Appeal No. UKEAT/0311/17/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 26 June 2018
Judgment handed down on 16 October 2018

Before

THE HONOURABLE MR JUSTICE SOOLE

(SITTING ALONE)

TWENTY-FOUR SEVEN RECRUITMENT SERVICES LIMITED & OTHER — APPELLANTS

MR D AFONSO & 190 OTHERS — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellants	MR JAMES BROMIGE (of Counsel) Instructed by: Franklins Solicitors LLP Silbury Court Silbury Boulevard Central Milton Keynes MK9 2LY
For Mr D Afonso & Others	MS NATASHA JOFFE (of Counsel) Instructed by: Pattinson & Brewer Solicitors 11 Pilgrim Street London EC4V 6RN
For Wincanton Group Ltd	MR ANDREW SMITH (of Counsel) Instructed by: Clarkslegal LLP 12 Henrietta Street Covent Garden London WC2E 8LH
For DHL Management Services Ltd	MS SALLY COWEN (of Counsel) Instructed by: DAC Beachcroft LLP 3 Hardman Street Manchester M3 3HF
For Mrs A De Souza and Mrs D Dias	No appearance or representation by or on behalf of the Respondents

SUMMARY

AGENCY WORKERS

The Claimant agency workers made complaints to the ET that their contracts of employment with the Respondent temporary work agencies ("TWA") did not comply with the requirements of Regulation 10(1)(a) of the **Agency Workers Regulations 2010** ("AWR"); and that in consequence the exemption from pay parity under Regulation 5 did not apply.

The ET upheld the claims as they related to Regulation 10(1)(a)(i) and (iii). The requirement of written terms and conditions "*... relating to - (i) the minimum scale or rate of remuneration or the method of calculating remuneration*" was not satisfied by the term which provided for pay "*at a rate at least equivalent to the then current National Minimum Wage*" ("NMW"). The requirement relating to "*(iii) the expected hours of work during any assignment*" was not satisfied by the term that "*The Employee's expected hours of work on each Assignment are:- Any 5 days out of 7*".

On appeal the EAT held that Regulation 10(1)(a)(i) was satisfied by the contractual terms, but 10(1)(a)(iii) was not. The appeal was therefore dismissed.

THE HONOURABLE MR JUSTICE SOOLE

1. This is an appeal by the First and Second Respondents (respectively "TFS" and "Tempay") against the Decision of the Employment Tribunal at Bristol (Employment Judge Mulvaney) sent to the parties on 14 September 2017 whereby it was concluded that their contracts of employment with the Claimants did not comply with the requirements of Regulation 10(1)(a) of the **Agency Workers Regulations 2010** ("AWR"); and that in consequence the exemption from Regulation 5, so far as it relates to pay, did not apply.

2. The background to this matter can be taken from the helpful summary in the Judgment. This is a multiple claim by 191 Claimants. Their claims arise from their employment as agency workers by the Respondent temporary work agencies ("TWA") for supply to hirers and in particular to the Fourth and Fifth Respondent hirers ("Wincanton" and "DHL"). Their generic complaints relate to the alleged failure to pay them at the same rate as the permanent employees of Wincanton and subsequently DHL, pursuant to **AWR** Regulation 5.

3. In September 2012 the Claimants' contract of employment with a TWA called The Best Connection ("TBC") was transferred under **TUPE** to TFS. In April 2013 there was a further transfer from TFS to Tempay. In March 2016 there was a transfer back from Tempay to TFS. Tempay went into voluntary liquidation in May 2016 but remains a party to these proceedings by its liquidators.

4. The Judge had to consider the Claimants' contracts with TBC, TFS and Tempay. This appeal is concerned with the latter two contracts which were materially in the same terms. The Tribunal held that these did not satisfy the conditions of Regulation 10(1)(a)(i) and (iii).

5. Regulations 5 and 7 entitle agency workers to the same basic working and employment conditions as the hirer's own employees, if they complete a qualifying period of 12 weeks in a particular job. Regulation 10 reflects what is known as the "Swedish derogation" from the **AWR**, namely an exception to Regulation 5 to the extent that it applies to pay. If an agency worker is engaged under a permanent contract of employment with a TWA which provides for him/her to be paid between assignments and the conditions of Regulation 10 are satisfied, he/she is excluded from the entitlement to pay parity under Regulation 5.

6. Regulation 10(1)(a) provides:

> **"(1) To the extent to which it relates to pay, regulation 5 does not have effect in relation to an agency worker who has a permanent contract of employment with a temporary work agency if -**
>
> > **(a) the contract of employment was entered into before the beginning of the first assignment under that contract and includes terms and conditions in writing relating to -**
> >
> > > **(i) the minimum scale or rate of remuneration or the method of calculating remuneration,**
> > >
> > > **(ii) the location or locations where the agency worker may be expected to work,**
> > >
> > > **(iii) the expected hours of work during any assignment,**
> > >
> > > **(iv) the maximum number of hours of work that the agency worker may be required to work each week during any assignment,**
> > >
> > > **(v) the minimum hours of work per week that may be offered to the agency worker during any assignment provided that it is a minimum of at least one hour, and**
> > >
> > > **(vi) the nature of the work that the agency worker may expect to be offered including any relevant requirements relating to qualifications or experience."**

The Judgment

Regulation 10(1)(a)(i)

7. The Judge first considered the requirements in Regulation 10(1)(a)(i), namely terms and conditions in writing "*relating to … the minimum scale or rate of remuneration or the method of calculating remuneration*".

8. The TBC contract provided that "*This document, together with such Assignment Details Report as issued to you, constitutes your contract of employment*". Section 4 ("Remuneration") included: "*4.2. Your rates of pay will at all times be no less than the National Minimum Wage (NMW) currently in force per hour worked. Rates of pay may differ for each Assignment and you will be notified in advance, including any relevant overtime rates*". The sample "Assignment Details" included, against a column for "Rate of remuneration", hourly rates of pay, e.g. "*Pay Normal £6.08*".

9. The TFS and Tempay contracts were headed "Temporary Workers Contract of Employment (Reg 10)". The preamble provided that "*... the conditions below together with the details of your Assignment as contained in your assignment schedule(s) from time to time and the sections in the Employee on Assignment Handbook (which are expressly identified in that Handbook as having contractual effect) contain details of your terms and conditions of employment*".

10. By the definition section "*Daily Pay*" was "*subject to paragraph 8 below, the amount of basic wages or salary payable to the Employee for any day calculated as the hourly rate, as notified to the Employee prior to the commencement of the Assignment and/or as varied during the Assignment or at any other time (provided always that such variation shall be notified to the Employee in writing), multiplied by the number of hours worked that day*". "*Assignment*" was defined as "*a placement or placements whereby the Employee is assigned or seconded to the Client to work in the capacity or capacities referred to within the Assignment details*".

11. Under "Conditions of Employment", paragraph 4 provided that the agency "*... will endeavour at all times during the currency of this contract to allocate the Employee to suitable*

Assignments and, as a minimum, guarantees to the Employee that they will be offered at least 336 hours of work on Assignment with a Client or Clients through [TFS/Tempay] *over the course of any full 12 month period commencing on the commencement date of the Employee's first Assignment at a rate of pay at least equivalent to the then current National Minimum Wage*".

By paragraph 8: "*The Employee will be entitled to receive total gross payments in respect of each day worked ... payable weekly in arrears ... calculated as follows: ... the Employee's pay for that day shall be calculated as the Daily Pay ...*".

By paragraph 17: "*Subject to paragraph 8, the Employee will only be paid in respect of hours worked which have been verified, at the hourly rates agreed and/or subsequently varied in respect of each Assignment. Such pay shall be at a rate at least equivalent to the then current National Minimum Wage. ...*".

12. The final section of the contract, headed "Regulation 10 of the AWR" contained a number of matters material to that Regulation, but none in respect of Regulation 10(1)(a)(i), i.e. remuneration.

13. Further to the contractual preamble, the Judge was provided by Tempay with two sample assignment schedules, headed "Assignment Details Form" and containing information of the Assignment in question. Against the column "Actual Rate of Pay", each stated "*[£] per hour. As per pay scale*". Sample "payscale" documents were provided. There was an evidential issue as to whether these had been supplied to individual Claimants. That issue does not arise in this appeal. No such assignment schedules/forms were supplied by TFS.

14. The Claimants contended that the contractual guarantee of "*a rate of pay at least equivalent to the then current National Minimum Wage*" did not satisfy Regulation 10(1)(a)(i). Without a figure, reference to the National Minimum Wage ("NMW") did not provide the agency worker with the requisite information, nor thus enable the worker to calculate his/her pay and thereby make an informed decision as to whether to forego his/her Regulation 5 right to pay parity.

15. The Respondents contended that Regulation 10(1)(a)(i) provided three options to meet the requirement: the minimum scale of remuneration, the minimum rate of remuneration or the method of calculating remuneration. The reference to the NMW rate of pay satisfied both the "minimum rate" and "the method of calculating remuneration". There was no need to specify the figure of the NMW hourly rate, which could be readily ascertained from official sources. This was further supported by the relatively undemanding language of Regulation 10, which required written terms and conditions "*relating to*" the identified matters.

16. The Judge first considered Regulation 10(1)(a)(i) in the context of the TBC contract; and then applied her construction to the language of the TFS/Tempay contracts. The Judge concluded that the TBC terms failed to satisfy the Regulation. Thus:

> **"57. Applying the natural meaning of the words in the Regulations, I concluded that the TBC contractual wording … did not comply with the … requirement. The term 'relating to' does not obviate the need for clarity of terms. It is an introductory term which encompasses the list of different subject areas to be covered within the written contract. If those words were intended to allow general and imprecise terminology within those subject areas, the protection afforded by regulation 10 would be severely undermined.**
>
> **58. Rather than there being three options for employers to comply with the requirement in respect of a remuneration term, I concluded that there were only two: firstly, the minimum scale or rate of remuneration, which requires either a fixed rate (for example £260 per week) or a sliding scale of remuneration depending on variables, for example types of shift worked, overtime etc.; or, secondly, a method of calculating remuneration. An ordinary interpretation of 'a method of calculating remuneration' must require the provision of sufficient information to enable the employee to arrive at a figure, for example overtime might be paid at 1.5 times the hourly rate and be payable for weekend working. A worker whose hours included weekends could then work out his/her actual pay if provided with the hourly rate; any variation to that rate and his/her hours of work.**

59. Although the [NMW] as set by the Government from time to time does provide a reference point for a scale of remuneration, depending on the age of the worker, the phrase 'National Minimum Wage' is not itself a scale or rate of remuneration. A scale or rate of remuneration or a method of calculating remuneration requires figures to be provided which enable the agency worker to know with certainty what the minimum amount of pay is that they will receive.

60. Agency workers are often vulnerable workers whose first language may not be English. It would not be acceptable to require them to discover from an external source what their actual rate of pay will be, so that they are then in a position to calculate it by reference to their hours worked. Although the hourly rate of pay to which the [NMW] applies changes on an annual basis and sometimes more frequently, I do not consider that the provision of a new Assignment form to agency workers by their employers to coincide with that change is an unsustainable or unreasonable expectation."

17. The Judge also considered that this conclusion was supported by the preamble which incorporated the Assignment Details into the TBC contract. The sample form included a column for the specific "Rate of remuneration". This further demonstrated that the wording in the main body of the contract was insufficient: paragraph 61. If it were established that the completed forms had been provided before the beginning of their first assignment to all the relevant Claimants, the requirement would be satisfied: paragraph 62. However that was an evidential matter on which she could make no findings: paragraph 63.

18. Turning to the TFS/Tempay contracts, the Judge referred back to these reasons and concluded that "*... simply referring to the National Minimum Wage without detailing a figure does not meet the requirements of Regulation 10(1)(a)(i)*": paragraph 82. Furthermore, the definition of "Daily Pay" indicated an intention that the employee would be notified prior to the Assignment of the actual hourly rate applicable thereto: paragraph 83. As to the Tempay Assignment forms, the requirement would be satisfied if it could be established that before the first assignment the individual Claimant had been provided with the form and attached pay scale documentation. However that was a matter of evidence: paragraph 87. TFS had provided no Assignment forms: paragraphs 86 and 88.

Regulation 10(1)(a)(iii)

19. Regulation 10(1)(a)(iii) concerns "*the expected hours of work during any assignment*". Paragraph 7 of the TFS/Tempay contracts provided that "*The hours of work likely to be involved for each Assignment (but which are not guaranteed in respect of that Assignment) will be as notified to the Employee prior to the commencement of the Assignment*". Then in each case the "Regulation 10" section provided: "*The Employee's expected hours of work on each Assignment are:- Any 5 days out of 7*": TFS paragraph 45; Tempay paragraph 44. The Tempay "Assignment Details Form" contained, against the column "Hours of work": "*Any 5 out of 7 days/nights as required*".

20. The Judge construed Regulation 10(1)(a)(iii) as follows: "*Taking the ordinary meaning of the words, the expected hours of work must be those which it is anticipated that the worker will actually work during any assignment (which will not necessarily be the same as the hours of work for which the employee is available)*" (paragraph 69); and "*Taking the words in their ordinary sense, the contract should include the hours of work that the worker would be expected to work during any assignment, for example, 40 hours per week. I did not accept that* [10(1)(a)(iii)] *requires a term which indicates the anticipated total number of hours that the worker was expected to work during the assignment. It is clear from the contractual provision that that is not how the requirement was understood by the respondents at the time*" (paragraph 93).

21. As applied to the TFS/Tempay terms, the Judge concluded that: "*... had the contract provided what number of hours workers were expected to work in a day, the reference to working five days out of seven might have been sufficient to comply with the ... requirement. However without that information, the employee has no information as to what hours he/she*

might be expected to work. The Assignment Details form once again fails to clarify the position as it states against 'Hours of Work': 'Any 5 out of 7 days/nights as required', adding 'nights' in to the contractual provision": paragraph 92. Accordingly the contracts did not comply with Regulation 10(1)(a)(iii): paragraph 94.

Ground 1: Submissions

22. The first ground of appeal is that the Judge wrongly held that Regulation 10(1)(a) offered two, not three, "options" to satisfy the requirement. Mr Bromige pointed to its disjunctive terms; and to the decision, not cited to the Judge, in **Ministry of Defence v Carr** (UKEAT/0291/09/LA). That case concerned the initial statement of employment particulars under section 1 **Employment Rights Act 1996** ("ERA"); and in particular section 1(4)(a) which requires particulars of "*(a) the scale or rate of remuneration or the method of calculating remuneration*". Cox J (sitting with lay members) agreed with the submission of both parties that the use of the disjunctive "or" indicated that it was sufficient for the statement to contain particulars of one of the three: paragraphs 131 to 132. Mr Bromige submits that the Judge wrongly (i) held that Regulation 10(1)(a)(i) offered only two options, and in consequence (ii) conflated the "minimum scale" and "minimum rate" of remuneration, and (iii) rejected the Respondents' case based on the third option of "the method of calculating the remuneration".

23. For the Claimants Ms Joffe did not dispute the authority of **MOD v Carr** as to the disjunctive language of section 1(4)(a) **ERA** / Regulation 10(1)(a)(i); but submitted that this did not mean that the TWA had a free choice between "three options". In each case, the employer must provide the information which was appropriate to the form of remuneration. If there was to be payment by e.g. an hourly rate, the amount of the rate must be identified. That obligation could not be obviated by stating that "the method of calculating remuneration" would be an

hourly rate multiplied by the number of hours. To do so would defeat the purpose of providing the worker with relevant information. In the case of Regulation 10, that purpose was for the agency worker to make an informed decision as to whether to forego the right of pay parity under Regulation 5: see also the DBIS[1] Guidance on the **AWR**, page 38. In any event the ground of appeal was academic. It was clear from the Judgment (paragraph 58) that the Judge considered the options relied on by the Respondents.

Conclusion on Ground 1

24. I accept that Regulation 10(1)(a)(i), like section 1(4)(a) **ERA**, provides three potential ways in which its requirements can be satisfied. However, I also accept Ms Joffe's submission that it does not follow that the employer has a free choice or "option" as between those three. Thus if the worker is to be paid on the basis of an hourly rate multiplied by the number of hours worked, the employer cannot avoid the requirement to identify the minimum rate by providing only the "method of calculating remuneration", i.e. hourly rate identified by number of hours worked. That approach would circumvent the statutory purpose of providing the worker with relevant information as to his/her actual (section 1(4)(a)) or minimum (Regulation 10(1)(a)(i)) hourly rate. The point applies equally to the case where remuneration is on the basis of a "scale".

25. **MOD v Carr** is consistent with this analysis. In that case it was agreed by the parties and the EAT that the initial statement which contained particulars of the rate of remuneration was not defective for failure to give particulars of the method of calculating remuneration: see paragraphs 130 to 131. In agreeing that the statutory language was disjunctive, the EAT was not thereby stating that the employer could, in the circumstances of that case, have opted to

[1] Department for Business Innovation & Skills

satisfy its section 1(4)(a) obligation in that alternative way. In any event I accept Ms Joffe's submission that nothing in this aspect of the Judgment had any impact on the Judge's ultimate decision in favour of the Claimants.

Ground 2: Submissions

26. The contention is that the Judge was wrong to hold that the contractual reference to the National Minimum Wage ("NMW") was not a term or condition relating to the "minimum rate" of remuneration within the meaning of Regulation 10(1)(a)(i).

27. Mr Bromige pointed first to the words "*relating to*" in Regulation 10(1). Noting authority that "*... the expression 'relating to' is capable of bearing a broader or narrower meaning as the context requires*" (**Svenska Petroleum Exploration AB v Republic of Lithuania** [2007] QB 886 per Moore-Bick LJ at paragraph 137), a broad meaning was appropriate in this context. Regulation 10 was not concerned with actual terms and conditions but looked to the future. Thus its provisions were expressed in the language of expectation and the minimum/maximum hours of work that may be required or offered: see Regulations 10(1)(a)(ii)-(vi). For the same reason, the Judge was wrong to state that "*A scale or rate of remuneration or a method of calculating remuneration requires figures to be provided which enable the agency worker to know with certainty what the minimum amount of pay is that they will receive*": paragraph 59.

28. As to the NMW, its governing statute and regulations identified a minimum hourly rate of remuneration. Thus section 1 of the **National Minimum Wage Act 1998** provided that:

> **"(1) A person who qualifies for the national minimum wage shall be remunerated by his employer in respect of his work in any pay reference period at a rate which is not less than the national minimum wage.**

(2) A person qualifies for the national minimum wage if he is an individual who -

(a) is a worker;

(b) is working, or ordinarily works, in the United Kingdom under his contract; and

(c) has ceased to be of compulsory school age.

(3) The national minimum wage shall be such single hourly rate as the Secretary of State may from time to time prescribe.

…"

29. The **National Minimum Wage Regulations 2015** (as amended) in turn specified the relevant hourly rate. Regulation 4 identified the hourly rate of the "national living wage rate". Regulation 4A then set out the scale of lower hourly rates for workers in age bands up to 24 years and the apprenticeship rate. Thus the Judge was wrong to state that "*the phrase 'National Minimum Wage' is not itself a scale or rate of remuneration*": paragraph 59. The contractual reference to "*a rate at least equivalent to the then current National Minimum Wage*" incorporated the statutory minimum hourly rates; and thus satisfied Regulation 10(1)(a)(i).

30. The Judge was also wrong to take account of potential language difficulties. Four of the Claimants had prepared statements for the Preliminary Hearing without the requirement of an interpreter. There was no dispute as to the Claimants' ability to understand English. They could conduct a basic Internet search as to the current rate of the NMW. Mr Bromige pointed to **AWR Explanatory Memorandum** whose annex referred to DBIS' leaflets ("Working in the UK") which included basic information about the NMW; guidance leaflets available in a range of languages; and the NMW helpline providing confidential advice: page 37.

31. Mr Bromige also pointed to the advantage of these contractual terms which incorporated the "current" NMW minimum rate; and thus obviated the need for contractual revision or further notice.

A

32. In response, Ms Joffe emphasised that the **AWR** implemented the **EU Directive 2008/104/EC** on temporary agency work and its purpose of providing protection and equal rights for agency workers. In consequence the Regulation 10 derogation must be strictly interpreted and narrowly construed so that the protections conferred by the **AWR**, and in particular Regulation 5, were not undermined. She pointed to the section of the **Explanatory Memorandum** which included emphasis by trades unions in the consultation process of "*... the need to prevent the unscrupulous from circumventing the Regulations in order to deprive workers of their rights*": paragraph 8.6. This was a sector which was perceived to be vulnerable; and the Judge was fully entitled to take account of potential language and other difficulties in the way of discovering the necessary information.

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33. As to Regulation 10(1)'s language of minima, maxima and expectation, in practice the position was not uncertain. Contracts between a TWA and an agency worker typically had a specific hirer in view. Thus in the present case the "Regulation 10" section of the Tempay contract specifically identified Wincanton as the hirer: paragraph 43.

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34. Ms Joffe then contrasted the section 1 **ERA 1996** provisions for the statement of initial employment particulars. In respect of some of the requisite particulars, the supplementary provisions of section 2 permitted reference in the statement to other specified documents if "*reasonably accessible to the employee*": sections 2(2) and (3). This did not apply to the particulars required under section 1(4)(a), which "*shall be included in a single document*": section 2(4). With the addition of the word "minimum", Regulation 10(1)(a)(i) adopted the language of section 1(4)(a) **ERA**. However the Regulation contained no provisions analogous to sections 2(2) to (4) **ERA**. Thus, when set against the underlying purpose of achieving equality between temporary and permanent workers, the information as to the "minimum rate of

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A remuneration" must be found within the TWA's contractual terms and conditions. It was not sufficient to leave it to the worker to seek out information as to the prevailing NMW hourly rates; nor did the contract refer the agency workers to any document or source which provided such information. The Judge was therefore right to conclude that Regulation 10(a)(i) was not satisfied by mere reference to the NMW. A figure was required; and in the event of statutory increases, the TWA could and should give notification of the new figure.

C 35. As to the statutory words "*relating to*", the Judge rightly observed that if these were construed so as to allow general and imprecise terminology, the protection afforded by the Regulation would be severely undermined: paragraph 57.

D **Conclusion on Ground 2**

36. In considering this appeal I have not found the debate on the statutory words "*relating to*" to be of particular assistance. That said, I agree with the Judge as to the need for clarity of terms and the avoidance of general and imprecise terminology (paragraph 57).

F 37. Its governing Act and Regulations make clear that the NMW is a minimum hourly rate of remuneration, with reduced rates in the identified age bands. Thus the prevailing rate for the Claimants in question in principle falls within the description of a "*minimum ... rate of remuneration*". Accordingly the critical question is whether the current rate must be identified G in the contract between the worker and the TWA. In my judgment that is not necessary.

H 38. First, I do not accept the Judge's premise that the requisite information must enable the worker to calculate "with certainty" the minimum amount of pay that he/she will receive: cf. paragraphs 59 and 60. The language in Regulation 10 is not that of certainty, but of the

"minimum" scale or rate of remuneration; the "minimum" hours of work per week that may be offered to the agency worker during any assignment; the "maximum" number of hours of work that the worker may be required to work each week during any assignment; the "expected" hours of work during any assignment; and the location or locations of work where the agency worker may be "expected" to work. Even on the premise that the identity of the hirer and the relevant terms and conditions for the first assignment are typically known and identified in the agency contract, there is no such certainty for subsequent assignments. This all provides a real contrast with the statement of initial employment particulars under section 1 **ERA**, which has to state the actual and certain terms and conditions of the contract of employment in the identified respects.

39. Secondly, the contractual references to "*a rate of pay at least equivalent to the then current National Minimum Wage*" in my judgment leave no doubt that this means the statutory minimum hourly rate. There is no element of vagueness or uncertainty about that phrase; and information as to the prevailing rate(s) is readily available. Whilst acknowledging the point about the potential language difficulties in this sector, these can arise in many aspects of reading and understanding a contract of employment. I do not consider that this factor is itself a bar to the identification of the minimum hourly rate of pay by reference to the statutory floor.

40. Thirdly, I do not consider that the absence of provisions analogous to section 2 **ERA 1996** provides any support for the proposition that the current figure for NMW must be specified within the contract of employment. The **ERA** provisions concern the distinct context of the particulars to be supplied in respect of the employee's actual terms and conditions. They do not give rise to an implication that Regulation 10 necessarily requires every detail of the requisite information to be contained within the contractual terms and conditions. At least in

respect of information as fundamental and readily ascertainable as the hourly rate of the National Minimum Wage, I do not consider it necessary for the current figure to be specified in the contract.

Ground 3

41. The Respondents' alternative argument under Regulation 10(1)(a)(i) is that the Judge should have held that the TFS/Tempay written terms sufficiently identified the "*method of calculating remuneration*", namely an hourly rate multiplied by the number of hours worked. The Judge was again wrong to hold that the agency worker must be given the figures which enable him/her "*to know with certainty what the minimum amount of pay is that they will receive*" (paragraph 59). All that was required was information as to the "method". This was also supported by certain observations of HHJ Eady QC in **Born London Ltd v Spire Production Services Ltd** [2017] IRLR 493 at paragraphs 37 and 38.

42. I do not consider **Spire** to have any relevance on this point. HHJ Eady's observations were made in a very different context and provide no support for either side in this appeal. That said, for the reasons already given under ground 2, I do not agree with the Judge's general proposition that the agency worker must be in a position to calculate with certainty the minimum amount of pay that he/she will receive.

43. However this ground of appeal founders on the basis already identified under ground 1, namely that where remuneration is to be on the basis of an hourly rate, the TWA cannot avoid the requirement to specify the minimum rate by opting to provide a method of calculation involving an unspecified hourly rate.

Ground 4: Submissions

44. This ground concerns Regulation 10(1)(a)(iii), namely the information to be provided "*relating to … the expected hours of work during any assignment*". Mr Bromige submitted that the Judge was wrong to conclude that this was not satisfied by the contractual provision which stated "*The Employee's expected hours of work on each Assignment are:- Any 5 days out of 7*".

45. "Assignment" was defined in the **AWR** as "*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*" (Regulation 2). The terms of Regulation 10(1)(a)(iv) and (v) implicitly envisaged that the minimum "*period of time*" for any assignment would be one week. Thus the "*expected hours of work*" must be an expected total number of hours per week. However that total could be expressed in a figure of days. This was supported by the DBIS Guidance which stated that the requisite contractual information included "*minimum and maximum expected hours (e.g. an agency worker may only be available for 2 days per week so a 5 day assignment would not be 'reasonable')*"; and by the statutory language of "*relating to*".

46. The agency worker could then convert the days into hours. For this purpose Mr Bromige pointed to the contractual clauses relating to Regulation 10(1)(a)(iv). These stated that the maximum number of hours which the employee may be required to work each week during any assignment was 48 hours: TFS paragraph 46; Tempay paragraph 45. From all this information the worker could make a calculation of the expected hours of work each day, i.e. 48 hours/5 days = 9.6 hours.

47. Mr Bromige emphasised the words "*any assignment*" in Regulation 10(1)(a)(iii). This was to be contrasted with paragraph 7 and its references to "*each Assignment*" and "th*at Assignment*". Paragraph 7 went further than the contemplation of the "expected" hours of work in "any" assignment; and was looking forward to a particular assignment. When an assignment was identified, the Assignment Details Form provided the further information: see e.g. the Tempay form stating "*Any 5 out of 7 days/nights as required*".

48. On behalf of Wincanton, Mr Andrew Smith took a different stance on the language of paragraph 7 of the TFS/Tempay contracts. He submitted that it was synonymous with the statutory language in Regulation 10(1)(a)(iii). Upon reading the contract the agency worker would know the minimum/maximum number of hours of work per week that may be offered/ required during any assignment. Confirmation of the "expected"/"likely" hours of work would then be provided prior to the commencement of an actual assignment. In the context of a Regulation which did not require the TWA to specify or stipulate the precise hours, but was focused on expectation and likelihood, that was a logical and pragmatic approach. Thus paragraph 7 satisfied Regulation 10(1)(a)(iii). In the alternative, and in the context of an expectation that the agency worker would be engaged by hirers on a full-time basis, "*Any 5 days out of 7*" sufficed.

49. On behalf of DHL, Ms Sally Cowen submitted that the focus must be on paragraph 45 (TFS) or paragraph 44 (Tempay) rather than paragraph 7. In the case of the first assignment, further detail was provided by the Assignment Details Form. That was provided "*before the beginning of the first assignment*" (Regulation 10(1)(a)) and was compliant. She accepted that this would not apply to subsequent assignments.

50. Ms Joffe submitted that the Judge's reasoning was correct in every respect. The requirement to provide information relating to the "*expected hours of work during any assignment*" could not be satisfied by a term which referred to "*Any 5 out of 7 days*"; nor by a process which required the agency worker to make his/her attempted calculation of the expected hours of work from the information provided. In any event the suggested calculation (48 hours/5 days) could not be sustained. Pursuant to Regulation 10(1)(a)(v) the contracts also specified the minimum number of hours of work per week that may be offered as 7 hours (TFS paragraph 47; Tempay paragraph 46). That could equally justify a calculation of 7 hours/5 days. Paragraph 7 could not be reconciled with paragraphs 45/44; but reflected the reality that the "expected hours of work" were only to be provided prior to the commencement of each assignment. She added that identification of the "expected hours of work" was a necessary component of whether an offer of work was "suitable" (Regulations 10(1)(c) and (2)).

Conclusion on Ground 4

51. Regulation 10(1)(a)(iii) does not qualify "hours of work" by reference to a number (cf. Regulation 10(1)(a)(iv)) or a period (cf. "per week" in (iii) and (iv)). Before hearing argument, I contemplated whether the intention was to refer to hours worked within a day, e.g. "9 to 5". However, I am persuaded by the Judgment and the submissions of counsel that the reference is to a total number of hours worked; and that the period would, at least typically, be "per week". As did all counsel in the appeal, I agree with the Judge that it does not refer to the expected total number of hours during any assignment.

52. As to paragraph 7 of the contracts, I do not accept that its language can be distinguished from the "*expected hours of work on each Assignment*" in TFS/Tempay paragraphs 45/44. In this context, objectively construed, likelihood and expectation must mean the same thing. Thus

the agency worker is faced with contractual terms relating to the matters required by Regulation 10(1)(a)(iii) in two separate paragraphs and in different terms. In any event, paragraph 7 provides no useful information and merely points to the provision of such information before the commencement of each assignment.

53. Like the Judge, I do not consider that the information in the "Regulation 10" section (paragraphs 45/44), nor in the Tempay Assignment Details Form for the first assignment, fares any better. Whether expressed as "*Any 5 days out of 7*" or "*Any 5 out of 7 days/nights as required*", this information does not provide the agency worker with a figure for the expected hours of work per week nor indeed for any other period. It was not for the agency workers to divine what the information meant in terms of expected hours of work per week, nor was it possible to do so with any degree of confidence. As Ms Joffe's counter-example demonstrated, there is no more reason to apply a calculation of 48 hours/5 days than one of 7 hours/5 days. This is quite different from the situation concerning the NMW where the reference is clear and precise and the information readily available.

Conclusion

54. Whilst in disagreement with the Judge's conclusion in respect of compliance with Regulation 10(1)(a)(i), I agree with her conclusion in respect of 10(1)(a)(iii). Since there must be compliance with all requirements of Regulation 10, the appeal is dismissed.