EMPLOYMENT TRIBUNALS

Claimant: **Jason Lutz**

Respondents: **(1) Ryanair DAC**
(2) MCG Aviation Ltd

Heard at: **East London Hearing Centre**

On: **29 March – 01 April 2022**

Before: **Employment Judge Housego**

Representation

Claimant: Michael Ford QC
Respondents: John Bowers QC
Edward Brown QC

JUDGMENT

1. **The Claimant was a "crew member" employed by MCG Aviation Limited within the meaning of regulation 3 of the Civil Aviation (Working Time) Regulations 2004.**

2. **The Claimant was a "crew member" on board civil aircraft, employed by MCG Aviation Limited within the meaning of clause 2 of the European Agreement on the Organisation of Mobile Staff in Civil Aviation, implemented by Directive 2000/79/EC.**

3. **The Claimant falls within the definition of "crew member" in the Civil Aviation (Working Time) Regulations 2004.**

4. **The Claimant was a "worker" for the purposes of the essential principle of EU law reflected in Article 31 of the Charter on Fundamental Rights of the EU.**

5. **The Claimant was an "agency worker" within the meaning of regulation 3(1) of the Agency Workers Regulations 2010.**

    5.1. The Claimant was supplied by MCG Aviation Limited to work temporarily for and under the supervision and direction of Ryanair DAC.

5.2. The Claimant had a contract with MCG Aviation Limited to perform work or services personally.

6. The Claimant was not excluded from the definition of "agency worker" under the Agency Workers Regulations 2010 by regulation 3(2), because the Claimant did not carry on a profession or business in which either MCG Aviation Limited or Ryanair DAC was a client or customer, within the meaning of regulation 3(2)(a) or 3(2)(b) of the Agency Workers Regulations 2010.

REASONS

What the case is about

1. This is a hearing to decide preliminary points about Mr Lutz's status in his role as a pilot for Ryanair[1]. It has, of course, a far greater significance than Mr Lutz's personal claim, as there are many pilots in precisely the same position as Mr Lutz[2].

2. In summary, Ryanair has employed pilots. It also has a pool of *"contracted pilots"* who are not employees. Ryanair has arranged that the Second Respondent (MCG[3]) manages this pool of pilots. Ryanair sends people to MGC, which then directs these pilots to accountants who set the pilots up with service companies and so as self-employed people. MCG organises everything for these pilots.

3. The pilots are all treated identically, day to day, by Ryanair, and only a small difference in airside ID passes can distinguish them[4]. The essence of the case is that Ryanair says this means that they are not entitled to holiday pay and sick pay. Mr Lutz says that he is an agency worker entitled to holiday and sick pay (and possibly other consequences follow). The way that claim was put forward by Mr Lutz is reflected in the judgment above.

The relevant legal provisions

4. Civil Aviation (Working Time) Regulations 2010 ('CAWR'):

   Regulation 3

   "crew member" means a person employed to act as a member of the cabin crew or flight crew on board a civil aircraft by an undertaking established in the United Kingdom;

   "employer" means an undertaking established in the United Kingdom by whom a crew member is (or where the employment has ceased, was)

[1] For reasons that are not germane the legal entity running the airline has changed. All agree that the correct respondent is Ryanair DAC. I have used the name Ryanair throughout.
[2] MCG had 1906 pilots at 30 November 2017, with a very high percentage being Ryanair pilots – page 369.0.0
[3] The company was originally Storm McGinley Ltd, and is now MGC Aviation Ltd. I refer to them as MGC. Whether it is the same legal entity or not is immaterial.
[4] The badges are identical, save that there is one line on them which reads either "Ryanair" or "McGinley"

employed;

"employment" in relation to a crew member, means employment under his contract, and "employed" shall be construed accordingly;

5. Agreement on Organisation of Mobile Staff in Civil Aviation Directive 2000/79/EC

Clause 2:

"Mobile staff in civil aviation" means crew members on board a civil aircraft, employed by an undertaking established in a Member State.

The reason this is important is by reason of the following provisions:

Clause 3
1. Mobile staff in civil aviation are entitled to paid annual leave of at least four weeks, in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.
2. The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.

Clause 4
1. (a) Mobile staff in civil aviation are entitled to a free health assessment before their assignment and thereafter at regular intervals.
(b) Mobile staff in civil aviation suffering from health problems recognised as being connected with the fact that they also work at night will be transferred whenever possible to mobile or non-mobile day work to which they are suited.
2. The free health assessment referred to in paragraph 1(a) shall comply with medical confidentiality.
3. The free health assessment referred to in paragraph 1(a) may be conducted within the national health system.

Clause 5
1. Mobile staff in civil aviation will have safety and health protection appropriate to the nature of their work.
2. Adequate protection and prevention services or facilities with regard to the safety and health of mobile staff in civil aviation will be available at all times.

6. CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION 2012/C 326/02[5]

[5] It is accepted that the EU Withdrawal Agreement means that there is no effect on this case of the UK leaving the EU. Mr Ford's skeleton argument at paragraphs 15 & 16 sets out why:
"15. First, as the Tribunal will know, employment law distinguishes between those employed under contracts of employment, those who are in business on their own account working for client or customers, and an "intermediate" class of self-employed workers. The intermediate class are, in the UK at least, taxed as self-employed, because taxation continues to draw on the older division between employees and the self-employed.
16. Second, EU law is relevant to some of the claims brought by Mr Lutz - for example his claim brought on the basis of the right to paid annual leave in Article 31 of the Charter. Article 31 is directly and horizontally effective against private parties: see Max Plank v Shimizu [2019] 1 CMLR 35. Because his claim was brought prior to "IP completion day", which is 31 December 2020, he can continue to rely on the direct effect of the Charter even after "Brexit": see the European Union (Withdrawal) Act 2018, s.5(4) and §39 of Schedule 8. In addition, the duty to interpret national law, so far as is possible, to achieve the result required by EU law is preserved by s.5 of the 2018 Act."

Article 31

Fair and just working conditions

1. Every worker has the right to working conditions which respect his or her health, safety and dignity.

2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.

7. Agency Workers Regulations 2010 ("AWR")[6]

The meaning of agency worker

3.(1) In these Regulations "agency worker" means an individual who—

(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—
(i) a contract of employment with the agency, or
(ii)any other contract with the agency to perform work or services personally.

(2) But an individual is not an agency worker if—

(a) the contract the individual has with the temporary work agency has the effect that the status of the agency is that of a client or customer of a profession or business undertaking carried on by the individual; or

(b) there is a contract, by virtue of which the individual is available to work for the hirer, having the effect that the status of the hirer is that of a client or customer of a profession or business undertaking carried on by the individual.

(3) For the purposes of paragraph (1)(a) an individual shall be treated as having been supplied by a temporary work agency to work temporarily for and under the supervision and direction of a hirer if—

(a) the temporary work agency initiates or is involved as an intermediary in the making of the arrangements that lead to the individual being supplied to work temporarily for and under the supervision and direction of the hirer, and

(b) the individual is supplied by an intermediary, or one of a number of intermediaries, to work temporarily for and under the supervision and direction of the hirer.

(4) An individual treated by virtue of paragraph (3) as having been supplied by a temporary work agency, shall be treated, for the purposes of paragraph (1)(b), as having a contract with the temporary work agency.

(5) An individual is not prevented from being an agency worker—

(a) because the temporary work agency supplies the individual through

[6] To be construed to give effect to the Directive (as set out in paragraph 19 of Ryanair's closing submissions.

one or more intermediaries;

(b) because one or more intermediaries supply that individual;

(c) because the individual is supplied pursuant to any contract or other arrangement between the temporary work agency, one or more intermediaries and the hirer;

(d) because the temporary work agency pays for the services of the individual through one or more intermediaries; or

(e) because the individual is employed by or otherwise has a contract with one or more intermediaries.

(6) Paragraph (5) does not prejudice the generality of paragraphs (1) to (4).

Summary of conclusions

8. In summary, my conclusions are as follows, and I set out the facts found and the reasons for reaching these conclusions subsequently.

9. The issues put before me are, in reality, simple to answer.

10. Mr Lutz was a first officer on Ryanair's Boeing 737s. He had to pass Ryanair competency assessments. He had a Ryanair uniform. He was rostered by Ryanair. No one could possibly think that he was other than part of the crew of the planes he flew. The planes could not fly without him being there as part of the crew.

11. So, the first two issues must be resolved in favour of the Claimant.

12. Mr Lutz was employed in the operations of Ryanair. *"Employed"* is often used, especially in Employment Tribunals, as shorthand for *"employed under a contract of employment".* The word itself is wider – Counsel in this case employed different arguments, for example. While the word *"employee"* means someone employed under an employment contract, the word *"employed"* is not so precise. He was certainly employed as a resource by Ryanair. He had a contract with MCG. That his work was not under a contract of *employment* with them (or anyone else) does not change that fact.

13. That is not enough, as CAWR refers to someone *"employed under his contract*". It does not say what *"his contract"* means. There must be a contract about the services being provided for the Regulations to apply. If it had to be a contract of employment Parliament would have said so. Mr Lutz had a contract which governed his work with Ryanair. Ryanair called Mr Lutz a contracted pilot – the very name confirms that he had a contract.

14. More fundamentally it would be extraordinary if the CAWR did not apply to Mr Lutz. This is a health and safety regulation. The need for such regulation for those flying passenger aeroplanes is obvious. It cannot be that a salaried pilot is subject to the CAWR but his/her contracted counterpart is not. On occasions a plane is flown by a contracted pilot and a contracted company pilot. It is impossible to contemplate that it is a proper construction of CAWR

that these regulations, put in place to make sure that the pilots who fly passenger planes are not impaired by being overtired, apply to neither pilot of a passenger jet carrying hundreds of people. The Regulations apply to Mr Lutz. This issue is resolved in Mr Lutz's favour.

15. Mr Lutz worked while flying planes for Ryanair. No one could possibly think otherwise. He was an integral part of the crew of the planes he flew. He was a worker. How, it may be asked, could someone flying a passenger jet aeroplane as his one and only job, and being paid for it, not be working (and so be a worker)? Mr Brown says that he has only to show that Mr Lutz was not a worker for MCG, and so he does not need to, and declined to, suggest who Mr Lutz worked for, saying only that it was not MCG. Of course, it is easier for Mr Brown to succeed if instead of simply saying that it was not MGC it must have been another. The only other actors are Dishport Ltd, Ryanair, or Mr Lutz was working for himself.

16. Was he an agency worker (for MCG)? The first question is whether he was supplied by MCG to Ryanair. It is said he was in business on his own account, so that Ryanair was a customer of his limited company. This is patently not so. Mr Lutz was not a self-employed pilot with Ryanair as a customer. Ryanair had no dealings *at all* with the service company, day to day about individual pilots. MCG had almost no communication with Mr Lutz after he started flying for Ryanair before being dismissed. It wrote to him in December 2018 about a *"no show"* for a flight, but even that does not assist their case (as set out below). Mr Lutz was not a director, shareholder or employee of the limited company into which MCG's retained accountant told Mr Lutz they had *"installed"* him, which they did without his prior knowledge. Mr Lutz was an integral part of the airline. The reasons for this are set out later. Since Ryanair did not give Mr Lutz a contract of employment, he was not their employee. Since (I find) he was not in business on his own account, and since MCG were the intermediary through which Ryanair dealt with all its contracted pilots (and would not deal with contracted pilots in any other way) there can be no conclusion other than that MGC supplied Mr Lutz to Ryanair.

17. To be an agency worker, the work has to be temporary. I conclude that the circumstances meet that definition (set out below). In essence it was a fixed term of five years. Mr Lutz pressed for employment. That would be permanent: he was temporary. As Mr Ford pointed out, a five-year posting is, in EU law, temporary. I reject the argument that temporary means, only, short term, such as cover for another. The word temporary stems, of course, from the Latin for time. This was a time limited appointment. That in some cases it was replaced by another time limited appointment (as occurred) does not make it cease to be a time limited appointment. And so Mr Lutz was an agency worker for MGC.

18. To decide that it is necessary to find that he had a contract to supply his services personally (and not through Dishford Port Ltd). I find that he did have a contract to supply services personally. He could, and on occasion did, ask to change his rostered flights, but that is just to change the days on which he would work. The regulatory framework is such that the pilot named on the roster *must* fly the plane. When Mr Lutz asked to change shifts Ryanair could say yes, or no, and did say no sometimes. Mr Lutz most

certainly could not send someone along to fly a plane he was rostered to fly. The *"right to substitute another"* did not exist. The documentation purporting to show otherwise is a sham, with no purpose other than to try to defeat an assertion that he was a worker. Insofar as there may have been a right of substitution, it is so narrow that it cannot be considered *"unfettered"*.

19. The high level of regulation in the airline industry is the *reason* why it had to be so fettered, but is not logical to say that the reason it is fettered means that it is not fettered: fettered it was.

20. Lastly, Mr Lutz did not have MGC or Ryanair as a customer of a business he ran. Every aspect of Mr Lutz's engagement with Ryanair was structured as Ryanair dictated. Mr Lutz had no say in anything. He just did what he was told. This is the polar opposite of running a business. Accordingly, Mr Lutz is not excluded from the Agency Workers Regulations.

21. It follows that I have decided all the issues in this preliminary hearing in favour of Mr Lutz.

Evidence

22. I heard oral evidence from Jason Lutz and from Ben Morais, a Ryanair captain, and Chairman of the Company Council for the British Airline Pilots Association (BALPA). For Ryanair I heard from Diamiud Rogers, Head of Flight Operations Base Management for all Ryanair bases across Europe and North Africa, and from Grace Crawford, Base Manager for 16 bases, including (at the relevant time) Stansted. For MGC I heard from Robert Scanlon, of Scanlon Associates Ltd ("Scanlons"), which is one of the firms of accountants contracted pilot are required by MCG to use, and which handled Mr Lutz, and from Elizabeth Hoefsmit, Managing Director of MGC[7].

23. There was a bundle of documents of over 1300 pages, and an authorities bundle of documents of 741 pages, and a chronology.

The hearing

24. The hearing took place, in person, over four days, the first of which was taken up by my reading of the witness statements (of over 100 pages), written submissions of Counsel for Mr Lutz and Ryanair (that of MGC was not forwarded to me until Wednesday, which was not their oversight) and the bundle of documents. I record my gratitude to all three Queen's Counsel for their focus and ability to deal with all the oral evidence in two days. They made oral submissions which they agreed to limit to 75 minutes each. I made a full typed record of proceedings which can be perused by a higher Court if required, and their written submissions can be read. All Queen's Counsel provided lengthy written closing submissions which I have considered carefully. As their total length is several hundred pages I do not attempt to paraphase what they said and wrote. My assessment of the oral evidence is in my findings of fact.

[7] When reviewing documentation the reader needs to be aware that Mrs Hoefsmit's surname was previously Cusack.

Facts found

25. Mr Lutz's father is a commercial pilot. Mr Lutz wanted to be a commercial pilot too. At his (or his family's) expense he trained and obtained a commercial pilot's licence.

26. Very few, if any, commercial airlines will train pilots from scratch. The pilot's licence obtained by Mr Lutz is the gateway qualification to be able to apply for jobs with airlines.

27. Ryanair had a five-year agreement with Storm McGinley Supports Services Ltd, dated 28 December 2011[8]. The parties agree that this is still the relevant document between Ryanair and MCG. MCG (it appears to have been the same company) was called *"the Supplier"* to Ryanair. MCG agreed to procure Service Companies for Ryanair, and these service companies would have *"Company Representatives"* (who would be the pilots). MCG agreed to provide a pool of pilots to support the expansion and contraction of Ryanair services at short notice. Plainly this was intended to provide skilled and trained pilots to deal with seasonal increases in flights, without them being employees. It was intended to be a series of temporary assignments with gaps in between. That has some relevance to the assessment of the arrangement at its start. However, by the time Mr Lutz came on board the rostering was of all pilots, employed and contracted, on the same basis. The contracted pilots became even more integrated when Ryanair agreed that for seniority purposes all pilots were one pool[9]. The agreement says that *"Company Representatives"* were not intended to be Ryanair employees, nor be deemed to be so. That Ryanair and MCG deem it so does not make it a fact, of course. In the agreement MCG is expressed not to be an agent of Ryanair.

28. In reality, MCG did not procure anyone to be a pilot. Ryanair advertised for pilots, and put them through a preliminary assessment and then those they approved were sent to MCG to process.

29. Ryanair advertised for pilots. Mr Lutz saw the advert. On 10 August 2017 Mr Lutz applied to Ryanair.

30. On 20 September 2017 Mr Lutz went to an assessment in Dublin, conducted by CAE (an independent training provider) which flagged its email on 07 September 2017 to Mr Lutz with the Ryanair banner[10]. This cost him €350.

31. Mr Lutz passed that assessment. Ryanair was not employing pilots directly at this time. The adverts did not say that was the case. They were taking on only what they call *"contracted pilots"*. Mr Rogers said in his oral evidence that this was common knowledge, and that Mr Lutz must have known this. I find as a fact that he did not. I found Mr Lutz a witness of truth: he said he did not know this, and I accept his evidence to that effect. I do not think it makes any difference.

32. Mr Lutz found out that he had passed and that he was being directed to be

[8] Page 55.16 et esq
[9] 417
[10] 232

a contracted pilot when Michael Loadwick of MCG emailed him to tell him so.

33. That email[11] was sent on 25 September 2017:

"I'd firstly like to congratulate you, as you have successfully passed the interview, and have been offered a position as a cadet on the CAE cadet programme to qualify as a contractor pilot operating for our Client, Ryanair.

McGinley Aviation are the chosen contractor for cadets coming through the CAE programme. They have passed us your details to give you the result of your interview, and also to arrange a date and prepare you for your Type Rating course."

34. Mr Lutz was not previously informed that he was going to be offered a place as a contracted pilot, and he had no choice as to the vehicle through which that was to be effected. It was not negotiable.

35. Mr Lutz was also asked for his preferences for training by CAE, an external trainer. Nothing turns on the fact that the trainer was external. On 02 October 2017 Mr Loadwick again emailed[12] Mr Lutz. He was told when and where his induction week would be held. It is the same for employed pilots.

36. The email also notified Mr Lutz of his training course. It is a template email and apologises if he was not given his first choice. Again, Mr Lutz had no say in the matter. The email also told Mr Lutz for which aircraft he was to be trained (Ryanair fly more than one type of plane). Mr Lutz was not consulted about this.

37. The training is for *"type rating"*: that is to get a ticket to fly a particular type of plane, in Mr Lutz's case the types of Boeing 737 flown by Ryanair. The cost of this course was €29,500 plus vat[13]. Mr Lutz had to pay that himself. He did not get reimbursed for it if he passed the course. It was simply a loss to him if he did not pass. About 50% of people do not pass the course (even having passed the €350 assessment). It is possible to resit it, but no more than once.

38. Employed pilots have a different arrangement. Ryanair pay all but €5,000 of the cost, and the remainder is "bonded" (meaning written off over a period of years, but the amount not written off being repayable on the pilot leaving before the cost is written off).

39. A further email from Michael Loadwick to Mr Lutz of 02 October 2017[14] told Mr Lutz that he needed to set up an Irish limited company. He was given the names of three firms that could do that for him, and who would then manage things afterwards. He had to pick one of them. He could not choose anyone else. He picked ContractPlus Ltd. The email from Michael Loadwick said he must:

[11] 272
[12] 277
[13] 385, vat invoice from Netherlands company CAE to Sudeley Consultants, at ConsultingPlus address.
[14] 288

"1. Set up an Irish Ltd Company

We are working with three accountancy specialists in Ireland, one of whom will help you to set up an Irish Limited company. Rather than relying on third party information we strongly encourage you to make direct contact with each, so that you can obtain the necessary relevant information in order to make an informed decision on which accountancy specialist to engage. Once you have engaged one and we have issued your Contract for Services, there is a 3 month notice period which must be served before you can change your accountancy specialist (and your limited Company Name / details.

Their contact details are shown below, so please make sure you contact each as soon as possible."

40. ContractPlus set him up with a limited company, Sudeley Ltd. Quite what his position was in Sudeley Ltd was not entirely clear. It matters not, as Scanlons took over and Mr Lutz left Sudeley behind (and whether he was removed as a director or not (if he was so appointed) was not known either: Mr Scanlon did not know what had occurred before).

41. The email also said:

"Please also complete and return the attached Next of Kin sheet. We require some details about your next of kin, this is someone to contact in case of an emergency, and this is usually a parent, partner, or someone similar. Please type the details into the returned sheet to avoid reading mistakes with handwriting.

Next of kin details are vital for all pilots."

I enquired of Mrs Hoefsmit why a person in business on his own account might be required by his customer to provide next of kin details, but she did not know. It is usual for an employment agency to ask for next of kin. It is usual for an employer to do so. It is not so usual for Ryanair's payroll provider (which is what Mrs Hoefsmit said was MCG's role was) to require this.

42. That email also directed Mr Lutz that:

"Your training contract will be formed between CAE and your Limited Company."

43. Accordingly, Mr Lutz, having applied to Ryanair and been told that he was successful, was told that he was to be engaged through another company, MGC, (by that company, not by Ryanair), and that he would have to set up an Irish limited company (which had doubtless never occurred to him to do), through an Irish adviser picked for him by MGC, when he had no connection with Ireland. He is German. He has a French driving licence. He was told that he was to be processed through MGC, which is an English company based in Watford (to whose offices Mr Lutz has never been). The Irish adviser then got him an Irish social security number.

44. There is no action taken by Mr Lutz that was not directed by Ryanair and all

were non-negotiable. He wanted to be employed by Ryanair. That was what he had applied for. Throughout his time as a contracted pilot with Ryanair he pressed Ryanair to become an employed pilot[15].

45. It is common ground that it would not have been possible for Mr Lutz to fly for another commercial airline at the same time as flying planes for Ryanair. (This is for regulatory reasons to do with pilot flight limitation).

46. It is suggested that Mr Lutz could have asked for unpaid time off in order to take courses to enable him to instruct on simulators, do safety work, or teach people for private pilot licences. He did not do so, and there was no reason for him to do so. He wanted to be an employed Ryanair pilot, not do any of those other things, to do which he would have obtain other qualifications and so forego income and incur expense, in order to replace Ryanair earnings with other earnings. The fact that he could have done this (contracted pilots may ask for up to 3 months a year off in off peak months, which Ryanair tries to accommodate – they need fewer pilots then) is not to the point at all. Mr Lutz was not, in fact, in business on his own account. He was, exclusively, a Ryanair pilot. For the reasons set out in this judgment Mr Lutz was not a self-employed individual, nor was he trading through a service company. He was a pilot placed by MGC with Ryanair. That was how Ryanair set it up.

47. Because the cost of €29,000 was put through Sudeley Ltd Mr Lutz was able to set it against his tax liabilities. With other expenses that meant that he paid no tax on any of his earnings from Ryanair. It is said this is commercial risk indicating entrepreneurial activity, meaning the end result is the setting up of a business by Mr Lutz. The fallacy of that argument is that all people accepted as pilots by Ryanair have, at their own expense, trained to get a commercial pilot's licence. Mr Lutz was willing to incur this further expense and risk in the hope of getting the job he wanted. That employed pilots have less financial expense or risk does not convert Mr Lutz into a businessman.

48. The underlying assertion, that Mr Lutz took full advantage of the ability to reduce or eliminate tax because he knew he was in business on his own account, and that was what he wanted, is belied by the fact that Mr Lutz repeatedly asked Ryanair to make him an employed pilot[16].

49. Mr Lutz's contract with Sudeley Ltd, organised by ContractPlus, was later replicated, in more or less identical terms with name changes, by Scanlons when they took over ContractPlus's pilots. The company being used was changed to Dishford Port Ltd. Again, Mr Lutz had no input into this document.

50. I was told that there were several pilots whose affairs were run through Dishford Port Ltd, and that this was to facilitate substitution of pilots on flights[17]. This is completely wrong. Mr Lutz knew no one with any connection with or to Dishford Port Ltd. That was his oral evidence in reply to a question from me, which was unchallenged and which I accept as truthful.

[15] For example 27 February 2019, page 475, after being with Ryanair for a year, and 17 April 2019, page 485.
[16] Footnote 12
[17] Robert Scanlon witness statement paragraph 8.3

51. ContractingPlus arranged for Mr Lutz to sign an agreement, dated 19 October 2017, between MGC, described as *"the Contractor",* Sudeley Consultants Ltd and Jason Lutz as *"Company Representative*". He had no input into its terms. It was for a fixed term of five years, starting 27 November 2017. All work under it was for *"the Hirer"* – Ryanair. There was a series of events entitling MGC to terminate the arrangement. They all relate to actions of Mr Lutz.

52. The contract, at 1 l. states:

"The Service Company will ensure the Company Representative (or an agreed acceptable and qualified nominated substitute) is available to perform the Work…"

53. The contract with MCG[18] (date redacted) August 2017 stated:

"b. The Service Company can provide a substitute notified to the hirer four weeks in advance of the work. Such substitute shall perform the Work provided that the substitute shall have the necessary experience and qualifications to perform the Work and is acceptable to the Contractor and the Hirer. Should the Service Company not provide an acceptable substitute they are obliged to carry out the work as scheduled."

54. It is these provisions on which the Respondents apply.

55. At the same time as signing the contract with ContractPlus[19], Mr Lutz signed an opt out from the Conduct of Employment Agencies and Employment Business Regulations 2003[20]. This was suggested to him by ContractingPlus (and this was repeated when Scanlons took over). There was no indication that independent advice might be a good idea. The email sending it gave no idea what rights the Regulations gave or what Mr Lutz was opting out of. It gave a set of pros and cons which clearly indicated that it was a *"no-brainer"*. Mr Lutz spoke to his father about it, and signed it. He was led to do so by the suggestions in the email. It is greatly to MCG's advantage to have an opt out signed. The source of ContractPlus's and Scanlon's work for Ryanair's pilot is MCG. For MCG Ryanair was about 85% of its turnover, now it is 90%. These are companies that will inevitably strive to do as their (almost) sole client wishes. It is hardly surprising that ContractPlus and Scanlons facilitated the opt outs being signed. The email read:

"Contract Number 3465
Sudeley Consultants Limited
Jason Lutz

RE: The Conduct of Employment Agencies and Employment Businesses Regulations 2003 and contractors

The above Regulations, which control how recruitment companies conduct their business, came into force on 6th April 2004. The Regulations affect

[18] At 63.8
[19] 324 et seq., where Mr Lutz is described as the "Specialist"
[20] The opt out forms are at 63.15 and 81

how we deal with 'temps' and also covers our dealings with contractors. However, after prolonged lobbying from various interest groups, the Government adopted a proposal which enables limited company contractors, such as you, to opt out of the Regulations. If you opt out then the Regulations will not apply to dealings between you and us.

The Regulations are located here:
www.legislation.gov.uk/uksi/2003/3319/contents/made.

Although it is not possible for us to explain all of the Regulations to you, we have set out in brief below some of the pros and cons of opting out:

Pros - Advantages of opting out
1. no increase in administration or forms to complete which could result in increased margins/costs to you
2. avoid potential delays in starting your assignments
3. less statutory restriction on your ability to substitute or sub-contract
4. avoid any implication that you are under the Client's control at all times (although you may agree to be)
5. will assist in demonstrating that you operate outside IR35
6. easier to show you are in business on your own account
7. increases your marketability to Clients & recruiters looking to reduce administration and place Candidates quickly
8. only one negotiation of contract terms in each case (rather than at the outset and at point of assignment)
9. less requirements on you to provide information and confirmations
10. more attractive to umbrella companies as they avoid increased statutory requirements

Cons - Disadvantages of opting out
1. no additional protection regarding potentially onerous contract terms (existing statutory
protection remains)
2. no statutory entitlement to information regarding health and safety (although our terms
deal with this)
3. no minimal protection when required to work away from home
4. no added protection regarding confidentiality (although Data Protection Act still applies)

Please indicate your choice by signing and dating below.

56. It is also noteworthy that the email states that the Regulations govern how they deal with *'temps'* – which can only mean temporary agency workers. The necessary inference is that they regarded Mr Lutz as a temporary agency worker, for otherwise they would not be asking him to opt out of the Act. MCG is such an agency.

57. An FAQ document was circulated. It ends:

"Our Expectations

You should be proud to have been selected to work for Europe's most

successful low-cost airline.

Equally, we have high expectations from each of our contractor pilots. We understand that occasionally there are events which occur that are beyond your control. However, as a Ryanair contractor pilot, we place our trust and reliance on you to report on time for duty and uphold the high standards of professionalism we expect."

The whole tenor of this is all about Mr Lutz as an individual, and there is no hint of him being a self-employed person, in business on his own account through the medium of a company.

58. That also stated:

"If you are sick, you must report this to rostering, this must be done, as minimum, 2 hours before your report time. Failure to do so will result in you being reported as a no show."

This is again all personal – the service company does not feature at all in anything from MGC to do with Mr Lutz's duties while he was with Ryanair, save one letter about failing to attend for a duty and a mention in the dismissal letter.

59. On 27 April 2019[21] Mr Lutz requested leave between 10-19 May 2019 as he was getting married: there was a misunderstanding and the leave had been removed. It is a contraindicator to Mr Lutz being in business on his own account that he had to obtain permission for absences, particularly one for a significant life event. The person in business on his own account is more likely to say that he was unavailable for that period.

60. This is a signally unusual way to set yourself up in business on your own account. This is because Mr Lutz was not setting himself up in business on his own account, he was just doing what he was told to do in order to be able to earn a living as a Ryanair pilot, a role for which there is great competition.

61. The reality is that Mr Lutz was simply a pilot whose skills Ryanair utilised as an individual otherwise than as an employee. This is apparent from the letter below about a missed shift. It is from MCG, and addressed to Mr Lutz personally. It refers to him as *"a service provider"*, but it does not refer to his company, or to him being in business on his own account. It says that he is a *"member of our pool of pilots"*. It refers to *"your colleagues"*. It says Mr Lutz needs to be clear on *"your contractual obligations"*, and so on:

McGinley Aviation
The Hub, Suite 3b,
Farnborough Business Park
Fowler Avenue
Farnborough
Hampshire
United Kingdom
GU14 7JF
T: + xxxx
E: hello@mcginleyaviation.com

[21] 540

www.mcginleyaviation.com

Jason Lutz
C/o McGinley Flight Operations
Sent via jason.lutz@xxxx

12th December 2018

Strictly Private & Confidential

Dear Jason,

I note that you are a service provider to McGinley Aviation and that you are a member of our pool of pilots that operate on Ryanair aircraft.

Your Unauthorised Absence from duty on 11th December '18 refers.

An unauthorised absence is a serious issue and your actions on this occasion placed undue pressure on our customers, our operation and on your colleagues, who had to cover your shift at short notice. Good attendance and punctuality as well as strict adherence to company policies and procedures is essential in the airline industry to avoid disruption to our customers.

Whilst we appreciate circumstances outside your control can have an impact on your schedule, the reason for your absence on 11th December '18 was unacceptable. Jason, you need to be clear on your contractual obligations, if you are rostered for a duty you must report on time, unless you are not fit to operate.

Pilots operating in Ryanair enjoy a stable roster and accordingly we expect all Pilots to fulfil the most basic element of any employment contract, to report for duties. As per the STN Base addendum, any unauthorised absences will be recovered in subsequent rosters through roster adjustments to scheduled days off. This ensures that the small number of Pilots who disrupt the roster and their colleagues unnecessarily at short notice will have the days recovered in the following roster.

I trust you will heed the advice in this letter and that we will never have to deal with an issue like this in the future.

If you need any further information, please let me know

Yours sincerely,

Emma Afenti
Account Administrator
McGinley Aviation

62. To return to the narrative, Mr Lutz signed with contracted with CAE for the course on 28 September 2017[22], started the Type Rating Course on 27 December 2017[23], and completed it successfully by mid-February 2018.

63. Meanwhile, on 14 November 2017 the Department for Business, Energy & Industrial Strategy (BIS) wrote[24] to arrange to inspect the records of MCG, under S9 of the Employment Agencies Act 1973. BIS was not satisfied with the results for on 22 December 2017 they wrote[25]:

"Further to our telephone conversation today, I am writing in response to

[22] 306 et seq
[23] 367
[24] 362.3
[25] 369.0.2

the documents you provided that relate to the contractual relationship between McGinley Aviation and the pilots its supplies to hirers and also the contractual documents between McGinley Aviation and the hirers of these pilots.

As discussed the terms to hirers do not sufficiently comply with Conduct Regulation 32 (9) in relation to workers who elect to "opt out" of the protections of the legislation.

[the whole of Regulation 32 was set out but is not reproduced here.]

(9) Subject to paragraph (12), paragraphs (1) - (8) shall not apply where, before an employment business or agency introduces or supplies to a hirer a work-seeker which is a company-
(a) the work-seeker and the person who is or would be supplied by that work–seeker to carry out the work agree that those paragraphs should not apply, and give notice of that agreement to the employment business or agency; and
(b) the employment business or agency proposing to introduce or supply that work-seeker and person to a hirer informs the hirer of such agreement.

I look forward to receiving your reply
Regards"

64. After further correspondence on 02 February 2018 MCG wrote to BIS[26]:

"Apologies for the delay in responding to your email but following our conversations we decided to go for a complete overhaul of the terms and please see attached for our updated terms for Aviation supply outside of the UK which currently covers 100% of our business.

The ltd company opt out is now detailed in clause 2.4 (page 5) and clause 7.1 (page 7) confirms self-employment."

65. These do not correspond with the terms of Mr Lutz agreement with MCG and Dishport, dated 19 October 2017[27] which, from its date, is before the redrafting. It appears that there was an issue with the opt out in the past paperwork, and whether or not the new document solved this, Mr Lutz was not issued with a new contract after 03 February 2018. Accordingly, I am unable to find that Mr Lutz opted out of the Employment Agency Regulations, both for that reason and because it was not, in my judgment, an informed choice.

66. Mr Bowers and Mr Brown submitted that that there was no duress or coercion in any of the relationship between those they represent and Mr Lutz. In assessing the relationship between the parties I find that there was a complete imbalance of power. Mr Lutz was very keen on working with Ryanair and invested a lot of time and money to be able to do so. He was not able to alter one single thing about the arrangements, about none of which had he any knowledge or experience. It was take it or leave it. His

[26] 369.0.3
[27] 73 et seq

other alternatives were to fly small planes in Africa, and he did not wish his career to go in that direction. Having invested so much and wanting a lifetime career with Ryanair it is unrealistic to think he would do other than comply.

67. Mr Lutz did not work for Ryanair under the agreement with ContractPlus, for on 28 February 2018 ContractingPlus emailed[28] Mr Lutz saying they were in a *"formal collaboration"* with Scanlons. In fact, this amounted to Ryanair taking ContractPlus pilots into Scanlons.

68. On 14 March 2018 Scanlons emailed[29] Mr Lutz.

"From: Jana Beader <jana@scanlonassociates.ie>
Sent: 14 March 2018 17:39
Subject: New company details

Dear Client,

As part of process of formal collaboration between Scanlon Associates and Contracting plus, we installed you into a new company. We are sending you company details below and there will be no more changes of companies. We will let you know about necessary documentation that needs to be completed for this process when time comes, as our main priority now is to make sure that all of you are paid on time and without any problems.

Please rest assured that Scanlon Associates Team, will give our best to make sure that this is a positive experience for all of us, and that you receive even better quality of service.

We already have advised McGinley aviation about changes in these company details.

For March, please continue to use C Plus portal for submitting expenses, but you will have our portal available soon, and we will notify you when we have that option available for you.

If you have any questions, feel free to contact us, but please note that because of high number of emails that we receiving, we will reply to you as soon as we can.

We are looking forward to working with you and thank you for your patience.

Details of your new limited company:

Company Name Company address CRO number VAT number

Dishford Port Limited

Office 1, The Anchorage, Charlotte Quay, D04
Y1919, Dublin, Ireland 476423

[28] 387
[29] 389

Kind regards,

From: Jana Beader <jana@scanlonassociates.ie>
Sent: 14 March 2018 17:39
Subject: New company details

69. It is apparent that:

69.1. Mr Lutz did not know this was happening.
69.2. He gave no instructions for this change.
69.3. He was not a director shareholder or employee of Dishford Port Ltd at the time (and never became one).
69.4. The agreement he signed was signed on behalf of Dishford Port Ltd – supposedly his service company – by someone of whom he had never heard.
69.5. Far from him being a self-employed businessman running his own company, he was being moved from pillar to post as Ryanair dictated (they must have removed the work from ContractingPlus and given it to Scanlons).

70. There is no indication what *"installed"* means. While Scanlons sent Mr Lutz a form (B10) to sign so that he might be a company director of Dishford Port Ltd he did not return it. Mr Lutz was never a shareholder director or employee of Dishford Port Ltd.

71. Mr Lutz did sign a form *"Terms and Conditions of Contract for services as a Co-pilot"* which is dated 01 February 2018[30].

72. Mr Lutz was not a director, shareholder or employee of Dishport Ltd. The agreement stated that:

"the Service Company is engaged as an independent consultant by the Contractor to provide the services of the Company Representative on the terms and conditions set out below"

This was not, as previously set out, an accurate assessment of the situation.

73. On 06 July 2018 Mr Lutz was informed[31] by MCG that he would be based at Stansted with effect from 01 August 2018. Again, he was told this. He could express a preference, but he could not decide.

74. Various aspects of how Ryanair organise their pilots is clear from the above. Shift patterns were rostered in detail for four weeks ahead and in outline 8 weeks ahead. The shift pattern for all pilots was regular – a set number of earlies, a set number of days off, followed by a set number of lates. It was possible for pilots to predict when they would be working, months in advance. Pilots were expected to work their shifts, for obvious reasons. If they wanted to change a shift they had to find someone to swap with. Then one or the other would use an intranet system called Crew Dock to request

[30] Page 83-91
[31] 419

the change. Most times there would be no issue, but sometimes there might be operational reasons (these were not specified) or a potential issue with flight hours limitation (or because swapping shifts from one calendar year might interfere with flight hours recording). Shifts could only be swapped with other Ryanair pilots. These might be employed or contract pilots – that was irrelevant. Employed pilots might swap with other employed pilots. Contract pilots get paid only when they fly. Employed pilots get a base salary and fly pay as well. Overall, co-pilots earn about €65,000 a year. Contracted pilots have variable earnings as they are guaranteed 450 hours and may work as many as 900. While rostering is the same for both there is, plainly, risk for the contracted pilot in the possibility of variable (that is reduced) hours.

75. There was one aspect in which MCG was involved which was when Mr Lutz asked to do all early shifts, and a colleague to do all late shifts. The acceptance of this was communicated to Mr Lutz via MCG, after he had made the request to the rostering team[32]. The approval[33] is entirely personal – your rostering pattern; you have no contractual right to any particular roster pattern; you must confirm your acceptance, and so on. The *"service company"* of a group of pilots is a fiction in practice.

76. Ryanair has been a growing airline. They aspire to excellence. They only take pilots as co-pilots who they think have the capability to become captains. A captain earns about double the pay of a company pilot. Any co-pilot can apply to become a captain, a process known as *"command upgrade"*. Usually five years' service is needed. Any pilot who succeeds in becoming a captain is offered an employed post. While about half of the co-pilots are contracted there are only a handful of contracted captains. While some co-pilots do not apply they are few. The advantage of double the pay, holiday pay, sick pay, a pension and job security with stable earnings are obvious.

77. At the end of a contracted pilots five-year term are usually – almost invariably – offered a new five year term. No-one is simply allowed to roll on past the five-year point.

78. In fact, very few pilots stay on as contracted pilots past the five-year mark. The evidence of Mr Scanlon and of Captain Morais was divergent, Mr Scanlon thinking that as many of 20% of co-pilots stayed on past five years, Captain Morais giving evidence that it was really quite unusual. I prefer the evidence of Captain Morais. He knows his membership, it was clear. Mr Scanlon is an accountant. This was not a point sprung on the Respondents. If he had wanted to, he could have provided exact figures.

79. The reasons very few stay on as contracted pilots are various. Like Mr Lutz, they seek security and a pension. They obtain other roles in the industry. It is very much a five-year process of *"up or out",* in practice.

80. Mr Lutz made various expense claims against his tax liability including a very expensive printer[34]. He also sought to claim the cost of the car he

[32] 13 July 2019, page 512-524
[33] 22 July 2019, 527-528
[34] €4484.86, page 869

bought to get to and from Standsted. Scanlons would not put that in his tax return. The expenses were input by Mr Lutz through Scanlons' online portal. Scanlons arranged for payslips to be sent to him, which it did though a subcontractor, Brightpay[35].

81. On 07 November 2019 Scanlons submitted Mr Lutz's tax return for 2018[36], without telling getting his prior approval of it. It had been sent to him for approval, but he had not responded. It was submitted anyway, on line, with Scanlons certifying its accuracy. In his oral evidence Mr Scanlon said this was *"all part of the service"* and done *"out of the kindness of his heart"*. This said that he had more than 15% of the shares of Sudeley, which was the threshold for a company with a shareholder with a controlling interest. That was an assumption. It stated that his income was from a directorship.

82. This was all part of the system put in place by Ryanair, which meant that Mr Lutz's work life was run by agents of Ryanair.

83. As Mr Lutz was never a director of Dishford Port Ltd his income from that company for the period that he was with them could not have been director's income.

84. Mrs Hoefsmit emailed Mr Lutz and the other pilots about an enhancement to bonus payments[37] and about equal treatment with employed pilots for seniority. Mr Ford sought to portray this as negotiation on behalf of contracted pilots. In no sense was MCG a representative of the contracted pilots, negotiating on their behalf. On the contrary, MCG was implementing Ryanair's way of dealing with non-employed pilots. It was BALPA which negotiated with Ryanair. Mrs Hoefsmit had regular meetings with Ryanair (Diarmiud Rogers) and he told her that Ryanair had decided to treat contracted pilots as employed pilots. One can see why – otherwise employed pilots would be treated better than contracted pilots. This was Ryanair implementing its policy for contracted pilots through MCG. While this does not support Mr Ford's contention that MCG was far more than a payroll operation (and there is more than enough other evidence supporting that submission) it does support the conclusion I reach, which is that all was organised as Ryanair wished.

85. In December 2019 Mr Lutz objected to a changing in his shifts and telephoned the rostering team to complain. He became agitated. The calls were recorded. Ryanair were unhappy. They asked MCG to take action. They did. Grace Crawford from Ryanair attended the disciplinary hearing (for such it was). Ryanair wanted Mr Lutz to cease being a pilot for them because of this. MCG depend upon Ryanair. They were never going to do otherwise than as Ryanair asked. MCG ran their letter past Ryanair for approval. That letter, dated 02 January 2020[38] was all about Mr Lutz and not about Dishfort Port Ltd, save that right at the end it says *"… given the circumstances it is impossible for the commercial relationship between Dishford Port Ltd and McGinley Aviation to continue, the contract is therefore terminated with immediate effect"*. As I pointed out in the hearing

[35] 866 is February 2020
[36] 863.1
[37] 07 December 2017, 369.1, and 417, undated
[38] Page 584-585: there are several iterations, all essentially the same.

this appeared to terminate the arrangement for the other pilots whose affairs were run through Dishford Port Ltd. It was taken to refer only to the specific tripartite agreement between MCG Dishford Port Ltd and Mr Lutz. It was, in reality, Ryanair dismissing Mr Lutz[39].

Burden and standard of proof

86. The burden of proving his case lies on Mr Lutz, on the balance of probabilities (save that the burden of proving any exception lies on the Respondents to the same standard).

Law applied to facts

87. Having found the facts, I turn to the law, and much law was cited to me. I have taken account of it all, and that a case or quotation from a case is not cited does not mean that I have not considered it. No judge should write a judgment long enough to deal with all the detailed points put before me.

Worker

88. I have paid particular attention to the Uber BV & Ors v Aslam & Ors [2021] UKSC 5, from paragraph 71 onwards, particularly paragraph 76:

> *"…it would be inconsistent with the purpose of this legislation to treat the terms of a written contract as the starting point in determining whether an individual falls within the definition of a "worker". To do so would reinstate the mischief which the legislation was enacted to prevent. It is the very fact that an employer is often in a position to dictate such contract terms and that the individual performing the work has little or no ability to influence those terms that gives rise to the need for statutory protection in the first place. The efficacy of such protection would be seriously undermined if the putative employer could by the way in which the relationship is characterised in the written contract determine, even prima facie, whether or not the other party is to be classified as a worker. Laws such as the National Minimum Wage Act were manifestly enacted to protect those whom Parliament considers to be in need of protection and not just those who are designated by their employer as qualifying for it."*

89. This section of the Supreme Court judgment refers to many of the cases cited to me, In particular it is important not to let the consideration start with and be guided by the documentation. Mr Lutz, though a highly skilled and well-paid person, perhaps to be thought of as far removed from the average Uber driver, was in a position of vulnerability – the bargaining power was all with Ryanair. The reality is as I have described above. The interposition of the limited company serves no purpose for Mr Lutz. It was not suggested that he needed limited liability, for example, for Ryanair insures fully.

90. It is inconceivable that Mr Lutz, when wearing his Ryanair uniform and flying a Ryanair plane filled with Ryanair passengers, and being paid to do so to

[39] The narrative of the ending of the arrangement is brief as it does not affect the substance of the case, other than to point to the personal nature of the process.

earn his income was not a worker.

91. As Ryanair and MCG set up the situation, and as MCG paid Mr Lutz via a service company they set up, he was a worker for them. He was not working for his service company, for the reasons given. No one says he was a worker for Ryanair – that is not the claim.

92. I am fortified in my conclusions by careful reading of Stuart Delivery Ltd v Augustine [2021] EWCA Civ 1514, from which I do not cite extracts. On the facts set out in this judgment, and applying the principles in the cases cited to me, this was a contract for personal service.

93. The documentation relied on by the Respondents, the Terms and Conditions of Contract for Services as a Co-pilot does not assist the Respondents. It states[40]:

> *"It is acknowledged that the Service Company [Dishford Port Ltd] is engaged as an independent consultant by the Contractor [MGC] to provide the services of the Company Representative [Mr Lutz]. Neither the Service Company nor the Company Representative shall be deemed to be an officer, agent, employee or servant of the Hirer [Ryanair] or the Contractor.*

As I observed during the hearing, this exclusion clause omits to exclude worker status of Mr Lutz with MGC.

CAWR

94. The point about the reality of the situation also applies to the CAWR issue about which I do not expand on the reasons given at the head of this judgment, save to observe that the importance of CAWR is clear from the fact that there is no opt out provision, as there is in the Working Time Regulations 1998.

95. The Directive was also relied on by Mr Ford. I agree that Mr Lutz plainly falls within its terms which, as Mr Ford submitted, apply directly, but as this was a secondary position I do not expand upon it. The Respondents defended this point on the basis of fact rather than law.

Relevance or otherwise of steps adding nothing

96. At the end of submissions I wondered whether Furniss (Inspector of Taxes) v Dawson [1983] UKHL 4 might be relevant, by analogy. I said that I could not see how the interpolation of a limited company, whilst it had been created, added anything to the process. There was no evidence of any advantage to Mr Lutz that would not have been available to him if he was simply a self-employed pilot. Mr Ford helpfully directed me to Lord Leggatt in *Uber* at paragraph 70 where he expressly referred to the treatment of tax cases (citing other Supreme Court authority): that facts that are not relevant to the application of the statute construed in the light of its purpose may be ignored. I bear this in mind. It is part of the overall assessment of the reality

[40] Clause 1d. at page 84

of the relationship.

Purposive interpretation

97. The purpose of the CAWR and of the AWR is plainly indicative of their application to the situation of Mr Lutz.

Substitution – unfettered – personal service

98. Much time was spent in considering the issue of substitution. My view, expressed in the hearing, is that swapping shifts through the rostering desk is not substitution at all, but a rearrangement of the day and time when personal service is required.

99. But if that is not so, it is plain that the right to substitute is not unfettered. For the Respondents it has to be an unfettered right in order that the service company is the provider and the individual excluded from worker status. First (as set out above) only another Ryanair pilot could take the shift. Second, permission had to be sought, and was refused on occasion, for operation reasons, for concerns about reaching pilot flight limits in any given time frame, or because they were in different calendar years. I do not see how the facts found in this case can lead to an outcome different to that in Pimlico Plumbers Ltd & Anor v Smith [2018] UKSC 29:

> *"28. So the question becomes: was Mr Smith's right to substitute another Pimlico operative inconsistent with an obligation of personal performance? It is important to note that the right was not limited to days when, by reason of illness or otherwise, Mr Smith was unable to do the work. His own example of an opportunity to accept a more lucrative assignment elsewhere demonstrates its wider reach.* [Similarly there is no limit on the reasons why Mr Lutz might want to change shifts.]
>
> *29. The judge concluded that the right to substitute another Pimlico operative did not negative Mr Smith's obligation of personal performance. She held that it was a means of work distribution between the operatives and akin to the swapping of shifts within a workforce.* [Which is what I find this to be.]
>
> *30. In challenging the tribunal's conclusion Pimlico relies heavily on the decision of the Court of Appeal in Halawi v WDFG UK Ltd (t/a World Duty Free) [2014] EWCA Civ 1387, [2015] 3 All ER 543. Mrs Halawi had been working as a beauty consultant in a duty-free outlet at Heathrow airport, managed by World Duty Free. It was the latter's practice to grant space in the outlet to cosmetic companies, in which consultants in the uniform of the companies would sell their products. Shiseido, a Japanese cosmetic company, took space in the outlet; and Mrs Halawi's role was to sell Shiseido's products there. But her contract was not with Shiseido, still less with World Duty Free. Her contract, or rather her service company's contract, was with a management services company which sold her services on to Shiseido; and then there was a contract between Shiseido and World Duty Free for an accounting between them referable to sales. Notwithstanding the absence of a contract between it and Mrs Halawi, World Duty Free controlled the outlet and in a handbook purported to impose certain rules upon those who worked there. One was that, instead of working personally, a consultant could appoint a substitute provided that she had both an airside pass and the approval of World Duty Free to work in an outlet. In due course World Duty Free withdrew its approval of Mrs Halawi to work in the outlet and thereby prevented her from continuing to do so; but she was held not to be entitled to bring*

a claim of unlawful discrimination against World Duty Free in that regard.

31. The primary answer to Mrs Halawi's claim, most clearly given by the appeal tribunal but apparently adopted by the Court of Appeal, was that she had no contract with World Duty Free of any sort. But the Court of Appeal saw fit also to hold, secondly, that the necessary degree of subordination of Mrs Halawi to World Duty Free was absent: and, thirdly, that her power of substitution (which Pimlico suggests to be analogous to Mr Smith's right to substitute another operative) negatived any obligation of personal performance. But her so-called power of substitution was not a contractual right at all. World Duty Free's declaration that Mrs Halawi might appoint a substitute reflected its understandable lack of interest in personal performance on her part under her contract with her own service company and/or under its contract with the management services company. Its interest was only that someone sufficiently presentable and competent to have secured its approval to work in an outlet, and of course in possession of an airside pass, should attend on behalf of Shiseido each day. In my view Mrs Halawi's case is of no assistance in perceiving the boundaries of a right to substitute consistent with personal performance. [Ryanair would not (could not) accept this.]

32. The case of Mirror Group Newspapers Ltd v Gunning [1986] ICR 145 concerned the right to distribute that company's Sunday newspapers around Sheffield. Mrs Gunning's father had held the distributorship but, on his retirement, the company refused to renew it in her favour. She alleged that its refusal was discriminatory and to that end she needed to establish that her father's contract had required personal performance of it on his part. In allowing the company's appeal the Court of Appeal held at pp 151 and 156 that Mrs Gunning had failed to show that the dominant purpose of her father's contract had been that he should perform it personally; instead the purpose had been that the company's Sunday newspapers should be efficiently distributed around Sheffield. But in James v Redcats (Brands) Ltd [2007] ICR 1006 Elias J, as president of the appeal tribunal, convincingly suggested at paras 65 to 67 that an inquiry into the dominant purpose of a contract had its difficulties; that, even when a company was insistent on personal performance, its dominant purpose in entering into the contract was probably to advance its business; and that the better search might be for the dominant feature of the contract. In the Hashwani case, cited in para 14 above, Lord Clarke of Stone-cum-Ebony, at paras 37 to 39, referred to the suggestions of Elias J in the James case with approval but stressed that, although it might be relevant to identify the dominant feature of a contract, it could not be the sole test. The sole test is, of course, the obligation of personal performance; any other so-called sole test would be an inappropriate usurpation of the sole test. But there are cases, of which the present case is one, in which it is helpful to assess the significance of Mr Smith's right to substitute another Pimlico operative by reference to whether the dominant feature of the contract remained personal performance on his part. [As here – Ryanair wants a pool of pilots, to undertake personal service for them.]

33. The terms of the contract made in 2009 are clearly directed to performance by Mr Smith personally. The right to substitute appears to have been regarded as so insignificant as not to be worthy of recognition in the terms deployed. Pimlico accepts that it would not be usual for an operative to estimate for a job and thereby to take responsibility for performing it but then to substitute another of its operatives to effect the performance. Indeed the terms of the contract quoted in para 18 above focus on personal performance: they refer to "your skills", to a warranty that "you will be competent to perform the work which you agree to carry out" and to a requirement of "a high standard of conduct and appearance"; and the terms of the manual quoted in para 19 above include requirements that "your appearance must be clean and smart", that the Pimlico uniform should be "clean and worn at all

times" and that "[y]our [Pimlico] ID card must be carried when working for the Company". The vocative words clearly show that these requirements are addressed to Mr Smith personally; and Pimlico's contention that the requirements are capable also of applying to anyone who substitutes for him stretches their natural meaning beyond breaking-point. [As, I find, here]

34. The tribunal was clearly entitled to hold, albeit in different words, that the dominant feature of Mr Smith's contracts with Pimlico was an obligation of personal performance. To the extent that his facility to appoint a substitute was the product of a contractual right, the limitation of it was significant: the substitute had to come from the ranks of Pimlico operatives, in other words from those bound to Pimlico by an identical suite of heavy obligations. It was the converse of a situation in which the other party is uninterested in the identity of the substitute, provided only that the work gets done. The tribunal was entitled to conclude that Mr Smith had established that he was a limb (b) worker - unless the status of Pimlico by virtue of the contract was that of a client or customer of his. [The substitute had to come from the employed or contracted pilots.]

100. Any one of these reasons is sufficient to find, as I do, that there was no unfettered right to substitute another, and that this was a contract for personal service. As I put in the summary, the regulated environment and Ryanair's wish to have only pilots it had approved fly its planes explains why any right to substitute was fettered. That is there is very good reason for fettering a right to substitute does not mean that it is unfettered.

In business on own account

101. These facts cannot sustain a rational conclusion that MCG or Ryanair were customers of a business run by Mr Lutz, either as an individual or through a company.

Temporary work

102. As to temporary work, I have taken careful account of the submissions founded on Allonby v Accrington & Rossendale College (ECJ) C-256-01, reported at [2004] ICR1328 et seq. The central point is that it matters not if there is a permanent contract with the agency, what matters is whether the assignments under it were temporary, or permanent. (A permanent contract to have a series of temporary work assignments does not convert those temporary assignments into one permanent contract.) Here, the contract with MCG was for one period of five years. There is no such divergence. The issue is whether the five years is temporary, or permanent.

103. I note also paragraph 45: Mr Lutz is in the position of Ms Allonby, who operated under the direction and responsibility of the college where she taught, very much as before she was relocated to an agency, which organised her activities for them, and the college remained liable to students for the quality of her teaching. In Mr Lutz's case, if one substitutes comparison with an employed pilot for comparison with Ms Allonby's past, and substitute airline, pilot and passenger for college, lecturer and student, there is no difference of substance. The description in Ms Allonby's case that *"… the legal arrangements instituted … may also be used to evade the consequences of employment protection legislation …* [and] *the facts … strongly point in that direction"* applies fully to Mr Lutz.

104. The limitation on teachers' freedom to choose their timetable or the place and content of their work must be considered, and the formal classification of a self-employed person under national law does not exclude the possibility that a person must be classified as a worker … if his independence is merely notional[41]. Mr Lutz's independence was entirely notional:

    104.1. Ryanair had told him he would be a contract pilot not an employee.

    104.2. They had told him when and where he would train to fly a plane they selected for him.

    104.3. They told him he had to pick one of three firms of accountants.

    104.4. They decided that he had to move accountants (ContractPlus to Scanlons).

    104.5. Those firms told him he had to have an Irish company. They picked it for him.

    104.6. MGC had the agreement with Mr Lutz signed on behalf of Dishford Port Ltd by someone of whom Mr Lutz had never heard.

    104.7. They dictated the terms of the documents he signed.

    104.8. Ryanair told him what his base was to be.

    104.9. His duties were rostered by them, and he had to do them unless he could find someone to agree to swap with him.

    104.10. If he found someone to swap with him they could and did refuse to change his shift.

    104.11. He was subject to discipline if he did not attend a shift.

    104.12. He was paid the amount they decided and he could not negotiate otherwise.

    104.13. He had to apply for holiday.

    104.14. He had to wear their uniform.

    There is nothing independent at all in this arrangement. Mr Lutz was plainly a worker, not a self-employed businessman.

105. I do not find Mr Bower's submission for Ryanair[42] that an essence of temporary work is flexibility to reconcile working and private life. That may be one reason why work is regarded as temporary work, but that is not to mean that to be temporary work must be flexible.

[41] Paragraphs 72 and 71 of *Allonby*
[42] Paragraph 28

106. Mr Lutz's case also depends on the work being *"temporary"*. My conclusion, summarised above, is that it was temporary within the meaning of the AWR.

107. I observe that the fallacy in the arguments of Mr Bowers and of Mr Brown appears to me to be that a temporary assignment does not become permanent by reason of the passage of time spent in it, if it does not end. A person has no job security (which is the whole point of the AWR) if that person has a series of short-term appointments which run one after another without a gap, because they never know when that run of short-term appointments will end.

108. And so, even at its highest, the argument that anyone who wanted it was in fact able to get a new five-year contract does not assist the Respondents.

109. In fact, most contracted pilots leave at or before the end of that five-year term (see above).

110. Accordingly, it must be decided whether a five-year term is temporary, or not.

111. The three cases cited to me were:

    111.1. Moran & Ors v Ideal Cleaning Services Ltd & Anor (Jurisdictional Points : Agency relationships) [2013] UKEAT 0274_13_1312

    111.2. Brooknight Guarding Ltd v. Matei (AGENCY WORKERS) [2018] UKEAT 0309_17_2604 and

    111.3. Angard Staffing Solutions Ltd & Anor v Kocur & Ors (AGENCY WORKERS) [2020] UKEAT 0050_20_1007

112. Mr Moran worked for many years as a cleaner at the same factory, placed by an agency. It was suggested that the cleaners were placed by the agency with their client on an indefinite basis. The judgment of Singh J clearly states[43] that a contract may *"properly be regarded as temporary because it is not permanent but it would not ordinarily be regarded as short term"*, and that[44] the judge at first instance *"did not fall into the error of interpreting "temporary" to mean short term"*. It means *"not permanent"*. There is no requirement that an agency worker has to work for a short time to qualify.

113. This is entirely supportive of Mr Ford's argument, and I see no adequate response to this simple focussed point. Employed pilots were employed permanently, contracted pilots were not, even if some of them stay a long time. As they are not permanent, they can only be temporary: this is an either/or binary decision[45].

114. In *Brooknight* HHJ Eady QC was deciding a case about a zero hours contracted security guard whose contract meant the agency could move him here and there. The respondent in that case denied it was a temporary work

[43] Paragraph 41
[44] Paragraph 42
[45] And see *Brooknight* at paragraph 20, also

agency, and lost on that point: it was engaged in economic activity, for profit, supplying individuals to work temporarily for, and under the supervision of hirers[46]. Eady J points out that the terms of the contract are not necessarily determinative of agency worker status[47] (but by implication those terms must be a relevant factor). Eady J stated that if the work – at any place – for the agency was indefinite the work would not be temporary. It follows that if it was not indefinite (that is if it was for a fixed term) it would be temporary.

115. Here, there was a fixed five-year term. It was not indefinite. (It also contained a three month notice period.) At the expiry of five years any contracted pilot who remained was, without exception, issued with a new five-year contract. A succession of fixed terms is not indefinite – by definition it is definite in time. It is, definitively, for five years. It does not have to be short term. It is not permanent. Therefore it is temporary work.

116. This case also makes clear[48] that the essence of the task in a case like this it to focus on the reality of the situation (exactly as is said in *Uber*): *"the ET is entitled to test the evidence given as to what occurred in practice against the relevant documentary evidence, which would include the contract"*. For the reasons given, the contract and reality are far apart. The reality is that Mr Lutz was directed by Ryanair to MCG, in order for them to place him with them as a temporary worker. While Mr Brooknight was working as cover for others (and that was fatal to the Respondent's case) there is no requirement that temporary workers *have* to be working as cover for others: that is just one type of temporary worker.

117. In *Angard*, the agency appealed the decision that Mr Kokur was a temporary worker with Royal Mail. The agency only supplied workers to Royal Mail, and so had a context similar to this case. There were a series of postings under a zero hours contract with the agency, and that contract was permanent (unlike this case). Mr Kokur's assignments were always time limited, and therefore, however long he worked for Royal Mail, he was not with them indefinitely[49].

118. Auerbach J expressly sets out a point fatal, in my judgment, to the case put forward by the Respondent.

> *"The focus of the Tribunal's enquiry should therefore be on the basis of which the worker is supplied to work, on each such occasion. In particular, it should ascertain, applying the guidance given in Moran [2014] ICR 442, whether that supply is made 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 hirer temporarily, and then another, and another."*
>
> [I do not take *"the latter"* to mean that it is any different in the case of successive fixed terms.]

[46] Paragraph 6 sets out the ETs findings, upheld
[47] Paragraph 25
[48] Paragraph 25 again
[49] Paragraph 9 quoting ET's judgment paragraph 37, which was upheld at paragraph 64

119. Applying the facts found in this case with the guidance in paragraph 64 of *Angard*, the result can only in Mr Lutz's favour:

> *"…Mr Kokur's work was, on each occasion when he was supplied, always time limited, and that thus was not, in practice, affected by the frequency or number of such assignments, or the fact that they continued to occur over a period of years. It properly found at paragraph 38: "Every engagement over the four years was for a finite period." It went on to properly find at paragraph 39: "The defined periods of work to provide cover is fatal to the argument that is not temporary."*

That Mr Kokur had short term assignments is not a difference to Mr Lutz's case, because temporary does not mean short term.

120. I observe that all three of these EAT cases were judgments of three eminent judges.

121. I referred in the closing submissions to the fact that no party made reference to the English law provision that for the purposes of the Employment Rights Act 1996 someone employed for a period of four years is to be regarded as a permanent employee[50]. None of the parties considered this relevant to the matters for me to decide.

122. Drawing these disparate elements of the case together, it is clear to me that:

122.1. Mr Lutz was a crew member of the planes he flew.

122.2. He was a worker when he did so, for MCG.

122.3. His was a contract for personal service.

122.4. There was no unfettered right of substitution.

122.5. The CAWR apply to him, as a member of the crew, and pilot of the planes he flew.

122.6. He was not in business in his own account.

122.7. He was an agency worker placed by MCG with Ryanair (having been sent by Ryanair to MCG's predecessor then transferred to MCG).

122.8. He falls within the AWR because:

122.8.1. MGC meet all the criteria for being a temporary work agency.

122.8.2. His assignment was temporary.

[50] The Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002, Regulation 8(2)(a)

122.8.3. The opt outs are ineffective.

Employment Judge Housego
Dated: 5 April 2022