



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case Number: 4102386/2020

**Hearing held remotely at Glasgow on 7 to 10 June 2021
Deliberations 11 and 14 June 2021**

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**Employment Judge D Hoey
Tribunal Member P McColl
Tribunal Member G McKay**

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Mr David Watt

**Claimant
Represented by
Himself**

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Atalian Servest Integrated Solutions Limited

**Respondent
Represented by:
Mr Sendall
(Counsel)
Instructed by
Respondent directly**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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- 1. The respondent was a temporary work agency in terms of the Agency Workers Regulations 2010 but only when the claimant was supplied to work a full shift in the press room within the respondent's client's operation and when he did so he was supplied temporarily for and under the supervision of the client such that he was an agency worker during those placements.**

2. The work the claimant did during such shifts was not the same as that carried out by the client's staff, as the work the claimant did was to support the client's employees. There was therefore no breach of the Agency Workers Regulations 2010 as the claimant was not paid less than a comparable employee who was directly employed by the client.

3. The claim is therefore dismissed.

REASONS

1. The claimant had raised a claim seeking compensation for breach of the Agency Worker Regulations 2010. While claims had initially been raised against a number of respondents, by the time the Hearing was convened there was only one respondent, the other claims having been withdrawn and dismissed. By the time the matter proceeded to a Hearing the only claim that was proceeding was a claim in relation to alleged breach of the Agency Worker Regulations 2010.

2. The hearing was conducted remotely via CVP with the claimant and the respondent's agent attending the entire hearing, with witnesses attending as necessary, all being able to be seen and heard, as well as being able themselves to see and hear. There were a number of breaks taken during the evidence to ensure the parties were able to put all relevant questions to the witnesses. The Tribunal was satisfied that the hearing had been conducted in a fair and appropriate manner, with the practice direction on remote hearings being followed, such that a decision could be made on the basis of the evidence led.

3. We agreed a timetable for the hearing of evidence and the parties worked together to assist the Tribunal in achieving the overriding objective, in dealing with matters justly and fairly taking account of the issues, cost and proportionality. As the claimant was not legally qualified, we ensured that

both parties were given sufficient time to ensure relevant questions were put to each of the witnesses and that the parties' case was fully put to the Tribunal.

4. At the outset we explained that the Tribunal can only determine the claim on the basis of the evidence presented and it was crucial that all matters the parties wish the Tribunal to take into account are led in evidence (and that the other side is given the chance to comment upon relevant matters).

5. At a previous case management preliminary hearing the issues had been discussed. Following a discussion at this Hearing it was confirmed that the parties had worked together and agreed that the issues arising were as follows:

- a. Is Mr Watt an agency worker in terms of Regulation 3 of the Agency Workers Regulations 2010 (The Regulations”), namely, is he an individual supplied by a temporary work agency to work temporarily for and under the supervision and direction of a hirer?
- b. If he is an agency worker, what would his terms and conditions be if he had been recruited by the hirer to do the same job?
- c. What sum, if any, should be awarded given it was alleged that the respondent alleged the hirer employed no workers who undertake the same or broadly similar work as the claimant, in particular in terms of tasks undertaken, skills and experience and hours/shifts worked.

Evidence

6. The parties had agreed a bundle of some 214 pages.

7. The parties had also agreed a statement of agreed facts which has been used in setting out the facts below, supplemented by the evidence led before the Tribunal.

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8. The Tribunal heard from the claimant, Ms Scott, Managing Director of the respondent, Ms Maclean, Site Manager of the respondent, and Mr Cochrane,

Operations Manager of the respondent. The witnesses had each provided a written witness statement and they were cross examined and asked further relevant questions.

5 9. As the claimant had originally raised his claim against both the respondent and the respondent's client (where he carried out his work) witness statements had been lodged on behalf of the client by Mr Sally, Print Manager, Mr McCleneghen, Post Press and Logistics Manager and Mr Brown, Commercial Director. These witnesses were not present to give evidence and we discussed this issue. It was agreed that the Tribunal would consider the statements, where relevant, and place appropriate weight upon them, given the witnesses had not been cross examined. It was noted that the statements contained relevant information for both parties given they focussed upon work the claimant did (and the value of it) and surrounding circumstances. The respondent's agent put relevant parts of those statements, which were being
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15 relied upon, to the claimant to allow him to comment upon them and the claimant was able to put his position before the Tribunal for each of the relevant points. The Tribunal gave appropriate weight to those witness statements given the witnesses had not been cross examined.

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10. It occurred to the Tribunal during the Hearing that the evidence that, other than the claimant's evidence, the other witnesses did not appear to be able to provide direct evidence as to what occurred on a day to day basis (such as with regard to what the claimant did and who controlled the claimant in relation to his day to day activities). This was because the statements from the client
25 (and indeed the evidence from the respondent) did not relate to specifically what had occurred on a day to day basis with regard to the claimant's role (and in particular the role the client had which the claimant alleged he was carrying out). We gave the parties the opportunity to lead evidence to deal with this issue, since it was a key issue for both parties, but both parties were
30 content to rely upon the evidence they had presented and let the Tribunal decide the issues from that (limited) evidence.

Facts

11. The Tribunal is able to make the following findings of fact which is done from the evidence submitted to it, both orally and in writing. The Tribunal only makes findings that are necessary to determine the issues before it (and not in relation to all disputes that arose nor in relation to all the evidence led before the Tribunal). Where there was a conflict in evidence, the conflict was resolved by considering the entire evidence and making a decision as to what position was more likely than not to be the case.
12. The respondent is a facilities management company which provides outsourced facilities management services including cleaning, security and other services for clients. At all material times the respondent provided services to Reach Printing Services (Saltire) Limited (“the client”) to assist with the operation of print machinery. The client operates a printing business and prints various newspapers and other material. The client carries out print manufacturing and is a wholly owned subsidiary of Reach PLC (the UK’s largest newspaper publisher).
13. The respondent provided the client with cleaning and press relates services which included the operation of the client’s printing press and machinery.
14. The claimant was employed by the respondent effect from 23 September 2002. The claimant entered into a contract of employment dated 25 February 2009. That contract stated that there were no collective agreements affecting his terms and conditions and that any changes would be confirmed in writing within one month of any such change. No change had been intimated to the claimant.
15. His job title was “Operator” and the respondent reserved the right to require him to perform other duties and work in other departments from time to time. It was a condition of his employment that he was prepared to do so.

16. His place of work was stated to be at Saltire Press, 110 fifty pitches place, Glasgow (the address of the client) which was to be his “base” but he may be required to travel and serve the respondent at other locations where the respondent carried out business for the performance of his duties. He was
5 required to travel to those areas where necessary to stay for long or short periods of time away from home. If overnight stays were needed reasonable notice would be given where possible.

17. Under the heading “client relations” the contract stated: “We provide services
10 to clients and you are employed to do work on behalf of our clients, sometimes on their own premises. Because of this relationship our clients may from time to time request that an individual be removed from a job in accordance with their contract with us. In such circumstances we will investigate the reasons for this. However, if our client maintains their stance, we will then take all
15 reasonable steps to ensure that alternative work is provided. If this is not possible we may have no alternative but to terminate your employment. This procedure is separate from any concurrent disciplinary matter which may need to be addressed.”

20 18. His pay was to be at a stated hourly rate (which was the then applicable national minimum wage rate).

19. As to hours of work, the contract stated: “Shift lengths will generally vary
25 between 7 and 12 hours but due to the nature of our business cannot be guaranteed. We will always aim to advise you of likely shift length but must state that in all instances you will be remunerated for the actual hours worked (minimum of six hours).” In other words the claimant was engaged on a zero hours contract of employment since there was no guaranteed minimum hours of work each week in terms of the written contract.

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20. The contract also contained provision as to holiday entitlement and sick pay.

21. Under “notice” he was entitled to receive and give the statutory minimum notice periods to terminate his employment.

5 22. The contract referred to a disciplinary and dismissal procedure which was in an Employee Handbook (which was not before the Tribunal) and any grievances should be raised with the line manager (as set out in the Handbook).

10 23. Under “Other Employment” the claimant was required to devote the whole of his time attention and abilities during his hours of work to his duties with the respondent Outside his hours of work he was not to engage in any business or employment which was similar to that of or competitive with the respondent (without the respondent’s consent).

15 24. The contract required the claimant to undertake appropriate training . Terms and conditions as to uniform and PPE were set out in the handbook.

Agreement between respondent and client

20 25. The respondent and the client had a long-standing commercial contract in place under which the respondent provides certain services to the client, including services to assist with the operation of the client’s print machinery (“the Services”). This commercial contract has been in existence since 29 July 2001.

25 26. This is a contract entitled “Agreement for the supply of production services.” In terms of the contract the respondent agrees to provide the client with “the Services at the Premises” as per an attached Schedule for 3 years. The Services can be altered by written agreement between the parties (to suit the business needs of the client).

30 27. The “Services” is defined as “the services to be provided” to the client by the respondent. Reference is made to a schedule but there was no schedule attached to the Agreement.

28. The respondent required to comply with all directions of the client in relation to carrying out the Services and keep detailed records in relation to performance of the Services.
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29. The respondent was to inform itself fully as to the condition around the Premises, plant equipment and materials and take full responsibility for its own equipment.
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30. The client was stated to operate a 365 day 24 hour operation and the respondent's staff holiday entitlement was to take account of this.
31. Under the heading "Contractor's Personnel" it stated that the respondent: "shall provide, or arrange for the provision of, all personnel necessary to carry out the Services. Once such personnel have completed their work they shall promptly leave the Premises unless otherwise requested by the client."
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32. The client was responsible for ensuring so far as reasonably practicable that the personnel it has employed for the Services continue in the functions and responsibilities to which they are initially assigned and/or for which they are specifically trained, except at the request of the client.
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33. The client has a contractual right of veto over any employees the respondent wishes to assign to the Services. On this basis, the client can and does refuse to accept employees of the respondent where it is not satisfied they have the required skills to perform the work or that their work meets the required quality or in the case of instances of misconduct. Subject to this right of veto, however, the client does not control whom the respondent employs in the provision of the Services. Any decisions regarding the ongoing employment of any such individuals is a matter for the respondent.
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34. Although the contract was subject to a 3 year period it has been in place for over 20 years.
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Claimant's role

35. When the claimant commenced employment with the respondent he understood that the role was based upon a zero hours contract. He had indicated that he was prepared to work full time hours, if possible (if not more). The respondent undertook to try and accommodate his requirements and did so. As a consequence, the claimant has worked for the respondent (at the client's site) for a period of around 18 years without interruption.

36. Any request for holidays or issues with regard to his terms and conditions (such as grievances) required to be raised with his line manager, Ms Maclean, whom the claimant saw infrequently (but communicated via written and other messages regularly to manage the shifts). This was due to Ms Maclean working principally during the day shift with the claimant's shifts being in the evening.

37. The claimant wore the respondent's uniform during the provision of his services and the client had provided the claimant with a security pass to allow him access to their site.

Role in despatch team

38. During his initial years working at the client's premises he spent the majority of his time in the an area called despatch or post press which processes everything produced by the press room.. This involved hand feeding material into the machines, operating onsite trucks, working in despatch bays and monitoring bales, carrying out cleaning duties and operating palletisers. These are semi-skilled tasks. The claimant would also undertake team leader duties and manage the respondent's other staff in this area.

39. When in the despatch area the claimant was largely subject to the direction, supervision and control of the respondent who directed the claimant as to specific work to be done and his location within the premises. There were limited staff employed by the client within this area of the site and the

respondent's team essentially ran that area of the operation. The client's staff would discuss work related matters with the claimant and on occasion issue directions or work related instructions to the claimant, but the work he was to do was largely determined by the respondent in this area given the way in which this team was set up.

Role in the press room

40. In 2010 the client asked the respondent to provide staff who could assist in the press room. The claimant and a few other staff volunteered. The client trained the relevant staff (and the claimant) to work in the press room and those staff were paid an enhanced hourly rate for each hour spent working in the press room. This allowed those staff, including the claimant, to assist in the press room when required by the client which was usually when the print run was being commenced and the printing plates needed to be hung on the printing press. The press cannot run until the plates are in place.

41. The claimant was trained with regard to press room activities by the client's printing operators and managers over a period of time that started in October 2010. That had occurred at a time when some of the client's print room staff left the organisation.

42. When working in the press room the claimant would assist the staff the client had employed to work in this area. He developed experience in this area. He was not a Printer nor was he carrying out the role of Operator (as defined by the client), nor was he carrying out the role of General Production Assistant, as defined within the client's organisation, when working in the press room. He would spend time fitting and removing printing plates and carry out a manual support role essentially. On occasion the claimant would assist with other tasks and he was able to do this given the time he had spent working in the press room and the quality of his work and dedication. However, the claimant's role was unique (in the sense that none of the client's staff did only the tasks the claims did) and he was not carrying out the same role as the

client's staff. While some of his tasks and responsibilities were aligned to those pertaining to General Production Assistant, the claimant's role was not the same as any of the client's staff whom he supported.

5 43. When working in the press room, the claimant would be subject to the direction, supervision and control of the clients' staff. There were few of the respondent's team in place at this area of the business which was run by the client's employees (who worked there on a permanent basis).

10 44. On arrival at the press hall the claimant would report to the client's shift manager's office to receive instructions as to who he is assisting and on what job and press. He would then assist the client colleague with work on that occasion. Sometimes he would be working alone. When he was no longer needed in the press hall, he would return to despatch. The client's staff
15 directed the claimant as to specific work to be done and his location within the premises.

45. Following his training in the press room, the claimant continued to be based in the despatch area but would routinely assist with the press room. His tasks
20 in the despatch area continued as before but sometimes during his shift in despatch he would be asked to assist in the press room. That request would normally come from the respondent but it could occasionally come directly from the client's staff.

25 **Typical shift pattern**

46. The claimant was placed permanently in the despatch each week. In other words there was always work for him to do. His working hours could vary each week. From 2019 his working weeks were as follows:

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- a. Wednesday and Thursday 830pm until 4am, Friday and Saturday 7am to 4am (33 hours)

- b. Tuesday to Thursday and Sunday 830pm to 4am, Friday and Saturday 7pm until 4am (48 hours)
- c. Wednesday, Thursday and Sunday 830pm to 4am, Saturday 7pm until 4am (off sick Friday) (31.5 hours)
- 5 d. Tuesday to Thursday 830pm to 4am and unavailable rest of week (22.5 hours)
- e. Wednesday, Thursday and Sunday 830pm to 4am, Friday and Saturday 7pm until 4am (40.5 hours)
- f. Wednesday and Thursday 830pm to 4am, Friday 7pm until 4am (off sick Saturday) (24 hours)
- 10 g. Wednesday and Thursday 830pm to 4am and Friday and Saturday 7pm until 4am (33 hours)
- h. Tuesday to Thursday and Sunday 830pm to 4am, Friday and Saturday 7pm until 4am (40.5 hours)
- 15 i. Friday and Saturday 7pm until 4am and Sunday 8pm until 330am (sick on Wednesday and Thursday) (25.5 hours)
- j. Tuesday to Thursday and Sunday 830pm to 330am, Friday and Saturday 7pm, until 4am (48 hours)
- k. Monday and Sunday 8pm until 330am and Friday and Saturday 7pm until 4am (33 hours)
- 20 l. Monday, Tuesday and Thursday 8pm to 330am (claimant was unavailable Friday to Sunday) (22.5 hours)
- m. Wednesday and Thursday 8pm to 330am and Friday and Saturday 7pm until 430am (34 hours)
- 25 n. Wednesday, Thursday and Sunday 8pm until 330am, Friday and Saturday 7pm until 4am (40.5 hours)
- o. Thursday and Sunday 8pm until 330am and Friday and Saturday 7pm until 4am (33 hours)
- 30 p. Wednesday and Thursday 8pm until 330am, Friday 7pm until 330am (claimant sick Tuesday and unavailable Sunday) (23.5 hours)

- q. Tuesday to Thursday 8pm to 330am and Friday 7pm until 4am, claimant unavailable Saturday and Sunday (31.5 hours)
- r. Tuesday, Wednesday and Sunday 8pm to 330am, Friday and Saturday 7pm until 330am (39.5 hours)
- 5 s. Thursday 8pm until 330am, Friday and Saturday 7pm until 4am (claimant unavailable Monday to Wednesday) (25.5 hours)
- t. Tuesday to Thursday 8pm to 330am and Friday 7pm until 4am (claimant sick Saturday and Sunday) (31.5 hours)
- 10 u. Friday and Saturday 7pm until 4am (claimant sick Monday and unavailable on Monday) (18 hours)
- v. Wednesday and Thursday 8pm until 330am and Friday and Saturday 7pm until 4am (claimant unavailable on Sunday) (33 hours)
- w. Wednesday and Thursday 8pm to 330am, Friday and Saturday 7pm until 4am (33 hours), which was a shift repeated on 2 consecutive weeks
- 15 x. Tuesday to Thursday 8pm to 330am and Friday and Saturday 7pm until 4am (40.5 hours)
- y. Monday to Wednesday 8pm until 330am (claimant unavailable Thursday to Sunday) (22.5 hours)
- 20 z. Monday, Thursday and Sunday 8pm until 330am, Friday and Saturday 7pm until 4am (claimant unavailable Monday and Tuesday) (40.5 hours)

Assisting in the press room

- 25 47. When the claimant was working his normal shifts in despatch, if required to assist in the press room, he would normally do so between around 930pm and 1230am which was the busiest time in the press room and the point when the client needed most help. Usually the claimant would return and continue to work in the despatch area to complete his shift. (He would receive a small increase in payment for the hours he assisted in the press room).
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- 48. There was a permanent requirement by the client for staff within the despatch team given the way in which the business was structured. The claimant was

placed there, by the respondent, to carry out work, permanently. He had done so for over 18 years on a regular basis, week on week.

49. When the client had absence or another urgent need for cover in the press room, the claimant could be asked to cover an entire shift in the press room. This was not regular. That request would be made of the claimant by the respondent, who would have been asked by the client for cover. The claimant, when placed to work in the client's press room, was placed there on a temporary basis, given he was covering a particular shift because of absence or otherwise. During such shifts the claimant would assist the client's employees during his shift, which usually arose as a result of absence of a client employee. He was directed and supervised by the client who controlled him during his shifts in the press room.

50. When the claimant worked in the press room he would assist the client's staff and carry out duties as requested. He was not carrying out the role of Operator or GPA but was assisting the client's staff in tasks as required particularly with regard to the press plates. The other staff engaged by the respondent who had also been trained in the press room, would similarly work such additional shifts.

51. The claimant assisted with other activities with the client's employees, including quality system awareness, reel loading, reel inspection, record reel numbers, apply standard pattern, control panel adjustments, understanding impositions, hang plates and wash up press but the amount of work needed would vary. His role was to support the client's employees in the press room.

Claimant's work for respondent

52. For the period from 1 April 2019 to 27 April 2020 the claimant worked 1713.75 hours for the respondent (all of which were spent working in the client's premises). 743 hours of his time (ie 43.35% of his time) was spent in

despatch, with the remainder, 970.75 hours (56.65% of his time) spent in the press hall.

53. The claimant's principal role was to work in despatch which would where he would ordinarily commence (and end) his normal or routine shifts. During his normal shifts he could be required to work in the press room and then return to despatch to finish his shift. He was occasionally required to work a full shift in the press room.

54. From January 2019 until April 2020 the claimant worked 238 shifts of which 51 were spent in the press room exclusively with the remainder, 187 shifts, normal shifts spent in despatch (assisting in the press room as required). The 51 shifts in the press room were shifts to exclusively assist the client in respect of absent staff.

Claimant was team leader

55. The claimant's job title (as set out in his contract) was "Operator" (which is not to be confused with the job title "Operator" used by the client, which is a different role).

56. When working in the despatch department, he was a team leader (although he received no material increase in pay). As part of this role while working in despatch he directed and supervised other employees of the respondent.

57. Team leaders also fill out a work area sheet, normally the night before, for the client, thereby informing the client and colleagues where they are working on a day to day basis.

58. The claimant did not perform a team leader role or provide any direction or control to other employees of the respondent when assisting in the press room.

Points arising in respect of his employment

59. The claimant had only ever worked for the client at the same location for the duration of his employment.

5 60. Although the contract is a zero hours contract of employment, other than weeks when the claimant informed the respondent that he was unavailable for work, he worked on the Services for the client every week throughout his employment.

10 61. If the claimant was unwell or unable to attend work, he would contact his line manager (Ms Maclean) to report this. Ms Maclean was employed by the respondent and she managed the relationship between the respondent and client and ensured, so far as she could, that the respondent provided sufficient staff, with the right skills, to meet the specific needs of the client on a day by day basis. Although she worked day shift, she would be available if needed
15 when she was not at work.

62. If the claimant wanted to request annual leave, he would contact his line manager to request this.

20 63. If the claimant had a work-related grievance, he would report this to the respondent's HR Department (which he had done previously).

64. The hours to be worked by the claimant each week are notified to him by the respondent.

25 **Allocating specific work**

65. At the end of each week, Ms Maclean met the client's despatch manager to discuss the client's requirements for the following week (in terms of number of staff and skills) and the hours needed. Ms Maclean would work up a schedule of staff (or rota) to cover the requirements of the client based upon
30 the client requirements and the skillset of the respondent staff who are available.

66. That schedule would be based on the availability of the respondent's staff who would indicate on a week by week basis their availability. The claimant had been given regular shifts each week and had been provided to the client, by the respondent, to work permanently within the client site.

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67. The claimant would be told on a Friday evening of shifts that he was to work the following week, but such shifts were subject to change, if, for example the client required urgent assistance in the press room. On occasion the claimant has been told directly by client managers where he was working on a shift, if Ms Maclean was not available or if the work was urgent.

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68. The claimant would be offered and would carry out work on the days he wished to work. While the number of hours could and did vary, the work was regular and the pattern as set out above shows the typical hours the claimant worked.

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69. The claimant understood that his contract was a zero hours contract and he felt under pressure to be available when required by the respondent. Given he was able to work in the press room, when the client required press room assistance, the respondent relied upon the claimant (and those few other staff who had been trained in that area) to provide their services. On occasion such requirements arose in times the claimant had been scheduled to be on leave and required leave to be cancelled. This was often due to the need for the respondent to have at least one team leader on site. Ms Maclean would try and fairly distribute leave. The decision as to whether the claimant be given annual leave or not was Ms Maclean's.

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70. If any disciplinary or grievance issues arose in respect of the claimant, that would be managed in the first instance by Ms Maclean which failing via the respondent's HR team.

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Allocating shifts

71. The respondent sought to accommodate the claimant's requirements with regard to the number of shifts sought by him and days to be worked but given the pressure of business and given the nature of the work, there were occasions when the respondent asked the claimant to work longer shifts or on times he did not wish to work. On such occasions the claimant agreed to provide his services.

72. The work that was offered to the claimant on each occasion would be based upon the needs of the client.

73. The work the claimant did in the despatch team was permanent work. There was a regular requirement for work within the despatch team as the client had engaged only a small number of its own in this area. The work that required to be done was mostly carried out by the respondent's staff. The respondent provided a minimum of 7 staff in this area each week which included the claimant. This position had been in place throughout the duration of the claimant's employment. The claimant was always offered work (and accepted work) each week of his employment, unless he was on leave or sick.

74. The work required by the claimant in the press room, when asked to carry out a full shift in the press room, was of a temporary nature and depended upon fluctuating needs of the client. The respondent placed the claimant and others to work in the client's premises (both in despatch and press room).

Client roles

75. The client's staffing structure differed to that of the respondent. The respondent had a relatively flat structure of Operators and Team Leaders (and then Site Manager, Operations Manager and Operations Director). Unlike the respondent, the client's terms and conditions were subject to collective bargaining with recognised trade unions. Agreements are reached as to the respective roles, duties and payments.

76. In the press room the client employed General Production Auxiliaries (GPAs), Operators, Printers and Pressroom Shift Managers. Each of these roles requires specific training and experience. The claimant had not received the specific training required for the roles, but had some experience.

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77. Pressroom Shift Managers are the most senior members of staff in the Pressroom. They deal with pre-production, production and post production and have primary responsibility for the print production. They start the print process from the machine console adjusting the settings as necessary in order to achieve a good print quality, visually check the production and make any necessary adjustments, confirm quality of the end product and generally run the print production against the required schedule. They would also be responsible for identifying any faults in the event of any stoppage of a press and any repair or remedial work as necessary.

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78. During the night shift in particular, there was a heavy printing schedule getting newspapers ready for the following morning so the absolute priority is to keep the presses running and deal with any stoppage as quickly as possible. This was a highly skilled role.

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79. Printers also have a skilled role and assist the Pressroom Shift Manager across a number of disciplines to achieve a successful production. This will include preparing the press for production, achieving good commercially acceptable quality and monitoring and adjusting various settings to maintain production. Remedial and calibration issues will be addressed as required.

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80. The next level is Operator which is lesser skilled than Printer with fewer responsibilities. Operators are trained on all aspects of the print process so that they can step up and cover for the Printer on a short-term basis if required to do so. On a day to day basis they work closely with the Printer supporting with the pre and post production activities and throughout production they undertake reel stand activities as well as assisting the Printer with colour console control functionality and adjustment as required. If there is any issue

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with the printing process, they are also trained to carry out more technical work on the presses such as remedial work and calibration. They can also provide breakdown support and carry out general maintenance.

- 5 81. General Production Assistants (GPAs) provide production support. In 2006 when efficiencies in the printing process led to fewer Operators being needed, the client agreed that the overall printing process would be helped by having general support available. GPAs have fewer skills than operators and less involvement in the printing process. They support the other more skilled staff as required and provide general support at each stage of the production process. During the actual print production their duties are limited to loading the reel stands with the required reel of paper as per the production configuration, checking the condition of the paper reel and applying splice tape as necessary, recording reel data on log sheets provided and keeping the workstation generally clean and tidy. They are not involved in the actual printing side of the process. They would carry out some remedial, calibration and maintenance tasks to support the Operator and to cover for an Operator if required to do so on a short term basis.
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- 20 82. When a member of the client's staff is absent, the staff members below the absent employee would be expected to "step up" and cover the tasks of the person in the role above them in the hierarchy for the period of absence.
- 25 83. The client assesses pay by reference to capabilities of the relevant personnel. This is because staff may not be required to undertake all of the required activities pertaining to each role on a day to day basis but the rate of pay includes a recognition that they are skilled in these activities and so can do them if they are ever called upon to do so (such as where the person in the role above is absent). Sufficiently skilled staff to work on the presses are in short supply and so, to some degree, their rate of pay is a retainer to keep them in the business for when they may be required.
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84. In despatch there are only a small number of employees employed by the client working in this area. As well as the Shift Managers there are Finishers and GPAs.
85. The Finisher is responsible for setting up and running all equipment used and carries out maintenance and technical support for this equipment
86. The GPA is a more junior position which provides support for the Finisher. They liaise with the Shift Managers regarding the requirement for the shift and offer assistance to workers setting up. They liaise with the Transport Manager to ensure that the batching that has been completed correctly and carry out minor technical repairs e.g. the realignment of photo cells. They also ensure that all documentation is correct and fill in production reports to confirm the work completed during the shift. They can also be trained to drive all in-house trucks such as fork lift trucks Stocklin trucks, pallet trucks and mobile elevated working platforms. GPAs are also capable and trained to cover as a Drum Minder if required which involves watching over a running inserting drum that has been set up by a Finisher. They are trained to carry out simple tasks such as clearing an inserting jam, but if a technical issue arises they will have to ask for immediate help from a Finisher or a Manager.
87. The salary for a General Production Auxiliary (GPA) is £22,559.40 gross per year, with an equivalent hourly rate of £11.12.
88. The gross salary for an Operator is £34,175.76 or an equivalent £16.85 an hour.
89. The claimant received national minimum wage (£8.72 in 2020) for each hour he worked in despatch and (around) an additional £0.36 per hour for each hour worked in the press hall.
90. The claimant had applied for a permanent GPA role in the press room in 2012 but was not successful. The client chose to appoint a candidate with more skills and experience than the claimant that could “hit the ground running”.

91. Roles undertaken by employees of the client were subject to working hours, grading and associated pay rates agreed with the trade unions recognised by the client which was not the position in respect of roles of the respondent.

5 **Observations on the evidence**

92. The witnesses that appeared before us were generally speaking credible and reliable and they each did their best to recollect the relevant issues.

10 93. While the vast majority of the facts in this case were not in dispute, one of the key areas of dispute was the work the claimant did when he was placed in the press team. He was convinced he did the same work as Operators, which were the colleagues employed by the client with whom he worked when he assisted in that department. The respondent's position (backed up with the
15 witness statements from the client) was significantly different. While we do not doubt the sincerity of the claimant's belief, the claimant could only speak to what he saw. He was unable to speak to what the specific skills were that the client required in respect of the relevant positions. He was also unable to speak to what those employed by the client in the press team did when he did
20 not see them (or what specific skill set or training they had).

94. Looking at the evidence as a whole and taking account of what the claimant said, we preferred the evidence of the respondent in this regard. The claimant assisted the team employed by the client when he worked in the press room.
25 He developed some experience given the work he did and his willingness to assist and he was clearly a very hard worker who was keen to learn. He accepted, however, that he did not have some of the key skills the client required for the roles in question. He was unable to "step up" for example and carry out the role of printer. While he did some additional duties, in addition to
30 the plates activity, we found that the work he carried out in the press room was a supportive role for the staff the client employed.

95. The claimant did not carry out the duties of Operator or GPA. He had not been trained on these specific roles (having had some limited training from the client's operators to do the support tasks he did). This was the position both when he assisted in the press room during his normal shifts and when he worked a full shift in the press room.

5

96. The Tribunal had given both parties the opportunity to lead evidence in this regard not least to ensure a better understanding was given of tasks done (which would have assisted both parties) but regrettably neither party chose to lead such evidence and both parties were content to proceed on the basis of the evidence led. We have done so from the oral and documentary evidence led. That included the evidence from the claimant and, to an extent, the written statements from the client's employees which we assessed in light of the evidence led before us.

10

15

97. Our conclusion from that analysis was that the claimant was not doing the work a client Operator did nor that of a GPA but rather he assisted with the press team staff on tasks at a relatively lower level (with lesser responsibilities).

20

Law

98. This case requires consideration of the provisions of the Agency Workers Regulations 2010 which say, so far as relevant, as follows:

25

2 Interpretation

In these Regulations—

'the 1996 Act' means the Employment Rights Act 1996;

'assignment' means a period of time during which an agency worker is supplied by one or more temporary work agencies to a hirer to work temporarily for and under the supervision and direction of the hirer;

30

'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 'employee' means an individual who has entered into or works under or, where the employment has ceased, worked under a contract of employment;

'employer', in relation to an employee or worker, means the person by whom the employee or worker is (or where the employment has ceased, was) employed;

10 'employment'—

(a) in relation to an employee, means employment under a contract of employment, and

(b) in relation to a worker, means employment under that worker's contract,

15 and 'employed' shall be construed accordingly;

'hirer' means a person engaged in economic activity, public or private, whether or not operating for profit, to whom individuals are supplied, to work temporarily for and under the supervision and direction of that person;...

20 **3 The meaning of agency worker**

(1) In these Regulations 'agency worker' means an individual who—

25 (a) is supplied by a temporary work agency to work temporarily for and under the supervision and direction of a hirer; and

(b) has a contract with the temporary work agency which is—
a contract of employment with the agency, or

[any other contract with the agency to perform work or services personally.]...

4 The meaning of temporary work agency

5 (1) In these Regulations 'temporary work agency' means a person engaged in the economic activity, public or private, whether or not operating for profit, and whether or not carrying on such activity in conjunction with others, of—

- (a) supplying individuals to work temporarily for and under the supervision and direction of hirers; or
- 10 (b) paying for, or receiving or forwarding payment for, the services of individuals who are supplied to work temporarily for and under the supervision and direction of hirers...

15 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—

- 20 (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—

- 25 (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.

5 (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

10 (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.

15 (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—

20 (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

25 (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.
30

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

6 Relevant terms and conditions

- 5 (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;
 - 10 (e) rest breaks; and
 - (f) annual leave.

7 Complaints to employment tribunals etc

- (1) In this regulation 'respondent' includes the hirer and any temporary work agency.
- 15 (2) Subject to regulation 17(5), 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)...
- (3) Where an employment tribunal finds that a complaint presented
- 20 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
 - 25 complainant;
 - (c) [except in relation to a complaint that the hirer has failed to comply with regulation 13A,] 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...

5

(4) Subject to paragraphs [11A,] (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—

10

(a) the infringement or breach to which the complaint relates; and

(b) any loss which is attributable to the infringement [or breach].

15

(5) [Subject to paragraph (11A), the] loss shall be taken to include—

(a) any expenses reasonably incurred by the complainant in consequence of the infringement or breach; and

(b) [except in relation to a complaint of a failure by the hirer to comply with regulation 13A,] loss of any benefit which the complainant might reasonably be expected to have had but for the infringement or breach...

20

(6) Compensation in respect of treating an agency worker in a manner which infringes the right conferred by regulation 5, 12 or 13 ... shall not include compensation for injury to feelings...

25

100. There have been a few important cases with regard to the Regulations and their application and it is important we consider these in some detail.

101. In **Moran** 2014 IRLR 172 Singh J (as he then was) considered whether or not a cleaner who had been provided via a contract cleaning company was correctly found not to be an agency worker given the nature of the relationship. The claimant in that case had been placed to work for the respondent for many years. The Employment Judge had assessed the factual matrix and concluded that the cleaner was placed to work for the respondent on a permanent basis.

102. The claimants were employed by an agency under a contract of employment to work for one client. The client's premises was specified as their normal place of work in their contracts of employment and the workers had worked for the same client for between 6 and 25 years, before being dismissed as redundant and bringing complaints under the Regulations alleging that they were agency workers.

103. Singh J considered that temporary means "not permanent". At paragraph 41 he opined that permanent "meant it is indefinite, in other words, open ended in duration, whereas a temporary contract will be terminable upon some other condition being satisfied, such as expiry of a fixed period or completion of a specific project". He found that temporary does not mean short term (albeit it could do); it means not permanent.

104. In that case the Judge had taken account of the fact that the claimant's contract had his place of work at the respondent where work had been provided for many years (between 6 and 25 years). The claimant was "ensconced in the respondent's premises for many years". The judge found that whatever the parties' intentions were, the relationship could not conceivably be called temporary given the longevity of the arrangement.

105. The contractual position of the claimant (with the agency) was considered which the Judge found to bear similarities to an employment contract. He found it bore the hallmarks of a contract for an indefinite duration to be placed to work for the hirer. The parties considered the relationship essentially to be permanent and did not expect to work elsewhere.

106. In short the Judge had found that the relationship was indefinite in that case not temporary but permanent and the Regulations were not intended to apply to permanent employment.
107. This was considered by Eady J (as she then was) in **Brooknight v Matei** 5 UKEAT/0309/17. In that case the claimant was a security guard engaged on a zero hours contract. He had provided services for under 2 years. His contract gave the respondent flexibility to assign him to different sites as required albeit he generally worked at the same site for the same hirer. The Tribunal found he was a “cover security guard”. There were some periods 10 where he was not required to work (and he was not paid) and he was required on occasion to work for other clients. He was in essence provided on an ad hoc basis. The Tribunal found that he was therefore not provided on a permanent basis having regard to the nature of the work and circumstances.
108. Upon appeal the respondent argued that the claimant was clearly regarded as 15 a permanent worker for the hirer. It was argued that this was evidenced, for example, by the indefinite nature of the contract and that the claimant knew the relationship was in reality indefinite.
109. Eady J noted that In **Moran** (*supra*) the Employment Appeal Tribunal 20 concluded the question is whether the work in issue is properly understood as being “temporary”. She notes that temporary can mean something not permanent or something short term or fleeting. The key question was whether the work could properly be regarded as temporary because it is not permanent (even if on paper it appeared to be temporary). In her view permanent does not mean “lasts forever” since most contracts are terminable on notice. She 25 regarded permanent as meaning open ended in duration whereas temporary means terminable upon a condition being satisfied. In **Moran** (*supra*) the Judge had found that the relationship was indefinite in duration and so it was permanent and not temporary.
110. In **Matei** (*supra*) the question was whether the differentiating factors justified 30 the opposite result. Eady J emphasised that the focus is on the purpose and nature of the work for which the worker is supplied – is it temporary or

permanent. This needs to be assessed and a factual analysis undertaken of the nature of the work.

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

10 112. At paragraph 25 Eady J emphasised that the terms of the contract between the agency worker and the agency are not necessarily determinative since the focus is on the purpose and nature of the work for which the worker is supplied – is it temporary or permanent. The contract between the claimant and agency may say that there is no obligation to provide work or that the claimant can be moved to different sites but if in fact the supply is indefinite
15 (as it was in Moran) then the supply is not temporary in nature. The contract should be used to test what happened as against what the parties intended to happen. At paragraph 26 she emphasised that even if there is complete flexibility in theory (from the contract), if that is never exercised, its relevance is diminished. In **Matei** the power was exercised and the worker was in
20 essence providing cover and so was not assigned on an indefinite basis to carry out ongoing work.

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

25 114. The third case and most recent consideration of the issues was undertaken by Auerbach, J in **Kocur -v- Angard Staffing Solutions Ltd (No.2)** 2020 IRLR 732 which concerned large numbers of casual workers at Royal Mail, engaged through the respondent. The respondent argued that the employees were not temporary workers, but the Tribunal found that each assignment on which they were employed was for a definite period with set shifts. On that basis it held that they were not permanent workers. Each engagement had a
30 start and end date, was time limited and there were some “fallow periods”

showing the supply was to supplement a fluctuation permanent staffing position.

5 115. The case emphasised the importance of the factual inquiry into the way in which the contracts worked in practice. Although the contracts with the agency were open-ended, the employees were supplied exclusively to Royal Mail and the arrangements had lasted for four years, a key factor was that the reality of the work was a series of defined assignments with set shifts so that the work was to be regarded as a series of defined temporary assignments rather than permanent work.

10 116. The Judge examined **Moran** noting in that case on the facts there were indefinite assignment which were permanent, not temporary and **Matie** where there were periods of no work with the worker being assigned to other clients, being viewed as cover. He emphasised that the focus is on the purpose and nature of the work supplied. It is worth quoting from the judgment with regard to the task required by the Employment Tribunal in cases like these::

15 “44. Regulation 3(1)(a) requires the Tribunal to determine, in the given case, whether the worker is supplied to work temporarily for and under the supervision and direction of a hirer. That requires the Tribunal, in particular, to make a finding of fact about the basis on which the worker is supplied to work for the hirer, and then to decide
20 whether the supply to work on that factual basis amounts to a supply to work temporarily, applying the guidance in the authorities.

25 45 The natural meaning of the words of Regulation 3(1)(a) is that it directs attention to the basis on which the worker is actually placed, designated, directed or sent to go and do work for a hirer, on one or more specific occasions. In common parlance, it refers to the basis on which the worker is to work pursuant to a particular assignment or engagement, on a particular occasion. That is the natural meaning of “supplied”, and particularly of being “supplied ... to work
30 temporarily” (my italics) for and under the supervision of the hirer.

46 The focus of the Tribunal's enquiry should therefore be on the basis
on which the worker is supplied to work, on each such occasion. In
particular, it should ascertain, applying the guidance in Moran,
whether that supply is made on the basis that, having embarked on
5 the assignment, the worker will continue to work for the hirer
indefinitely (whether full or part-time), or on the basis that the work
will cease at the end of a fixed period, on the completion of a
particular task, or on the occurrence of some other event. If it is the
latter, it may be followed by another supply to work for the same
10 hirer temporarily, and then another, and another."

117. He noted that the overarching relationship between the agency and the
worker would not be definitive given the question that is to be answered but it
can be considered as background to cast light on what the parties intended
to happen.

15 118. At paragraph 53 he noted that the contract may allow a worker to be moved
to different clients or sites but if in fact the power is never exercised and the
worker is supplied to work for a single hirer on an open ended basis then that
would not be a temporary supply. The question is ultimately whether on the
facts the supply is temporary or not. It was permanent in **Moran** (and the
20 contract envisaged that it be permanent and the worker was placed on a
permanent basis) but in **Matei** there was complete flexibility to move jobs
which was a power that was in fact exercised. At paragraph 54 Auerbach J
noted that the position could well have been different had the power not been
exercised and had the worker been given a permanent assignment.

25 119. At paragraph 58 he emphasised that variations in supply (which includes the
nature, frequency and duration) would only make a difference if they "bespeak
a change from supplying the someone to work temporarily to supplying them
permanently or vice versa". At paragraph 59 he said: "What matters is what
in fact happens in practice and in a given case that could change. Parliament
30 has decided the protection applies if and for so long as the worker is supplied
temporarily" and that could change.

120. On the facts of that case each engagement was for a time limited period and was finite. The defined periods of work to provide cover was fatal to the argument the supply was not temporary.
121. Finally at paragraph 65 Auerbach J noted that the fact a worker is only supplied to one hirer does not alter the position (even although the definition refers to hirers, ie in plural),
122. There were other cases raised in relation to that relationship – such as **Kocur -v- Angard Staffing Solutions Ltd (No.1)** 2019 IRLR 933 in which the Court of Appeal held agency workers are not entitled to work the same number of contractual hours as a relevant comparator. **Kocur -v- Angard Staffing Solutions Ltd (No.3)** 2021 IRLR 212 held that agency workers do not require to be given the same length of shifts as directly employed workers under the Regulations.
123. Government Guidance has been issued which although not statutory in nature is useful in interpreting the Regulations in practice At page 12 there is reference to “managed service companies” which can potentially be outside the scope of the Regulations. The Guidance states: “Where a company provides a specific service to a customer – such as catering or cleaning this is usually known as a Managed Service Contract which is based on a contract for services that will usually set out certain service level agreements. The managed service contractor has responsibility for managing and delivering the catering or cleaning service and employs rather than supplies the workers. The Managed Service Contractor must be genuinely engaged in supervising and directing its workers on site on a day to day basis and must determine how and when the work is done. If it is the customer that determines how the work is done, then it is more likely that the workers will be covered by the Regulations. Merely having an on-site presence (e.g. a named supervisor) would not necessarily mean that there is a Managed Service Contract. Conversely, where the customer has some responsibilities for all workers on site, for example health and safety responsibilities, this would not in itself mean that this was not a Managed Service Contract. Please note that where a Managed Service Contractor requests agency workers via a TWA to work

under their supervision and direction, they will be in scope as the Managed Service Contractor will be the hirer.”

124. The Guidance also gives examples at page 13 of characteristics that demonstrate an individual is in scope. This includes “A company has a staff canteen managed by an in-house catering manager. One of the company’s catering staff is absent and is replaced by a worker supplied by a TWA. During her assignment the worker is supervised and directed by the hirer’s catering manager. She fits the definition of an agency worker and is in scope”.
125. In another example: “A number of workers number of factory workers are sent by a TWA to work on a hirer’s production line. Because there are lots of workers on the line provided by the same TWA, the TWA sends a manager who works on site to deal with issues such as sickness absence or any other problems that may occur in relation to the agency workers. However, each worker still does his or her job under the supervision and direction of the hirer. The workers all fit the definition of an agency worker and are in scope”. The Guidance states that “where one legal entity employs temporary workers and places them into another legal entity (e.g. individual’s contract is with one company but they work for another), including other associated or group companies, then they are likely to be acting as a TWA and the workers in scope.”
126. Example characteristics that demonstrates an individual is not in scope include were “an organisation contracts out the management of its canteen. The contractor manages the entire operation of the canteen and is responsible for the direction and control of its own catering staff. Although they are working on the customer’s premises, the contractor’s workers are not agency workers because they are not subject to direction and control by the customer.”

Submissions

127. Both parties provided written submissions which were supplemented to orally. We summarise the respective submissions below.

Submissions from respondent

128. The respondent's agent dealt with the 4 issues arising in turn: was the
5 respondent a temporary work agency, was the claimant supplied temporarily,
was the claimant under the supervision and direction of the client and was
there a breach of the Regulations.

Temporary Work Agency

10 129. It was submitted that there are a number of reasons why the respondent was
not a temporary work agency. In particular:

- (1) The agreement with the client was for the provision of a managed
service rather than for the "supply of individuals" as is required.
- (2) The agreement is titled "Agreement for the Supply of Production
15 Services".
- (3) The obligation on the respondent under the Agreement is to provide
the Services not to provide particular individuals.
- (4) Under the contract the respondent is obliged to use staff who meet the
qualification and training requirements of the client, but it is otherwise
20 free to select its own staff (subject to a right of veto) and there is no
requirement for individual approval of workers and nor are any
individuals specified to be provided for any particular assignment or
period of time.
- (5) The contract requires the respondent to provide its own staff who are
25 referred to in the Agreement as "the Contractor's staff"
- (6) The respondent's employees are required to wear the respondent's
corporate uniform.
- (7) The respondent provides its own site manager at the client's premises
who is responsible for allocating work to the respondent's staff and for
30 managing them.
- (8) The employees engaged by the respondent to provide Service under
the contract with the client are not being supplied "to work temporarily".

The initial period of the contract was 3 years, but the contract became an indefinite one which has now endured for over 20 years. There is nothing temporary about the agreement under which the claimant's services are provided. Although the number of workers needed to provide the service may fluctuate over time the essential nature of the agreement is to provide a service to the client not to hire out workers on a temporary basis. The respondent's business is the provision of an outsourced service, which is performed by individuals providing their labour it is not a temporary work agency.

5

10

(9) The respondent's employees are employed to fulfil the contract with the client are not employed for any fixed period nor for the duration of any defined assignment. Their hours of work are not guaranteed and they have no maximum nor minimum (save that any allocated shift has a minimum of 6 hours), but their engagement is not in any sense temporary. The claimant has been working continuously and exclusively at the client's site for over 18 years.

15

20

130. It was submitted that this was a labour intensive business of indefinite duration, a fluid ongoing indefinite and permanent relationship. If the requirement was to provide staff on a last minute basis, the respondent's agent argued the position may be different but the reality of the relationship should be considered.

25

131. The respondent's agent cautioned the Tribunal about having regard to (or perhaps too much regard to) the written contract and instead look at what actually happens in practice. Theoretical possibilities have never happened for 2 decades and should not be used to govern what the basis of the arrangement is.

30

132. There was a permanent requirement for people to work in despatch where the claimant accepts he begins most shifts. That, it was submitted, is an important feature of this case since makes it clear those provided by the respondent help it fulfil their overall service agreement with the client.

133. This was not a standard agency worker relationship. The Guidance made it clear the Regulations were not designed to cover managed services situation but the respondent's agent accepted the case (like all cases under the Regulations) will turn upon what the Tribunal finds by way of the facts and not just what the agreement says. The respondent is not a temporary work agency,.

Is the claimant working "temporarily"?

134. Referring to the case law, the respondent's agent argued that the arrangement was not temporary, it was permanent.

135. In the claimant's case, it is submitted that it is of critical importance that while his contract on its face is a zero hours contract in the sense that there is no guarantee of any work at all, he has consistently been provided with work every week that he was available for work for over 18 years and was never offered less work than the minimum number of shifts that he desired to work. The nature of the work in **Brooknight** was to provide cover only when needed whereas the claimant's work is consistent work and although that work often involves providing cover in the Press Hall, this was mostly occurring when he was already rostered to be working in Despatch and was asked to move from Despatch to the Press Hall.

136. The respondent's agent noted that the occasions when the claimant was asked to come to work exclusively to cover Press Hall work was "extra shifts over and above those for which he was already rostered".

137. The respondent's agent distinguished **Kocur** by arguing the facts were very different from the claimant's employment where there are no defined assignments of the kind found in that case. It was submitted that during the course of his 18 years in employment the reality of the claimant's work was consistent and continuous permanent employment. Each week's roster did not constitute a new temporary assignment. Both the respondent and the claimant had a well-founded expectation that his work would continue indefinitely. He was not in any meaningful sense engaged in working 'temporarily' for the client.

Supervision and direction

138. The expression “supervision and direction” is not defined in the Regulations.
5 It is submitted that the facts of this case make the expression particularly difficult to apply. This is so because it is clear from the evidence that some aspects of the claimant’s employment are supervised and directed by the respondent and some by the client with occasional overlap between the two. There is also a difference between the work done by the claimant in Despatch
10 and the work done by him in the Press Hall.
139. Unlike most standard agency worker situations the respondent has its own site manager who is based on site at the client’s premises and she acts as the claimant’s line manager. She allocates his hours and at least, his initial duties for each shift. She also administers the other usual aspects of his
15 employment, so she is the person to whom he reports sickness absence and to whom he applies for holiday leave. If there is a conduct, capability or performance issue, that would be brought to her for the respondent to manage. Any such issues, even if originating from the client would be escalated to her as the claimant’s manager. It was also noted that when the
20 client required additional workers in the Press Hall, they place that request with Ms Maclean and she would allocate the particular workers.
140. It was accepted that it is clear from the evidence that on a day to day basis the client had a role in practical supervision and direction of the claimant’s work, especially when he was working in the Press Hall. It was argued that
25 the claimant accepted in cross-examination that he did not need someone from the client to be closely supervising or directing his work, but when working in the Press Hall in particular, the client’s managers might assign particular tasks to him. There was also no one from the respondent working on the night shifts in order to provide direct supervision or direction for his
30 work.
141. The respondent provided his line management structure and ultimately controls whether he works, when he works and where he works and also is responsible for ensuring his conduct and capability are at an acceptable level,

but the client also had an involvement in directing and supervising the way in which he goes about the work he has been assigned, including sometimes allocating tasks within a shift that the respondent has rostered him to work.

142. It was submitted that the most critical aspects of direction and supervision are undertaken by the respondent in that they carry primary responsibility for the way in which he works and that for the purposes of Regulations 3 and 4 he does not work under the direction and supervision of the client.

Part Agency Worker?

143. The respondent's agent argued that it would be conceptually very difficult to separate out different relationships within the same contractual framework and near impossible in this case. In recent times (prior to his sickness absence) the claimant spent slightly more than half of his time working in the Press Hall. Arguably, this work has more hallmarks of agency work than his work in Despatch because it occurs on a rather more ad hoc basis and it relates to covering at least part of the duties of one or more client employees. However, much of the time it takes place for part of a shift only and often seems to occur after the claimant has already been rostered to work a shift in Despatch and he is then shifted to the Press Hall.

144. It was suggested that it would not really seem conceptually possible under the Regulations to analyse his contract of employment as one which flexes between agency work and not being agency work in that sort of way.

145. In any event, there would still be the consideration that the real underlying nature of the arrangement that is made is for the provision by the respondent of an additional resource (in the shape of the claimant) to keep the Press Hall service running rather than a contract for the hire of a particular individual, even if on occasion he is requested specifically by name. This will mostly be taking place because of the limited number of individuals able to do the work and his physical presence on site at the relevant time when the need arises.

146. It was submitted that the claimant did not fall within the definition of an agency worker because the respondent is not a temporary work agency and the

claimant is not being supplied to the client to work temporarily under its direction and supervision.

Regulation 5 rights

5 147. It was argued that the principal problem under this heading was that it was agreed that there was no comparable client employee who can be used as a benchmark to determine what the claimant would be paid if he had been employed directly by the client to undertake the work that he is employed to undertake. There was no evidence before the Tribunal as to what the rate of
10 pay might be for someone to be employed on the basis upon which he is employed.

148. A particularly difficult issue arises because of the fact that the claimant was employed under a zero hours contract. By way of contrast, the client employees are all salaried employees with fixed 37.5 hour weeks and defined
15 shifts. As was held in **Kocur -v- Angard Staffing Solutions Ltd (No.3)** [2021] IRLR 212, agency workers do not have to have the same length shifts as directly-employed workers. The EAT also observed that in **Kocur -v- Angard Staffing Solutions Ltd (No.1)** [2019] IRLR 933, the Court of Appeal made it clear that the Regulations do not entitle agency workers to work the
20 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. The EAT held that neither the Directive nor the regulations were intended to regulate the minimum length of a working day. The Court of Appeal recognised that it would be unworkable to require agency workers to
25 work the same length shifts as comparable employees and that the reference to 'the duration of working time' in Regulation 6 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.

30 149. An employee working under a zero hours contract would not usually be paid at the same rate as a full-time salaried member of staff with fixed hours and fixed shifts. The claimant adduced no evidence to support an argument that

such an employee employed directly by the client would be paid at a higher rate than the rate at which the claimant received.

150. There were are a number of difficulties in comparing himself to an Operator:

- 5
- (1) The claimant accepted that he does not possess the same skills as qualified Press Operators.
 - (2) Although the claimant may work alongside Press Operators frequently and may fulfil many of the same tasks as them, their pay reflects the fact that they could be required to utilise the additional skills if required and that from time to time, this could also entail them 'stepping up' to fulfil at least part of the duties of a Printer.
 - 10
 - (3) Press Operators are full-time salaried staff with fixed hours and fixed shifts means that it is not possible simply to compare their notional hourly rate to that paid to the claimant.
 - (4) Although the claimant may not regard it as always being an advantage to him, his ability to choose not to be available for work has to be contrasted with the contractual obligation entered into by the Press Operators to be available to work full time and it has to be acknowledged that this is a factor that will make a significant difference pay.
 - 15
 - (5) There was no evidence from which any assessment could be made that the parts of the Press Operator functions that he performs would be remunerated at a higher rate than the rate at which he is currently paid.
 - 20

151. The Government Guidance also makes it clear that a claim is likely to fail where there are no identifiable and applicable pay scales and no comparable permanent employees.

25 152. Even if the claimant is found to be an agency worker, it was submitted that he has failed to demonstrate that he is paid any less than he would be paid if he was employed directly by the client to undertake the same work as he undertakes for the respondent. Accordingly it is submitted that his claim that his rights under Regulation 5 have been infringed should be dismissed.

Claimant's submissions

Definition of "Temporary Work Agency

153. The claimant argued he was provided to the client to work temporarily when
5 in the Press Hall and as such the respondent was a Temporary Work Agency.

Definition of Temporary Agency Worker"

154. The claimant submitted that he was provided to work for the client
"temporarily" should relate to the nature of his work.

155. The claimant noted that the respondent's witnesses accepted he was a zero
10 hours worker, as and when required. He was only present in the Press Hall
when the client required his assistance in that department (i.e. to cover their
full-time staff). Based on his working hours, he spent most of his time in Press
Hall away from the Despatch.

156. As outlined in the Agency Worker Regulations Act, the twelve week period to
15 qualify for equal treatment (including pay) is triggered by working in the same
job for the same hirer for twelve calendar weeks. A calendar week, in this
context, will comprise any period of seven days starting with the first day of
an assignment. Calendar weeks will be accrued regardless of how many
hours the worker does on a weekly basis.

20 Assignments

157. The fact that he was covering/assisting the client employee Operators from a
different department on an *ad hoc*/temporary basis meant, he argued, that on
each occasion in which he provided full cover or assistance, the very fact that
he moved from Despatch to Press Hall meant that this should be treated at a
25 new assignment. This was demonstrated by the fact that these two roles (i.e.
Despatch work and Press Hall work) had two different pay rates.

How to distinguish between press hall and despatch

158. With regard to the distinction he said that when he worked in the Press Hall,
he covered for full-time client Employees, whereas, when he worked in
30 Despatch he was not. This was, once again, demonstrated by the two

separate rates of pay, with the main point being that when in Press Hall, he was covering for a client Operator and engaged in work that is more or less identical, and of equal value; while in Despatch, he was not.

159. While all of the respondent employees on-site are employed in Despatch, a
5 very limited number (of which he had been one for the best part of a decade)
are qualified to work in Press Hall, which once again, is demonstrated by the
differing levels of pay for working in these departments.

What Is supervision/direction?

160. He argued that this had been shown by the evidence. "Supervision" was a
10 manager (or overseer) watching his activity and completion of the tasks in
hand in the workplace, and "direction" entailed the manager or overseer
issuing instructions and/or advice relevant to the completion of the task at
hand.

161. The claimant submitted both supervision and direction on-site and at all times
15 during his working hours had been solely provided by the client management.

What would the rate be?

162. The claimant argued he should be given the same rate as the client's
Operator. The claim was only respect of hours spent in press hall. He argued
his claim should be upheld and compensation awarded.

20

Discussion and decision

163. The Tribunal was able to reach a unanimous conclusion in relation to the
issues arising, which we consider in order within the definition of Agency
25 Worker and then whether or not the claim is to be upheld.

Temporary work agency

30 164. The first issue that arises is whether or not the respondent, when placing the
claimant to work for the client, is a temporary work agency, as defined in the
Regulations.

165. The Tribunal did not consider this an easy issue to determine. That was because of the way in which the relationship operated.
166. If the issue was solely in respect of the placing of the claimant to work for the client during his normal shifts in despatch, the issue would have been simpler since during those occasions we would have concluded that the respondent was not a temporary work agency since it was not providing the claimant to work for the client temporarily (as defined by the authorities in this area).
167. To the extent that the claim is based on the claimant's normal shifts when working in the despatch team, that claim fails since the respondent when placing the claimant there is not a temporary work agency (and he is not an agency worker, for the reasons we set out below). We did not accept the claimant's submission that the mere supplying of his services to the client during a despatch shift thereby showed that the respondent was a temporary work agency. The provision of the claimant during such a shift was a supply of the claimant on a permanent not temporary basis.
168. We considered that the issue in this case is not the position when the claimant is working his normal shifts in despatch but when he is placed to work in the client to cover the press hall as a full shift. When the respondent placed the claimant in the press hall to cover those shifts they did so on a temporary basis. In other words when they did so the respondent was supplying individuals to work temporarily for and under the supervision and direction of hirers (in this case the client) (for reasons set out below).
169. We considered the respondent's agent's submissions on this point carefully. While we accept the respondent is not a temporary work agency in respect of placements in the despatch, we considered they were a temporary work agency when placing staff in the press hall. We did not accept the submission that the respondent's status as a temporary work agency is fixed or binary and could not change irrespective of the nature of the supply of staff to the client.
170. While the respondent focussed on whether or not there was a managed services contract, we considered the issue to be whether the definition within

the Regulations is satisfied and applicable in this case. The Guidance refers to managed services agreements but only to show the types of arrangements which might not fall within the terms of the Regulations.

5 171. The Guidance says: “The Managed Service Contractor must be genuinely engaged in supervising and directing its workers on site on a day to day basis and must determine how and when the work is done. If it is the customer that determines how the work is done, then it is more likely that the workers will be covered by the Regulations. Merely having an on-site presence (e.g. a named supervisor) would not necessarily mean that there is a Managed
10 Service Contract”.

172. In this case the client supervises the claimant when he works in the press room and there was some degree of supervision when in despatch. This was not a situation whereby the respondent was exclusively in control of the claimant when carrying out the services. On a night by night basis there was
15 very little supervision and direction in the press room. The client on occasion would supervise and direct the claimant when he worked in despatch.

173. As the Guidance says, the issue is not necessarily automatic nor is it a tick box exercise. The issue is whether or not the terms of regulation 4 are satisfied, and in particular whether the entity supplies individuals to work
20 temporarily for and under the supervision and direction of hirers. Having an individual on site could defeat the argument that the organisation is a temporary work agency (in other words where there is a genuine managed service contract) but only if that person supervises and directs (rather than the client) and the relationship does not properly fall within regulation 4.

25 174. In this case we found the client supervised and directed the claimant when he worked in the press room at the material times with some degree of regularity (in that it was not a one off situation). We considered the specific statutory wording and the facts of this case specifically.

30 175. The placement of the claimant to work a specific press room shift did not occur on a very small number of occasions to be insignificant or irrelevant in the

context of the work carried out. There were a reasonable number of times when the claimant was called to carry out a full shift and was accordingly supplied by the respondent to temporarily work for and under the supervision and direction of the client and a sufficient number of occasions to result in the decision we have made.

5

176. We carefully considered the judgment of Auerbach, J in **Kocur -v- Angard Staffing Solutions Ltd (No.2)** [2020] IRLR 732. Taken in context this requires the Tribunal to look at each assignment and assess whether or not the statutory conditions are satisfied. We approached this case (and indeed the others) with some caution given the focus was in respect of whether or not the worker was an agency worker, rather than whether or not the respondent was a temporary work agency, but we considered the points made to be relevant in determining the question. We were conscious there were no authorities to assist us directly in interpreting what a temporary work agency is but the use of the word “temporary” is repeated in the definition of agency worker and the way in which the appellate courts have approached this, we think, can assist us in interpreting the regulation and giving it a common sense and fair meaning,

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177. It is possible, in our view, particularly taking account of the Tribunal members’ experience, that an organisation could be an agency falling within the terms of the Regulations for some placements but not others – even if placed pursuant to the same contract to the same client but in (totally) different circumstances and occasions. Paragraphs 45 and 46 of **Kocur** reminds us that we need to consider carefully each placement and determine whether or not the constituent elements of the definition are satisfied.

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178. At paragraph 58 of his judgment, Auerbach J noted that the nature of the supply can change and if the nature changes, such as to become temporary or permanent, the status of the worker can change. As he said at paragraph 59 what matters is what in fact happens in practice. We considered that to apply equally to the status of the respondent and whether or not it is a temporary work agency.

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179. There is no suggestion within the Regulations that an organisation cannot be a temporary work agency in respect of one particular assignment and then not a temporary work agency in respect of other assignments. If that were so, we considered such a position would frustrate the intention of the Regulations and would allow those providing staff to avoid the application of the Regulations. We are conscious that a purposive interpretation should be adopted to give true effect to the underlying purpose of the Regulations (and thereby the Directive) (see Singh J paragraph 47 in **Moran**). We consider that a common sense interpretation of the words arrives at the same outcome.
180. We did not accept the respondent's agent's argument that the agreement with the client was "for the provision of a managed service rather than for the "supply of individuals" as is required under Regulation 4". We had to look at the reality of the relationship, taking account of the contractual and factual matrix. The respondent was required to provide labour to their client to meet their requirements. In other words the respondent was temporarily providing staff to work for their client. The fact they also provided staff permanently did not alter the fact that they also provided staff on a temporary basis too. While they did provide a service, it was specifically to provide workers too and we concluded the status of the respondent fell within a common sense interpretation of the definition of temporary work agency, taking account of the nature of the contractual relationship and how the relationship operated in practice.
181. We considered the submission that the respondent's business is the provision of an outsourced service, which is performed by individuals providing their labour, and that it is not a temporary work agency. Superficially that is an attractive submission but the reality of the relationship in our view from the evidence before us was that the respondent was engaged in the economic activity of placing staff temporarily to work for hirers. Whether or not the respondent also carried out business of an outsourcing service did not change the nature of the placing of the claimant in the press hall to cover specific shifts. When it did so the respondent was clearly engaged in the economic

activity required by the Regulations. We required to apply the definition set out in the regulations in light of the facts before us and we did so.

- 5 182. We did not consider the title of the agreement, namely “Agreement for the Supply of Production Services” to be of significance since the important considerations are what happened and practice and how the relationship operated in practice in light of the legal definition.
183. While the obligation on the respondent under the Agreement was to provide the Services rather than particular individuals, the respondent was providing staff temporarily for and under the supervision and direction of a hirer.
- 10 184. We took account of the fact that the respondent is contractually obliged to use staff who meet the qualification and training requirements of its client but is otherwise free to select its own staff (subject to a right of veto) and that there is no requirement for individual approval of workers and nor are any individuals specified to be provided for any particular assignment or period of
15 time but this did not alter the nature of the relationship in practice. The respondent was engaged in the economic activity of providing the relevant individuals.
- 20 185. We did not place much weight upon the fact that the contract required the respondent to provide its own staff who are referred to in the Agreement as “the Contractor’s staff” nor to the fact the respondent’s employees are required to wear the respondent’s corporate uniform. The whole purpose of a temporary work agency is to provide staff (and the nature of such staff is not material) nor is the requirement to wear a uniform.
- 25 186. The fact that the respondent provided its own site manager at the client’s premises who was responsible for allocating work to staff and, in part, for managing them was important but in our judgment the position was not such as to deprive the client of sufficient supervision and control. The site manager managed the claimant with regard to his contractual position but on a day to day basis the claimant was fully managed by the client, when working in the
30 press hall. When the claimant was placed to work in the press hall, in the

absence of a requirement for him to work in despatch as part of his normal shift, we considered the respondent to be a temporary work agency.

- 5 187. We did not accept the respondent's agent submission that the employees engaged by the respondent to provide Service under the contract with their client are not being supplied "to work temporarily" for the client. We have to look at each particular placement and assess the nature of the parties and the definitions within the Regulations.
- 10 188. While there is an overarching agreement in place, when the claimant is placed to work in the press hall, he is placed there temporarily in the sense of the workers in **Kocur** as noted by Auerbach J at paragraph 64. The provision of the claimant to the client in the press hall for those shifts was for a finite period, covering for other workers.
- 15 189. The nature of the relationship in question is not the contractual relationship between the respondent and the client (and whether that is temporary or not) but rather whether the respondent is a person engaged in economic activity of supplying individuals to work temporarily for and under supervision and direction of hirers. That is exactly what occurred when the claimant was placed in the press hall for such shifts.
- 20 190. The final submission was that the employees of the respondent who are employed to fulfil the contract with the client were not employed for any fixed period nor for the duration of any defined assignment. Their hours of work are not guaranteed and they have no maximum nor minimum (save that any allocated shift has a minimum of 6 hours), but their engagement is not in any sense temporary which was evidenced by the fact the claimant had been
25 working continuously and exclusively at the site for over 18 years. That did not detract from the fact that when the claimant was placed to work for a press hall shift he was doing so on a temporary or finite basis. He was covering a specific purpose which ended upon the conclusion of the shift. That was clearly a supply of an individual temporarily.

191. We considered the respondent's agent's submission that it would not really seem conceptually possible under the Regulations to analyse the claimant's contract of employment as one which flexes between agency work and not being agency work in that sort of way. We did not consider that to be sound
5 in law. As indicated above, the Tribunal's task is to consider each individual assignment and on those occasions whether or not the definition is satisfied on the facts. We did not consider, in principle, it to be impossible to be a temporary work agency when providing a worker on one occasion and then not a temporary work agency when supplied on a different occasion. We
10 consider that to be possible because the circumstances surrounding each placement can and will change. If on one occasion the nature of the placement differs, the status could change under the Regulations. If the status of the provider was fixed, the purpose of the Regulations would be frustrated. Ultimately the status of the provider of the staff is a factual question to
15 determine on each occasion the worker is supplied.

192. There is no exception as such to those managed service contracts from the Regulations. While the Guidance gives that as an example of situations falling
outwith the Regulations, we did not consider that to be suggesting that such a body could in principle never be a temporary work agency. We must apply
20 the wording from the Regulation and apply the law as presently understood to the facts we have found which we have done.

193. We also considered the respondent's agent's submission that the real underlying nature of the arrangement was for the provision by the respondent of an additional resource (in the shape of the claimant) to keep the press hall
25 service running rather than a contract for the hire of a particular individual, even if on occasion he was requested specifically by name. It was argued that this took place because of the limited number of individuals able to do the work and his physical presence on site at the relevant time when the need arises.

30 194. We were mindful that there are no authorities on such as to what a temporary work agency is (given the focus of the other cases are principally upon the

agency worker). We apply the wording of the Regulations as interpreted by these authorities to achieve their objective. Had the Regulations referred to some restrictions on the relevant provision, such as “wholly and mainly”, or in some other way limited the definition as set out, the position would have been different, but as drafted and applying the Guidance and bearing in mind the purpose the Regulations exist to achieve and the nature of the authorities, we considered the respondent to be a temporary work agency as defined in the Regulations on the facts we found in this case when the claimant was provided to the client’s press hall for a discrete shift but only on those occasions.

195. The definition requires there to be an organisation which was engaged in the economic activity of supply individuals to work temporarily for and under control of hirers. There is no requirement within the definition for the supply to be of named workers. From the facts we found, applying the law, we were satisfied the respondent fell within the definition of temporary work agency when the claimant was supplied to work for the respondent’s client for a whole shift in the press room (which was not part of a despatch shift).

196. For the foregoing reasons we found that the respondent was engaged in economic activity supplying individuals to work temporarily for and under the supervision and direction of hirers, but only when the claimant was supplied to work a full shift in the press hall. The definition was not satisfied in respect of the shifts the claimant worked in despatch (even if he was called to assist in the press hall during those shifts).

Temporarily supplied

197. Applying the ratio from the judgment in **Kocur**, we considered that the placement of the claimant in the shifts when he worked (or began his work) in despatch to be permanent. Such placements were not temporary in any sense. The placements were not like the security guards in **Matie** nor the workers in **Kocur**. They were more similar to the workers in **Moran**.

198. The passage of time had shown that the claimant’s role in the despatch team was permanent in the sense of it was not temporary. We took account of the

full factual matrix in this determination. Thus the claimant was employed on a zero hours contract and could potentially have been given no work to do. The respondent could also have required the claimant to work at a different site or different location but unlike the position in **Matie**, as a matter of fact these provisions were never relied upon and never applied. The claimant worked regular shifts each week in the despatch area for almost 2 decades. The shifts were not cover for other workers or meeting a temporary demand of the client. The shifts were permanent shifts required on an ongoing basis. It was indefinite in the sense set out by Eady J in **Matie**.

10 199. As Auerbach J at paragraph 53 in **Kocur** noted, if the contract allows the worker to be moved but this power is not in fact exercised and the worker is, as a matter of fact, provided to work for the client on an open ended basis, that would not be temporary. That is what happened in this case with regard to the claimant's shifts in despatch. The work was indefinite in the sense of open ended in duration as found in **Moran**. The claimant's place of work was the client's site. His work in despatch was not covering absence or subject to termination upon the occurrence of some condition being satisfied or event occurring. The claimant was not placed in despatch to cover for others on a time limited basis which was the position in **Kocur**. Here the claimant was provided on an open ended basis in despatch.

15 200. Even when the claimant was asked to assist in the press room during such shifts we considered that the claimant was still provided to work permanently (ie not temporarily) for an under the supervision and direction of the hirer. The shifts he began in the despatch area were permanent and even although he sometimes assisted elsewhere (as permitted by his contract), the placement of the claimant on those occasions was permanent. He returned to despatch to complete his work, assisting the press room because it was busy and then returning to his permanent work. The supply of the claimant to work for the client during that shift was not temporary. It was permanent.

20 201. That contrasted sharply with the occasions where the claimant was placed to work in the press hall for an entire shift outwith the despatch shifts. Those

situations were on all fours with the workers in **Kocur**. These shifts were not planned in the sense that they depended upon the fluctuating demands of the client. If an absence arose that required assistance from the respondent's staff, the claimant could be asked to help. On those specific occasions, when
5 he was not working in despatch, and he was supplied to work in the client's press hall for a full shift, the supply was on a temporary basis. On those occasions we considered the time limited nature of the shift was fatal to the argument that the supply was not temporary. It was not permanent.

202. In reaching that conclusion we considered the judgment in **Kocur**. We require
10 to look at each particular assignment or placement and assess the position. We did this carefully.

203. When the claimant was placed to work in the press hall for a full shift, outwith
his despatch shifts, this was the respondent supplying him temporarily to work for the client.

15

Supervision and direction

204. Given the claimant was supplied for that work temporarily (when placed for a full shift in the press room), the next question is whether the temporary supply was "for and under the supervision and direction" of the client.

20 205. We considered that in relation to the shifts commenced in despatch the claimant was not placed under the supervision and direction of the hirer. That work was essentially run by the respondent's staff and not subject to any material intervention by the client's team. While there was some interaction with the client's staff who were employed in this area, the operation was
25 essentially run by the respondent's staff.

206. The position was materially different in the press team when the claimant worked in the press hall where he worked without any of the respondent's assistance in terms of the work he did. While the respondent managed his contract, including absence, holidays, sickness and performance, there was
30 no suggestion that they supervised or directed him in terms of the work he

was doing. The specific work that the claimant had to do on these occasions was entirely a matter for the client.

5 207. We considered the issue of “supervision” and “direction” was one of fact. While the respondent supervised the claimant in the sense of provided a line manager, in reality the work that was done was supervised by the client. In no material sense did the client supervise the claimant when he worked his full shift in the press hall. His work throughout the entire shift was supervised by the client.

10 208. When he was placed in the press hall the only direction of the claimant by the respondent was in terms of his contract of employment in the sense of holidays and sickness absence etc but these did not apply when he was working on those shifts to any appreciable extent since he was at work, following the instructions of the client. While the respondent’s line manager was to line manage him and ostensibly deal with performance management, 15 there was no evidence as to what this meant in practice or whether in fact the client’s staff would be involved, given the respondent had no control or visibility over the claimant’s performance when working in the press hall since that was a matter entirely within the knowledge of the client.

20 209. The material direction of the claimant during these shifts was by the client who directed the claimant as to the work he was to do and how he was to do it. The direction of the claimant in terms of his contractual issues (even including performance) did not alter the fact that the client materially supervised and directed the claimant during those shifts.

25 210. We were satisfied that the claimant was supplied by a temporary work agency (the respondent) to work temporarily for and under the supervision and direction of a hirer (the client) on these shifts.

211. We took a step back to assess the evidence and the relationship between the parties. We found that when the claimant was supplied to the client to work in the press hall as a discrete shift, with the claimant not returning to work in the

despatch hall, he was doing so as an agency worker in terms of the definition within the Regulations.

Regulation 5: were the Regulations breached on the facts?

5 212. We then considered the position in respect of regulation 5 which entitled the claimant to the same basic working and employment conditions as if the claimant had been recruited by the hirer and considered whether the Regulations were breached on the facts we found. The terms and conditions in terms of regulation 5(4) must be those of a comparable employee engaged in the same or broadly similar work having regard to qualifications and skills.

10 213. We found that there was no comparable employees working for the client from the evidence before the Tribunal in relation to the shifts the claimant worked in the press room. We were satisfied the claimant was not carrying out the work of an Operator, nor of a GPA. The claimant was supporting such staff.

15 214. We found the respondent's submissions in this regard to have merit and we uphold them.

20 215. While the claimant believed that he was carrying out the work of an Operator, he did not have full visibility of the full shift an Operator worked on each occasion (nor of the full skill set and training/experience of each Operator). The claimant would regularly assist often during the busiest period but he was not present during each of the client's Operator's full shifts. He did carry out full shifts in the press hall but we did not accept his contention that when he did so he was carrying out the work as Operator. He was assisting the client's employees in the press hall.

25 216. The claimant himself accepted he did not have the full capabilities of an Operator. One of the key or core competencies of an Operator was the ability to step up to Printer in the event of an absence. The claimant could not do so. While the claimant may not have seen the Operators carry out such duties, that did not mean they did not possess them. The client's position was that it

was necessary for the relevant post holders to have the skill, so they could use it if required. That did not mean the skill was necessarily used regularly or even at all.

5 217. The work the claimant did was unique in the sense that there were no staff employed by the client carrying out only the work the claimant did when he worked in the press hall (which was a matter the claimant conceded during cross examination).

10 218. The claimant accepted he did not possess the same skills as qualified Press Operators albeit he did some of the work that they did. The level of pay pertaining to Operators reflects the fact that they could be required to utilise the additional skills if required and that from time to time, which included the requirement that they 'step up' to fulfil at least part of the duties of a Printer.

15 219. We did not consider the submission from the respondent's agent that the fact that Operators are full-time salaried staff with fixed hours and fixed shifts meant it was not possible simply to calculate the hourly rate from the annual salary given the differing nature of the role. We considered such an approach would have been appropriate if the claimant had been carrying out the role of Operator. The annual salary for the role was in respect of the annual hours that was done. The notional hourly rate from the annual salary would, in our
20 view, properly identify the value of that hour's work. In this case, as there was no comparator, the Operator's salary was not relevant.

25 220. We accepted the respondent's agent's submission that there was no evidence from which any assessment could be made that the parts of the Press Operator functions that the claimant performs would be remunerated at a higher rate than the rate at which he is currently paid. That was a key conclusion we reached.

221. We considered whether the claimant was carrying out the role of GPA and whether it would be appropriate to use that role as a compactor but we

concluded from the evidence before us the claimant was not carrying out this role when he worked in the press room. His role was to assist the client's staff in the press room and carry out work as directed. He did not have the key skills nor full training that the client's staff had. While the client's staff could do all the work the claimant did, the claimant was not doing the work of an Operator or GPA. He was assisting the client's staff within the press room during his full shift. He would carry out such duties as asked of him, but those duties were to assist the client's employees in that area, and were not the duties of Operator or General Production Assistant. The duties were to assist those individuals in carrying out their tasks.

222. The claimant was not paid less than a comparator as required by regulation 5 to allow his claim to be upheld. There was no actual comparator, given the claimant was not doing the same work as the Operators and GPAs. He was supporting these roles (and the rate of pay pertaining to that work would have been lower than the existing roles, had there been a comparator).

223. Applying the terms of regulation 5 to the facts we have found, we were satisfied there was no breach of the Regulations. The claim is accordingly ill founded.

20 **Summary**

224. From the evidence presented to the Tribunal, we found that the respondent was a temporary work agency when (but only when) the claimant was supplied to work a discrete full shift in the press room and when he did so he was supplied by the respondent temporarily for and under the supervision of the client. He was therefore an agency worker during such shifts.

225. We found that the work the claimant did during such shifts, from the evidence before this Tribunal, was not the same work as that carried out by the client's staff. The work he did was to assist the client's staff. The claimant was undertaking work of a lesser value, in respect of which there was no

comparator. We were satisfied that there was no breach of the Regulations as the claimant was not paid less than a comparable employee who was directly employed by the client.

226. The claim is therefore dismissed.

5

Observation

227. The above conclusions arise by virtue of the evidence we heard and is solely based upon that evidence.

10 228. We conclude by thanking both the claimant and the respondent's agent for their professionalism and the way in which they worked together to progress matters in line with the overriding objective.

15 Employment Judge: David Hoey
Date of Judgment: 02 July 2021
Entered in register: 20 July 2021
and copied to parties

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