

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4104144/2016

Heard in Glasgow on the 20 and 21 September 2017

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**Employment Judge: Lucy Wiseman
Members: Gerry Eckersley
Anne Middleton**

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Mr Cameron Riddell

**Claimant
In Person**

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Wilson Gibb Management Services Ltd

**Respondent
Represented by:
Mr I D Truscott -
Queens Counsel**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Tribunal decided to dismiss the claim.

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REASONS

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1. The claimant presented a claim to the Employment Tribunal on 4 August 2016 pursuing a claim under the Agency Workers Regulations 2010. The claimant argued he had the relevant qualifying period to assert the rights set out in Regulation 5.

2. The respondent entered a response asserting the roles carried out by employees were substantially different to the roles carried out by the agency workers, and accordingly the claimant was not entitled to the rights set out in Regulation 5.

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3. A case management preliminary hearing took place on the 7 December 2016 at which it was noted there was no dispute regarding the fact (i) the claimant was an agency worker within the meaning of Regulation 3; (ii) the respondent is a temporary work agency in terms of Regulation 4 and (iii) the claimant had worked for the requisite relevant qualifying period of 12 continuous calendar weeks with the Hirer.

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4. There was initially a dispute between the parties regarding the issue of whether the claimant required a comparator to proceed with a claim in terms of Regulation 5. This issue was determined following a Preliminary Hearing on the 7 February 2017, when a Tribunal decided that in order to invoke the rights conferred by Regulation 5 of the Agency Worker Regulations (the Regulations), the claimant did not require to identify a comparator who was an employee of the Hirer, carrying out work which was the same or broadly similar to that performed by the claimant for the Hirer.

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5. This Hearing was to determine the claimant's claim brought under Regulation 5 of the Regulations. We heard evidence from Mr Patrick Docherty, Depot Manager, Whirlpool; Ms Margaret Findlay, Area Manager with the respondent and the claimant. We were also referred to a number of documents in bundles produced by the claimant and the respondent. We, on the basis of the evidence before us, made the following material findings of fact.

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30 **Findings of fact**

6. The respondent is a recruitment agency which provides staff on a predominantly temporary basis to a variety of companies. One such company is Whirlpool, whose business involves the delivery and installation

of white goods such as washing machines, fridges, freezers and tumble dryers.

- 5 7. Whirlpool employ a range of employees, including Drivers, probationary Drivers, Mates, probationary Mates and Accompanied Drivers, who carry out a range of duties. They also use the services of agency workers provided to them by the respondent.
- 10 8. Whirlpool does not employ employees to carry out solely driving duties.
- 15 9. Drivers employed by Whirlpool attend an intensive week-long course in Manchester which covers all aspects of the job including health and safety, customer care, connections and installations, company procedures and use of the Hand Held Terminal (HHT). Drivers work a 13 week probationary period during which they are tested twice to ensure all aspects of the work are being carried out correctly.
- 20 10. The duties of the Driver include attending at the depot each day and collecting the HHT, which contains all information regarding the work to be carried out that day. The Driver is responsible for checking the customer details upon arrival at the property; checking to ensure there is no damage to the floor in the property; ensuring the correct appliance is delivered, connected/installed and the old appliance removed if requested; ensuring the customer reads the terms and conditions of the warranty and signs for delivery.
- 25 11. A probationer Driver earns a salary of £17,700.09 and once the probationary period has been completed successfully a Driver earns a salary of £21,362.16.
- 30 12. A Driver (or probationary driver) will usually be accompanied by a Mate, who will be trained to the same standard as a Driver. Mates do not undertake driving duties, although they may on occasion be asked to do so if they hold a 7.5 tonne vehicle licence.

13. A probationer Mate will earn a salary of £15,278.73, and a Mate will earn a salary of £16,370.83.
14. Whirlpool also have a number of Accompanied Drivers. Existing employees
5 may make a request to become an accompanied driver, and usually such requests follow a period of ill-health or where employees find the work too demanding. Whirlpool do not grant all requests to become an accompanied driver, and do not recruit Accompanied drivers.
- 10 15. An accompanied driver earns a salary of £18,506.89.
16. Whirlpool use agency staff to supplement the workforce to deal with increases in workload, and to provide cover for holidays and sickness absence.
- 15 17. The claimant was engaged as a temporary worker with the respondent. The claimant holds a licence to drive a 7.5 tonne vehicle.
18. The claimant (who is not required to accept the offer of work) was offered
20 and accepted assignments with Whirlpool in the period 10 November 2015 to 5 May 2016. The claimant worked as an agency driver during this period.
19. The claimant, as an agency driver, was responsible for obtaining the keys
25 for the vehicle at the depot and carrying out the vehicle checks. The claimant drove the route specified by Whirlpool and in the time specified by them. He unloaded the appliance from the vehicle and loaded on any scrap appliances. The claimant may assist in unpacking the appliance, but he was not permitted to undertake any of the customer facing duties, operate the HHT or carry out any connections or installations.
- 30 20. Agency workers are always accompanied by an employee of Whirlpool, and the employee is the designated responsible person. Agency workers are not trained at Whirlpool's academy; they do not carry out deliveries alone or stay away overnight.

21. The respondent operates an Agency Worker Regulations procedure whereby every booking is logged in the system, which keeps track of the number of weeks each person has completed. The respondent also requires that each client completes an Agency Worker Regulations questionnaire which asks them to provide comparator information. Whirlpool completed their questionnaire (page 65) in September 2014, and confirmed there were no comparator Drivers or Mates in the business.
22. The claimant sent an email to the respondent in May 2016 enquiring about the Agency Workers Regulations. Ms Findlay responded on 25 May 2016 (page 68) to confirm that the pay parity part of the Agency Workers Regulations apply when a worker is doing the same/very similar role to a full time employee that is not deemed to be substantively different. Ms Findlay confirmed the claimant's role was deemed to be substantively different to that of the full time Hotpoint (Whirlpool) employees because they have different skills and competences and have to undergo extensive additional training. Ms Findlay confirmed the agency workers were not required to undertake connections and installations.
23. The claimant earned £7.50 per hour. The respondent calculated the claimant earned £453.70 less than a probationer Driver (whose hourly rate is £8.12) in the period 14 February 2016 to 17 April 2016.
24. Whirlpool advertise vacancies for Drivers and Mates on the internal notice board. Agency workers may apply for those positions, and in the past year all Mates have been recruited from agency workers.
25. Whirlpool provides its employees with a complete uniform and all safety wear. It provides agency workers with gloves and a hi-viz vest.
26. The respondent provides the personal protective equipment required by each worker. The claimant did not request any items during his period with the respondent.

27. The claimant accepted he had not made a request for any personal protective equipment, but he had purchased boots to wear for work.

Respondent's submissions

5 28. Mr Truscott noted the issue to be determined by the Tribunal is whether the work carried out by the claimant, was broadly similar to that carried out by an employee (probationer driver) of Whirlpool. An issue had been raised regarding personal protective equipment, but it was submitted the Tribunal did not have jurisdiction to determine this issue.

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29. The periods of hire were not in dispute, and the relevant period was from 10 November 2015 to the 5 May 2016. The claimant was, during this time, hired by the respondent to Whirlpool as a driver. The claimant's duties were to drive the vehicle and assist the Whirlpool employee by unloading the appliance and loading the scrap appliance.

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30. Mr Truscott invited the Tribunal to accept the evidence of Mr Docherty, and noted the claimant had not really disputed much of what he had said. The material point was that the role of the Whirlpool employee and the agency worker were not comparable and were substantially different:-

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- the roles involved different skills and competencies;
- agency workers are hired to drive and assist with deliveries;
- Whirlpool employees carry out installations; undergo extensive training; are responsible for completing deliveries; use the HHT; plan the route, are responsible for the paperwork; deal with the face to face interactions with customers; sometimes carry out deliveries alone and stay away overnight;

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- Agency drivers do not undertake training; do not carry out installations; are always accompanied by a Whirlpool employee; do not use the HHT and never work alone.

5 31. Mr Truscott referred the Tribunal to Regulation 5 of the Agency Worker Regulations and submitted that this regulation provides that a qualifying agency worker is entitled to the same basic working and employment conditions as s/he would have been entitled to for doing the same job, had they been recruited (at the time that they were) by the hirer other than
10 through an agency. There is no requirement for a comparator, but there must be a comparison. There was no comparator in this case.

32. Mr Truscott referred to the cases of **Matthews v Kent & Medway Towns Fire Authority 2006 IRLR 367** and **Moultrie v Ministry of Justice 2015 IRLR 264** for guidance regarding the term “broadly similar”.

33. Mr Truscott submitted the Whirlpool employees did not do a broadly similar role to the agency worker. There were duties that went with the Whirlpool rate of pay which agency workers did not carry out, and accordingly the rate
20 of pay was less. The qualitative role was the customer facing role and that is what was undertaken by the Whirlpool employee. The agency worker facilitated the function of the Whirlpool employee. The roles were not broadly similar and in light of the qualitative differences between the jobs, the claim must fail.

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34. Mr Truscott invited the Tribunal to dismiss the claim. He wished it noted no application for expenses was made.

Claimants submissions

30 35. Mr Riddell noted the following facts had been agreed at the preliminary hearing on the 7 December 2016: (i) the claimant was an agency worker; (ii) the respondent was a temporary work agency and (iii) the qualifying period had been completed.

36. Mr Riddell further noted the following facts appeared not to be in dispute: (a) the claimant did not receive the basic employment and working conditions of his role at or before 12 weeks in the role (no evidence had been produced to say otherwise) and (b) all aspects of his employment stayed the same during the nine weeks following the 12 week qualifying period. This included how shifts were allocated, the job the claimant was doing and also his pay.
37. Mr Riddell submitted that Regulation 5 stated, with regard to basic employment and working conditions, that the conditions should apply as they would be applied to a direct employee and that they should be applied as they were when the qualifying period commenced. There were no valid exceptions in this case which meant the Regulation 5 rights could not apply.
38. Mr Riddell submitted he should have had access to training and should have been allowed to contribute in the same way as a direct employee.
39. Mr Riddell invited the Tribunal to find that the respondent must attempt to secure rights, and they had not taken sufficient steps to do so. The respondent had not followed up on the information gathering form which was no more than a starting point for discussions. Pay information had not been requested until well into the employment tribunal process, and they had refused to change their position after the preliminary hearing found no comparator was necessary.
40. Mr Riddell referred to the terms of Regulation 5 and submitted he was an agency worker, and the respondent was a temporary work agency. He had completed a qualifying period and there should have been equal treatment. A comparator did not need to be used, but a comparison had to be made with existing workers. Equal treatment meant treating the worker as if he had been recruited directly to the same job.

41. The claimant submitted he was a 7.5 tonne driver, with the necessary qualifications and experience. The claimant referred to the Whirlpool Appliances UK Role Definition for Home Delivery Driver (claimant's documents page 69) and submitted there was nothing in the skills and requirements section which he could not do.
42. Mr Riddell submitted he should have been treated as if he had been employed directly, with appropriate consideration to his skills and experience. He had the requisite driving skills, qualifications and appeared to meet all the demands indicated in the skills section of the job description to enable entry to employment at Whirlpool at starter grade for (probationary driver's mate or) probationary driver.
43. The claimant noted the respondent continued to insist that the comparator was an issue in this case and submitted they were wrong in this approach. The respondent appeared to argue that because the claimant was not doing the connections and dealing with the customer care aspects of the job, this meant that Regulation 5 rights did not apply. The claimant submitted this argument was fatally flawed because the very reason he was not contributing equally after 12 weeks was because his rights were not established by the temporary work agency. There was little the claimant could do if he was not allowed to contribute equally and not given the appropriate training.
44. Mr Riddell submitted he met all the requirements to start as a probationer and should have been sent for training. He further submitted he was entitled to equal treatment no matter if he was trained or not.
45. The claimant also invited the Tribunal to determine the complaint in respect of personal protective equipment (PPE). It was submitted the employer has legal obligations to provide PPE to the employee (The Personal Protective Equipment at Work Regulations 1992). The employer cannot make a charge for the provision of items necessary to meet the statutory requirements (The Health and Safety at Work Act 1974).

46. The claimant submitted the agency was the employer for the 21 weeks' service the claimant completed with Whirlpool. The agency indicated steel-toe-capped boots were required, which was the case. The claimant believed the work conditions required a dedicated work coat to protect from the elements whilst working outdoors. There was also significant risk of tearing and damage to clothing such as trousers, polo shirts and jumpers.
47. The claimant produced a schedule of loss (claimant's documents page 130) in which he sought payment of minimum compensation (£674.40); pay shortfall (£782.63); meal subsidy (£82); shift pattern compensation (£337.20) and access to training (£723.52). The claimant also sought payment of £105.50 in respect of PPE.

Discussion and Decision

48. We noted firstly that there was no dispute in this case regarding the fact the claimant was an agency worker in terms of Regulation 3 of the Agency Worker Regulations (the Regulations); that the respondent is a temporary work agency in terms of Regulation 4 and that the claimant had completed the necessary qualifying period of 12 continuous calendar weeks in terms of Regulation 7.
49. We also noted the claimant did not dispute much of Mr Docherty's evidence regarding the duties and responsibilities of the employees of Whirlpool, and the agency workers. The claimant accepted that his duties were limited to attending at the depot, obtaining the vehicle keys, carrying out the vehicle inspection, driving the route planned by Whirlpool, unloading the appliance and loading on the old appliance. The claimant further accepted that he did none of the customer facing role, did not operate the HHT and did not carry out connections or installations.

50. We next had regard to the terms of Regulation 5, which is entitled "Rights of agency workers in relation to the basic working and employment conditions". The regulation is in the following terms:

5 ^u(1) *Subject to Regulation 7, an agency worker shall be entitled to the same basic working and employment conditions as the agency worker would be entitled to for doing the same job had the agency worker been recruited by the hirer -*

10 (i) *other than by using the services of a temporary work agency; and*

 (ii) *at the time the qualifying period commenced.*

15 (2) *For the purposes of paragraph (1), the basic working and employment conditions are -*

 (i) *where the agency worker would have been recruited as an employee, the relevant terms and conditions that are ordinarily included in the contracts of employees of the hirer;*

 (ii) *where the agency worker 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.

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(3) Paragraph (1) shall be deemed to have been complied with where

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(a) an agency worker is working under the same relevant terms and conditions as an employee who is a comparable employee, and

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(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.

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(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 -

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

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(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

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(b) the employee works or is based at the same establishment as the agency worker or, where there is no comparable employee working or based at that establishment who satisfies the requirements of sub-paragraph (a), works or is based at a different establishment and satisfies those requirements.

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

51. Regulation 5 sets out the principal right in terms of the Agency Workers Regulations: an agency worker who has completed a 12 week qualifying period must receive the same basic working and employment conditions as he would be entitled to for doing the same job (our emphasis) had he been recruited directly by the hirer at the time the qualifying period commenced. This regulation means that if an employer employing, say, cleaners, supplements the workforce by using agency workers as cleaners, the agency workers are entitled (after the qualifying period) to the same basic working and employment conditions (for doing that job) as they would have been entitled to had they been recruited as a cleaner directly by the hirer. If the employer paid its employees £10 per hour for cleaning, the agency workers would be entitled to this rate of pay after the qualifying period.

52. The above points make clear that an agency worker, who has completed a 12-week qualifying period, must receive the same pay as he would be entitled to for doing the same job, at the time the qualifying period commenced, had he been recruited directly by the hirer. The issue is equal treatment in respect of the pay the claimant would have been entitled to, for doing the same job, that is, driving only duties, had he been recruited directly by Whirlpool.

53. We, in considering the above point, turned to consider what basic working and employment conditions (for which we use the shorthand term, pay) would the claimant have been entitled to, had he been recruited directly by Whirlpool to carry out the duties which he did as an agency worker.

54. The first point we noted was that there was no dispute regarding the fact Whirlpool does not employ employees to carry out the same duties as the claimant: there are no employees employed solely to carry out driving duties. Accordingly there was no evidence regarding pay for such duties.

55. This was not a case where the claimant could point to Whirlpool pay scales or collective agreements indicating a going rate for the job he carried out, even though no-one was employed to do the job. There was no such evidence before us.

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56. The second point we noted was that in terms of the Regulations, Regulation 5(1) is deemed to have been complied with where the agency worker is working under the same relevant terms and conditions as an employee who is a comparable employee. A comparable employee is defined as an employee working for the hirer and engaged in the same or broadly similar work, having regard, where relevant, to whether they have a similar level of qualification and skills.

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57. The parties agreed (and the preliminary hearing determined) that it was not necessary for the claimant to rely upon a comparator. However, if there is a comparable employee carrying out broadly similar work to the claimant, the claimant would be able to rely on this to seek equal treatment.

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58. We asked whether there was a comparable employee in this case. The claimant suggested a probationary Driver or probationary Mate were comparable employees. We have set out above the fact the claimant did not dispute much of Mr Docherty's evidence regarding the duties of a probationary Driver or Mate.

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59. We found as a matter of fact that a probationary Driver employed by Whirlpool undertakes the following duties:

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- attendance at the training academy for one week, such training to include all elements of the job, health and safety, customer care, connections and installations, HHT and company procedures;
- attendance at the depot and collection of the HHT ;
- checking customer details;

- driving the route as set on the HHT ;
 - inspect the property for damage and log any relevant details on the HHT;
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- note information from the HHT regarding the appliance to be delivered, whether it has to be connected/installed and whether the old appliance is to be removed;
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- customer facing duties including have the customer read the terms and conditions of the warranty and sign the HHT;
 - may be required to travel and stay away overnight and
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- may be required to work alone.

60. A probationary Mate is trained to the same standard as a Driver. The Mate's role is to accompany the driver, and Mates do not usually carry out driving duties, although they may occasionally be asked to do so.

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61. The claimant accepted that:-

- (i) he was not required to attend the training academy;
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- (ii) he was not required to complete a probationary period;
 - (iii) he did not operate the HHT ;
 - (iv) he did not carry out any customer facing role;

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(v) he was required to drive the route determined by Whirlpool, in the time determined by Whirlpool;

(vi) he was not required to carry out any connections or installations;

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(vii) he was not required to stay away overnight and

(viii) he was not permitted to work alone.

10 62. The claimant's duties were to drive the vehicle and to unload appliances and load scrap appliances.

63. We concluded from the above facts that the work carried out by the claimant and a probationary Driver or a probationary Mate was not the same or broadly similar. We further concluded there was no comparable employee in this case.

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64. We decided, for the reasons set out above, that the claim for equal treatment in terms of Regulation 5, must fail.

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65. The claimant, in his submissions to the Tribunal, suggested his skills and experience were such that he met the requirements for recruitment as a probationary Driver. Accordingly if he had been recruited directly by Whirlpool, it would have been to this position. The claimant sought equal treatment on this basis. We make no comment on whether the claimant has the skills and experience necessary to be recruited as a Driver by Whirlpool. The material issue, however, is that the Regulations make clear that an agency worker is entitled to the same basic working and employment conditions as he would be entitled to for doing the same job had he been recruited by the hirer, that is Whirlpool. The issue is not what pay the claimant would have received had he been recruited directly by Whirlpool to do another job.

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66. The claimant also brought a claim for payment in respect of personal protective equipment. We decided to dismiss this claim because a tribunal has no jurisdiction to determine it. Furthermore, Ms Findlay's clear and uncontested evidence was that the respondent provides the PPE required by each worker, but the claimant had not made a request for any items during his period with the respondent.

67. We decided to dismiss the claim.

10 Employment Judge: Lucy Wiseman
Date of Judgment: 16 October 2017
Entered in register: 19 October 2017
and copied to parties

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