Appeal Nos. UKEAT/0105/19/JOJ
UKEAT/0209/19/JOJ

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 21 and 22 October 2020
Judgment handed down on 11 December 2020

Before

THE HONOURABLE MR JUSTICE CAVANAGH

MR P M HUNTER

UKEAT/0105/19/JOJ

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

(1) MR D KOCUR
(2) MS C ROBERTS — RESPONDENTS

UKEAT/0209/19/JOJ

(1) MR D KOCUR
(2) MS C ROBERTS — APPELLANTS

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

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellants in UKEAT/0105/19/JOJ	MR DAVID READE (One of Her Majesty's Counsel) And MR JAMES BOYD (Of Counsel) Instructed by: DAC Beachcroft LLP The Walbrook Building 25 Walbrook London EC4W 8AF
For the First Respondent in UKEAT/0105/19/JOJ	MR NATHANIEL CAIDEN (Of Counsel) Instructed by: Direct Access
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For the Appellants in UKEAT/0209/19/JOJ	MR DANIEL BARNETT (Of Counsel) Instructed by: Marc Jones, IBB Law Capital Court 30 Windsor Street Uxbridge Middlesex UB8 1AB
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For the Respondents in UKEAT/0209/19/JOJ	MR JAMES BOYD (Of Counsel) Instructed by: DAC Beachcroft LLP The Walbrook Building 25 Walbrook London EC4W 8AF

SUMMARY

AGENCY WORKERS AND CONTRACT OF EMPLOYMENT

This appeal is primarily concerned with the scope of the rights conferred on agency workers by and the Agency Workers' Regulations 2010 ("the AWR"), which implements the Agency Workers Directive ("the Directive") into domestic law. The EAT found that:

(1) The right conferred by regulation 13(1) of the AWR (derived from Article 6.1 of the Directive), which provides that an agency worker has, during an assignment, the right to be informed by the hirer of any relevant vacant posts with the hirer, to give the agency worker the same opportunity as a comparable worker to find permanent employment with the hirer, does not mean that the agency worker has a right to be entitled to apply for and be considered for, internal vacancies on the same terms as directly-recruited employees. It is a right to be notified of the vacancies on the same basis as directly-recruited employees, and a right to be given the same level of information about the vacancies as the directly-recruited employees. Angard and Royal Mail's appeal on this issue was allowed;

(2) There was no breach of regulation 5 of the AWR arising from the fact that shift lengths for the claimant agency workers were 12 minutes longer than they would have been if the claimants had been recruited directly. The disparity arose because the weekly working hours for direct recruits were 39 hours, whereas agency workers were given shifts on the basis of a 40-hour week. Agency workers were paid for the extra time that they worked. The AWR (and the Directive) do not entitle agency workers to work the same number of contractual hours as a comparator directly-recruited worker. The reference to equal treatment in relation to "the duration of working time" has a more limited meaning: it means that if the hirer sets a maximum period when a comparable employee could be required to work, the hirer could not set a different maximum for agency workers. This

conclusion is consistent with the rulings of the EAT and the Court of Appeal in **Kocur 1** (**Kocur v Angard Staffing Solutions Ltd and another** [2018] ICR 1126, and [2019] EWCA Civ 1185; [2020] ICR 170). Angard and Royal Mail's appeal on this issue was allowed;

(3) A pay rise was implemented for the claimant agency workers some six months after it had been implemented for comparable direct employees, even though, eventually, both groups of workers were paid at the same rate for the relevant period. The EAT found that there could, potentially, be a breach of the requirement in regulation 5 of the AWR to provide equal treatment to agency workers for basic employment and working conditions relating to "pay", if pay rises were implemented for agency workers at a later date than they were implemented for direct employees. The ET erred in law on this issue. The claimants' appeal on this ground was allowed and the matter remitted to a different ET to determine whether an implied term was ordinarily included in the terms and conditions of direct employees to the effect that pay rises should be implemented within a reasonable period and, if there was such an implied term, whether the agency workers had been treated less favourably than direct employees and/or had suffered loss;

(4) The ET had not erred in law in holding that Angard and Royal Mail had not acted in breach of the obligation regarding equal treatment in relation to the "duration of working time" by providing weekly half-hour "Work Time Listening and Learning" training sessions for direct employees at a time when agency workers were expected to carry on with their normal work. There is nothing in the wording of either the Directive or the AWR to suggest that there is a requirement for equality of treatment in relation to the content of working time. The claimants' appeal on this issue was dismissed;

(5) Comparable direct employees were given first refusal in relation to overtime opportunities in preference to agency workers. The ET was right to find that this did not breach the

claimants' rights under the AWR. The right to equality of treatment in relation to basic working and employment conditions concerned with "overtime" did not extend to a right to equal treatment in relation to opportunities for overtime. Further, and in any event, the ET was right to undertake the hypothetical exercise of consider whether, if the claimants had been directly recruited, they would have been included in the group of employees who had a contractual right to first refusal for overtime. The ET was entitled to find that they would not have been included. The Claimants' appeal on this issue was dismissed;

(6) The pay slips of the claimant agency workers provided a less detailed breakdown of pay information than the payslips of direct employees. The right, under regulation 5(1) of the AWR, to equal treatment for basic working and employment conditions relating to "pay" did not extend to a right to the same pay information on pay slips. In any event, the ET was entitled to conclude that, if the claimants had been employed directly, they would not have had a contract term which specified a particular level of information on their pay slips. Accordingly, the ET did not err in law on this issue and the claimants' appeal on this point was dismissed;

(7) The breaks of agency workers within each shift were of the same duration as those of comparable direct employees. Both sets of workers were paid at the same rate for their breaks. However, the short breaks in each shift were scheduled in advance for direct employees, but not for agency workers. The ET was right to find that this did not breach the AWR. The timing of breaks was not within the scope of regulation 5(1) of the AWR because it did not concern "the duration of working time". In any event, the ET was entitled to find that direct employees had no contractual right to have their shorter breaks scheduled in advance. The claimants' appeal on this point was dismissed.

Angard also appealed on the basis that the ET had erred in law in finding that Angard had failed in its obligations to provide the claimants with an accurate and up-to-date statement of particulars of their employment, as required by sections 1 and 4 of the Employment Rights Act 1996, because the terms and conditions set out in their section 1 statements did not reflect the rights conferred upon them by the equal treatment provisions of the AWR. Angard contended that the AWR did not create any contractual rights. The EAT declined to decide this issue on the basis that the appeal was premature, as the ET had not itself yet ruled on this point.

THE HONOURABLE MR JUSTICE CAVANAGH

Introduction

1. This judgment is handed down in respect of two appeals, involving the same parties, which were heard consecutively. Each of the appeals is an appeal against the judgment of the Employment Tribunal (ET), sitting in Sheffield (Employment Judge Wade and members), which was entered in the Register and sent to the parties on 29 November 2018. The appellants in the first appeal are the respondents in the second, and vice versa. For convenience, we will refer to Angard Staffing Solutions Limited as "Angard" and to Royal Mail Group Limited as "Royal Mail" (and collectively as "the respondents"), and we will refer to Mr Kocur and Ms Roberts as "the claimants".

2. The relevant facts were not in dispute before the ET. At all material times, the claimants were employed by Angard as agency workers. It is common ground between the parties that the claimants were agency workers for the purposes of the Agency Workers Regulations 2010, SI 2010/93 ("the AWR"), and that they had attained the 12 weeks' qualifying service which is required in order for an agency worker to qualify for the rights in relation to the basic working and employment conditions that are set out in regulation 5 of the AWR. Angard is an employment agency which is a wholly-owned subsidiary of Royal Mail. Angard provides agency workers to Royal Mail (and only to Royal Mail) in order to assist Royal Mail with reacting to fluctuations in demand for postal workers from day to day. As it is wholly within Royal Mail's control, it is Royal Mail which determines the pay and conditions of employment for agency workers who are employed by Angard. The claimants were supplied by Angard to work in Royal

Mail's Leeds Mail Centre in an operational post grade (known as OPG). They were given regular work at the Leeds Mail Centre.

3. In the proceedings before the ET, the claimants presented twelve complaints of alleged breaches of the AWR by Angard (as the employment agency which employed the claimants) and Royal Mail (as the hirer), and, in one respect, of a breach of section 1 of the Employment Rights Act 1996 by Angard (obligation to provide a statement of terms and conditions of employment). The claimants were successful in five of them. The respondents appealed against certain of the ET's findings against them to the Employment Appeal Tribunal (EAT), and the claimants appealed against a number of the ET's findings against them. In respect of the respondents' appeal (0105/19), Elisabeth Laing J permitted two grounds of appeal to proceed at the paper sift stage, and Eady J permitted a further ground of appeal to proceed at a rule 3(10) hearing. As for the claimants' appeal (0209/19), Lavender J declined to permit any grounds to proceed at the paper sift stage, but HHJ Stacey allowed five (amended) grounds to proceed at a rule 3(10) hearing.

4. We will deal with each of the grounds of appeal in detail later in this judgment. In short however, the respondents have five grounds of appeal that relate to three issues:

Issue (1): Internal vacancies

(1) Regulation 13(1) of the AWR provides that an agency worker has, during an assignment, the right to be informed by the hirer of any relevant vacant posts with the hirer, to give the agency worker the same opportunity as a comparable worker to find permanent employment with the hirer. The ET held that this extended to an obligation to grant the agency worker the same opportunity to apply for relevant vacant posts as the comparable worker. The respondents contend that the ET misinterpreted regulation 13, and that the obligation was satisfied if agency workers

were informed of the relevant vacancies, even if they were not given the opportunity to apply for them.

Issue (2): Shift length

(2) The claimants' shifts were 12 minutes longer than the comparable workers' shifts. This was because daily shifts were planned on the basis of a 39-hour working week for the comparable permanent workers, and a 40-hour working week for agency workers. The ET found that this infringed the Claimants' rights under the AWR, regulation 5, to be entitled to the same basic working and employment conditions as they would have been entitled to for doing the same job if they had been recruited by the hirer. The respondents contend that, in so finding, the ET misdirected itself about the meaning and effect of regulation 5, and/or drew conclusions based on contradictory findings.

Issue (3): section 1 statement

(3) The respondents contend that, in concluding that Angard did not include adequate particulars of employment in the claimants' contracts of employment and in making a (provisional) determination as to the correct particulars of employment, the Tribunal misapplied the law as set out in sections 1, 4, 11 and 12 Employment Rights Act 1996 ('ERA'), and/or reached a conclusion that was perverse.

5. The claimants' five grounds of appeal are as follows:

Issue (4): Late payment of the 2018 pay increase

(4) On 26 January 2018, a collective agreement was agreed between Royal Mail and the Communications Workers' Union ("CWU"). This provided, amongst other things, for a 5% pay increase, backdated to October 2017. The pay increase was implemented for Royal Mail employees in Leeds Mail Centre on or about 4 May 2018, at which point the Royal Mail employees received the backdated element of their pay increase. At about the same time, Royal Mail commenced a review of agency terms. Following the review,

the 5% pay increase, including the backdated element, was paid to agency staff in two tranches, in July and late September or October 2018. The two claimants received their backdated pay increases by the end of October 2018. The result was that, when the backdated element was taken into account, the claimants received the same pay as comparable full-time workers for the period from October 2017 onwards, but they had to wait longer for the pay rise to be implemented and to receive their backdated element. The ET rejected the claimants' contention that this was a breach of AWR, regulation 5. The claimants submit that the ET erred in law in so doing.

Issue (5): Worktime Listening and Learning training sessions

(5) Comparable direct employees at the Leeds Mail Centre were required to attend a "Work Time Listening and Learning" ("WTLL") training session once a week. Agency workers did not attend these training sessions. The ET rejected the claimants' argument that this difference in treatment amounted to a breach of AWR, regulation 5. The claimants submit that this was an error of law.

Issue (6): Opportunity for overtime

(6) Comparable direct employees at the Leeds Mail Centre were given first refusal on opportunities for overtime, before agency workers would be offered overtime. The claimants contended that the different arrangements for overtime were a breach of AWR, regulation 5. The ET rejected this contention and the claimants submit that this was an error of law.

Issue (7): Averaging pay on payslips

(7) The amount of information that Royal Mail provided to its direct employees on their payslips is generally more detailed than the information that Angard provides to agency workers on their payslips. The agency workers' payslips did not set out all the underlying pay rates and hours information. Instead, an average pay rate appeared on the payslips. The claimants contended that this, too, was a breach of regulation 5. The ET dismissed this part of their claims and the claimants say that this was an error of law.

Issue (8): the scheduling of breaks

(8) Agency workers were entitled to the same amount and duration of breaks within shifts as directly-employed Royal Mail employees. The only difference was that the timing of one break, the shorter break, was specified on the signing-in sheets of directly-employed employees at the Leeds Mail Centre, whereas this was not the case for agency workers. Agency workers did not know at the start of their shift when they would be taking their shorter break, and would go when told to do so by their manager. The ET rejected the claimants' argument that this was a breach of regulation 5, and they say, once again, that this was an error of law on the part of the ET.

6. These appeals, which were heard remotely, were dealt with by a judge and one lay member. The other lay member who had been assigned to these appeals was unwell and was unable to participate. The parties were informed of this, in accordance with paragraph 19(1) of the EAT Practice Direction and each gave written confirmation of their agreement for the appeals to proceed with a judge and a single lay member. Therefore, in accordance with the Employment Tribunals Act 1996, section 28(3), the appeals proceeded with a judge and one lay member.

7. The respondents were represented in appeal 0105/19 by David Reade QC and James Boyd, and by Mr Boyd in appeal 0209/19. Mr Kocur was represented in appeal 0105/19 by Mr Nathaniel Caiden of counsel. Mr Kocur represented his fellow claimant, Ms Roberts, in this appeal, and we permitted him to follow Mr Caiden by making some oral submissions of his own. We proceed on the basis that he also adopted Mr Caiden's submissions on behalf of Ms Roberts. In the second appeal, 0209/19, Mr Daniel Barnett of counsel appeared on behalf of the claimants. Exceptionally, we permitted Mr Kocur to follow Mr Barnett by making some additional submissions of his own. We are grateful to counsel and to Mr Kocur for their helpful submissions.

A

8. We will first set out the legal framework relating to the agency worker claims, and the findings of the ET as regards the identity of comparable permanent workers for the purposes of claims under regulation 13 of the AWR, and the arrangements for filling vacancies at the Leeds Mail Centre. We will then deal in turn with the eight issues in these appeals.

B

9. This is not the only set of proceedings which Mr Kocur has brought against Angard and Royal Mail, in which he complains about breaches of the AWR. In 2016, an ET heard complaints by Mr Kocur of breaches of AWR, regulation 5, in relation to annual leave and compensation for rest breaks. In a judgment dated 16 September 2016, the ET rejected Mr Kocur's claims. In a judgment dated 23 February 2018, the EAT (Choudhury J, Mr H Singh and Mr D G Smith), allowed Mr Kocur's appeal in relation to annual leave and dismissed his appeal in relation to compensation for rest breaks: **Kocur v Angard Staffing Solutions Ltd and another** [2018] ICR 1126. Mr Kocur appealed to the Court of Appeal, and, in a judgment dated 11 July 2019, the Court of Appeal (Underhill, Lewison and King LJJ) dismissed Mr Kocur's appeal: [2019] EWCA Civ 1185; [2020] ICR 170. We will refer to these appeals as the appeals in **Kocur 1**. The ET in the present proceedings was aware of, and took account, of the EAT's judgment, but its judgment was handed down before the further appeal to the Court of Appeal was heard. In still further proceedings under the AWR, involving Mr Kocur and others, the EAT held that Mr Kocur and those in a similar position were "agency workers" for the purposes of the definition in regulation 3 of the AWR: **Kocur and others v Angard Staffing Solutions and another** [2020] IRLR 732 (HHJ Auerbach). On behalf of the respondents in the present appeals, Mr Reade QC made clear that he was not arguing, for the purposes of these proceedings, that Mr Kocur and Ms Roberts were not agency workers for the purposes of the AWR.

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The legal framework relating to the agency worker claims

The Agency Workers' Directive

10. The AWR were made in order to implement into domestic law the Temporary Agency Workers' Directive, Directive 2008/104/EC of 19 November 2008 ("the Directive"). In accordance with normal principles of construction of domestic legislation which implements an EU Directive, the provisions of the AWR must, so far as is possible, be read in a way which gives effect to the meaning and purpose of the provisions of the Directive that they were designed to implement.

11. The recitals to the Directive make clear that the intention is to strike an appropriate balance between the protections to be granted to agency workers, on the one hand, and the benefits of the flexibility that is provided to employers and to workers by agency working, on the other.

12. The recitals include the following:

> **"(1) This Directive respects the fundamental rights and complies with the principles recognised by the Charter of Fundamental Rights of the European Union. In particular, it is designed to ensure full compliance with article 31 of the Charter, which provides that every worker has the right to working conditions which respect his or her health, safety and dignity, and to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.**
>
> **(2) The Community Charter of the Fundamental Social Rights of Workers provides, in point 7 thereof, inter alia, that the completion of the internal market must lead to an improvement in the living and working conditions of workers in the European Community; this process will be achieved by harmonising progress on these conditions, mainly in respect of forms of work such as fixed-term contract work, part-time work, temporary agency work and seasonal work.**
>
> ....
>
> **(8) In March 2005, the European Council considered it vital to relaunch the Lisbon Strategy and to refocus its priorities on growth and employment. The Council approved the Integrated Guidelines for Growth and Jobs 2005–2008, which seek, inter alia, to promote flexibility combined with employment security**

and to reduce labour market segmentation, having due regard to the role of the social partners.

(9) In accordance with the Communication from the Commission on the Social Agenda covering the period up to 2010, which was welcomed by the March 2005 European Council as a contribution towards achieving the Lisbon Strategy objectives by reinforcing the European social model, the European Council considered that new forms of work organisation and a greater diversity of contractual arrangements for workers and businesses, better combining flexibility with security, would contribute to adaptability. Furthermore, the December 2007 European Council endorsed the agreed common principles of flexicurity, which strike a balance between flexibility and security in the labour market and help both workers and employers to seize the opportunities offered by globalisation.

….

(11) Temporary agency work meets not only undertakings' needs for flexibility but also the need of employees to reconcile their working and private lives. It thus contributes to job creation and to participation and integration in the labour market.

(12) This Directive establishes a protective framework for temporary agency workers which is non-discriminatory, transparent and proportionate, while respecting the diversity of labour markets and industrial relations.

….

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

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

…."

13. The substantive parts of the Directive state as follows, in relevant part:

"Article 1

Scope

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

Article 2

Aim

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

Article 3

Definitions

1. For the purposes of this Directive— … (e) 'assignment' means the period during which the temporary agency worker is placed at the user undertaking to work temporarily under its supervision and direction;

(f) 'basic working and employment conditions' means working and employment conditions laid down by legislation, Regulations, administrative provisions, collective agreements and/or other binding general provisions in force in the user undertaking relating to— (i) the duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays; (ii) pay …

2. This Directive shall be without prejudice to national law as regards the definition of pay, contract of employment, employment relationship or worker.

Article 5

The principle of equal treatment

1. The basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job

….

4. Provided that an adequate level of protection is provided for temporary agency workers, member states in which there is either no system in law for declaring collective agreements universally applicable or no such system in law or practice for extending their provisions to all similar undertakings in a certain sector or

geographical area, may, after consulting the social partners at national level and on the basis of an agreement concluded by them, establish arrangements concerning the basic working and employment conditions which derogate from the principle established in paragraph 1. Such arrangements may include a qualifying period for equal treatment. The arrangements referred to in this paragraph shall be in conformity with Community legislation and shall be sufficiently precise and accessible to allow the sectors and firms concerned to identify and comply with their obligations

….

Article 6

Access to employment, collective facilities and vocational training

1. Temporary agency workers shall be informed of any vacant posts in the user undertaking to give them the same opportunity as other workers in that undertaking to find permanent employment. Such information may be provided by a general announcement in a suitable place in the undertaking for which, and under whose supervision, temporary agency workers are engaged.

2. Member States shall take any action required to ensure that any clauses prohibiting or having the effect of preventing the conclusion of a contract of employment or an employment relationship between the user undertaking and the temporary agency worker after his assignment are null and void or may be declared null and void.

This paragraph is without prejudice to provisions under which the temporary agencies receive a reasonable level of recompense for services rendered to user undertakings for the assignment, recruitment and training of agency workers.

3. Temporary-work agencies shall not charge workers any fees in exchange for arranging them to be recruited by a user undertaking, or for concluding a contract of employment or an employment relationship with a user undertaking after carrying out an assignment in that undertaking.

….

5. Member states shall take suitable measures or shall promote dialogue between the social partners, in accordance with their national traditions and practices, in order to:

….

(b) improve temporary agency workers' access to training for user undertakings' workers.

Article 9

Minimum requirements

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

The AWR

14. The AWR creates certain rights for agency workers which are in place from the commencement of the temporary work assignment (sometimes known as "Day 1 rights") and other rights which only come into being once a 12-week qualifying period has been served.

15. The AWR provide, in relevant part:

"2. Interpretation

…..

"contract of employment" means a contract of service or of apprenticeship, whether express or implied, and (if it is express) whether oral or in writing"

…."

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

(1) Subject to regulation 7 , an agency worker (A) shall be entitled to the same basic working and employment conditions as A would be entitled to for doing the same job had A been recruited by the hirer— (a) other than by using the services of a temporary work agency; and (b) at the time the qualifying period commenced.

(2) For the purposes of paragraph (1), the basic working and employment conditions are— (a) where A would have been recruited as an employee, the relevant terms and conditions that are ordinarily included in the contracts of employees of the hirer; (b) where A would have been recruited as a worker, the relevant terms and conditions that are ordinarily included in the contracts of workers of the hirer, whether by collective agreement or otherwise, including any variations in those relevant terms and conditions made at any time after the qualifying period commenced.

(3) Paragraph (1) shall be deemed to have been complied with where— (a) an agency worker is working under the same relevant terms and conditions as an employee who is a comparable employee, and (b) the relevant terms and conditions of that comparable employee are terms and conditions ordinarily included in the contracts of employees, who are comparable employees of the hirer, whether by collective agreement or otherwise.

(4) For the purposes of paragraph (3) an employee is a comparable employee in relation to an agency worker if at the time when the breach of paragraph (1) is alleged to take place— (a) both that employee and the agency worker are— (i) working for and under the supervision and direction of the hirer, and (ii) engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification and skills; and (b) the employee works or is based at the same establishment as the agency worker or, where there is no comparable employee working or based at that establishment who satisfies the requirements of sub-paragraph (a), works or is based at a different establishment and satisfies those requirements.

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

…..

"6. Relevant terms and conditions

(1) In regulation 5(2) and (3) 'relevant terms and conditions' means terms and conditions relating to— (a) pay; (b) the duration of working time; (c) night work; (d) rest periods; (e) rest breaks; and (f) annual leave.

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

….

"(5) In this regulation— …

"relevant training" means work experience provided pursuant to a training course or programme, training for employment, or both, other than work experience or training –

the immediate provider of which is an educational institution or a person whose main business is the provision of training, and

which is provided on a course run by that institution or person;

"rest period", in relation to an individual, means a period which is not working time, other than a rest break or leave to which that individual is entitled either

under the Working Time Regulations 1998 or under the contract between that individual and the employer of that individual;

"working time", in relation to an individual means— (a) any period during which that individual is working, at the disposal of the employer of that individual and carrying out the activity or duties of that individual, (b) any period during which that individual is receiving relevant training, and (c) any additional period which is to be treated as working time for the purposes of the Working Time Regulations 1998 under a working time agreement;

…."

"7. Qualifying period

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

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

…."

"13. Rights of agency workers in relation to access to employment

(1) An agency worker has during an assignment the right to be informed by the hirer of any relevant vacant posts with the hirer, to give that agency worker the same opportunity as a comparable worker to find permanent employment with the hirer.

(2) For the purposes of paragraph (1) an individual is a comparable worker in relation to an agency worker if at the time when the breach of paragraph (1) is alleged to take place—

(a)both that individual and the agency worker are—

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

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

(b)that individual works or is based at the same establishment as the agency worker; and

(c)that individual is an employee of the hirer or, where there is no employee satisfying the requirements of sub-paragraphs (a) and (b), is a worker of the hirer and satisfies those requirements.

(3) For the purposes of paragraph (1), an individual is not a comparable worker if that individual's employment with the hirer has ceased.

(4) For the purposes of paragraph (1) the hirer may inform the agency worker by a general announcement in a suitable place in the hirer's establishment."

16. Regulation 14 provides that both the temporary work agency and the hirer are responsible for any breach of regulation 5, to the extent that they are responsible for the breach (subject to some irrelevant exceptions in the case of the hirer). It is for this reason that both Angard and Royal Mail were made respondents in these proceedings.

17. As for remedies, regulation 18 provides that an agency worker may bring a complaint to the ET in relation to a breach of the AWR, and regulation 18(8) provides:

"(8) Where an employment tribunal finds that a complaint presented to it under this regulation is well founded, it shall take such of the following steps as it considers just and equitable—

(a)making a declaration as to the rights of the complainant in relation to the matters to which the complaint relates;

(b)ordering the respondent to pay compensation to the complainant;

(c)recommending that the respondent take, within a specified period, action appearing to the tribunal to be reasonable, in all the circumstances of the case, for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the complaint relates."

Kocur 1

18. **Kocur 1** dealt with different issues from those that arise in the present appeals. However, the EAT in **Kocur 1** gave helpful general guidance which is relevant to the present appeals, and we will refer later in this judgment to guidance that the EAT and/or Court of Appeal gave in **Kocur 1** which is relevant to particular issues in these appeals.

19. At paragraphs 27 and 28 of **Kocur 1**, the EAT made clear that a term-by-term approach is required by the AWR, and that the mechanism by which parity is achieved need not be identical for agency workers and for direct recruits. The EAT said:

> **"27. We agree with both counsel that a term-by-term approach is required by the Regulations. The structure of the Regulations, whereby only a few stipulated terms and conditions are required to be the same for the agency worker and the employee, and where there is nothing to suggest that the employer or agency can offset the shortfall in respect of one of those terms (e g annual leave) by conferring a greater entitlement in respect of another (e g rest periods), drives one to that conclusion. However, when considering what remuneration an agency worker obtains in respect of annual leave, one is only concerned with a particular term, namely the term dealing with remuneration for annual leave. The Regulations do not prescribe that the mechanism by which parity is achieved must be identical. Thus, an agency worker may be paid for his identical holiday entitlement by means of a lump sum at the end of the assignment, or by means of a higher hourly rate into which an amount for holiday pay has been rolled-up. These methods of payment might differ from that applicable to employees. However, if the result is that the agency worker is paid at least that which is paid to the employee in respect of the same holiday entitlement then there would not be a breach. That approach is not a package-based one, but one which focuses on the term as to remuneration for annual leave.**
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> **28. However, the analysis in the preceding paragraph is subject to an important caveat. That is that the payment mechanism deployed must be transparent and the agency worker must be able readily to ascertain precisely what aspect of his remuneration relates to annual leave. In our judgment, if it is clear on the facts that an agency worker receives remuneration in respect of annual leave which is at least that which employees receive, then, notwithstanding that this may be achieved by a different mechanism, the requirement under regulation 5(1) of the Regulations would be met."**

20. Moreover, the EAT and the Court of Appeal in **Kocur 1** gave important guidance on the meaning of "the duration of working time" in regulation 6(1) of the AWR, which defines "relevant terms and conditions" for the purposes of regulation 5. We will consider this guidance when we come on to deal with Issue (2).

Comparable employees and comparable workers, and the arrangements for filling vacancies at the Leeds Mail Office

21. The entitlement to parity of treatment in relation to the basic working and employment conditions, set out in regulation 5(1), is to the same basic working and employment conditions as the agency worker would be entitled to for doing the same job if he or she had been directly recruited by the hirer. The effect of regulation 5(3) is that this obligation is deemed to have been complied with if the agency worker is working under the same relevant terms and conditions as a comparable employee of the hirer, and those terms and conditions are ordinarily included in the contracts of comparable employees of the hirer, whether by collective agreement or otherwise. Comparable employees are defined in regulation 5(4), above. Also, the right to be notified of relevant vacant posts under regulation 13 is in order "to give the agency worker the same opportunity as a comparable worker to find permanent employment with the hirer." The definition of "comparable workers" in regulation 13 is, similar, though not quite identical, to the definition of comparable employees. It is, therefore, important in a case such as this to identify the comparable employees and comparable workers

22. The ET in the present case made a finding about comparable workers at paragraph 83 of its judgment, in which the ET said that:

> **"In our judgment a comparable worker is a reserve OPG, an employee of Royal Mail yet to be allocated a permanent duty consisting of sorting work, but deployed to cover the absence of permanent such duty holders."**

23. At paragraphs 26 and 27 of the judgment, the ET found that Royal Mail operated a CWU agreed resourcing model, pursuant to which recruitment of direct employees to address wastage occurred every six months or when vacancy levels rose above 5%. In practice, after direct employees' overtime was allocated, there was a weekly need for agency workers of up to 5% capacity. This demand was met by keeping a bank of long-term "temporary" agency workers, who were employed by Angard, but who had considerable experience of the work at the Leeds

Mail Office. The core grade of employees who carried out sorting work at the Leeds Mail Office was known as the OPG Grade. When new directly-recruited OPG employees were required, they were recruited as reserves, in the sense that they were not allocated a fixed shift or duty, but were used as the first tier of flexible resource. When a fixed role became available, it was filled from the reserve OPG pool solely on the basis of seniority (ie length of service). It was this "reserve" class of OPG operatives that the ET found amounted to comparable employees with the agency workers for the purpose of regulation 5 of the AWR.

The issues in the appeals

Issue (1): internal vacancies

24. The question is whether the obligation under regulation 13 is satisfied if the hirer notifies the agency worker of a relevant vacant post, without giving the agency worker the same opportunity to apply for, and be considered for, that post as a comparable directly-employed worker would have had. This arises in circumstances in which permanent, fixed, vacancies for particular shifts or duties in relation to sorting work at the Leeds Mail Office were offered first to OPG operatives who were already in permanent posts and to those in the reserve class of OPG operatives. This was in accordance with an agreement with the CWU. As the ET observed at paragraph 80 of its judgment, "This system of seniority allows those with longer service to seek out more genial posts without external competition." Royal Mail wanted to fill the vacancies without increasing headcount.

25. Agency workers in the claimants' position were notified when such vacancies arose. The vacancy list was put up on the notice board at Leeds Mail Centre. However, they were not given the opportunity to apply for them. Indeed, they were informed that they were ineligible to do so. They could only apply for vacancies when they were advertised externally, and when they did so, they were in competition with external applicants.

26. The ET accepted the respondents' submission that, if it is to be read literally, regulation 13 only requires that vacancies such as these are notified to the agency workers. However, the ET noted that Article 6.1 of the Directive, which regulation 13 implements, provides that "Temporary agency workers shall be informed of any vacant posts in the user undertaking *to give them the same opportunity as other workers in that undertaking to find permanent employment*…." (emphasis added). Similar wording appears in regulation 13(1) itself. The ET interpreted this to mean that the agency workers had also to be given the same opportunity to apply for, and be considered for, the permanent posts as those in the OPG reserve. Therefore, the ET found, in the claimants' favour, that Royal Mail had breached regulation 13. However, the ET postponed until the remedy stage a further issue, namely how the "seniority" criterion is to be addressed for agency workers, bearing in mind, in particular, that the right under regulation 13 is a Day 1 right. The ET also left open the possibility that a different approach might apply where the preference given to internal staff was in order to protect them from dismissal where their own jobs were redundant. The vacancies to which the complaints related had not arisen against the background of redundancies. They were vacancies that had arisen in the normal course of events because of departures for different jobs or retirements.

27. It is fair to say that the ET did not set out its reasoning in relation to the "internal vacancies" issue in any great detail, at paragraphs 77-91 of the judgment, but it may well be that the ET did not have the benefit of the detailed submissions that we have received on this issue.

The parties' submissions

28. In his submissions on behalf of the respondents, Mr Reade QC emphasised that the Directive was not designed to inhibit agency work, and was infused with a recognition that the

intention was to provide flexibility, whilst recognising the diversity of labour markets and industrial relations in the EU. A balance has been struck, and there is no absolute right to equal treatment for agency workers with direct hires. Therefore, whilst he accepted that the AWR should be given a purposive interpretation so as to bring them, if possible, in line with the meaning and purpose of the Directive, he said that this did not mean that the AWR should be interpreted in a way that extended the protections beyond the protections that are expressly set out in the clear language of the Regulations themselves. He acknowledged that the literal construction yields to the purposive approach, but submitted that the literal construction was consistent with the purposive approach.

29. It was submitted that regulation 13 is drafted in a conjunctive way. Mr Reade QC emphasised that the express right to be informed of vacancies exists "so as to provide" the agency worker with the same opportunity as comparable workers to find permanent employment. This means, he submitted, that the "same opportunity" is met by fulfilling the primary obligation to inform. It is not granting an additional right.

30. Mr Reade QC referred us to the last sentence of Article 6.1, which does not appear in the AWR. This says that "Such information may be provided by a general announcement in a suitable place in the undertaking for which, and under whose supervision, temporary agency workers are engaged." Mr Reade QC said that this emphasises that the obligation is an obligation to inform, and to do no more than that. If the Directive had intended to add an obligation to permit agency workers to apply on the same basis as comparable workers, it would surely have said so. He said that the interpretation adopted by the ET added a whole new set of rights to equal treatment in the AWR, which are not set out in the Directive. On the claimants' case, there was, in addition to a right to be informed of relevant vacancies, a right to apply for them, and then a further right to be considered for them on the same basis as comparable worker. He pointed

out that the right to be notified of vacancies was in a different provision within the Directive, Article 6, from the general right to equal treatment, which was dealt with in Article 5. Moreover, the relevant part to the heading in Article 6 was "Access to employment" not "Equal treatment in employment opportunities". The rest of Article 6 was not about equal treatment for agency workers. For example, Article 6.3 promoted access to employment in that it prohibited temporary-work agencies from charging fees to workers for being directly recruited by the hirer.

31. Mr Reade QC further submitted that it would be wrong in principle to prevent employers such as Royal Mail from deciding that it should limit the opportunity to fill internal vacancies to those who were already permanent employees. It would fetter an employer's ability to choose the terms upon which it selected its employees. This would be inconsistent with the objectives of the Directive, as set out in the recitals. Moreover, in other legal contexts the Court of Justice of the European Union ("CJEU") has underlined the need to balance protection for workers with the need for companies to be free to conduct their business. Mr Reade QC gave the example of **Alemo-Herron v Parkwood Leisure Limited (C-426/11)** [2013] ICR 1116, at paragraph 25. This was a TUPE case in which the CJEU said that the Acquired Rights Directive made clear that the transferee business must be in a position to make the adjustments and changes necessary to carry on its operations.

32. Mr Reade QC relied upon the ruling of the EAT in the case of **Coles v Ministry of Defence** [2016] ICR 55 (Langstaff J), which he said gave strong support to his argument, though he stopped short of submitting that we were bound to follow **Coles**. In **Coles,** the Ministry of Defence had placed a number of direct employees in a redeployment pool, after a restructuring exercise. They were at risk of redundancy. Employees in the redeployment pool were given priority consideration for vacancies at the Ministry. The claimant was an agency worker who had been supplied to work at the Ministry. The post that the claimant had been filling was advertised

on the Civil Service website, and it would have been visible to the claimant if he had looked for it, but he was not eligible to apply for it. The post was given to a permanent employee from the redeployment pool.

33. The ET in **Coles** accepted that the Directive had direct effect, because the Ministry is an emanation of the state. However, the ET rejected the claimant's submission that Article 6.1 did not permit the Ministry to form a redeployment pool of employees, whose members could be given priority over temporary agency workers for vacancies within its undertaking. The ET held that both the Directive and the AWR required the provision of information about vacancies so as to confer the opportunity for potential application, but it does not confer the right to apply as such. The ET said that the Directive did not require the employer to displace existing permanent workers by offering temporary agency workers the right to compete with them for a permanent post.

34. The EAT dismissed the claimant's appeal against the ET's decision on this issue. The EAT accepted that the right to be informed of a vacancy was a valuable right in itself, because it gives the agency worker an opportunity to make an informed decision as to whether to apply: see judgment, paras 29-33. The EAT held that the language of Article 6 supports the respondent's case.

35. Langstaff J summarised his conclusions at paragraph 51 of his judgment:

> **"51. In summary, it is clear that the Directive provides a right to information. The right is a valuable right in itself. The purpose of the Directive is to give temporary agency workers the same chance as other workers in the undertaking of the end user to find permanent employment with that end user. It has nothing to say about the terms upon which there should be recruitment for any post. If an employer wishes to give preference to those being redeployed, perhaps to satisfy his obligations to them as his permanent employees, he is entitled to do so, and will not in doing so break any duty imposed by the Regulations or the Directive."**

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36. Langstaff J declined to refer a question to the CJEU on this issue, on the basis that there was no need to do so, as he was confident as to the meaning of Article 6 of the Directive. We should mention in passing that, not surprisingly, none of the parties to the present appeals invited us to make a reference to the CJEU.

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37. The final point that Mr Reade QC made in his submissions was that if the domestic canons of statutory construction were applied, leaving aside the EU law context, then it is clear that a literal interpretation should be applied to regulation 13, and, if such a construction was applied, there is no right for agency workers to apply for, or to be considered for, a vacancy on the same terms as comparable workers.

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38. In his submissions on behalf of the claimants, Mr Caiden said that the purpose of regulation 13 is to ensure access to employment. This cannot be achieved simply by affording a right to be informed of vacancies. There must, as a corollary, be a right to apply.

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39. Mr Caiden submitted that a purposive approach should be adopted to interpretation, in line with the general principles as set out in the Directive, and taking account of proportionality and effectiveness. He emphasised, in particular, the reference in recital 12 to the requirement for a protective framework that is non-discriminatory. An interpretation which allows the hirer to treat comparable workers more favourably than agency workers in relation to vacancies would be discriminatory. The French language version of Article 6 refers to "obtenir" rather than "trouver" in relation to obtaining work. This serves to emphasise that there is a substantial right to apply for the job, not just an inconsequential right to be informed that the job vacancy exists. Merely being informed of a vacancy does not allow one to have the same opportunity as other workers of finding permanent employment.

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40. Mr Caiden also said that the heading to Article 6, "Access to employment….", shows that the purpose is to provide opportunities to agency workers to obtain permanent direct employment. This does not mean that employers are prohibited from setting appropriate criteria for posts, such as a requirement for a certain amount of relevant experience. It only means that they cannot discriminate against agency workers.

41. Mr Caiden relied on the language of the second half of the first sentences of Article 6.1 and regulation 5.1, which each refers to giving agency workers the same opportunity as other workers in the hirer's undertaking to find permanent employment. He says that this wording would be redundant if the respondents' interpretation is adopted. Indeed, he submitted, the respondent's interpretation would mean that the right conferred by regulation 13 and by Article 6.1 would be valueless. Merely having to inform agency workers of vacancies but allowing hirers to apply rules or policies that prevent them from applying for such vacancies would mean that the right to be informed serves no purpose.

42. So far as **Coles v Ministry of Defence** is concerned, Mr Caiden said that it can be distinguished on its facts. He said that the applicability of the reasoning of the EAT in **Coles** is limited to cases where preferential treatment was being given to direct employees because they were at risk of dismissal for redundancy. That was not the position in the present case. In the present case, the pool of direct employees who were being given preferential treatment did not consist of employees at risk of redundancy. The only difference between members of this pool of direct employees and the claimants was that the claimants were agency workers. This is pure discrimination against agency workers. Mr Caiden said that we are not obliged under normal

principles of stare decisis to follow **Coles,** and in any event that EU law requires us to apply EU law principles, even in the face of otherwise binding judgments of domestic courts.

43. Mr Caiden submitted that even if, contrary to his primary case, the standard principles of interpretation for domestic legislation which implements an EU Directive do not apply, the same result is obtained by the application of standard domestic law principles of statutory interpretation. Domestic law principles require that meaning and effect is given to all parts of a statutory provision, and the effect of the respondents' argument is that the second half of the first sentence of regulation 13(1) is otiose.

44. Still further, Mr Caiden submitted that Royal Mail was an emanation of the state and that Article 6.1 of the Directive has direct effect.

45. Mr Kocur, in his oral submissions, adopted the submissions of Mr Caiden. He pointed out that **Coles** was not mentioned in the respondents' submissions before the ET in the present case. Mr Kocur submitted that, for agency workers such as him, the comparable workers were not just those in the OPG reserve pool but extended to those OPG operatives who had been given fixed and permanent roles or shifts.

Discussion and conclusions on Issue (1)

46. The starting point is that, since regulation 13 of the AWR was made in order to implement Article 6.1 of the Directive, it is clear, in our view, that we should adopt the purposive, or teleological, approach to statutory interpretation which applies to domestic legislation that was designed to implement an EU Directive. This is not an issue to which the traditional domestic canons of construction apply. This means that regulation 13 must be interpreted, so far as

possible, in a way that is consistent with the meaning and purpose of the Directive, even if it is necessary to adopt a strained interpretation, or to read words into the regulation, or to depart from conventional rules of construction, in order to achieve this objective. This can be done, so long as the interpretation does not go against the grain of the domestic legislation, or its underlying thrust. This principle of conforming interpretation has been spelled out many times in the case law authorities, for example, in **Marleasing SA v La Comercial Internacional de Alimentacion SA (Case C-106/89)** [1992] 1 CMLR 305, at paragraph 8, and in **British Gas Trading Limited v Lock** [2017] ICR 1 (CA), at paragraphs 31-40.

47. We look first at the language of Article 6.1, whilst reminding ourselves that the English language text of the Article is only one of many different language versions of the Article which each has equal status. On a literal reading of the first sentence of Article 6.1, the right granted therein does not go any further than a right to be made aware of any vacant posts in the user undertaking. The second half of the first sentence, which follows immediately from the statement of that right, and says that it is "to give them the same opportunity as other workers in that undertaking to find permanent employment", does not add any further rights. Rather, it explains why the right referred to in the first part of the first sentence has been conferred. As Mr Reade QC pointed out, the second sentence in Article 6.1 (which does not appear in the wording of regulation 13) deals only with, and elaborates upon, the right to be notified of vacancies. There is no suggestion that the right goes any further than that.

48. In our judgment, this strongly suggests that Article 6.1 was not intended to confer a right for agency workers to apply for or to be considered for jobs on the same terms as workers who are employed by the hirer. This is a very different thing from a right simply to be informed of vacancies. It changes the character of the right completely. It is a major limitation on the freedom

of employers to conduct their business as they wish, and would remove a valuable benefit from directly-employed workers, namely to be given priority for vacancies when they are at risk of redundancy, or in other circumstances. In our view, if those drafting the Directive had intended it to confer a right to apply for and be considered for positions within the end-user, they would have said so. Indeed, they would not have been able to stop there. Some further elaboration would have been necessary. There would have had to be some degree of specificity about the types of positions that the agency workers had a right to apply for, and about the extent to which they should receive equal treatment with direct employees of the hirer in being considered for the positions. In particular, it would have been important to make clear whether this meant that directly-employed workers could not be given priority when at risk of redundancy dismissal. The absence of any such elaboration, in our view, is a clear indication that Article 6.1 was not intended to go any further than the grant of a right to be informed of vacancies. As Langstaff J put it in **Coles** at paragraph 34, "The information is provided not to *secure* further employment, but is designed towards *helping to find* it."

49. However, the right provided for by Article 6.1 and regulation 13 goes further than a bare right simply to be informed that the vacancies exist, in one important respect. It extends to a right to being given the same information about the vacancies as are given to internal candidates. It would not be sufficient to give internal candidates full information about the job, including for example, salary rate, job description and job specification, whilst withholding the same level of information from agency workers. The wording in the second half of the first sentences of Article 6.1 and regulation 13 is given substance if the right is understood to be a right to be given equal treatment in relation to the provision of information about the vacancy, not just a right to equal treatment to be informed of the existence of the vacancy.

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50. Mr Caiden referred to the heading of Article 6, which begins "Access to employment….". He submitted that this shows that the right that is set out is Article 6.1 must go further than a bare right to be notified, and must extend to a right to apply and to be considered for posts. In our judgment, however, that is not so. The heading strongly suggests that the rights conferred by Article 6 must help agency workers to have access to employment, but it does not say anything about how far that assistance goes, or the extent to which the right in Article 6.1, specifically, promotes access to employment. Article 6.1 is not the only part of Article 6 which promotes access to employment. Article 6.2 requires Member States to prohibit terms in contracts of employment for agency workers which prevent them from taking a job with the hirer, and Article 6.3 prohibits temporary work agencies from charging fees if an agency worker is recruited by the hirer when the temporary work assignment is over. This means that, whether Article 6.1 is given a narrow or a broad interpretation, Article 6 has provisions which promote access to employment. Accordingly, no conclusions as to the scope of the right in Article 6.1 can be drawn from the heading to the Article. (The rights conferred by Articles 6.2 and 6.3 are enacted into domestic law in the Employment Agencies Act 1973 and the Conduct of Employment Agencies and Employment Businesses Regulations 2003 (SI 2003/3319), rather than in the AWR.)

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51. Mr Caiden further submitted that if Article 6.1, and regulation 13, do no more than confer a bare right to be informed of a vacancy, even though the agency worker has no right to apply for, or be considered for the vacancy, then the right is pointless and otiose. He submitted that it cannot possibly have been the intention of EU law, or of domestic law, to grant a right that is valueless. In our view, this is his best point. At first sight, it makes no sense to impose an obligation upon the hirer to inform agency workers of vacant posts when there may be nothing that the agency workers can do with the information. However, we do not accept this submission. In our judgment, the right to be informed of any vacant posts is a valuable right in itself, albeit

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one that is limited in its scope. It means that agency workers are in a better position than the general public, members of which may well not be aware of any vacancies that have arisen in the hirer's business. Where a vacancy arises which is open to the agency worker to apply for, and which the agency worker is a potentially suitable candidate for, there is no danger that the agency worker will miss out because she or he is unaware of the vacancy. It is true that there will be occasions when agency workers will be notified of vacancies but will be told, in the same breath, that they are not eligible to apply for them. There will also be occasions, no doubt, when agency workers are notified of vacant posts which are plainly unsuitable for them, even if the vacancies are not ring-fenced for employees of the hirer. Nonetheless, there is a value in being kept informed of any vacant posts, especially as this means that the agency worker can make an informed judgment as regards whether it is worth applying. The value of the right is enhanced because, as we have said, it extends to a right to be given the same level of information about the job as a directly-employed worker. Fundamentally, therefore, in our view, the purpose of Article 6.1 is to ensure that agency workers are as well-informed about vacancies as the directly-employed colleagues, and do not run the risk of being unaware when a suitable vacancy crops up. As we have said, this places agency workers in a better position than the general public. They have as much information as they would have done if they had been direct recruits. It follows that the right conferred by Article 6.1, and regulation 13, even if is limited to a right to be informed of any vacant posts, is not empty or otiose.

52. In the present case, agency workers were not eligible for the vacancies in question, but that will not always be the case. If the Royal Mail opens out vacancies to external candidates, then agency workers will be in a better position than other job-seekers, as they will have been informed of the vacant posts. There is no blanket obligation to take steps to inform all potential

candidates amongst the general public of such vacancies, and so other job-seekers may never find out about the vacancies.

53. In our judgment, this explains the wording of the second half of the first sentence in Article 6.1. By being informed of any vacant posts in the user undertaking, and by being given the same level of information as directly-employed workers, agency workers are given "the same opportunity as other workers in that undertaking to find permanent employment" in the sense that they are given the same information about permanent opportunities as direct employees. They do not run the risk of missing out on opportunities because they are not informed of vacancies, or are not given sufficient detail about them. We do not think that this wording means that Article 6.1 must be interpreted to mean that agency workers have to be given equal treatment with direct employees in terms of applying for or being considered for vacancies. It follows that this wording is not mere surplusage. This view is not affected by the French language wording of Article 6.1.

54. Finally, in relation to the language of Article 6.1 itself, it is important to note that, in that Article, the right to be informed of vacancies is in order to be given the same opportunity as other workers in the undertaking in general. Unlike regulation 13, Article 6.1 does not specify the class of comparable workers with whom the agency worker must have the same opportunity to find permanent employment with the hirer. This means that the agency workers must have the same opportunity as those employed anywhere else in the hirer's undertaking. Such other direct employees may be manifestly unsuitable for the position, and so the provision of information will be of no more benefit to them as it would be to the agency worker who is told that he or she is ineligible for it. This means in turn, in our judgment, that it is not possible to read into Article

A 6.1 a requirement that the person who is notified must not only be informed of the vacancy but must be rendered eligible to apply for it.

B 55. We next look to see whether any guidance as to the meaning and effect of Article 6.1 can be derived from the recitals to the Directive, or from the general purpose and scope of the Directive.

C 56. Taking the recitals first, these are, in our view, of little assistance in resolving the particular point of interpretation that we have to deal with. The recitals make clear that a balance has to be struck between the grant of rights to agency workers, on the one hand, and the need for D flexibility for the benefit of businesses and agency workers, on the other. But they do not shed light on where exactly the balance should be struck in Article 6.1. It is also clear, from recital 12, that the framework of rights created by the Directive must, inter alia, respect industrial relations. However, one cannot infer from recital 12 that this must automatically mean that E Article 6.1 does not extend to an obligation to offer vacant posts to agency workers on the same terms as direct employees, because this might upset trade unions which represent direct employees. It is not safe to assume that trade unions will invariably be in favour of preferential F treatment of direct employees.

57. In our judgment, however, an examination of the general purpose and scope of the G Directive is of much greater assistance in determining the meaning and effect of Article 6.1, and it supports the conclusion that the right is limited to a right to be informed of any vacant posts. The aim of the AWR is not to provide equal treatment in almost every respect between agency workers and comparable direct employees. In this respect, the AWR is different from the Fixed- H Term Workers' Regulations, Directive 99/70/EC of 28 June 1999, implemented into domestic

law by the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 (SI 2002/2034). The principle of equal treatment in the AWR, set out in Article 5, does not even extend to all terms and conditions of employment: it extends only to basic working and employment conditions. Against that background, it would be surprising if the Directive granted a right to equal treatment in relation to applying for, and being considered for, vacant positions. Moreover, the right to be informed of any vacant posts is not in the part of the Directive which deals with the principle of equal treatment (Article 5), but in the part which deals with access to employment, collective facilities and vocational training.

58. In the final analysis, the intention of the Directive is not to treat agency workers as if they are direct hires. It is recognised that the relationship between agency workers and the hirer is a more tenuous and flexible one than the relationship between direct employees and the hirer. This is often to the mutual benefit of the agency worker and the undertaking.

59. Standing back, it would be very surprising if the Directive went so far as to impose a positive obligation for employers to give equal treatment to agency workers in relation to applying for, and being considered for vacant posts in the user undertaking, especially when this very valuable right is not even expressly mentioned in the Directive. It would, in our view, be odd if the Directive meant that an employer cannot give preference to in-house candidates when a vacancy occurs. This is a very common practice, and is generally thought to be a beneficial one, as it is believed to reward loyalty to the employer and to promote morale. Furthermore, whilst the Directive and the AWR prohibit less favourable treatment of agency workers, as compared to direct hires, in relation to pay (amongst other things), there is no prohibition against treating agency workers *more* favourably than direct hires in relation to pay (as the EAT pointed out at paragraph 17 of the judgment in **Kocur 1**). This may happen because the working life of

an agency worker is more uncertain, and hirers may consider it necessary to pay a premium to agency workers to reward them for their flexibility and to compensate them for periods when there may be no work to offer them. In those circumstances, employers may legitimately feel it appropriate to ring-fence internal vacancies for direct hires in order to make it more attractive for workers to take a permanent job, rather than to take more highly-paid temporary work.

60. The position is perhaps clearest in the context of a redundancy situation, as in **Coles v Ministry of Defence.** If a direct employee's position is about to be deleted from the establishment, it is very frequently the case that the employee will be placed in a redeployment pool and will be given preferential treatment, as compared to external candidates, or even other internal candidates, in relation to vacancies that exist elsewhere in the establishment. This may be by being slotted-in to the other role, or by being given a guaranteed interview for it. In our judgment, it is highly unlikely that the Directive intended to render this practice unlawful, by requiring the employer to make any job opportunities in a redundancy situation open to agency workers as well as direct hires, on the same terms. It is beneficial for the direct employees to be given a chance to avoid dismissal for redundancy, and it is also beneficial for the employers who can retain experienced employees in the business, and who can avoid having to make redundancy payments and avoid increasing the headcount.

61. It should also be borne in mind that the right conferred by Article 6.1 and by regulation 13 is a Day 1 right. The entitlement extends to agency workers even if they have only just started a short temporary assignment with the hirer. The claimants in the present appeals had a relatively long-term and stable working relationship with Royal Mail, but the right in Article 6.1 is not confined to such cases. It is difficult to see why an agency worker who has been working for the hirer for a day or two should be entitled to the same rights to apply for and be considered for a

vacancy as those who are employed directly by the hirer. It is no answer to this point to submit that the employer can filter out such short-term agency workers by applying a length of service criterion to the filling of the vacancy. There will be cases in which an employer wishes to fill a vacancy without using a simple length of service criterion to do so. Accordingly, if the claimants' submission were right, it would mean that there will be cases in which direct employees, in a redeployment pool, who are perfectly competent to fill the vacant post, will lose out to an agency worker.

62. In our judgment, it is not possible to side-step this problem by saying that a different approach should be taken in redundancy cases. There is no suggestion in the language of Article 6.1 that such a different approach is to be followed where there are direct hires who are at risk of redundancy dismissal. Moreover, we do not see why the approach should be any different in a redundancy case, on the one hand, and in cases in which the vacant posts are likely to be attractive and sought-after, on the other. That was the position at Royal Mail. Direct hires were first placed in the OPG reserve, and had no fixed shift pattern or duties. The hope and expectation for those who started off in the OPG reserve was that they would, sooner or later, be appointed into a fixed position, which would be much more congenial to them. If the claimants' submissions are right, this practice was unlawful, because Royal Mail was obliged to offer the fixed positions to agency workers on the same terms as to those in the OPG reserve.

63. Still further, as Langstaff J pointed out in **Coles** at paragraphs 36-37, the effect of the interpretation put forward by the claimants would be that, in redeployment cases, agency workers would be in a better position than those permanent workers (usually the majority) who are outside the redeployment pool. There would be nothing to prevent the employer from treating those direct employees who are outside the redeployment pool more favourably than those who are

within it, but, if the claimants are right, Article 6.1 and regulation 13 would prevent the employer from treating agency workers any less favourably than those permanent employees who are outside the redeployment pool.

64. It follows that there is no valid ground of distinction between the present case and **Coles v Ministry of Defence.** The two cases cannot be distinguished on the basis that the vacancy in **Coles** arose in a redundancy situation and the vacancies in the present appeals did not. In our judgment, the issue which arises as Issue (1) in our appeal has already been dealt with by the EAT in **Coles,** as part of the ratio decidendi in that case. In those circumstances, even if we had been inclined to disagree with the reasoning in **Coles,** we would have felt obliged to follow it, on the basis that the EAT should follow an earlier decision on the same point, where the decision was part of the ratio of the earlier case, unless the earlier decision was manifestly wrong, or there were exceptional circumstances that justified the departure: see **Lock v British Gas Trading Ltd** [2016] ICR 503, per Singh J at paragraph 72-78. As will be apparent, far from considering that the decision in **Coles** was manifestly wrong, we consider that it was correctly decided. We have dealt with this issue in detail, in deference to the arguments that were put before us, but we agree with the reasoning and the conclusions of Langstaff J in **Coles.**

65. Mr Reade QC drew our attention to The BIS Guidance: Agency Workers Regulations of May 2011, which says that "This obligation [i.e. regulation 13] does not constrain hirers' freedom regarding; …. how they treat applications." However, we do not think that the language of a leaflet provided by BIS should have any significant impact on our conclusions as regards the correct interpretation of Article 6.1 and regulation 13 (though in fact our conclusions are consistent with the language of the Guidance).

66. In light of our conclusions, it is not necessary to go on to consider whether Royal Mail is an emanation of the state, such that Article 6.1 has direct effect. We did not hear full argument on this issue and so we will not say anything about it. It is also unnecessary to consider in detail the domestic law canons of construction. Suffice it to say that if we were required to apply domestic law canons of construction, we would have come to the same conclusion: a literal reading of regulation 13 leads to the conclusion that the right is a right to be informed of vacant posts and, for the reasons that we have given, this does not mean that any part of the language of regulation 13 is otiose.

67. For all of these reasons, we allow the respondents' appeal on Issue (1).

Issue (2): shift length

68. At the relevant time, agency workers worked 12 minutes longer on each daily shift as compared with directly employed OPG employees. This was because Royal Mail had negotiated a 39-hour working week with the CWU for OPG employees, but, at the relevant time, this did not apply to agency workers, who worked a 40-hour week. On the basis that five shifts were worked per week, the extra hour per week translated into an extra 12 minutes per shift. Agency workers were paid for the additional time that they worked.

69. The ET held, at paragraphs 106 and 107 of its judgment, that the claimants' claim was well-founded, because if they had been recruited directly by Royal Mail as flexible employees, they would have had the immediate benefit of the 39-hour week. The claimants accepted that they had suffered no financial loss from this infringement and so the ET did not award compensation. The position had been corrected by the respondents between the commencement of the claim and the ET hearing, so that agency workers also worked a 39-hour week, and their

shift length was the same as for directly employed workers. Accordingly, the claimants did not seek any recommendation in relation to Issue (2).

The parties' submissions

70. The respondents submit that the ET erred in law in finding in the claimants' favour on Issue (2). The undisputed evidence before the ET, albeit not recorded in the ET's judgment, was that historically a practice had grown up of agency workers having slightly different shift times than permanent employees. This was because it was helpful to have some (agency) staff still working during the changeover of shifts.

71. Mr Reade QC said that the answer to this issue was to be found in the EAT and Court of Appeal judgments in **Kocur 1.** As we have said, the Court of Appeal judgment was handed down after the ET gave its judgment in the present case. Mr Reade QC submitted that these authorities make clear that agency workers do not have a right to comparability in quantum of work, with directly employed workers. The intention of the Directive was not to guarantee agency workers a particular number of hours' work per week, or the same amount of work as comparable employees.

72. Mr Reade QC also said that the ET's approach was unworkable. The claimants focused on some comparable employees who happened to work standard 8-hour shifts However, not all comparable employees worked the same pattern. Some worked 6-hour or 10-hour shifts. How can the comparison be made with the shift length of comparable employees if different comparators work different shift lengths.

73. On behalf of the claimants, Mr Caiden submitted that the rulings of the EAT and the Court of Appeal in **Kocur 1** were distinguishable, because the issue in those proceedings was whether the overall length of the working week had to be the same for agency workers and for comparable employees. The answer was "no", but the present appeal is concerned with something different, the length of a particular shift. He further submitted that it is clear from Articles 3 and 5 of the Directive and regulations 5 and 6 of the AWR that agency workers were entitled to equality of treatment in relation to the "duration of working time", provided that, as here, the duration is ordinarily set out in comparable employees' contracts of employment. Terms relating to the length of a shift are terms relating to the duration of working time.

74. Mr Caiden relied upon the statement of the EAT in **Kocur 1,** at paragraph 44(b), that an "agency worker's working time should not exceed that which would ordinarily apply to employees". He said that this is exactly what happened here.

75. Mr Kocur pointed out that, whilst the underlying explanation for the different shift lengths may have been the 39-hour week for comparable employees, agency workers at Royal Mail were not employed on a weekly basis. This Issue was concerned with the hours worked in a single shift, not on the total hours required to be worked in a week.

Discussion and conclusions on Issue (2)

76. In our judgment the answer to this issue is to be found in the reasoning of the EAT and the Court of Appeal in **Kocur 1**.

77. In **Kocur 1,** the EAT considered the meaning of "the duration of working time" in regulation 6(1) of the AWR, which defines "relevant terms and conditions" for the purposes of

A regulation 5. In **Kocur 1**, Mr Caiden, on behalf of Mr Kocur, had submitted that agency workers were entitled to the same 39-hour working week as a standard direct recruit. The EAT rejected this submission. At paragraph 44, the EAT said:

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

That analysis appears to us to be correct.

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

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

(d) The tribunal's reference to comparators at para 50 of the reasons is not inapt. Regulation 5(3) of the 2010 Regulations identifies the circumstances in which regulation 5(1) will be deemed to have been complied with. However, if the number of hours worked were the relevant factor, then any comparable employee identified by the hirer for the purposes of regulation 5(3) could be immediately displaced and countered by the agency worker pointing to another employee on different hours. As the tribunal found, that would create an unworkable outcome."

78. Pausing there, the reasons why it would be unworkable for there to be a requirement for agency workers to be given the same number of hours per week as comparable employees are equally reasons why it would be unworkable for it to be a legal requirement for agency workers to be given the same hours in a particular day as comparable employees. The whole point of using agency workers is the flexibility they provide to deal with fluctuations in the undertaking's requirement for workers. This cannot work if the employer is placed in the strait-jacket of only being able to make use of agency workers if they work the same number of hours in a particular day as comparable direct employees. Mr Kocur emphasised in his oral submissions that, just as his contention was that it was unlawful to roster an agency worker to work a longer shift than a comparable employee, so it would be unlawful to roster an agency worker to work a shorter shift than a comparable employee. It would also be unlawful to have different shift lengths for different agency workers. So, as Mr Caiden accepted in oral argument, if some agency workers

wanted to work longer hours than others, because they needed the money, this could not lawfully be accommodated.

79. The other feature which would make the law unworkable, if the claimants are right, is that comparable employees will often have different shift lengths. If there are comparable employees who, variously, work a shift of 6, 8 and 10 hours on a particular day, how does one tell what the legal requirement is as regards shift length for agency workers? It is not possible in such cases to work out what the contract entitlements would have been if the agency workers had been recruited directly.

80. It is true that the ET in **Kocur 1** said, at paragraph 48 of its judgment, quoted in paragraph 44 of the EAT judgment, that 'the duration of working time' relates to the particular assignment, and could involve, for example, not requiring employees of the temporary work agency to have to work longer shifts than those of the hirer. It is also true that the EAT said, at the end of paragraph 44 of its judgment, that the ET's analysis appeared to be correct. However, this comment by the ET was an obiter dictum, as the ET was not dealing with a complaint about a particular shift, or about a particular assignment, and we do not understand the EAT's statement of approval of the ET's analysis of the issue that arose in **Kocur 1** to mean that the EAT approved the ET's obiter dictum. Indeed, the analysis by the EAT in paragraph 44 of its judgment would be inconsistent with the conclusion that shift lengths must be the same for agency workers as for comparable employees. Moreover, the EAT provided a different indication of what "the duration of working time" means, at paragraph 44(b). The EAT said that there would be a breach of regulation 5 if the maximum shift length for agency workers was greater than the maximum shift length for comparable employees. With respect, we think that this is right, and, as will be seen, it is consistent with the reasoning of the Court of Appeal. There is no requirement in the AWR

that shift lengths must be the same for agency workers as for comparable employees, but if the hirer has set a maximum shift length for comparable employees, that maximum must apply to agency workers also.

81. In **Kocur 1** in the Court of Appeal, Mr Caspar Glyn QC (leading Mr Caiden) renewed his submission that agency workers were entitled to the same 39-hour working week as direct hires. The Court of Appeal rejected this submission. Giving the judgment of the Court, Underhill LJ said:

> **"29. I do not accept either that that construction [advanced on behalf of Mr Kocur] represents the natural meaning of the phrase "duration of working time" in regulation 6 (1) (b) or that it is consistent with the purpose of the legislation. My reasons are as follows.**
>
> **30. I start with the words themselves. If one writes the definition of "working time" from paragraph (5) (a) into paragraph (1) (b), it reads:**
>
> **"… the duration of any period during which [the] individual is working, at the disposal of [his or her] employer … and carrying out [his or her] activity or duties".**
>
> **There are elements of repetition or overlap in that definition and for present purposes I can shorten it to "the duration of any period during which the individual is working". (It would be possible to add in the other kinds of "working time" specified at paragraph 5 (b) and (c), but that would unnecessarily complicate the exercise.)**
>
> **31. Even without any statutory context, I do not think it is natural to describe a term specifying the number of hours in the working week as relating to the "duration" of the "period" during which an individual is working. Mr Glyn referred us to the definition of "duration" in Black's Law Dictionary as "the length of time something lasts" or "the length of time; a continuance of time" and offered his own paraphrase "the time during which something continues". We need not be pinned to a specific definition, but I agree that "duration" connotes the length of a period of time. It seems to me to follow in the ordinary case that the period in question should be continuous, and indeed both the Black's definition and Mr Glyn's incorporate that concept. That would mean that in this context the "periods" of time to whose duration regulation 6 (1) (b) refers are periods during which the worker is working continuously (ignoring rest-breaks), such as the working day or shift. Outside such a period the worker is neither working nor at the disposal of his or her employer nor carrying out any activity or duties. Regulation 5 (1) would accordingly not apply to a term specifying a 39-hour working week, which will necessarily involve several discrete periods of work. Not only is that a correct use of language but it is in accordance with ordinary usage: you would not describe someone working full-time as working for a "period" of (say) 39 hours. At para. 14 of his skeleton**

argument Mr Glyn summarises his position by adopting the shorthand "a quantity of time". But that is not accurate, because it does not incorporate the notion of a continuous period. It allows Mr Glyn to advance the apparently obvious proposition that 39 hours is "a quantity of time": no doubt in one sense it is, but it is not necessarily, and is not in this context, the duration of a period.

32. The position becomes clearer still when one takes into account the wider context. I have noted at para. 17 above the correlations of heads (b)-(f) in regulation 6 (1) with the subject-matter, and language of the WTR. In the light of that, it seems to me plain (subject to para. 34 below) that regulation 6 (1) (b) is intended to refer to terms which set a maximum length for any such period, as the WTR does. (It is not an answer to say that such a term would be unnecessary because the WTR provides for such maxima: the model of the WTR is that maxima should be set by agreement, with the legislation only providing a floor, or default.) It is no doubt literally possible to read the statutory language as referring also to a term specifying the minimum length of a shift or a working day – as Mr Glyn put it, providing for a cuff as well as a collar – but the close relationship with the WTR makes it very unlikely that that was what the draftsman intended. Even if that were the intention, I am not sure that it would assist Mr Glyn, because the right for which he contends does not relate to particular periods of work but to the entire working week.

33. That is how both the ET and the EAT read it: see para. 49 of the ET's Reasons and para. 44 (a) and (b) of the EAT's judgment. I believe that they were right; and on that basis the Regulations do not entitle agency workers to work the same number of contractual hours as a comparator.

34. The foregoing reasoning requires a slight gloss. As appears from para. 17 above, each of the other items listed under regulation 6 (1) (with the exception of (a), pay) correlates to a particular provision, or group of provisions, in the WTR: specifically, item (c) correlates to regulation 6 , item (d) to regulations 10-11 , item (e) to regulation 12 , and item (f) to regulations 13-16 . That being so, it would be natural to expect regulation 6 (1) to cover the only other substantive provision of the WTR, regulation 4 , which (to over-simplify a complex provision) sets a "maximum weekly working time of 48 hours". In order to achieve that it would be necessary to construe the phrase "the duration of working time" as covering not only periods of continuous work such as a shift but also the group of such periods which constitutes the working week. For the reasons which I have given above, I think that that is difficult as a matter of language. It might nevertheless be possible if it were sufficiently clear from the broader context that that must have been the statutory intention. I need not reach a view about that, however, because even if the phrase were to be construed as covering the number of hours in the working week it would not assist the Claimant. If the only basis for adopting such a construction was in order to achieve a closer fit with the WTR, that would only apply to terms setting the maximum period which a worker could be required to work: it would have nothing to do with any entitlement on the part of the worker to work a particular number of hours, which is not the subject-matter of the WTR.

35. That conclusion is reinforced by a consideration of the purpose of the Regulations, and the underlying Directive, and of the practical consequences of the Claimant's construction. The purpose of the Directive is plainly to ensure the equal treatment of agency workers and permanent employees while at work, and in respect of rights arising from their work; but there is nothing in either the preamble or its actual provisions to suggest that it is intended to regulate

> **the amount of work which agency workers are entitled to be given. And of course a provision with the effect contended for by the Claimant would be contrary to the whole purpose of making use of agency workers, which is to afford the hirer flexibility in the size of workforce available to it from time to time – a purpose which the Directive expressly recognises and endorses (see in particular recital (11)). Both the ET and the EAT – in each case incorporating lay members – recognised this, and full weight must be given to their specialist expertise. The essential point is made at para. 48 of the ET's Reasons and para. 44 (c) of the judgment of the EAT. But the ET was also right to point out at para. 51 that the Claimant's revised submission (see para. 20 above) recognised an essential difficulty in his case but failed to offer any workable solution to it. The fact that Mr Glyn, no doubt prudently, chose to abandon that submission evades rather than answers the underlying difficulty."**

82. In our judgment it is clear from this passage in the Court of Appeal's judgment that, as Underhill LJ said at paragraph 33, "… the Regulations do not entitle agency workers to work the same number of contractual hours as a comparator". This applies just as much to a complaint about the length of a particular shift as it does to the length of a working week. In paragraph 32, Underhill LJ said that it was very unlikely that those who drafted the Directive and the regulations intended to regulate the minimum length of a working day. It is plain from the rest of the passage that we have quoted that the Court of Appeal went further and decided that this was not the intention of the Directive or the regulations. The Court of Appeal recognised that it would be unworkable to require agency workers to work the same length shifts as comparable employees and that the reference to "the duration of working time" has a more limited meaning: it means that if the hirer set a maximum period when a comparable employee could be required to work, the hirer could not set a different maximum for agency workers. At paragraphs 34 and 35, the Court said that this conclusion was reinforced by a consideration of the relationship between the AWR and the Working Time regulations, and by a consideration of the wider purpose of the Directive and the AWR.

83. In our view, the analysis of the law set out by the EAT and the Court of Appeal in **Kocur 1** shows that the ET in the present case erred in law on Issue (2). Whether or not we are bound

by the rules of precedent to follow the decision of the Court of Appeal on this issue is a moot point because, in any event, with respect, we are in entire agreement with it.

84. We should add that Mr Caiden submitted that the arguments relied upon by the respondents on this Issue went further than the grounds in the Notice of Appeal (which was drafted before the Court of Appeal handed down its judgment in **Kocur 1**). Suffice it to say that we do not accept that submission and that we do not agree that the respondents are prohibited, for technical reasons, from advancing the grounds of appeal that they relied upon on Issue (2).

85. Accordingly, we allow the respondents' appeal on Issue (2).

Issue (3): section 1 statement

86. Section 1(1) of the Employment Rights Act 1996 provides that when a worker begins employment with an employer, the employer must give the worker a written statement of particulars of employment. The statement, commonly referred to as a section 1 statement, must contain the particulars that are specified in sections 1(3) and 1(4). These include, amongst other things, particulars of the rate of remuneration or the method of calculating remuneration, any terms and conditions relating to hours of work, terms and conditions regarding entitlement to holidays, and terms relating to notice. Section 4 requires the employer to give a written statement of changes to any of the matters for which particulars are required to be given, within one month of the relevant change.

87. Section 11(1) of the 1996 Act provides that:

> **"Where an employer does not give a worker a statement as required by section 1, 4 or 8 (either because the employer gives the worker no statement or because the statement the employer gives does not comply with what is required), the worker may require a reference to be made to an employment tribunal to**

> **determine what particulars ought to have been included or referred to in a statement so as to comply with the requirements of the section concerned."**

88. Section 12(1) provides that:

> **"Where, on a reference under section 11(1), an employment tribunal determines particulars as being those which ought to have been included or referred to in a statement given under section 1 or 4, the employer shall be deemed to have given to the worker a statement in which those particulars were included, or referred to, as specified in the decision of the tribunal."**

89. In the present case, the claimants contended that Angard had failed to provide them with an accurate section 1 statement. The claimants said that the section 1 statement was inaccurate in four respects, namely remuneration, holiday pay/entitlement, hours of work (including rest breaks), and applicable collective agreements. The ET held that the claimants' contention was correct, and held that the claimant's section 1 particulars should be amended in relation to those four matters by reference to a form of words provisionally determined by the ET and set out in the ET's Order, at paragraph 7. However, the judgment said that:

> **"The Section 1 particulars set out [in the Order] will stand as determined by the Tribunal in this hearing unless, by no later than 13 December 2018, the first respondent provides to the claimants and to the Tribunal an application that the Tribunal determine as section 1 particulars those it provide addressing the matters below."**

90. It will be seen, therefore, that the ET did not finally determine what the section 1 particulars should be. Rather, the ET set out its provisional view about what the section 1 particulars should be, but granted Angard the opportunity to provide alternative suggestions, on the basis that, if Angard did so, the ET would resolve the matter at a later hearing.

91. The respondents' legal advisers wrote to the ET in a letter dated 13 December 2018, applying to vary paragraph 7 of the ET's Order, so that the ET would not determine the section 1 statement particulars issue until the ET had heard full argument on the question whether the ET

had any jurisdiction to make the Order that it had made, and also on the exercise of identifying the correct contractual terms.

92. In an Order dated 6 February 2019, EJ Wade granted the respondents' application, and ordered that the section 1 particulars issue will be dealt with at a future hearing, following submissions from all parties.

The parties' submissions

93. The respondents submit that the ET had erred in law in paragraph 7 of its original Order, because it should not have purported to amend the section 1 statement on the basis that Angard had failed to take account of the claimants' entitlement, under the AWR, to the same basic working and employment conditions as they would be entitled to for doing the same job if they had been directly recruited by the hirer. They submit that the AWR does not have the effect of automatically amending contracts of employment. The remedies for breach are those that are set out in regulation 18(8) of the AWR (set out at paragraph 17, above), and they do not include retrospective amendment of the terms and conditions of employment. Therefore, the ET has no jurisdiction to amend the section 1 statements. This is an important point, because, if there is a failure in relation to a section 1 statement, this will result in an award of two weeks' pay or four week's pay to the worker unless there are exceptional circumstances (Employment Act 2002, section 38).

94. The claimants submit that this ground of appeal is premature, as the ET has indicated in its order dated 6 February 2019 that it will hear submissions on whether it has jurisdiction to amend the section 1 statements to bring them into line with its findings about the claimants' rights under the AWR. Further and in any event, they submit that the ET was right to take the view that

it had jurisdiction to amend the section 1 statements on this ground. Indeed, Mr Caiden said, if claimants were limited to the remedies in regulation 18 of the AWR, this may mean that the implementation into UK law of the rights conferred by the Directive offended against the fundamental EU law principle that domestic law must provide an effective remedy for breach of rights derived from EU law.

Discussion and conclusion on Issue (3)

95. In our judgment, the claimants are right that this ground of appeal is premature. The ET has, in EJ Wade's order of 6 February 2019, accepted the respondents' application for the ET to withdraw paragraph 7 of its earlier Order, and to reconsider the question whether it has jurisdiction make a declaration of amended terms of employment for the purpose of the claimants' section 1 statement. Consideration of this issue has been postponed to a hearing that has yet to take place. It follows, in our judgment, that there is currently no Order in relation to section 1 statements for the respondents to appeal against. It follows in turn that this ground of appeal is premature, both in form and in substance. For this reason, this ground of appeal must be dismissed. In the circumstances, we have not considered the parties' arguments on this issue in detail. However, we think that it is appropriate to express a provisional view to the effect that there is force in the respondents' contention: the remedies for breach of the AWR are those set out in regulation 18 of the AWR, and they do not include a power retrospectively to amend a section 1 statement. Moreover, at first blush, the remedies set out in regulation 18 satisfy the requirement in EU law for an effective remedy. Nevertheless, we must emphasise that this is not a final concluded view.

96. We should add, finally on this point, that we understand that there may be an issue as regards whether Angard has failed in its obligations to provide an accurate section 1 statement to the claimants, even if the statement is not required to be amended to reflect their entitlements under the AWR. Therefore, even if the respondents are right on the jurisdictional point, is it still necessary for the ET to give further consideration to the section 1 statement issue.

97. Accordingly, we dismiss the respondents' appeal on issue (3).

Issue (4): late payment of the 2018 pay increase

98. This is the first of the grounds of appeal on behalf of the claimants. We have summarised the issue at paragraph 5, above. In essence, the 2018 pay increase, including the backdated element, was paid to the agency workers some months after it was paid to direct employees of Royal Mail. The agency workers, including the claimants, were granted the same pay rise, for the same period, as direct employees, but the agency workers had to wait longer for the pay rise to be implemented. They did not receive the pay increase, or the backdated element, at the same time as the direct employees. The claimants submit that, if they had been directly employed by Royal Mail, they would have had a contractual entitlement to the pay rise at an earlier date.

99. The reason for the difference in treatment was explained by the ET in its findings at paragraphs 28-35 of the judgment. In a collective agreement, dated 26 January 2018, entitled the "Negotiators' Agreement" and known as the "NA", Royal Mail reached agreement with the CWU about a number of changes to the terms and conditions of employment of directly employed staff. The changes included pension changes and a gradual move to a 35-hour working week. There was also an agreement for a 5% pay increase, backdated to October 2017, and to a further 2%

increase with effect from April 2019. The NA stated that both parties reaffirmed that they would deploy legally binding commitments to part-time workers and the use of agency workers, but the NA did not expressly apply to agency workers. There was no term in the NA as to the date when the backdated payments would be implemented (ET judgment, paragraph 68).

100. The EAT handed down its judgment in **Kocur 1** on 23 February 2018. In this judgment, the EAT had held that the respondents had breached regulation 5(1) in that direct employees had a longer leave entitlement than agency workers. The EAT held that this could not be offset by a payment in lieu of a specific entitlement to annual leave for agency workers (judgment, paragraph 23). The EAT also held that the respondents had breached regulation 5(1) by paying direct employees at a higher hourly rate for rest breaks than agency workers (judgment, paragraph 39). Following the hand-down of this judgment, the respondents took some time to consider whether to appeal on these issues but, by the end of March 2018, they had decided not to do so (ET judgment, paragraph 29). Direct employees in the Leeds Mail Centre received their back pay from the January NA pay deal on or around 4 May 2018. In or around May 2018, Royal Mail commenced a review of agency terms. This involved consultation with a number of employment agencies, as Angard was not the only supplier of agency workers, and the preparation of a report. Royal Mail decided that changes to terms and conditions and working practices for agency workers should be co-ordinated and implemented at the same time by all employment agencies. Royal Mail's task was made more complicated by the January NA, including the pay improvements and changes to working hours, all of which had an impact on pay calculations across a complex and extensive list of grades and roles, and the accompanying financial models which support them (ET judgment, paragraph 31).

101. In July 2018, Royal Mail issued an instruction to the employment agencies to implement the 5% pay increase in two tranches, one at the end of July 2018 and the other at the end of September 2018. There was slippage, but the two claimants received their backdated pay increase by the end of October 2018 (ET judgment, paragraph 33).

102. The reason for the delay in implementation of the backdated pay increases for agency workers, therefore, was that Royal Mail wanted to take stock in light of the outcome of **Kocur 1**, and then conducted a review and consultation about pay and conditions with the employment agencies which supplied Royal Mail with agency workers. This took some time, especially as it required detailed and complicated pay calculations. The pay rise was only implemented when this process was completed. The consequence was that the claimants in these proceedings received their backdated pay increases some six months after comparable direct employees.

103. This complaint is, therefore, about the timing of pay increases/backdated pay awards, rather than about the amount of the pay increases.

104. The ET found, at paragraph 69 of its judgment, that the complaint about the timing of the implementation of the pay increase was not well-founded. The ET gave two reasons for this conclusion. First, the ET said that, in the context of a far-reaching pay agreement, the date for payment of a backdated pay rise is properly to be described as a mechanism for parity rather than parity itself. Second, the ET said that the entitlement under the AWR is to the same basic terms that are currently included in the OPG staff contracts (including any collectively agreed and included terms). The ET said that the date of back payment of such an increase was not such a term.

The parties' submissions

105. On behalf of the claimants, Mr Daniel Barnett submitted that, pursuant to regulation 5(1) of the AWR, agency workers were entitled to the same working and employment conditions as they would have been entitled to if they had been direct employees, provided that those terms were included in the contracts of employment of direct employees. The definition of relevant terms and conditions in regulation 6(1), and the equivalent definition in Article 3.1(f)(ii) of the Directive, included terms and conditions "relating to pay". This covered not just the amount of pay, but the timing of the payment. The ET had been wrong to direct itself that that date for the payment was outside the scope of regulations 5 and 6 of the AWR because it was a mechanism for parity, rather than parity itself.

106. Mr Barnett further submitted that the ET was wrong to find that the date for payment of the pay increase was not a term of the direct employees' contracts. He submitted that the rights conferred upon direct employees by the NA had contractual force. Though the NA did not expressly state when the pay rise had to be implemented, it was an implied term that the pay rise (including the backdated element) would be implemented as soon as reasonably practicable. That reasonably practicable period was 13 weeks, which meant that the pay rise should have been implemented by 4 May 2018, as it was for direct employees. Accordingly, comparable direct employees had a right to receive the pay rise and backdated pay by 4 May 2018, and this would have applied to the claimants if they had been direct employees. This right was not afforded to agency workers and so there was a breach of regulation 5(1). Mr Barnett submitted, in the alternative, that, even if he was wrong that there was an implied term that the payments had to be made as soon as reasonably practicable, there was an express term that the payments had to be made within a reasonable period. This had not happened for the agency workers and so this amounted to a breach of regulation 5(1).

107. On behalf of the respondents, Mr James Boyd relied upon a passage in the EAT judgment in **Kocur 1**, at paragraph 27, which was dealing with a complaint about holiday pay. In that passage, the EAT drew a distinction between the right to parity of treatment, which is within the scope of the AWR, and the mechanism by which parity is achieved, which is not. We have already set it out earlier in this judgment, but it is worth setting out again here:

> **"27…..However, when considering what remuneration an agency worker obtains in respect of annual leave, one is only concerned with a particular term, namely the term dealing with remuneration for annual leave. The Regulations do not prescribe that the mechanism by which parity is achieved must be identical. Thus, an agency worker may be paid for his identical holiday entitlement by means of a lump sum at the end of the assignment, or by means of a higher hourly rate into which an amount for holiday pay has been rolled-up. These methods of payment might differ from that applicable to employees. However, if the result is that the agency worker is paid at least that which is paid to the employee in respect of the same holiday entitlement then there would not be a breach. That approach is not a package-based one, but one which focuses on the term as to remuneration for annual leave."**

108. Mr Boyd submitted that this shows that the mechanism for payment, or the timing of, a particular element of pay, need not be the same, provided that the agency workers receive the same pay in the final analysis. In other words, it cannot be a breach of the AWR to make a payment to agency workers at a different time from the time when the same payment is made to direct employees (and would have been made to the agency workers if they had been direct recruits).

109. Mr Boyd further submitted that, in any event, there was no express term in the direct employees' contracts, or in the NA, relating to the timing of the implementation of the pay increase. Nor was there an implied term. The fact that, in his submissions, Mr Barnett had canvassed two potential implied terms, namely an obligation to implement the pay rise as soon as reasonably practicable and an obligation to implement the pay rise within a reasonable period, showed that it was not possible to identify a specific term that had to be implied into contracts of

employment of direct recruits, whether on the ground of necessity or otherwise. Alternatively, if a term was to be implied, it should be a term to the effect that the pay rise had to be implemented within a reasonable period. On the basis of the findings of the ET, it was clear that there had been good reasons for the delay in implementation of the pay rise for the agency workers. Royal Mail had to consider carefully what to do and it took time to make arrangements for agency workers. Therefore, even if such a term was to be implied in the contracts of employment of direct employees, there was no breach of regulation 5(1).

Discussion and conclusions on Issue (4)

110. The first question that we have to decide is whether a term relating to the timing of payment is a term or condition relating to "pay" for the purposes of the Directive and the AWR. In our judgment, the answer is "Yes".

111. The word "pay" is not further defined either in Article 3.1 of the Directive, the definitions provision, or in regulation 6(1) of the AWR, but we do not think that there is any reason to confine it solely to the amount of pay, so as to exclude the timing of the payment. In both Article 3.1(f)(ii) of the Directive, and regulation 6(1)(a) of the AWR, the reference is to terms or conditions "relating to" pay. In our judgment, a term that is concerned with the timing of payment is a term relating to pay.

112. Moreover, it is consistent with the spirit and purpose of the Directive and the AWR for "basic working and employment conditions" to cover the point at which payments are made, as well as the amount of payments. The timing of payments can be of great importance to workers. In the present case, the pay rises were made to agency workers some six months after they had been paid to direct employees. It is true that the payments related only to 5% of total pay, but this was still a significant matter. If a worker was in financial difficulties, this delay might well have caused serious inconvenience, or worse. Moreover, as Mr Barnett pointed out, if the respondents' submissions on this issue were right they would have far-reaching consequences. He gave an example of an employer who paid direct employees £14 per hour, and paid it weekly, and who paid agency workers the same total of £14 per hour, but broken down into £10 per hour that was paid weekly and the remaining £4 per hour that was paid some months later at the end of the assignment. This would be a very significant difference in treatment which might cause real hardship to agency workers. Furthermore, at common law, a failure to pay salary on the due date may amount to a repudiatory breach of contract: **Adams v Charles Zub Associates** [1978] IRLR 551 (EAT). This reinforces our view that equality of treatment in relation to "pay" extends to terms relating to the timing of payment, not just to the amount of payment: timing matters.

113. However, that does not necessarily mean that the claimants' appeal succeeds on this ground. Even if something is within the scope of "basic employment and working conditions", a claim under regulation 5(1) can only succeed if the relevant term or condition is ordinarily included in the contracts of workers of the hirer, whether by collective agreement or otherwise (regulation 5(2)). Mr Boyd submitted on behalf of the respondents that, even if a term relating to timing of payments is a term relating to "pay", no such term was ordinarily included in the contracts of employment of direct OPG employees of Royal Mail at the Leeds Mail Centre.

114. It is true that there was no express term in the direct employees' contracts of employment or the NA that specified when the pay rise had to be paid. If there had been such an express term in the NA, that would plainly have had contractual force. However, in our view there is no reason why a relevant term or condition, for regulation 5(1) purposes, cannot be implied rather than express. Mr Barnett contended for two potential implied terms. His primary argument was that there was an implied term to the effect that the pay rise had to be implemented as soon as reasonably practicable. He submitted that the term was implied by necessity. He said that, in the context of this case, this meant that the pay rise had to be implemented within 13 weeks (ie by 4 May 2018). In our judgment, this cannot be right. Necessity does not go so far as to require that a pay rise needs to be implemented as soon as reasonably practicable.

115. However, in our judgment it is arguable that there was an implied term in the NA, ordinarily incorporated into the individual contracts of employment of direct employees, to the effect that the pay rise should be implemented within a reasonable period of the collective agreement being concluded. Such a term might be implied on the basis that if the matter had been raised by the officious bystander, the parties would inevitably have both agreed that such a term should be included in the contracts of employment of directly employed staff. This not the same as implying a term that agency workers should receive the pay rise at the same time as direct employees. There would be no reason to imply such a term in the contracts of employment of direct employees, who have no personal interest in the date of payment of the pay rise to agency workers. In any event, there may be valid reasons why it is reasonable for the payments to agency workers are made at a later date than the payments to direct employees.

116. We do not consider that we are compelled by the reasoning in paragraph 27 of the ET judgment in **Kocur 1** to come to a different conclusion. The EAT emphasised that the AWR did

not require that agency workers received identical treatment to direct employees in relation to all aspects of matters that were within the scope of "basic working and employment conditions". We agree. As we have said, it may be that a term requiring a payment to be made within a reasonable time can be complied with by making the payment at different times to direct employees and agency workers, respectively. We do not read paragraph 27 of the EAT's judgment in **Kocur 1** to mean that there is a hard-and-fast division between parity, on the one hand, and the mechanism for parity, on the other. No such distinction appears in the Directive or the AWR. Rather, the EAT in **Kocur 1** was saying that the relevant term for direct employees relating to holiday pay did not specify the mechanism by which the payments had to be made to employees. We should add that the Court of Appeal in **Kocur 1** did not have to deal with this issue.

117. Accordingly, we accept the claimants' submission that the ET erred in law in its treatment of this issue. The ET erred in law in finding that the reference to a term relating to pay for the purposes regulation 6(1) of the AWR could not encompass a term relating to the timing of pay, and the ET further erred in failing to explore the possibility that there was an implied term in the contracts of direct employees to the effect that the pay rise had to be implemented within a reasonable time.

118. We do not consider that we are in a position to determine whether there was a term ordinarily included in the contracts of employment of direct employees to the effect that the pay rise should be implemented within a reasonable period of the collective agreement being concluded. (which would have been included in the claimants' contracts if they had been direct recruits). This is a fact-specific issue. It was not a matter that was directly addressed in the findings of fact that were made by the ET. Similarly, we are not in a position to determine

whether, if such an implied term existed, it was breached in relation to the agency workers and whether they have suffered any loss as a result. Accordingly, we allow the claimants' appeal on this issue and will remit the issue to a differently-constituted ET to reconsider the matter. We do not think that there would be any advantage in remitting the matter to the same tribunal, and we think that it is best if the issue is looked at afresh by a new Tribunal.

Issue (5): Worktime Listening and Learning training sessions

119. The claimants submitted that the ET erred in law in failing to find that there was a breach of regulation 5(1) in that direct employees at the Leeds Mail Centre were required to attend WTLL training session once a week, whilst agency workers had to carry on working.

120. The ET dealt with this issue at paragraphs 71-76 of its judgment. The ET noted that the claimants were pursuing their argument under regulation 5 of the AWR and had expressly disavowed any reliance upon regulation 12, which deals with "Rights of agency workers in relation to access to collective facilities and amenities." The ET rejected the claimants' contention that the right to the same basic working and employment rights in relation to "duration of working time" meant that they were entitled to the same 30-minute weekly training period as direct employees. This was because, in the ET's view, the claimants were not seeking parity in the duration of their working time, but were seeking the right to be given precisely the same work or duties. This is not provided for by the AWR. In light of this conclusion, the ET found it unnecessary to decide whether the obligation to attend WLLT sessions formed part of the contract of employment or collectively-agreed terms of direct employees at Leeds Mail Centre.

The parties' submissions

121. Mr Barnett pointed out that the definition of "working time" in regulation 6(5) of the AWR is divided into three parts, namely any period during which the individual is working, any period during which the individual is receiving relevant training, and any additional period which is to be treated as working time for the purposes of the Working Time Regulations 1998 under a working time agreement. He submitted that this means that agency workers are entitled to equal treatment in respect of each of the three elements of working time separately. This means in turn that the duration of training periods must be the same for agency workers as for direct employees.

122. Mr Boyd submitted that the ET's analysis was plainly correct. Neither the Directive nor the AWR requires equality of treatment in relation to the content of working time, rather than the duration of working time.

Discussion and conclusion on Issue (5)

123. In our judgment, the ET's reasoning and conclusion on this issue was plainly correct. There is nothing in the wording of either the Directive or the AWR to suggest that there is a requirement for equality of treatment in relation to the content of working time. The phrase, the "duration of working time" must be given a narrow interpretation for the reasons that we dealt with in our examination of Issue (1), above. There is no basis for inferring that the requirement for equality of treatment in relation to contract terms that are concerned with the duration of working time imports an obligation to provide the same working content for agency workers as for direct employees. Indeed, such an obligation would plainly be wholly inconsistent with the requirement for flexibility and would be utterly unworkable. It would mean that hirers could not use agency workers to provide cover whilst permanent employees were away undertaking different duties. In addition, it is impossible to see how such an obligation would work in practice when the comparable direct employees may well be engaged in a range of different duties. It is

not possible for an agency worker simultaneously to be engaged in the same work as different people doing different things. So, for example, if half of the direct employees were attending a training session, and the other half were not, the agency worker could not at one and the same time be undertaking the training session alongside one half of his or her directly employed colleagues, and carrying out the normal work alongside the other half.

124. Mr Barnett's argument does not derive any support from the definition of "working time" in regulation 6(5) of the AWR. There is no suggestion that the definition in three parts means that there is an obligation for hirers to allocate work to agency workers within the three parts in exactly the same proportions as direct employees. There is no definition of "working time" in the Directive itself. The definition of "working time" in regulation 6(5) has plainly been inserted simply to make clear that "working time" has the same meaning in the AWR as in the Working Time Regulations and Working Time Directive.

125. Still further, in our view it is significant that Article 6.5(b) of the Directive provides that Member States shall take suitable measures or shall promote dialogue between the social partners, in accordance with their national traditions and practices, in order to improve temporary workers' access to training for user undertakings workers. This falls far short of imposing an obligation for user undertakings to provide the same in-house training for agency workers as for direct employees.

126. Accordingly, this ground of appeal is dismissed.

Issue (6): Opportunity for overtime

127. The contracts of employment of directly employed OPG grade operatives at Leeds Mail Centre stated that "it is a condition of your employment that you are liable to work overtime …. as the needs of the service demand." Accordingly, they had a contractual obligation to work overtime if Royal Mail asked them to. In practice, though, it rarely happened that direct employees were required to work overtime against their wishes. In practice, there was a local collective agreement concerning overtime at the Leeds Mail Centre, which Royal Mail had entered into with the local CWU Branch, and which provided for voluntary overtime. Employees would have the opportunity to express an interest in doing overtime in a particular week, and Royal Mail would then draw up a working rota which allocated overtime to the volunteers. Royal Mail would then arrange for agency workers to be brought in to cover the work that was not being done by direct employees, either in normal working hours or as overtime. Occasionally, further opportunities for overtime would arise at short notice, because of sickness, late arrival of deliveries etc. In such circumstances, first refusal was given to Royal Mail employees who had placed their name on the overtime list, to indicate their willingness to do overtime. It would only be if none of these Royal Mail employees was interested in to doing the overtime that it would be offered to the agency workers.

128. The claimants contended before the ET that the arrangements relating to overtime for direct employees were terms and conditions relating to the duration of working time that were ordinarily included in the Royal Mail OPG contracts in the summer of 2015, and which would have been included in the claimants' contracts if they had been direct recruits.

129. The ET dismissed this part of the claimants' claim, at paragraphs 101 to 105 of the judgment, for two cumulative reasons. First, the ET said that the "duration of working time" could only refer to the duration of the assignment that had been given to the agency workers.

Overtime working involves, inherently, working beyond the duration of any assignment or engagement. Therefore, any term relating to overtime could not be a term relating to the duration of working time. The ET considered that this issue had been resolved by the judgment of the EAT in **Kocur 1.**

130. Second, and in any event, the ET said that it needed to ask itself the comparative and hypothetical question that is required by regulation 5. This requires the ET to identify the basic and working conditions that the claimants would have been working under if they had been employed directly by Royal Mail in 2015. The ET found that, as the whole idea of the relationship between Royal Mail and Angard was to provide a flexible bank of OPG workers, Royal Mail would not have included in such employees' contracts the right to volunteer for overtime alongside contracted hours employees, had the claimants been direct recruits in 2015.

The parties' submissions

131. Mr Barnett acknowledged that in order to succeed on this issue, he needed to persuade us that both of the reasons relied upon by the ET when rejecting this part of the claimants' case were wrong.

132. As for the first reason, he submitted that the starting point is that the AWR must be interpreted so as to give effect to the meaning and purpose of the Directive, even if it is necessary to add words to the AWR to do so. He pointed out that the definition of "basic working and employment conditions" in Article 3.1(f)(i) of the Directive, for which there must be equal treatment, includes "the duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays." He said that the reference to overtime means that the opportunities for overtime must be the same for agency workers as for direct employees, provided

A that the right to be offered overtime is contained in the contracts of employment or a contractually-binding collective agreement. Mr Barnett said that, for reasons that are not clear, the word "overtime" was omitted from the list of relevant terms and conditions which amount to basic working and employment conditions in regulations 5(2) and 6(1) of AWR. However, he submitted that it is necessary to read the word "overtime" into the domestic regulations. Alternatively, the claimants could rely upon the direct effect of the Directive, because, he said, Royal Mail is a state authority.

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133. As for the second reason, Mr Barnett submitted that the ET's approach was fundamentally misconceived. He submitted that the ET was wrong to conduct the hypothetical exercise of working out what the terms and conditions would have been for the claimants if they had been recruited by Royal Mail into a flexible reserve which performed the same functions as the agency workers actually perform. The ET should have looked at the terms and conditions that are actually ordinarily included in the contracts of employees of the hirer. On the ET's own findings, the actual contracts for OPG operatives included the opportunity have first refusal on overtime opportunities. Further and alternatively, Mr Barnett submitted that the ET had no evidential basis for its conclusion, hypothetically, that if the agency workers had been direct recruits, they would not have been given first refusal on overtime.

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134. For the respondents, Mr Boyd accepted that there is a difference in wording between the Directive and the AWR, in that the AWR does not refer specifically to overtime. However, he submitted that the reference to "overtime" in the Directive was to overtime pay and not to the opportunity to do overtime. The definition of "pay" in regulation 6.2 of the AWR was wide enough to encompass overtime pay and so there was no mis-match between the Directive and the AWR in this regard.

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135. In relation to the second point, Mr Boyd submitted that, properly understood, regulations 5.1 and 5.2 do indeed require the ET to undertake a hypothetical exercise. Furthermore, he submitted that the ET was entitled to conclude that if the agency workers had been directly recruited by Royal Mail, they would not have been given the same first refusal for overtime as other employees, because the whole idea was that they were intended to be a flexible resource.

Discussion and conclusions on Issue (6)

136. We accept that the regulations should be interpreted in a way that is consistent with the meaning and effect of the Directive. In our judgment, the starting point is that the word "overtime" in the Directive may potentially refer to three things. First, it could refer to the amount of overtime pay or an overtime premium. Second, it could refer to the point in the working week or other period at which the workers become eligible for overtime, eg after 35 or 40 hours' work, and, third, it could also refer to the arrangements for selecting workers to be offered overtime.

137. In our view, the word "overtime" in the Directive has the first two meanings, but not the third. The reference to "overtime" in the Directive means that the "basic working and employment conditions" include contract terms relating to the amount of overtime pay, and to the point in the pay period at which overtime becomes payable. Both of these terms affect the amount that the agency worker will be paid for the work that he or she has done. So, for example, if agency workers are paid, say, an extra 20% per hour for overtime, and, if they were direct employees they would be paid an extra 33% per hour for overtime under their contracts of employment, this would be a breach of regulation 5(1). Again, if direct employees would have been paid overtime after 35 hours in a week, and agency workers only qualify for overtime after

working 40 hours, this, too, would be a breach of regulation 5(1). This would not be because there would be a breach in relation to "duration of working hours", but because there would be a breach in relation to "pay". We agree with Mr Boyd that "pay" is wide enough to cover pay for overtime hours.

138. However, we do not accept Mr Barnett's submission that "overtime" in the Directive also covers the opportunity to undertake overtime. This would not be a matter relating to the amount of pay for work done. Nor would it be a matter relating to duration of working hours. As the Court of Appeal made clear in **Kocur 1**, the reference in the Directive and the AWR to "duration of working hours" does not mean that hirers are obliged to offer a particular number of hours' work to agency workers. By parity of reasoning, the Directive does not require hirers to offer overtime to agency workers, whether at all, or on the same terms as it would have been offered to them if they had been direct employees. To do so would run counter to the flexibility which is at the heart of the relationship between hirers and agency workers.

139. Since the Directive does not require terms relating to the arrangements for offering overtime to count as "basic working and employment conditions", the same must apply to the regulations. As Mr Barnett recognised, there is nothing in the language of the regulations themselves which would lead to this conclusion.

140. In light of this, this ground of appeal by the claimants must be dismissed.

141. We will, however, go on to deal briefly with the second point that arises in this issue. In our judgment, the ET was right to undertake the hypothetical exercise which it undertook. Regulation 5(1) states that an agency worker is entitled to the same basic working and

employment conditions as the same agency worker would have been entitled to for doing the same job if the agency worker had been hired directly by the hirer. This is necessarily a hypothetical exercise. The question is what the basic employment and working conditions would have been in circumstances that never actually happened, i.e. if the worker had been hired directly instead of being engaged as an agency worker. This is made all the clearer by Article 5.1 of the Directive, which states that the basic working and employment conditions are those "that would apply if [the agency workers] had been recruited directly by the undertaking to occupy the same job."

142. There is nothing in regulation 5(2) which undermines this conclusion. The purpose of regulation 5(2) is to make clear that terms and conditions will only count as basic working and employment conditions if they deal with particular subject-matters (pay etc), and if the terms and conditions would ordinarily be included in contracts of employment. Arrangements that are non-contractual do not count as basic working and employment conditions.

143. Regulation 5(3) deems the obligations under regulation 5(1) to be satisfied if the terms and conditions of agency workers are the same as the terms and conditions of comparable employees, but this does not detract from the position that the focus, under regulation 5(1) is on a comparison with the contractual terms under which the agency worker would have been working if he or she had been a direct recruit.

144. As for whether the ET was entitled to come to the conclusion that if the claimants were directly recruited, they would not have been included in the group of employees who had a contractual right to first refusal for overtime, we accept that this conclusion is not self-evidently right. It might arguably have been the case that, once the claimants were welcomed into the

Royal Mail family, they would have been given the same first refusal rights to overtime as everyone else at the Leeds Mail Centre. However, we are unable to go so far as to say that the ET's conclusion was perverse and, in any event, this point is moot, since this ground of appeal must fail, whether the ET was correct on this point or not.

Issue (7): Averaging pay on payslips

145. Direct Royal Mail employees receive their pay slips in paper form, by post. Agency workers employed by Angard receive their payslips electronically. The pay slips of Royal Mail employees are more detailed, providing a breakdown of most hourly rates and hours, although the sheer complexity of the pay grades and rates means that some information has to be compressed. Agency workers, in contrast, are just provided with an average pay rate. The electronic system does not have the capacity to provide all of the underlying pay rate and hours information.

146. The claimants complained that the failure to provide them with the same amount of detail on their pay slips as they would have had if they were direct employees was a breach of regulation 5(1). The ET rejected this contention, at paragraphs 120-121 of its judgment. The ET said that there was no contractual term for direct recruits which entitled them to a particular level of detail in a pay slip. The ET also pointed out that section 8 of the Employment Rights Act 1996 permits the provision of an average rate of pay on an itemised pay slip. The ET said that the claimants' right to pay rate information was not a matter for the AWR but was properly to be delivered by an accurate section 1 statement, and timely updates to that statement when pay rates change.

The parties' submissions

147. Mr Barnett submitted on behalf of the claimants that the ET had misinterpreted section 8 of the 1996 Act, and that the section does not give employers a blanket right to set out average rates of pay on pay slips. Mr Barnett submitted that section 8 was incorporated into direct hire employees' contracts and this meant that they had a contractual right to the more detailed breakdown. He also pointed out that section 1 of the 1996 Act only covers employees and not workers, but the AWR covers both categories.

148. Mr Boyd, for the respondents, submitted that section 8 was a red herring. The key point is that if the claimants had been direct hires they would not have had a contractual right to a particular level of pay information on their pay slips, and so they could have no claim under the AWR.

Discussion and conclusion on Issue (7)

149. In our judgment the ET directed itself correctly on this issue and reached the right conclusion. The ET was entitled to conclude that, if the claimants had been employed directly, they would not have had a contract term which specified a particular level of information on their pay slips, and so that they cannot succeed with a claim under regulation 5(1). As we have said, claims under the AWR can only succeed if the relevant term or condition would have been part of the agency worker's contract of employment if they had been directly recruited. There was no express term for Royal Mail employees which entitled them to a particular amount of information on their pay slips. There is no basis for implying such a level of information. The fact that a right to some information on an itemised pay slip is specified in a statutory provision, section 8,

does not mean that the right takes on contractual force. It is a statutory right, not a contractual right. It is therefore unnecessary for us to resolve the disagreement between the parties as to the extent to which section 8 permits a pay slip to provide an average rate of pay.

150. In any event, we do not think that the level of information on a pay slip falls within the list of matters that can amount to basic employment and working conditions in Article 3.1(f) of the Directive, and regulation 6.1 of the AWR. It is not, in our view, a term relating to pay. Therefore, even if, contrary to our view, the claimants' contracts of employment, if they had been directly recruited, would have included a term about the information to be provided in a pay slip, they could not have brought a claim under regulation 5(1) on this matter.

151. Accordingly, this ground of appeal is dismissed.

Issue (8): the scheduling of breaks

152. Those worked in the sorting office at Leeds Mail Centre were entitled to two breaks per shift, a long and a short break. Direct employees and agency workers received the same number of breaks, of the same duration, in each shift. The only difference was that direct OPG employees knew before their shift began when their shorter break would take place, because it was specified on their signing-on sheets. Agency workers were not given this information in advance, and they would take their shorter break when told to do so by their manager. Therefore, the agency workers would not know in advance when their shorter break would take place.

153. The claimants contended that this was a breach of regulation 5 of the AWR. The ET rejected this contention, at paragraph 122 of the judgment. The ET said that this was a complaint about a means of contractual delivery rather than a contractual term. The ET said that there were practical reasons why this difference existed. Though the ET did not specify what the reasons were, we infer that the main reason was that agency workers were brought in to provide cover and flexibility, and it assisted management to be able to require agency workers to take their shorter breaks at convenient moments when the work-flow dropped off.

The parties' submissions

154. Mr Barnett submitted that the ET erred because it simply assumed that there was no contractual term about the scheduling of rest breaks. The ET had failed to consider whether having the shorter rest break scheduled in advance had become a contractual entitlement for direct employees through custom and practice (and so would have been a contractual entitlement for the claimants if they had been direct hires).

155. Mr Boyd submitted that the ET's conclusion was plainly right. It was simply the case that for business expediency, permanent employees' breaks were structured. It was not a contractual term and so it fell outside the scope of the AWR.

Discussion and conclusions on Issue (8)

156. In our judgment, the ET's conclusion on this issue was plainly right. The ET was entitled to find that direct employees had no contractual right have their shorter breaks scheduled in advance. There was no express term in the contracts of employment of direct hires or in the collective agreements to this effect. There was no basis for a finding that this had crystallised into a contract term as a matter of custom and practice. As the ET said, this was a matter of

contractual delivery. In other words, this was a small matter of detail about the arrangements for the working day which was not of sufficient importance to be elevated into a term of the contract. Not every single aspect of working lives forms part of a contract of employment. Say, for example, an employee has a desk by the window, with a pleasant view, and has been there for many years. If the employer reorganises the room so that the employee no longer has the benefit of the view, this would not be a breach of contract. The mere fact that something happens for a long time, and is part of the rhythm of working life, does not automatically mean that it becomes part of the contract of employment as a result of custom and practice.

157. In any event, we do not think that the timing of breaks comes within the subject-matter of "working and employment conditions". It is not part of the "duration of working time". Even if that phrase were given a wide meaning – and the Court of Appeal judgment in **Kocur 1** makes clear that it should not be given a wide meaning – it would not extend to the scheduling of breaks within a shift.

158. Accordingly, this ground of appeal is dismissed.

Summary and disposal

159. In light of the above, our conclusions on these appeals are as follows:

Appeal 0105/19

160. The respondents' appeals on Issue (1), internal vacancies, and Issue (2), shift lengths, are allowed. There is no need to remit these issues to the ET, as the appeals were concerned with

pure points of law against a background of agreed facts. Accordingly, we substitute a finding that the claimants' claims on these issues are dismissed.

161. The respondents' appeal on Issue (3), section 1 statements, is dismissed, as it is premature.

Appeal 0209/19

162. The claimants' appeal on Issue (4), late payment of 2018 pay increase, is allowed. The issue is remitted to a differently constituted ET to determine whether there would have been an implied term in the claimants' contracts of employment, if they had been direct recruits, to the effect that the pay rise would be implemented within a reasonable time and, if so whether the pay rise was implemented for the claimants within a reasonable time.

163. The other grounds of appeal relied upon by the claimants are dismissed. These are concerned with Issue (5), Worktime Listening and Learning training sessions, Issue (6): opportunity for overtime, Issue (7), averaging pay on payslips, and issue (8): the scheduling of breaks.