



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Andras Toth (C1)  
Mr Adam Toth (C2)

**Respondent:** HR GO (Liverpool) Ltd (R1)  
Mayr-Meinhof Packaging UK Ltd (R2)

**HELD AT:** Wrexham (a hybrid hearing) **ON:** 1<sup>st</sup> & 2<sup>nd</sup> February 2021

**BEFORE:** Employment Judge T. Vincent Ryan

## REPRESENTATION:

**Claimant:** Mr Andras Toth for himself and his son (C2)  
**Respondents:** Mr. E. McFarlane, Consultant (R1)  
Mr. J. Anderson, Counsel (R2)  
**Interpreter:** Ms J. Lyndsey (Hungarian/English languages)

# RESERVED PRELIMINARY HEARING JUDGMENT

The judgment of the Tribunal is:

1. The claimants' employment whilst working for R2, following introduction by R1, was covered by Regulations 10 and 11 Agency Workers Regulations 2010.
2. The claimants' claims that they that they were entitled to the same basic working and employment conditions in relation to pay as R2's permanent employees and that they were not paid properly fail and are dismissed.

## REASONS

### 1. The Issue:

- 1.1. Whether the relevant employment of the claimants was covered by regulations 10 and 11 of the Agency Workers Regulations 2010 (the Regulations) as they then applied (that is, whether “the Swedish derogation” applied).
- 1.2. It was agreed at previous preliminary hearings and again at the outset of this hearing, that the potential issue of comparability of the claimants to a permanent employee was not to be considered today but only the Swedish derogation point.

### 2. The Facts:

- 2.1. For the purposes of this hearing and the application of the Regulations the claimants were agency workers, R 1 was the temporary work agency and R 2 was the hirer. Those roles and their relationships as defined by the regulations are not controversial.
- 2.2. C1 provided a written witness statement in accordance with case management orders. C 2 did not do so. Only C1 therefore gave oral evidence under cross-examination at this preliminary hearing. It is understood that the position of C2 was the same or broadly similar to that of C 1, and that there was no material difference between them.
- 2.3. R 1 sourced agency workers for its clients such as R 2, and other hirers.
- 2.4. The agency workers would then enter into contracts of employment with a payroll company introduced by R1 before each assignment with, for example, R2. R1 outsourced payroll and employment in this relationship to a series of payroll companies. The identity of the employing payroll company changed over time as directed by the management of R1. On each change of payroll company (the employer of the agency worker) at the commencement of any assignment or extension of an on-going assignment, a new contract would be issued to the agency worker who would be required to accept the terms of it if he or she wished to work.
- 2.5. Upon interviewing any prospective agency worker, pre-registration, it would be explained to them that the contract and payslips would be available for them online and that they would have to accept the terms online in order to be granted assignments and to check their payslips. This is what happened with the claimants.
- 2.6. The hearing bundle contains contracts between various payroll companies and the claimants that cover the period of time that the claimants were

engaged on assignments with R2 following introduction by R1. All of the contracts are compliant with Regulation 10, the Swedish derogation.

2.7. C1 registered with R 1 on 3 November 2017 and accepted assignments offered to him to work for R 2 until 6 October 2019. It appears from his ET1 that C2's dates are similar, when not the same.

2.8. C1 understood the terms of the contracts that he accepted at each assignment or extension of any assignment. With hindsight, comparing themselves with permanent employees, the claimants took exception to the provisions of those contracts all of which satisfy the requirements of Regulation 10, containing the required statement giving effect to the Swedish derogation. In part at least for the purposes of today's hearing the claimants take exception to the fact that the expression "Swedish derogation" is not used in the series of contracts to which they were party and they feel it ought to have been clearer. C1 conceded in evidence that he accepted the terms and conditions of the series of contracts with the payroll companies which are in the hearing bundle and says that he had to do that to obtain work and access to payslips; he did so; he worked; he was paid. His other particular complaint was that he did not know the identity of the payroll companies and had no personal dealings with anyone that he knew to be from them; his dealings were with the two respondents and their personnel.

2.9. The claimants did not complain at any time to R1 or R2 that they were not paid between assignments. C1 asserted today that he and C2 were not paid between assignments but they have not adduced evidence of gaps in employment when R1 or any payroll company failed to take reasonable steps to seek suitable work for them, and if they found work then to offer it to the claimants, but if there was a gap between assignments when they did not work then that payment was withheld or not made to them ("the minimum amount" referred to in regulation 10 (c) and Regulation 11). C1 gave evidence that he worked for R2 for nearly 2 years; that would coincide with the dates that were available to me today from C1's registration on 3 November 2017 to the end of the last assignment on 6 October 2019. There were no proven gaps between assignments, that is any period of time after an assignment had ended when C1 was seeking work through these agency arrangements, and he was not found work.

### **3. The Law:**

3.1. The Agency Workers Regulations 2010 govern the relationship between an agency worker, temporary work agency and a hirer, each of which role is defined in regulation 3 and 4.

3.2. What is called The Swedish derogation no longer applies but it did at the material time and it is provided for in this regulations 10 and 11, revoked with effect from 6 April 2020.

- 3.3. Subject to a qualifying period of 12 weeks continuous work in the same role with the same hirer, an agency worker is entitled to the same basic working and employment conditions as a permanent or direct employee of a hirer.
- 3.4. At the time when the Swedish derogation applied, the parties could opt out of the regulation 5 basic working and employment conditions in relation to pay. Where the derogation applied an agency worker would not be entitled to equal pay with that of a comparable permanent or direct employee of the hirer.
- 3.5. For the Swedish derogation to apply the parties must have entered a contract of employment before the beginning of the first assignment under that contract. Furthermore the contract had to include certain terms and conditions in writing relating to remuneration rates, locations of work, expected hours (minimum and maximum) and the nature of the work. The contract of employment would have to contain a statement that the effect of entering into it is that the employee does not, during the currency of the contract, have any entitlement to the right conferred by regulation 5 relating to pay. It is also a requirement of such a relationship under the Swedish derogation that between assignments the temporary work agency would take reasonable steps to seek suitable work for the agency worker and offer it if was available, but if it was not then it would pay a minimum amount of remuneration for the period when there was no work (pay between assignments or PBA). The temporary work agency was not to terminate the contract of employment until it had complied with these latter obligations for an aggregate of not less than four calendar weeks during the contract.
- 3.6. The wording of a contract is to be given its ordinary meaning. Terms and conditions ought not to be implied by a tribunal unless necessary to give effect to the contractual relationship. Unless therefore there is evidence of coercion or that the contract is a sham (or is illegal and other such exceptions) a contract will exist in the terms in which it is written where there is an offer, acceptance, and valuable consideration. Where in fact the parties work to implied terms of a contract ignoring or altering what was written then effect ought to be given to the actuality of the situation and not mere labelling.

#### **4. Application of law to facts:**

- 4.1. The contracts made between various payroll companies, and the claimants which were produced at this hearing satisfy the requirements of the Swedish derogation.
- 4.2. C 1 accepted in evidence that he had agreed to the terms of those contracts, albeit he says that the expression "Swedish derogation" ought to have been expressly stated, and he was unhappy that he had no real understanding of the identity of the various payroll companies. He had no real understanding of the rather complicated structure in relation to agency workers and the interrelationship of payroll companies and their micro-companies. He

understood however that he was accepting agency employment and what that entailed. He knew and appreciated that he was entitled to PBA.

- 4.3. The rationale behind the Swedish derogation is that an agency worker is prepared to accept that he or she may be paid less than a permanent employee, but this is in return for the assurance that between assignments the temporary work agency will seek alternative employment, offer it, or make certain payments between assignments to the agency worker. That is an assurance that has value.
- 4.4. C 1 understood that assurance. At no stage prior to these proceedings did he ever say that R1 had failed to comply with its part of the assurance given in regulation 10. He adduced no evidence in support of his suspicion that he would not have received or did not receive PBA and the benefit of assistance in obtaining alternative employment when he wanted work. There is no evidence that this contract is a sham, is illegal, or that there was any coercion.
- 4.5. The claimants had the benefit at all times of contracts compliant with the Swedish derogation, and which gave them safeguards between assignments.
- 4.6. As the Swedish derogation applied to the claimants' employment the question of comparison with a permanent employee of R2 does not arise. The claimants have failed at the first stage of the exercise to see whether their claims may succeed.

Employment Judge T.V. Ryan

Date: 12.02.21

JUDGMENT SENT TO THE PARTIES ON 16 February 2021

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FOR THE TRIBUNAL OFFICE Mr N Roche