked "*were indefinite in duration and therefore permanent and not temporary*" (see **Moran**, paragraph 42); on that basis, it had been entitled to find the Claimants were not agency workers.

23. As the ET observed in the present case, there are a number of distinctions between this and the facts of **Moran**. The real question raised by the appeal is whether those distinctions have the relevance apparently attributed to them by the ET.

24. In seeking to resist the appeal, the Claimant has focused on the contractual arrangements between him and the Respondent, specifically the zero-hours nature of the contract and the lack of obligation to provide him with work. He further emphasises the express contractual provision allowing for him to be moved from assignment to assignment, something that could be contrasted with the specifically identified place of work in **Moran**. For the Respondent, however, it is objected that these points cannot answer the question whether work is temporary; it is possible to carry out work for a particular entity pursuant to a zero-hour contract on an entirely indefinite basis, and the ET must focus on the way in which the work is performed in fact, rather than on the provisions of the contract.

25. On the whole, I agree with the Respondent that the terms of the contract will not necessarily be determinative of agency worker status. The focus under Regulation 3(1)(a) is on the purpose and nature of the work for which the work is supplied: is it temporary or permanent? The underlying contract - as will necessarily have been found to exist for the purposes of Regulation 3(1)(b) - may state that there is no obligation to provide or undertake work, and may allow that the worker can be moved from site to site but if, in fact, that individual is supplied to carry out work on an indefinite basis (the continuing cleaning jobs in issue in **Moran**, for example), it would not be temporary in nature. Although in **Murray v Foyle Meats Ltd** [2000] 1 AC 51, the House of Lords was concerned with the statutory definition of redundancy ("work of a particular kind", see section 139 of the **Employment Rights Act 1996**), I agree that the same kind of factual analysis is required for present purposes. That said, the terms of the contract may not be irrelevant: the contract provides evidence as to what the parties understood and intended in terms of the work that the worker might carry out, and the ET is entitled to test the evidence given as to what occurred in practice against the relevant documentary evidence, which would include the contract.

26. In the present case, the ET was entitled to have regard to the complete flexibility afforded to the Respondent under the zero-hour contracts it offered to its security guards. It was relevant, in particular, that the contract gave it the flexibility to move individuals from job to job. Of course, if that power was never exercised, its relevance might be diminished, but the ET was entitled to have regard to the fact that it had been utilised in the Claimant's case. More particularly, however, the ET accepted the Claimant's evidence that, as a matter of practice, he worked as "cover": this was not, on the ET's findings, a case where the Claimant was assigned on an indefinite basis to carry out particular ongoing work; he was, rather, used as a "cover security guard" (as the ET described his position).

27. That finding was, in my judgment, fatal to the Respondent's case. The ET found that the Claimant was being supplied to work to provide specific cover for Mitie, as and when required, and would thus be temporarily working for the fixed duration of the absence being covered. That finding by the ET was, moreover, not solely derived from the Claimant's evidence but was also corroborated by Mitie's characterisation of the services supplied by the Respondent as being on a "*required only basis*" and usually "*connected to additional cover that our customer base has requested*". Although the ET had regard to the zero-hours nature of the Claimant's contract and the relatively short duration of his employment with the Respondent, I do not read its conclusion as being dependent upon those matters. They were relevant parts of the background, but I cannot see that the ET saw these as determinative of the question of the Claimant's status. It is also right that the ET had regard to the contractual flexibility clause allowing the Respondent to assign the Claimant to different sites and customers as it saw fit but again I do not read its Judgment as stating that was determinative, rather, it found it was a relevant factor because it reflected the reality of the relationship in practice. These were all, therefore, matters to which the ET was entitled to have regard but the most significant part of its

reasoning was based upon its finding as to the nature of the work done for clients such as Mitie and, specifically, as to the nature of the Claimant's role as a cover security guard.

28. I understand that the Respondent objects to this finding but it is a finding of fact that is supported by the evidence - both that of the Claimant (corroborated by the terms of the contract he had been given by the Respondent) and by the description of the services provided by Mitie. The Respondent objects that this finding could impact upon employees throughout the country and might have a disastrous impact upon the Respondent itself. Even if these were relevant considerations, however, I cannot see that such consequences necessarily flow. The ET's findings of fact were specific to the Claimant's case. The work done by others employed by agencies such as the Respondent might be found to fall on the **Moran** side of the line - work properly described as of an indefinite or permanent nature - each case will necessarily be fact sensitive. The question for me, on this appeal, is whether the ET applied the correct test in reaching its conclusion in this case. Having considered the objections taken, I am satisfied that it did and I therefore dismiss the appeal.