



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

5 **Case No: 4101677/2019; 4101678/2019; 4101679/2019; 4101680/2019; and  
4102837/2019 (multiple 8978 – Capita Resourcing)**

**Held in Glasgow on 23, 24, 25 and 26 September 2019**

**Employment Judge D Hoey**

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**Mrs E Robinson**

**First Claimant  
In Person**

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**Mrs M Lindsay**

**Second Claimant  
Represented by  
Mrs E Robinson**

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**Mrs M Fisher**

**Third Claimant  
Represented by  
Mrs E Robinson**

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**Mrs D Johnstone**

**Fourth Claimant  
Represented by  
Mrs E Robinson**

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**Mrs A Bruce**

**Fifth Claimant  
Represented by  
Mrs E Robinson**

**Capita Resourcing Limited**

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**First Respondent  
Represented by:  
Mr J Boyd -  
Counsel (Day 1)  
and Mr C Bourne  
- Agent (Days 2, 3  
and 4)**

**Magnox Limited**

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**Second Respondent  
Represented by:  
Mr J Wynne -  
Barrister**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Employment Tribunal is that:

1. The claims by Astrid Bruce are dismissed upon her withdrawal of her claims
2. The remaining claimants are agency workers for the purposes of regulation 3 of the Agency Workers Regulations 2010
- 20 3. The claims should now proceed to a Hearing.

**REASONS**

1. This case called as a Preliminary Hearing which had been set down for 4 days. 2 case management Preliminary Hearings had taken place and the issues to be determined had been identified. This Preliminary Hearing had been fixed to determine whether or not the claimants were entitled to the benefit of the Agency Workers Regulations 2010.  
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2. On the first day of the Hearing a conflict issue arose in respect of counsel for the first respondent which resulted in the Hearing proceeding substantively on day 2. This was not due to the fault of any party. The parties had agreed upon the productions and a bundle of some 794 pages had been agreed. The time was taken on the first day to clarify the issues and ensure the matter was ready to proceed.  
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3. Counsel for the second respondent explained that he had understood Ms Bruce had received the sums she had been seeking. Ms Bruce considered

the position and confirmed that she had received the sums she was seeking and therefore withdrew her claims and consented to their dismissal.

4. Witness statements had been provided in respect of each of the witnesses which comprised each claimant together with Head of Resourcing and Regional HR Business Partner for the respondent. The witnesses were cross examined.
5. The Hearing began by my emphasising the overriding objective within Schedule 1 to the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 and in particular the need to ensure that the parties worked together to ensure matters were dealt with justly and fairly. I also explained the need to ensure, so far as possible, the parties were placed on an equal footing. Counsel for the second respondent worked with the Tribunal to achieve this.
6. The agent for the first respondent explained that he was essentially carrying out a 'watching brief'. Counsel for the second respondent would cross examine the witnesses and make submissions, albeit the parties accepted that in the event that the second respondent's submission was upheld, the outcome would be the same for both respondents.
7. Mrs Robinson was the lead claimant and she conducted the case on behalf of each of the claimants. I explained the purpose of the Hearing and rules of evidence (with counsel for the second respondent's input) which Mrs Robinson readily understood and applied.

### Issues

8. The parties confirmed that the issue for the purposes of the preliminary hearing was very narrow. The parties agreed that the general question for the Tribunal was whether regulation 3 of the Agency Workers Regulations 2010 was satisfied. It was accepted that there was only one part of that regulation that was in dispute, the remainder being accepted as applicable to the parties. The only issue that was in dispute was whether or not each claimant was supplied "temporarily" for and under the supervision and direction of the hirer

(the second respondent). This was a question of fact to be determined from the evidence.

### **Facts**

9. Having heard each of the claimants' evidence and the 2 respondent witnesses (the Regional HR Business Partner and Head of Resourcing) and having considered the evidence and productions to which the Tribunal's attention was drawn, the Tribunal is able to make the following findings of fact. The Tribunal does so on the balance of probability, namely on the basis of what is more likely than not to be the case. The Tribunal only makes findings in relation to facts which are necessary to determine the issue before it.

### **The second respondent**

10. The second respondent is responsible for the safe and secure clean-up of 12 nuclear sites and the operation of one hydroelectric plant. The sites are all owned by the Nuclear Decommissioning Authority. The ultimate mission of the second respondent is to safely and securely deliver the 12 sites to closure. Each of the claimants works at the Hunterston or Chapelcross sites.
11. The strategic decisions relating to resourcing of the second respondent are normally made by the strategic resource board which checks the overall strategy, reviews skill vulnerabilities and monitors the position. At a local level each of the sites and regions have resource management boards which consider skill requirements.
12. The second respondent has around 2500 permanent employees with around 400 – 500 agency workers. The number of permanent employees has significantly reduced over the years as a result of the second respondent moving through the phases of generating, defueling and decommissioning and eventually moving towards closing the sites (which is scheduled to take place in or around 5 years' time).

### **Use of agency workers**

13. The second respondent engages the services of agency workers, which it calls contingent labour (or agency support workers – ASLs), for a number of reasons.
- a. The resource covers areas where vacancies arise such as absence due to illness or maternity cover (and where staffing needs fluctuate)
  - b. The second respondent is also funded by the Government and requires to make annual requests for funding. The amount of funding that is granted determines the second respondent's activities each year and thereby affects its resourcing decisions. That means that the projects on which the second respondent carries out can change. Employees engaged on those projects could be at risk of redundancy and to avoid redundancy it is possible to move those staff into roles performed by contingent labour (who would be displaced). As such individuals are not believed by the second respondent to be employees, their displacement does not incur redundancy costs. Preference is usually given to employees.
  - c. A further reason for the second respondent utilising agency workers is because the terms and conditions given to employees are under discussion with the relevant trade unions and agreement has not been reached as to suitable terms and conditions for employees going forward. The second respondent wishes to avoid engaging employees until those matters have been agreed and instead procures staff via an agency, the first respondent, rather than use terms and conditions which have yet to be agreed.
14. The second respondent tries to retain agency workers whom it has sourced via the first respondent where it considers such individuals to have skills that the second respondent wishes to retain. That is particularly so given such individuals have secured security clearance and have experience of the work involved. Obtaining such clearance for new workers can take up to 6 weeks.
15. On some rare occasions where there was a risk of losing an agency worker (and where the skills were scarce) the second respondent would offer that

individual a contract of employment (such that the individual would cease being an agency worker and become a permanent employee) but that was (and is) very rare.

- 5 16. The second respondent entered into a contract with the first respondent as to the provision of agency workers. That contract states under the heading “term of engagement” that “the policy” is not to engage agency workers for longer than 12 months. Where the role performed by an agency worker is required beyond 12 months the relationship may be terminated or the agency worker may be recruited as an employee. In reality agency workers have regularly  
10 been retained beyond 12 months.

### **Resourcing Procedure for staff**

17. The second respondent has a procedure that sets out the plan for ensuring the appropriate employment of suitably qualified and experienced people. That plan (which was created in July 2018) emphasises the precedence given  
15 to employees (over agency workers). For example, all approved vacancies should be considered for internal employees first.
18. That policy states that “the length of time that an [agency worker] is required will be determined by the work or project requirements and fluctuations in resource demands, as determined by the resource profile and lifecycle of that  
20 site.”
19. The policy also deals with appointment of agency workers to employee status and states that “any appointment of [agency workers] to indefinite or fixed term employee status must be made in accordance with arrangements set out in this Standard”.
- 25 20. The document also defines agency workers as “individuals engaged under a contract for services with a supplying agency to fulfil a specific short/medium term resourcing requirement.”

### **Resourcing Procedure for agency workers**

21. The second respondent also has a resourcing procedure for Agency Workers which was created on 1 July 2019 and sets out the arrangements, responsibilities and approvals for the recruitment and selection of suitably qualified and experienced agency workers. The definition of agency worker is the same as set out above with reference to fulfilling a specific short or medium term resourcing requirement. Internal employees are generally given preference to agency workers, who can be displaced in favour of internal employees where needed.

### **New roles**

22. When resourcing for a new role a manager will discuss the resource need with their local HR business partner and agree how best to procure that need. The opportunity for a new role will usually go to the “internal market” first, thereby giving preference to the second respondent’s employees. If there are no suitable internal candidates, the second respondent considers using agency workers. Existing agency workers working within the second respondent are then considered, if they wish to be considered, as would existing agency workers whose assignments are ending. Such workers are still offered the roles on the basis they remain an agency worker (and subject to the usual restrictions).

### **Agency workers**

23. Agency workers enter into a contract with the first respondent who then places them to work for the second respondent. The first respondent provided agency workers to work for the second respondent from 2010. Prior to that date another agency provided staff. Those staff who worked for the second respondent with the previous agency had their contracts with the original agency terminated and had to enter into a new contract with the first respondent.

### **Agency worker contracts**

24. In terms of the agency worker's contract with the first respondent, which is the same for each claimant, the agency worker agrees to carry out work set out in an Assignment Schedule (a Schedule attached to the contract) subject to the terms and conditions set out in that Schedule. There are some generic terms and conditions governing the individual's relationship with the first respondent in the contract, including in relation to time sheets, payment, holidays and sickness procedures. The Assignment Schedule details who the client is (the hirer – which need not be the second respondent) together with the assignment location, description, rate of pay, "term start date" and "term end date". The "term end date" is the date when the particular assignment is due to end. The second respondent seeks to review matters shortly before the end date to determine whether or not the individual can be retained, whether in relation to that particular assignment or some other role.

#### **"End" dates**

25. Without exception, each agency worker (including each claimant) is given a specific end date for each assignment at which point the second respondent makes a decision as to whether or not to retain the individual, which they will only do if there is a specific role for the individual. Even if the work is potentially indefinite (and a permanent employee could do it, but chooses not to) the agency worker is still only given the role for a defined period of time, with the individual's position being reviewed upon expiry of the fixed period. There is no guarantee the agency worker will remain in post, even if the project continues. The second respondent seeks to retain agency workers who have gained experience working for the organisation but there is no guarantee or right for the agency worker to remain, whose position is reviewed at the end of each assignment period. Renewal is not automatic and authorisation is needed to grant a new assignment period.

26. By way of example, the approach can be seen from the exchange in respect of Ms Johnstone and the ending of her assignment in March 2017. By email of 27 March 2017 the first respondent asked the second respondent: "As the role is due to finish on 1 April 2017 are there any other temporary vacancies or is her contract coming to an end?". The second respondent's response was



that: "As far as I am aware her contract will come to an end as expected. We do not have any other clerical ASW vacancies at the moment". Another role did in fact become available and she was retained but this shows that there are no guarantees for each of the agency workers, unlike permanent staff whose positions are indefinite and not reviewed in the same way as agency workers.

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27. The position is again evidenced in an email dated 26 July 2017 where the first respondent asks the second respondent if Ms Fisher's and Ms Lindsay's assignments were to be extended. The second respondent's reply was that Ms Fisher's contract was not to be extended as there was no role for her and the second respondent was currently in the process of seeking approval to extend the other role. Both roles were ultimately extended. Each role for each claimant is finite in duration.

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28. The second respondent seeks to retain agency workers but only offers specific assignments for specific periods at a time, with no certainty as to whether a vacancy would be found upon expiry of the period set out.

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29. Where the relationship is continued, which has been the norm, another Assignment Schedule would be issued. This means that agency workers can have a large number of different Assignment Schedules dependent upon how long they have been retained and the different roles to which they were assigned. There is no rule as to how long subsequent assignments last and they can be short term (a few months) up to 2 years. While the duration may mirror the financial year (and be dependent upon funding) that is not always the case and is dependent upon the need of the line manager in question.

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### **Flexibility**

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30. It is possible for the worker to be assigned to a different location or area of the second respondent's business for new assignments. The contract each claimant has with the first respondent has sufficient flexibility to allow the individuals to be assigned to different clients, but this had not been exercised in relation to the claimants, albeit some had worked in different areas of the second respondent's business and in different teams.

31. Agency workers are engaged by the second respondent to cover different types of roles. Such roles vary from covering for maternity leave to more open-ended projects.
32. The claimants carry out administrative and clerical services. There are only a small number of such positions within the second respondent's sites which means that the second respondent does not have a large number of agency workers in such roles. This means that those agency workers who are provided to the second respondent, whose skills and abilities are satisfactory to the second respondent, tend to stay with the second respondent for lengthy periods of time – on some occasions for many years. They do so by having a new assignment start immediately upon expiry of the previous assignment (where there is work to be done and the other conditions have been satisfied).
33. On a few occasions it has not been possible to find other roles upon expiry of the existing role and in such cases there were breaks where no work was provided and no payment was made.

### Notice

34. As the second respondent is now in the process of closing down, albeit within a 5 year or so period, all staff are aware that their role is not indefinite. Given the nature of the business, there are often staff reorganisations during which resourcing requirements are considered and on occasion permanent employees will be at risk of their roles becoming redundant (in which case those individuals may "displace" agency workers).
35. Employees have notice periods in their contract in addition to recognising that their positions will eventually end when the site closes. Agency workers can have their engagement ended upon expiry of the assignment period or by the provision of notice. Agency workers also have a notice period in their contracts which allows their engagement to be ended before the end date.

### Each claimant's position

36. I now turn to the specific position in respect of each claimant, although it is accepted by the parties that the position in respect of each claimant is essentially the same, in that the position, system and approach as set out above applies to each claimant.

5 **Ms Lindsay**

37. Ms Lindsay started providing services to the second respondent on 18 February 2008 when she was told her role would be temporary in nature. She has provided services to the second respondent for 11.5 years and had extensions to her assignments ranging from 3 to 24 months each of which was subject to a defined “end date”, each of which were in respect of specific projects or cover for particular reasons.

38. In 2008 she was recruited to provide administrative support to the engineering group. Her initial contract was with the first respondent’s predecessor and her initial assignment ran from 18 February 2008 to 15 August 2008. The assignment was then extended to 31 March 2009. It was extended again to 26 June 2010 which was the last date the first respondent’s predecessor provided services to the second respondent.

39. Ms Lindsay was then engaged by the second respondent via the first respondent via annual assignments. Her assignments were continued with a 2 year extension running from 31 March 2013 until 28 March 2015. Her assignment was extended to 26 March 2016. In May 2015 the second respondent advertised a vacancy within the safety department. Ms Lindsay was successful in applying for that role but chose instead to remain in her existing role.

40. Following a reorganisation within the site at which Ms Lindsay worked, one of the second respondent’s employees was likely to take on the role Ms Lindsay carried out (given the second respondent’s preference for employees and desire to avoid dismissing employees where possible). Ms Lindsay was retained to cover training and other duties.

41. Ms Lindsay's contract was extended from 2 April 2017 to 30 September 2017 to provide support for an individual who was returning from long term sickness. Ms Lindsay secured the role of administrator in another project. Her assignment was extended from 11 September 2017 until 25 August 2018. It has since been extended to 25 August 2018 and then to 27 March 2021.

### Ms Fisher

42. Ms Fisher was first recruited as an administrative assistant on 12 December 2016. She was initially engaged to cover maternity cover (on an indirect basis). That was extended due to the need for a handover period and then further extended from 30 September 2017 to 31 March 2018 in the administrative assistant role to cover a backlog of filing.

43. As a resource need was identified elsewhere on the site on 4 December 2017 she was transferred to another office to work as an administrative assistant. Her assignment was then extended to 5 October 2018 and then 30 March 2019. On 18 February 2018 she transferred back to the document centre to cover maternity leave. The expiry date of 28 September 2019 was extended to 27 March 2021. Ms Fisher carries out a substantive role which is part of the core compliance and safety related functions.

### Ms Johnstone

44. Ms Johnstone initially commenced work for the second respondent on 1 March 2010. There was only 1 break, namely 2 weeks in April 2017 when she was between posts and the assignment ended and the contract with the first respondent could not be processed in time. She was not paid for periods when she did not work.

45. Ms Johnstone was initially provided to the second respondent via the predecessor to the first respondent to carry out a clerical support role. That was connected to a particular project and would conclude "upon completion of the project". In October 2010 she transferred to the security department and her contract was extended to 31 March 2012 and then for a further year to 31 March 2013. She then continued in that role continuously until 1 April

2017 during which time there were varying contract extensions ranging from 3 months to a year. There was a proposal to reduce the number of roles which was why her assignments were subject to shorter extensions.

- 5 46. The final extension was to 1 April 2017 by which time the project was complete. There was another vacancy within another team allowing Ms Johnstone to carry out clerical work. There was a break until 18 April 2017 when she gained a 6 months assignment which was extended until the post holder was due to return from maternity leave on 31 January 2018 and then extended again to 24 February 2018. There was other work she could do  
10 which allowed a new assignment to be created for Ms Johnstone which ran from 25 February 2018 to 31 March 2019 with the role and assignment being extended to 28 March 2020. This is a substantive role forming part of the core safety and compliance related roles.

### **Mrs Robinson**

- 15 47. Mrs Robinson commenced working for the second respondent on 5 May 2014. She was told upon commencement of the work that it was temporary in nature and there was no guarantee of any extension to any assignment. This was the same position in respect of each of the claimants. Ms Robinson carried out a number of different roles until the end of her assignment on 15  
20 April 2017. She had secured a permanent role elsewhere (just at the point her assignment had been extended for a further year).
48. Mrs Robinson contacted the second respondent to see whether they would allow her to return as her new role had not worked out. The second respondent agreed and her assignment commenced on 11 June 2017 to the  
25 end of the financial year on 31 March 2018. That was then extended on 1 April 2018 until 30 March 2019. It was known that the project connected to the role would complete in mid May 2018 and the second respondent indicated that they would look for opportunities to retain her.
49. She was given another role which resulted in her being given an extension in  
30 April 2018 until March 2019. She transferred into a new role on 1 July 2018

with the assignment being extended on 5 June 2019 to 28 March 2020. This is a substantive role forming part of the core safety and compliance roles.

### **General issues regarding the claimants**

50. Each of the claimants was given defined assignments with work given for a particular and defined periods of time with a defined end date, even if the work itself was potentially of an indefinite nature.

51. Each of the claimants while given extensions (for varying periods of time) was not given any guarantee that an assignment would continue indefinitely or beyond the end date. It was possible that the assignment could end upon expiry of the assignment.

52. Permanent staff would also have a degree of uncertainty (given the transition of the business) but these individuals would be given preference during restructures (and had no “end” date as such). While it is in the intention of the second respondent to retain agency workers, and this has happened very regularly, it is not possible for the second respondent to say that each assignment will last beyond the assignment dates given the nature of the business and policy to protect permanent staff. At the start of each assignment, the second respondent cannot guarantee that the individual worker will be retained after the end date as this is dependent upon another assignment being found, funding being available and approval being granted to retain the agency worker (even if the work continues to be needed).

53. Even if the temporary worker was engaged in a core role it is still possible that the assignment is not continued beyond the end date or it is brought to an end sooner, if another permanent member of staff requires to be protected.

### **Law**

54. The claimants seek a remedy in terms of the Agency Workers Regulations 2010. These Regulations are only engaged where the claimants are shown to be agency workers as defined.

55. There was only 1 issue in dispute in terms of the definition. Regulation 3(1) states that an “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”.
- 5 56. It was not disputed that the first respondent was a temporary work agency and that the second respondent is the hirer. The claimants were provided by the first respondent to work for an under the supervision and direction of the hirer.
57. The only issue was whether the claimants were supplied to work “temporarily”.
- 10 58. There have been 2 reported cases on this issue.
59. In **Moran** 2014 IRLR 172 Singh J (as he then was) considered whether or not a cleaner who had been provided via a contract cleaning company was correctly found not to be an agency worker given the nature of the relationship. The claimant in that case had been placed to work for the respondent for many years. The Employment Judge had assessed the factual matrix and concluded that the cleaner was placed to work for the respondent on a permanent basis.
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60. Singh J considered that temporary means “not permanent”. At paragraph 41 he opines that permanent “meant it is indefinite, in other words, open ended in duration, whereas a temporary contract will be terminable upon some other condition being satisfied, such as expiry of a fixed period or completion of a specific project”. He found that temporary does not mean short term (albeit it could do); it means not permanent.
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61. In that case the Judge had taken account of the fact that the claimant’s contract had his place of work at the respondent where work had been provided for many years (between 6 and 25 years). The claimant was “ensconced in the respondent’s premises for many years”. The judge found that whatever the parties’ intentions were, the relationship could not conceivably be called temporary given the longevity of the arrangement.
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62. The contractual position of the claimant (with the agency) was considered which the Judge found to bear similarities to an employment contract. He found it bore the hallmarks of a contract for an indefinite duration to be placed to work for the hirer. The parties considered the relationship essentially to be permanent and did not expect to work elsewhere.
63. In short the Judge had found that the relationship was indefinite in that case not temporary but permanent.
64. This was considered by Eady J (as she then was) in **Brooknight v Matei** UKEAT/0309/17. In that case the claimant was a security guard engaged on a zero hours contract. He had provided services for under 2 years. His contract gave the respondent flexibility to assign him to different sites as required albeit he generally worked at the same site for the same hirer. The Tribunal found he was a “cover security guard”. There were some periods where he was not required to work (and he was not paid). He was in essence provided on an ad hoc basis. The Tribunal found that he was therefore not provided on a permanent basis having regard to the nature of the work and circumstances.
65. Upon appeal the respondent argued that the claimant was clearly regarded as a permanent worker for the hirer. It was argued that this was evidenced, for example, by the indefinite nature of the contract and that the claimant knew the relationship was in reality indefinite.
66. Eady J noted that In **Moran** (*supra*) the Employment Appeal Tribunal concluded the question is whether the work in issue is properly understood as being “temporary”. She notes that temporary can mean something not permanent or something short term or fleeting. The key question was whether the work could properly regarded as temporary because it is not permanent. She observes that that does not mean permanent means lasts forever since most contracts are terminable on notice. She regards permanent as meaning open ended in duration whereas temporary means terminable upon a condition being satisfied. In **Moran** (*supra*) the Judge had found that the



relationship was indefinite in duration and so it was permanent and not temporary.

67. In **Matei** (*supra*) the question was whether the differentiating factors justified the opposite result. Eady J emphasised that the focus is on the purpose and nature of the work for which the worker is supplied – is it temporary or permanent. This needs to be assessed and a factual analysis undertaken of the nature of the work.

68. The contractual matrix is relevant but not determinative and the reality as to how the work is carried out should be considered. The facts in that case were that the guard was not assigned on an indefinite basis to carry out ongoing work. He was required to work when required. He was provided temporarily to work for a fixed duration (when work was needed) and so he was not permanent.

69. The court emphasised that each case and each claimant is fact sensitive.

#### **Submissions on behalf of the second respondent**

70. The main argument on behalf of the second respondent was that the second respondent had adopted a systemic approach whereby by and large agency workers were being used essentially as permanent staff. They were engaged on the basis that their engagement would be indefinite. While assignments had an end date, this was in reality a review date whereby the assignments would be renewed or other roles identified.

71. It was argued that the intention of the parties is relevance in assessing whether the work was temporary or not and the claimants were hired with the intention they remain for indefinite period of time. In every case for each of the claimants their assignments were renewed

72. The agency workers were in a similar position to permanent staff who also faced uncertainty. The intention was to retain the staff. It was argued that none of the claimants was engaged for a specific period. This was not like engaging a delivery driver for Christmas. The intention was to create a long term

ongoing relationship. There was always going to be an ongoing need for clerical support and skills and experience each of the claimants had.

73. There was a greater risk agency workers would leave to give preference to employees but that did not stop them being provided on a basis that was not temporary. There was also some evidence that agency workers could be kept on even in preference to employees where skills demanded. The sheer number of occasions assignments were reviewed and renewed for each claimant shows how strong the second respondent's argument is that their intention was to retain the claimants.
74. It was also submitted that the assessment as to whether the work was temporary or not is done with benefit of hindsight viewing all facts over the entire period the claimants provided work to the second respondent. It would be artificial to exclude later material following the point of engagement
75. Mr Wynne sought to distinguish **Matei** (*supra*) on the basis that in this case the agency workers are engaged largely to hire people who would otherwise be hired as employees. They were engaged through the medium of the first respondent due to the constraints on the second respondent as to the contorted contractual framework
76. While the assignment schedule looks temporary (with an end date) that does not reflect true picture which is that the second respondent hires the claimants on an indefinite basis in reality which is evidenced by the fact none of the claimants did not have their assignment renewed
77. In reality the claimants move around to fit the continuing changing need of the business which would potentially be what could happen for employees who need more work to do and who would move around as needed
78. Mr Wynne argued that the case could be determined by a broad brush approach since the respondent's system was applied to each of the claimants whose engagement was not temporary and it was not necessary to examine the minutiae of each engagement or each claimant.

79. The claimants know the intention is to retain them on a long term basis. This is known when they are hired or soon after.
80. Other than Ms Fisher, the claimants had prior knowledge of the second respondent's system of renewing the assignments. Ms Fisher started covering maternity leave but then undertook an indefinite position. She had no knowledge of the first respondent's predecessor but she knew how it worked following the renewal of her assignments.
81. Mr Wynne argued that the claimants should be seen as "permanent" because they were supplied for an indefinite or uncertain period. He urged the Tribunal to ignore the assignment schedule and look at intention and practice. The end date was chosen because there had to be a review date. It was not really intended to be a termination date. Her compared it to an employee's probationary period.
82. Mr Wynne urged the Tribunal to take a step back and see that the claimants were engaged on an indefinite not temporary basis. There were some situations where temporary staff were given permanent contracts but that was unusual.
83. Given the end date of each assignment for each claimant was in reality uncertain, that meant they were not provided on a temporary basis. In **Matei** (*supra*) the Employment Appeal Tribunal says at paragraph 12 that permanent means open ended in duration – open ended, uncertain or indefinite – which is the position here.
84. The second respondent had a requirement for clerical support workers on a long term basis. The date on the assignment schedule was a date for review not a date for termination. This was supported by the fact every claimant's assignment was renewed on review which was similar to employees who were reviewed in advance of every financial year.
85. Both employees and agency workers suffer a degree of risk of termination. If the position ceases to exist or an employee requires to displace the agency worker, they could be displaced. But he argued employees suffer similar

uncertainty as there were regular staff reviews which meant their positions were not guaranteed either, particularly when viewed against the end date for the organisation.

- 5 86. In short the system adopted by the second respondent was such that the claimants were not engaged temporarily to provide work for the second respondent. The Regulations are not therefore engaged.

### **Claimants' submissions**

- 10 87. The claimants agreed with counsel for the second respondent in that the case can be determined by applying a broad brush (without looking at each individual claimant's position) since it was agreed that the second respondent operated the same system for each claimant.

- 15 88. Their submission was straightforward. Each of the claimants was engaged via a contract with the first assignment which had attached to it an assignment. That assignment was by definition temporary – it had an end date. The fact the end date is displaced by a new end date does not alter the fact the work is temporary. The surrounding factual matrix was such that the intention was never to keep each agency worker beyond each assignment, it is only by coincidence that there has been other work to allow the agency worker to be retained. There is no obligation to do so. There was a specific reason every  
20 time an assignment has been extended

- 25 89. Each claimant was hired temporarily to cover a specific role or assignment. Each assignment is a temporary assignment. The claimants' principal submission was that successive temporary assignments do not make the work permanent, notwithstanding the system the second respondent utilises to engage individuals (and avoid permanent staff). It was open to the second respondent to offer permanent or indefinite assignments but they choose not to.

- 30 90. Even if the assignment is linked to a core function, the role is still not indefinite because there is an end date. Even if the end date is a review date, employees do not have such uncertainty. Just because the position is stable

at the moment does not mean the position can change. Each claimant had successive temporary contracts – individual assignments.

- 5 91. The claimants compared themselves to **Matei** (*supra*) at paragraph 26 where it was noted that the Tribunal had regard to the flexibility given to the respondent. The evidence from the respondent showed that flexibility was the key reason agency workers were hired. They were flexible and could move roles and were used to cover specific needs. Each individual assignment is used to provide specific cover. There is always an uncertainty that the role ends at the expiry date. There are no guarantees and it is not indefinite. 10 Each assignment is subject to an end date and so it cannot be said to be indefinite.
- 15 92. While the second respondent argues their intention is for each role to be indefinite, the factual matrix does not support this. The intention is to retain agency workers to cover each specific project or until an employee displaces them. Just because there have been circumstances which allowed each assignment to be extended does not mean this is guaranteed in the future.
93. Mrs Robinson referred to paragraph 41 of **Moran** (*supra*) and noted that indefinite contract would have no end date which required an assessment of the work done as matter of practice. For each of the claimants there is a clear end date and so it can only be temporary

## 20 **The second respondent's response**

- 25 94. Mr Wynne noted that the Tribunal needs to decide whether the “end date” found within the assignment schedule is best regarded as the intended end date (of the work) or whether it is better viewed as a formality as part of the approach to review the continuation of the resource depending upon business need. He contrasted a security guard providing weekend cover due to holidays with the situation where there is ongoing work.

## **Discussion and reasons**

- 30 95. The question in this case is whether the work the claimants were each engaged to do is properly understood as being temporary, in that it is not permanent or something short term or fleeting. The key question was whether

the work could properly regarded as temporary because it is not permanent. Permanent is open ended in duration whereas temporary means terminable upon a condition being satisfied, such as upon expiry of a fixed term or completion of a specific project.

5 96. Each of the claimants was engaged upon contracts with the second  
respondent to provide services pursuant to the Assignment Schedule. These  
Schedules had specific end dates in respect of each assignment  
(notwithstanding the second respondent's intention to retain the individuals  
beyond those dates). The second respondent reviewed each position  
10 individually. There was no guarantee that any claimant would be retained.  
Their position to that extent was not permanent and the work they were  
provided to do was not permanent. The approach taken for each claimant was  
the same.

15 97. The position is contrasted with that found in **Moran** (*supra*) where the  
relationship was indefinite in duration and so it was permanent and not  
temporary. The claimants in the instant case have no indefinite role as there  
is no certainty that their role will be continued after their current assignment  
ends. The second respondent's witnesses each acknowledged that at the  
point of starting each assignment, it is not known whether or not the individual  
20 will be retained after the end date, since that would depend upon further work  
and funding being available and there being no permanent employee who is  
to be transferred to the role. That differs from permanent staff who are  
engaged indefinitely, that is, on an open ended basis.

25 98. The claimants are not engaged indefinitely in the sense that there is a  
condition that requires to be satisfied for their engagement to continue,  
namely the existence of another assignment, funding and approval, none of  
which is not guaranteed. They are not engaged on an open ended basis.

30 99. I note from **Matei** (*supra*) that the focus is on the purpose and nature of the  
work for which the worker is supplied – is it temporary or permanent - and that  
this needs to be assessed and a factual analysis undertaken of the nature of

the work. It is not simply a question of how long the claimant has provided services for the hirer.

100. The contractual matrix is relevant but not determinative and the reality as to how the work is carried out should be considered.

5 101. In that case the guard was not assigned on an indefinite basis to carry out ongoing work. He was required to work when required. He was provided temporarily to work for a fixed duration (when work was needed) and so he was not permanent.

10 102. In the instant case the claimants were not assigned on an indefinite basis. The second respondent might well have wanted the claimants to continue beyond each assignment, and did so, but that does not mean they are not temporary in the sense interpreted by the authorities. I take into account the second respondent's intention as submitted by counsel for the second respondent and clearly the second respondent wishes each claimant's  
15 position to be indefinite, but in reality the claimants are engaged on an assignment by assignment basis with no guarantee of continued engagement, irrespective of the second respondent's intention.

20 103. The second respondent relies on the overarching policy or system they say they have created whereby temporary staff are relied upon essentially as the norm, with a view to continuing in post indefinitely and are thereby not temporary (albeit it was accepted that agency workers may be engaged on permanent contracts once the terms and conditions issues have been resolved with the trade union). The second respondent also relies on the reality and practice to date which shows most were retained upon expiry of  
25 each assignment with no breaks. The claimants argue that their retention has only been because there was other work for them to do, rather than their having been engaged on an indefinite basis. They were not engaged on an indefinite basis given the clear agreement that existed between each of the parties as to their position ending upon expiry of the assignment period,  
30 unless the second respondent offers another assignment.

104. The second respondent does not automatically retain the claimants upon expiry of each assignment. The “end” date is not just a review date in reality. Absent any other role for the claimant to do upon expiry of the assignment, the relationship would end. That happened on a very limited number of occasions. The second respondent’s witnesses accepted that for each of the claimants, at the point of entering into any assignment, they cannot say whether or not the individual would be needed beyond the end date – even for work which might not be limited in time. The review that takes place for each claimant at expiry of the assignment is fundamentally different from what happens with permanent staff, whose roles are indefinite (even if subject to a degree of uncertainty given ongoing organisational reviews and the impending closure of the organisation in the future).
105. Looking at the practice of the second respondent and approach taken, the claimants’ engagement is not regarded as indefinite. It is notable that the Resourcing Procedure for Staff states that any change to a worker’s contract to become *indefinite* (my emphasis) requires specific approval. This is referring to the agency worker being given an employment contract. This highlights that the work given to the claimants is not indefinite; their engagement is subject to distinct engagements for fixed periods of time. It is then reviewed and could (and probably would) be continued but there is no right to continue even if the second respondent wishes to do so. Their roles are terminable upon some condition being satisfied (such as the absence of other work upon expiry of the assignment, the absence of funding or lack of authorisation to renew the engagement), unlike that of permanent employees whose contracts are indefinite (in the sense of not being temporary).
106. I note that some of the claimants have lengthy service with the second respondent. But temporary does not mean short term; it means not permanent. The claimants’ roles are not indefinite in nature. They were not retained on a permanent or indefinite basis.
107. Looking at each claimants’ position on an individual basis (even although the parties accept this is not necessary) supports the conclusion that, for each of them, their roles are not permanent or indefinite. Each claimant has been



engaged on specific series of assignments which had an end date. That was considered by the second respondent who determined whether or not to extend or offer another post. Absent other work (and/or funding and/or approval) the engagement would end. At the point of entering each assignment, the parties knew that the role was not guaranteed to continue – it was not indefinite. It was terminable upon conclusion unless the conditions were satisfied that allowed another assignment to be offered. The email communication between the first and second respondent shows that the roles are not indefinite and would end, absent any other assignments. This underlines the temporary nature of the claimants' work.

108. Permanent means open ended in duration which is the opposite of the relationship each claimant has with the second respondent.

109. The reality of the claimant's positions, in my judgment, having considered the evidence I heard and the productions to which I was directed, is that the claimants were provided temporarily to work for and under the control of the second respondent. I reach this conclusion having considered carefully both counsel for the second respondent's submissions and the claimants' submissions and the authorities in this area and I have applied the wording of the Regulations.

110. I have reached my conclusions by assessing the purpose and nature of the work for which each claimant was supplied to the second respondent. The reality of the situation was that each claimant, from the evidence, was not supplied on a permanent basis – it was temporary. The claimants were not engaged or assigned on an indefinite basis to carry out ongoing work. They worked temporarily for a fixed period, even in respect of work that could be described as indefinite or ongoing. Each assignment would only be renewed if the second respondent was able (and desirous) to do so. Their desire or intention, however, does not result in the work being permanent, or not temporary. That is assessed by looking at the full circumstances which I have done.

**Conclusion**

111. In conclusion I find that each claimant was an individual who was supplied by  
the first respondent (a temporary work agency) to work temporarily for and  
under the supervision and direction of the second respondent (the hirer) and  
5 as such the claimant's claims should now proceed to a Hearing.

Employment Judge:

D Hoey

Date of Judgement:

23 October 2019

10 Entered in Register,

Copied to Parties:

29 October 2019