



EMPLOYMENT TRIBUNALS

Claimant: Mr W Victorin
Represented by: In person

Respondents: The Kingdom Group Ltd
(t/a Kings Recruitment Consultants) (1)
The London Borough of Lewisham (2)

Represented by: Mrs S Hopkins, Managing Director (1)
Mr Patel, Counsel (2)

**Heard in London South
ET by CVP**

On 27 – 29 January 2021

Before: Employment Judge L Burge

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The Claimant was not permitted to amend his claim to include a claim under Regulation 17(2) of the Agency Worker Regulations 2010 (“AWR”);
2. The Claimant did not make a written request to the First Respondent for a written statement pursuant to Regulation 16 AWR; and
3. The Claimant’s claim under Regulation 5 of the AWR fails.

REASONS

Background to the claim

1. By a claim form presented on 3 November 2019, the Claimant complained that he had not been treated appropriately by the Respondents in respect of his entitlements under the AWR. At a Case Management discussion on 14 May 2020 the Claimant also complained that he had not been paid the appropriate pay and arrears of pay, although by the time of the Preliminary

Hearing on 29 September 2020 the Claimant confirmed that he had now received all sums owing to him arising out of his employment at scale 4.

2. The claim was listed for a final hearing for 3 days to commence 27 January 2021 with a full directions timetable in place.

The Issues

3. The issues for the Tribunal to determine were:
 - a. Were the Claimant's rights under Regulation 5(1) breached by the Respondents at the qualifying period and/or any time thereafter?
 - b. Under Regulation 16:
 - i. Did the Claimant make a written request to the First Respondent for a written statement pursuant to Regulation 16(1); and if so
 - ii. Did the First Respondent fail to provide a written statement in accordance with Regulation 16(2); and if so
 - iii. Should the Tribunal draw an inference which it considers just and equitable to draw, including an inference that the First Respondent breached the right in question?
 - c. If the Claimant's rights under Regulation 5(1) were breached is it just and equitable to award compensation to the Claimant and if so, in what amount?
 - d. If the Employment Tribunal determines infringements occurred, which Respondent(s) is/are liable and to what extent, pursuant to regulation 14(2) and regulation 18(9)?
4. The Claimant contended that Jackie Ley was the appropriate comparator and that he was entitled to be paid the same as Ms Ley was at the termination of her employment.
5. The Claimant also wanted to amend his claim to include a claim for detriment under Regulation 17 but this was refused by the Tribunal. The Claimant had not included it in his claim form. The Claimant confirmed that the three alleged instances of detriment (threat to terminate placement, request to lodge a counterclaim and failure to pay the Claimant in March 2019) had not in fact materialised and so the Tribunal decided they did not appear to constitute a detriment. Also, this issue had not been raised at the Preliminary Hearing which took place on 29 September 2020 when his application to amend his claim to include an equal pay claim had been refused and the Respondents were not in a position to deal with the issue at this hearing. *Selkent Bus Co Ltd v Moore* ([1996] IRLR 661) and the overriding objective applied, the Tribunal decided it was not in the interests to justice to grant the application.

The evidence

6. The Tribunal was provided with a bundle running to 705 pages, a 14 page addition (candidate forms), a cast list and chronology. A list of issues was also provided, with some of the issues agreed. Wilson Victorin, the Claimant, gave evidence on his own behalf. Annetal Crossley (Front of House/Building Facilities Manager), Shevie McKenzie (Claimant's line manager, Front of House Team Leader), Tracey Hawks (HR Resourcing Manager) and Jackie Klang (Senior HR Advisor) gave evidence on behalf of the Second Respondent. Sharon Hopkins and Vidya Serrao gave evidence on behalf of the First Respondent.
7. The Claimant, Ms Hopkins and Mr Patel provided written closing submissions. Ms Hopkins and Mr Patel also gave oral closing submissions, the Claimant chose not to.

Findings of Fact

8. On 1 June 2011 Jackie Ley entered into a contract of employment with the Second Respondent. Her grade was Senior Officer 1 ("SO1") and her job title was Senior information Management and Technology Officer. She was placed in the Resources Directorate. Her job description showed the main purpose of the job to be:
 - *maintaining security, confidentiality and integrity of information systems across the Council*
 - *Investigate operational requirements and business needs, identifying solutions to problems and improvements to systems and processes*
 - *Maintaining and develop data structures within the Council*
 - *Define scope and business priorities for small-scale changes. Ensure requirements are agreed and prioritised with stakeholders and meeting business objectives.*
 - *Monitor service delivery performance measures and liase with management and customers to ensure service level agreements are maintained*
 - *Identify issues with applications and resolve queries, following agreed procedures.*
9. The summary of responsibilities and person duties provided more description encompassing strategy and architecture portfolio, business change portfolio, solutions development and implementation portfolio, service management and procedure management and support. Ms Crossley gave evidence that Ms Ley initially worked to this job description, it was a generic grade that meant that she and other SO1s could work on various projects such as procurement. Ms Ley had rolled out mobile telephones across the Second Respondent. By the time the Claimant joined in 2015 she was managing the "In-Print" service.
10. The Second Respondent's "In-Print" section is responsible for printing all of the papers associated with Council meetings, as well as many other documents and leaflets for a variety of sections within the Council. They also

take on external jobs (such as for schools) and members of the public which generate income.

11. Prior to 2013-2014 In-Print was part of the Information Management and Technology Division (IMT) under Simon Berlin as Head of Service. In 2013 the Division was restructured with staff reductions in 2013 and 2014. Over time the In-print service has moved around a number of teams in the Second Respondent with the view that at some point it would eventually be closed down as the Second Respondent was increasingly going paperless and Committee Agenda documents in particular were available in electronic format. Ms Crossley gave evidence, which is accepted by the Tribunal, that there had been a significant reduction in work/output over the last few years and the intention was still to stop this service. She said that the Second Respondent was trying to digitalise, so for example, Counsellors were offered laptops to obtain their papers digitally and most Counsellors took this up. She gave evidence that in 2016 the Second Respondent spent £9,000 on paper, in 2018-2019 they only spent £1300. The Claimant's evidence, which is accepted, was that the equipment was very old and continually broke and that the Second Respondent would not go to the expense of replacing or repairing broken finishing equipment including the folding machine. Certain licences had expired, and the Mac had been removed from In-print.
12. After a round of cuts in IMT in 2014 the In-Print unit ran with Ms Ley as the full time member of staff and one other member of staff Linda Turner, who worked 3 days a week. The service was put under the management of Michelle Ouzman and subsequently under Rosalind Jeffrey in 2015, to whom Ms Ley reported. Ms Turner was made redundant in the restructure in November 2014, leaving in January 2015 and her jobs such as ordering and finance were split between Ms Jeffrey and Ms Ley, although Ms Jeffrey managed the Xerox contract among other matters. Ms Ley ran the day to day operation of the service with an apprentice under her whom she supervised and agency staff were brought in to work under Ms Ley as necessary to provide on-going support. Ms Ley also handled some of the finance after Ms Turner left and dealings with customers and invoicing.
13. Agency staff were brought in at the end of 2014 beginning of 2015 to provide cover. An agency worker (Jasmine Brown) was placed at the Second Respondent, Ms Hopkins evidence, which is accepted, was that she believed Ms Brown was paid £12 per hour. Ms Hawks gave evidence, which is accepted by the Tribunal, that it was when the agency worker prior to the Claimant was placed that the job was considered to be grade Business Support Officer ("BSO") at scale 4.
14. On 23 January 2015 the Claimant received an email from the First Respondent providing details of an assignment with the Second Respondent. The email gave the job description of "Reprographics operator" starting on 26 January 2015 for a duration of possibly 10 weeks working 9am – 5pm on a rate of £12 per hour and reporting to Jackie Ley (SO1 grade) who was described as the "print room manager". The Claimant gave evidence, which is accepted by the Tribunal, that the hourly rate was less

than he was used to but the job had the real advantage of being local - he could drop his children to school and save on train fares.

15. The Second Respondent had pay scales. The pay scale applicable from when the Claimant started working at the Second Respondent detailed the following grades SCP1A, SCP1B, SCP2, SCP3, SCP4, SCP5, SCP6, SO1, SO2, PO1, PO2, PO3 and continued upwards. Each grade occupied 3 or 4 points on the pay scale. Scale 4 ("SCP4") occupied scale points 19-22 on the pay scale which equated to £21,312 – £23,148 for basic salary. SO1 was three grades higher and occupied scale points 29-31 which equated to £28,224 - £29,868 basic salary. Each year the pay scales would change. The 2019/20 payscale for SCP4 encompassed spine points 8 – 10 which equated to £24,054 - £24,927 basic salary. For SO1 the spine points were 23 – 25 which equated to £31,434 - £32,577 basic salary.
16. The Claimant gave evidence that when he worked with her, Ms Ley did not do any of the things that are specified in her job description (detailed above). In his view, Ms Ley's role appeared to be more of an administrative one, but she assisted with incoming work if the print room was exceptionally busy. Ms Ley sat at the desk greeting customers, keeping them updated about their jobs, answering the phone, chasing costs codes for work, costing and journaling jobs, sending these details to finance and handling workflows generally. She also arranged call outs for engineers, dealt with stocktaking and ordering supplies. Ms Ley liaised with Xerox on consumables and their meter readings and resolved In-Print IT issues. The Claimant worked with an apprentice doing the printing/reprographics jobs. On quieter days the Claimant sometimes assisted Ms Ley with the administrative duties. The Tribunal finds as a fact that the duties detailed above were the duties undertaken by Ms Ley and the Claimant at the time the Claimant's qualifying period began (20 April 2015).
17. A number of jobs were to be deleted as part of a restructure at the Second Respondent in 2015, one of the roles at risk was Ms Ley's. Ms Crossley gave evidence that by 2015 Ms Ley was not performing duties at SO1 level. This accorded with the Claimant's description of Ms Ley's work. The Tribunal finds as a fact that by the time she was working with the Claimant, Ms Ley was not performing work at SO1 level.
18. In January 2016 the Claimant's pay increased to £13 per hour.
19. Ms Crossley gave evidence that Ms Ley, and numerous others, were faced with applying for voluntary redundancy or applying for one of the proposed new roles. Ms Ley chose redundancy and left the Second Respondent on 31 March 2016. Ms Ley handed over the administrative duties that accompanied the functioning of the print room including paper stocktaking and handling all incoming calls and dealing with customers. The Claimant was set up with login details to the Xerox account so he could order consumables, provide meter readings and book engineers. In-Print was moved under the hub of Ms Crossley, Buildings Facilities Manager, Customer Services Centre and from October 2016 the Claimant reported to

Kingston Koraheng (PO1 Business Support Team Leader) who took over paper ordering from him.

20. In cross examination the Claimant accepted he did not manage staff and did not book agency staff as cover when he was absent, that was the responsibility of his line manager. He also said at other points that he did manage the temps when they came in and that he had helped to manage the apprentice. The Second Respondent's witnesses say that this was no more than would be expected if a new member of staff joined and an existing member of staff showed them what to do. The Tribunal finds that the Claimant did take the lead in showing new workers how the systems worked, he had become a valued and experienced member of staff. This did not, however, amount to having management responsibilities and there had been no formal change in his duties or job role. When the Claimant was on leave or off sick, an agency worker would cover with Ms Mackenzie's help, although she would often phone the Claimant to ask him if she was not sure about something.
21. The First Respondent supplied an Information Request Form to the Second Respondent who completed it on 28 September 2016, specifying that the Claimant's position was "Digital Reprographics Operator (scale 4) BSO" and provided further details on items such as pay, working hours, annual leave.
22. On 20 October 2016 the First Respondent emailed the Second Respondent saying that the Claimant had started at the Second Respondent on 26 January 2015 and was entitled to parity from 20 April 2015, he had an increase to his rate on 18 January 2016 and that they wanted to check that the salary had not changed as there would be 18 months to adjust. Ms Hawks of the Second Respondent responded that the Claimant would not be eligible for an increment until 1 April 2017 and that the salary of the permanent comparator on the second increment of a scale 4 is £22,677.
23. By the end of 2016 the Claimant more or less worked alone in In-Print. The Claimant gave evidence, that is accepted by the Tribunal, that he found it difficult to take holiday as when he returned to In-Print there would be a backlog of work and those covering may have jammed the machines.
24. The Claimant's work consisted of standard printing of A4 pages and also consisted of offset printing items such as workbooks, birthday cards, calendars, business cards and photographs. Not only would he be servicing the Council but members of the public might use the In-Print services. The Claimant did not have a qualification in offset printing but he gave evidence that he got good on the job experience in the MOD. He would advise his customers in In-Print on their printing and carry out the tasks for them. He worked hard with the aging machines that he had been left with. In the Claimant's view offset printing was a specialist skill. In cross examination the Claimant accepted "within reason", and the Tribunal finds as a fact, that the description provided in the government guidelines for the job title "Reprographic Assistant" included offset printing and described the Claimant's duties:

- *copying and binding printed materials*
- *discussing the job requirements with the customer*
- *helping prepare designs and layouts for print runs*
- *working out timescales, costs and the number of copies required*
- *programming instructions into the copying equipment*
- *making sure machines have suitable levels of inks, chemicals and toners*
- *supplying print materials to the machines*
- *mounting printing plates or cylinders, if working on a press, and lining them up correctly*
- *monitoring the progress of the copying run and quality checking samples*
- *finishing copied items, by trimming, binding or laminating*
- *performing basic equipment maintenance and cleaning*
- *administrative tasks like recording job details and ordering supplies*

The government guidance gave the average salary as £13,500 (starter) to £25,000 (experienced). The Claimant's salary at the qualifying period was £21,780 and by the date of the hearing was over £24,000. Ms Hopkins of the First Respondent gave evidence that the standard rate for a Reprographic Operator was £9.75 but with the Claimant's experience and good skills the initial hourly wage of £12 was, in her view, correct.

25. The Second Respondent provided a job description for a Business Support Role, scale 4. This detailed tasks such as filing records, maintaining systems, photocopy/fax/scan documents, printing documents, raising purchase orders and invoices. It also contained items such as collating information for complaints and FOI, managing information questions, undertaking data collection, supporting induction and training, reception functions and basic project management support.
26. The Claimant gave evidence that he spent approximately 70% of his time on offset printing whereas the Second Respondent had produced a report to say that 70% of the Claimant's time was taken up with standard A4 copying. The Tribunal finds that the truth lies somewhere in the middle and finds as a fact that the Claimant spent 50% of his time on standard A4 printing and 50% on offset printing.
27. Following a restructure in 2018, the Business Support Team Leader roles were deleted from the structure and Ms McKenzie was appointed to the Front of House Team Leader role acquiring management responsibility of In-Print, in addition to other teams. She worked in a different building to the Claimant but she would speak to him on the phone and would visit occasionally either to see him or other members of her team who worked at the same location as the Claimant. Ms McKenzie had access to the In-Print inbox so she could see the daily requests that came in and the communications back and forth.
28. Ms McKenzie gave evidence of the jobs that other BSOs did within her line management. The BSOs working in the post room had to deal with a high volume of internal and external post, deliver it to departments, use the franking machines and create internal re-charges so that franking costs were uploaded to departmental spreadsheets with appropriate costs codes in order to allocate the franking cost to the correct budgets. The BSOs

working on reception had to deal with an element of finance in that they had to charge external clients for using facilities, generate invoices and dealt with meeting requests. They also had to make meeting room bookings for internal clients, perform triage for housing and social care and use SignLive.

29. Ms McKenzie also gave evidence about a document management role that had been graded at grade 3 (a grade lower than the BSO grade 4 role) . She said:

“I have looked at the Document Management role within the Front of House Service which was downgraded from a scale 4 to a scale 3 following the restructure in 2018. Both roles, 4 although different in terms of tasks and responsibilities are considered to be on par with regards to the level of knowledge, knowhow and experience which is required, with the Document Management role requiring a higher level of scrutiny due to the large quantities of work produced on a daily basis in relation to the services supported it supports – Revenues and Benefits and concessionary awards etc. In addition to this both roles require timely completion of work in certain cases due to the statutory requirements for work to be ready and available to the respective services supported by both roles. This being said however the Document management role was still evaluated as a scale 3 role.”

30. Ms Crossley also gave evidence about other BSO roles within her directorate. She said that the receptionists are the forefront of the Second Respondent, they are the first point of contact for the Mayor, Chief Executive and queries from the public dealing with a wide range of matters including housing enquiries, blue permits, the library and anything relating to the Second Respondent’s business. Ms Crossley gave evidence that this included difficult encounters within adult social care, children’s social care, conferences, safeguarding meetings and they were informed about difficult social care issues as they could face volatile behaviour from those attending the meeting.
31. The Claimant emailed a generic emailed address at the First Respondent on 29 May 2019 saying that it had come to his attention under the AWR that once an agency worker had worked for 12 weeks they qualified for the same basic employment rights as someone else employed directly by the company. He said that he had been at the Second Respondent for 4 years but had not benefited from any of these rights and that he was disappointed that the First Respondent had not made him aware of his rights. He said “Please let me know by return how you intend to resolve the situation”.
32. In early July 2019 the Claimant emailed the Second Respondent a lengthy letter, primarily requesting a permanent position. On 15 July 2019 Ms Mckenzie provided a lengthy reply stating, amongst other things, that the long term future of In-Print remained under consideration and it was therefore not appropriate to advertise the position as permanent.

33. On 23 July 2019 the Claimant emailed the First Respondent raising AWR and said that there used to be three people in In-Print and now there was only him, so he was effectively doing the job of three people. He asked how the hourly rate had remained the same since January 2015 (the Claimant confirmed in evidence that it should have stated 2016) and that could not be right. In evidence the Claimant confirmed, and the Tribunal finds as a fact, that in this communication he had raised two things: information about his rights under the AWR and also he was questioning why his rate had remained the same since 2016.
34. On 25 July 2019 the Second Respondent completed an AWR form sent by the First Respondent for the position of “Digital Reprographic Operator”.
35. On 26 July 2019 the First Respondent emailed the Claimant reassuring him that they were engaging with the Second Respondent. The First Respondent investigated thereafter, performing a pay audit. There was correspondence between the parties and on 13 August 2019 Ms Hopkins of the First Respondent visited the Claimant at his place of work to enable the Claimant to verbalise his concerns and to explain to him how leave was accrued, calculated and paid.
36. On 12 September 2019 Ms Hopkins emailed the Claimant the holiday pay investigation and attached the findings. Having undertaken an extensive review into all hours worked, leave taken and appropriate pay and leave comparisons with a permanent BSO, scale 4 at the Second Respondent, on 7 August 2020 the First Respondent paid the Claimant £1,420.44 comprising outstanding hourly pay adjustments and AWR holiday pay.
37. Ms Klang gave evidence for the Second Respondent. She is an experienced HR professional, trained in job evaluation and has undertaken hundreds of job evaluations. In July 2020 she was asked to perform a job evaluation on the Claimant’s role. The Claimant’s line manager Ms McKenzie provided her with a job description and person specification, a completed job evaluation questionnaire, and a copy of the structure. In her witness statement Ms Klang gave evidence that the questionnaire took into consideration eleven factors of the post when grading and that these were supervision and management of people, creativity and innovation, contacts and relationships, decision/discretion, decision/consequences, resources, work demands, physical demands, working conditions, work context and knowledge and skills. Ms Klang gave evidence that she marked up some of Ms McKenzie’s markings for the post – she increased Ms McKenzie’s markings to:
- “regular ongoing requirement for creativity and some innovative thinking in the resolution of problems and handling issues”.
 - “resolution of difficult situations and/or complex problems”
 - “the post has general guidelines available but in some areas the post holder will have some discretion to interpret those procedures/guidelines in the light of the actual problems/situations encountered”

- “providing detailed explanations/advice on specialist matters”
- “freedom to take decisions from a wide range of choices within programmes and objectives on a day to day basis”
- “providing detailed advice to others”; and
- “How often do interruptions/changes in priority lead to the post holder switching to a different programme of tasks” – “occasionally/regularly”.

38. The outcome of the job evaluation was that the Claimant’s job was evaluated as BSO. Ms Klang gave evidence to the Tribunal that at the time of the job evaluation she did not realise that the Claimant was a lone worker with a guillotine and other potentially dangerous equipment. This would have changed her response in “exposure to risk” to “some ... this level could include working unaccompanied where another element poses some risk e.g. working at night, lone use of potentially dangerous equipment”. Ms Klang gave evidence that this would have increased the Claimant’s score by 8 points but would not have altered the outcome of the job being evaluated at BSO. Ms Klang also gave evidence that had she used the job description prepared by the Claimant and the First Respondent, this would also have resulted in an evaluation of BSO. The Tribunal found Ms Klang to be a professional, unbiased and honest witness and finds as a fact that the job evaluation fairly evaluated the Claimant’s post as BSO, scale 4.

The Law

39. Regulation 5 of the Agency Worker Regulations 2010 (“AWR”) provides:

“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 subparagraph (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.”

40. The relevant parts of Regulation 6 AWR state:

“6(1) In regulation 5(2) and (3) “relevant terms and conditions” means terms and conditions relating to— (a) pay; ...

(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).”

41. The relevant parts of Regulation 7 AWR provide that:

“7(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.

(3) For the purposes of this regulation and regulations 8 and 9, the agency worker works in “the same role” unless—

(a) the agency worker has started a new role with the same hirer, whether supplied by the same or by a different temporary work agency;

(b) the work or duties that make up the whole or the main part of that new role are substantively different from the work or duties that made up the whole or the main part of the previous role; and

(c) the temporary work agency has informed the agency worker in writing of the type of work the agency worker will be required to do in the new role.”

42. The relevant parts of Regulation 16 (Right to receive information) state:

“16.—(1) An agency worker who considers that the hirer or a temporary work agency may have treated that agency worker in a manner which infringes a right conferred by regulation 5, may make a written request to the temporary work agency for a written statement containing information relating to the treatment in question.

(2) A temporary work agency that receives such a request from an agency worker shall, within 28 days of receiving it, provide the agency worker with a written statement setting out—

(a) relevant information relating to the basic working and employment conditions of the workers of the hirer,

(b) the factors the temporary work agency considered when determining the basic working and employment conditions which applied to the agency worker at the time when the breach of regulation 5 is alleged to have taken place, and

(c) where the temporary work agency seeks to rely on regulation 5(3), relevant information which—

- (i) explains the basis on which it is considered that an individual is a comparable employee, and
- (ii) describes the relevant terms and conditions, which apply to that employee.

...

(8) Information provided under this regulation, whether in the form of a written statement or otherwise, is admissible as evidence in any proceedings under these Regulations.

(9) If it appears to the tribunal in any proceedings under these Regulations—

- (a) that a temporary work agency or the hirer (as the case may be) deliberately, and without reasonable excuse, failed to provide information, whether in the form of a written statement or otherwise, or
- (b) that any written statement supplied is evasive or equivocal, it may draw any inference which it considers it just and equitable to draw, including an inference that that temporary work agency or hirer (as the case may be) has infringed the right in question.”

43. The relevant parts of Regulation 18 provide:

“

...

(2) ... an agency worker may present a complaint to an employment tribunal that a temporary work agency or the hirer has infringed a right conferred on the agency worker by regulation 5, 12, 13 or 17 (2).

...

(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.

(10) Subject to paragraphs (12) and (13), where a tribunal orders compensation under paragraph (8)(b), the amount of the compensation awarded shall be such as the tribunal considers just and equitable in all the circumstances having regard to —

- (a) the infringement or breach to which the complaint relates; and
- (b) any loss which is attributable to the infringement.

(11) The loss shall be taken to include —

- (a) any expenses reasonably incurred by the complainant in consequence of the infringement or breach; and
- (b) loss of any benefit which the complainant might reasonably be expected to have had but for the infringement or breach.

(12) Subject to paragraph (13), where a tribunal orders compensation under paragraph (8)(b), any compensation which relates to an infringement or breach of the rights —

- (a) conferred by regulation 5 or 10; or
- (b) conferred by regulation 17(2) to the extent that the infringement or breach relates to regulation 5 or 10, shall not be less than two weeks' pay, calculated in accordance with regulation 19.

(13) Paragraph (12) does not apply where the tribunal considers that in all the circumstances of the case, taking into account the conduct of the claimant and respondent, two weeks' pay is not a just and equitable amount of compensation, and the amount shall be reduced as the tribunal consider appropriate.

(16) In ascertaining the loss the tribunal shall apply the same rule concerning the duty of a person to mitigate loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) the law of Scotland.

(17) Where the tribunal finds that the act, or failure to act, to which the complaint relates was to any extent caused or contributed to by action of the complainant, it shall reduce the amount of the compensation by such proportion as it considers just and equitable having regard to that finding."

44. The Department for Business Innovation and Skills, now BEIS, issued Guidance on the application of the Agency Worker Regulations. That gave guidance on comparators at page 26:

"It is not necessary to look for a comparator. Given what is said above, it is quite possible to identify the appropriate "basic working and employment conditions" without one.

However, the hirer will be deemed to have complied with the Regulations on equal treatment on basic working and employment conditions if the hirer identifies an appropriate comparator and treats the agency worker in the same manner. In these circumstances the comparator must be an employee.

A comparator needs to be engaged in broadly similar work, but account can be taken of their skills and qualifications as this may justify a higher level of pay for the comparator. They must work at the same or, if there is no comparable employee in the same workplace, in another of the hirer's workplaces. They will not be a comparable employee if they are no longer employed by the hirer."

45. Guidance on substantive changes to job roles and qualifying period restarting is given as pages 24-25 of the Guidance:

"Substantively different

If there is a substantive change to a job role within the same hirer, a new qualifying clock commences for the new role.

However, for this to happen, the work or duties which make up the whole or main part of a role must be substantively different; it is not enough that a line manager has changed but not the job requirements or that the agency worker has transferred between similar administrative functions or has moved within a single, relatively small business unit or has been given a different pay rate. None of these things by themselves would be sufficient. There has to be a genuine and real difference to the role.

The factors that may make the work or duties substantively different

In the event of a dispute, a combination of factors can be expected to be taken into account by a Tribunal when establishing whether or not the work or duties are substantively different.

A combination of the following characteristics can help to establish if the work or duties are substantively different:

- Are different skills and competences used?*
- Is the pay rate different?*
- Is the work in a different location/cost centre?*
- Is the line manager different?*
- Are the working hours different?*
- The role requires extra training - and/or a specific qualification that wasn't needed before?*
- Is different equipment involved*

...

In order for the 12 week qualifying clock to be reset to zero, the hirer must notify the agency that the work or duties have changed and this information must be passed to the agency worker:

• *A hirer must notify a TWA in writing when there is a new role that is substantively different (see Conduct Regulations for more details) and record details of on the job requirements.*

• *The TWA must provide a description of the new role in writing to the agency worker. The TWA should record details about the new vacancy and notify the agency worker, in writing, that their role has substantively changed and that the qualifying period will start again.”*

Discussion and Application of the Law

46. The parties agreed that the Claimant was an agency worker for the purposes of the AWR. Applying Regulation 5, if the Claimant had been directly employed by the Second Respondent to do the same job on 20 April 2015 (the date his qualifying period began), then he would be entitled to the same terms and conditions as someone directly employed to do the same job. Annual leave and pay for annual leave had been resolved prior to the hearing.

Is there an actual Comparator?

47. Paragraphs (1) and (2) of Regulation 5 AWR allow a hypothetical comparison, looking at what the agency worker would have had the benefit of if they had been recruited directly. Paragraphs (3) to (5) permit the use of an actual comparator if there is one.

48. The Claimant's case was that he should have been paid at grade SO1, because that was the grade that his colleague Ms Ley was employed as and she was his appropriate comparator. Regulation 5(5) says that an employee is not a comparable employee if that employee's employment has ceased or ended. Although Ms Ley's has since ended, she was in employment at the time the qualifying period started, 20 April 2015, and the Tribunal concludes that notwithstanding the fact she has left the Second Respondent, she could be a potential comparator for the Claimant as at 20 April 2015.

49. The Claimant's job title was Reprographics Operator and on 20 April 2015 he and the apprentice reported to Ms Ley. Ms Ley managed staff, the Claimant did not. The Claimant himself gave evidence that Ms Ley managed the service and was doing different work to the work carried out by the Claimant and the apprentice, although she would assist with incoming work if they were exceptionally busy. Applying the language from Regulation 5(4)(ii) of "same or broadly similar" and giving it its ordinary meaning, the Claimant and Ms Ley were not doing the same or broadly similar work during the relevant period, she was not an actual comparator.

50. Further, the Claimant and the Second Respondent's witnesses agreed that in any event in 2015 Ms Ley's work did not resemble that detailed in her SO1 job description. Ms Ley was not performing a SO1 role by the time the Claimant started to work with her and for the subsequent period until she was made redundant in March 2016.

What would the Claimant's position have been on the Second Respondent's pay scales had he been employed directly?

51. There was no one directly employed within In-Print doing the same job as the Claimant. The Claimant's role of Reprographics Operator was the grade of Business Support Officer (BSO). The reason why the Tribunal has reached this conclusion is that:
- a. When the agency worker prior to the Claimant was placed that the Second Respondent in the same role, the job was stated to be at grade Business Support Officer ("BSO") at scale 4.
 - b. The First Respondent supplied an Information Request Form to the Second Respondent who completed it on 28 September 2016, specifying that the Claimant's position was "Digital Reprographics Operator (scale 4) BSO"
 - c. The Business Support Role, scale 4 job description was comparable to the Claimant's job in that there were similar tasks such as filing records, maintaining systems, photocopy/fax/scan documents, printing documents, raising purchase orders and invoices. There were also tasks that the Claimant did not do such as collating information for complaints and FOI, managing information questions, undertaking data collection, supporting induction and training, reception functions and basic project management support, although these can be balanced against the fact that 50% of the Claimant's work was the more specialist offset printing.
 - d. The salary range of scale 4 was appropriate for the Claimant's role. The government guidance gave the average salary as £13,500 (starter) to £25,000 (experienced). The Claimant's salary at the qualifying period was £21,780 and by the date of the hearing was over £24,000. It was right that he was at the top end of the scale because half of his work was offset printing, the more specialist aspect of the role.
 - e. The Claimant's duties, while of a different specialism, were equivalent to other BSO roles. Ms McKenzie and Ms Crossley detailed that the postroom and the receptionist roles contained similar duties to those carried out by the Claimant. The postroom roles involved a high volume of work using a specialist machine (franking machine) and inputting financial information to allocate cost codes against appropriate budgets. The receptionists had to be skilled communicators, dealing with a large volume of varied clients with the potential for confrontation. They also dealt with finance in that they would have to charge external clients for using facilities, generate invoices and dealt with meeting requests.
 - f. The Claimant's job was evaluated as a BSO role by Ms Klang, an HR professional at the Second Respondent experienced in job evaluations.

Did the Claimant's role change so as to entitle him to pay at a higher grade at a later date?

52. The Claimant took over some duties from Ms Ley following her departure in March 2016, he was set up with login details to the Xerox account so he could order consumables, provide meter readings and book engineers. He began to handle all incoming calls and customers, he did the paper stocktake, he showed temporary workers what to do, although he did not manage staff. By the end of 2016 he was working alone in In-Print, although the volume of work was diminishing. The Claimant's role changed as there was no longer three people performing the tasks, there was only the Claimant. He also had a different line manager but continued to work full time.
53. The Tribunal concludes that Claimant's role did not become "substantively different". There was not a genuine and real difference to the role – it continued to fall within the job description of a Reprographics Operator. The skills and competencies remained the same, no additional training was required and the equipment remained the same.
54. In any event, the Guidance states that in order for the 12 week qualifying clock to be reset to zero, the Second Respondent had to have notified the First Respondent that the work or duties had changed and this information had to have been passed to the agency worker. This did not happen and so the requirements of Regulation 7(3)(c) are not fulfilled.
55. The AWR form was completed on 28 September 2016, specifying that the Claimant's position was "Digital Reprographics Operator (scale 4) BSO". Ms Klang confirmed that when taking into account the Claimant's role as at 2020, including the fact he worked alone, it would still be graded as a BSO scale 4.

Did the Claimant make a written request to the First Respondent for a written statement containing information relating to the treatment in question (Regulation 16(1))?

56. The Claimant's email to the generic email address at the First Respondent on 29 May 2019 said that in accordance with the AWR he was entitled to the same basic employment rights as someone else employed directly by the company, he had not benefitted from those rights and he was disappointed that the First Respondent had not made him aware of his rights. He said "Please let me know by return how you intend to resolve the situation". This cannot be described as a request for a "written statement". It is a request for a suggestion of how his rights could be rectified.
57. The Claimant says that the second communication requesting a written statement was on 23 July 2019 when he emailed the First Respondent raising AWR and said that there used to be three people in In-Print and now there was only him, so he was effectively doing the job of three people and raised that the hourly rate had remained the same since January 2016. In

evidence the Claimant confirmed that in this communication he had raised two things: information about his rights under the AWR and he was questioning why his rate had remained the same since 2016. Again, this does not qualify as a request for a “written statement”. It is asking for information about his rights under the AWR and it is asking why he continued to be paid the same when three people used to work in In-print and now there was only him. The First Respondent’s obligation to provide a “written statement” under Regulation 16(2) was therefore not triggered and the Tribunal does not draw any inference under Regulation 16(9).

58. Based upon the findings of fact and the conclusions drawn from those facts, the Claimant’s claims under Regulation 5 and 16 AWR fail for those reasons and are dismissed.

Employment Judge L Burge
Dated 31 January 2021

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.