



EMPLOYMENT TRIBUNALS

Claimant: Mr. D McQuillan

Respondent: PPF Limited t/a ADR Network

HELD AT: Leeds Employment Tribunal

ON: 12 September 2022

BEFORE: Employment Judge Buckley

REPRESENTATION:

Claimant: In person

Respondent: Mr. Chaudhuri (Consultant)

RESERVED JUDGMENT

1. The claim for breach of the Agency Worker Regulations 2010 is dismissed.

REASONS

Summary of main reasons for the decision

1. Mr McQuillan presented his case in a straightforward manner. I have attempted to write a similarly straightforward summary of the main reasons for my decision. The full reasons appear below.
2. Mr McQuillan argued that the 'daily bonus' should not be seen as part of his basic pay. I have decided that it should be seen as part of his basic pay. I decided this because he was paid it simply for turning up and doing a day's to work. Although it was called a 'bonus', in reality it was simply part of his normal daily pay.

3. The claim relates to the period between 1 July 2021 and 1 January 2022. If the 'daily bonus' is seen as part of Mr McQuillan's basic pay, he took home more pay per week than he would taken home if he had been taken on as an employee. The agency workers were paid more than the employees.
4. The employees were given a pay rise in December 2021. It was backdated to August 2021. Even if the pay rise had been given to employees in August 2021, Mr McQuillan still took home more pay per week than if he had been taken on as an employee. The agency workers were paid more than the employees would have been paid if they had got the pay rise in August 2021.
5. Mr McQuillan is not owed any pay to make up any shortfall, because there wasn't a shortfall.
6. After the pay rise was agreed the employees were given the extra pay they would have earned in a one off payment of back pay in December 2021. Mr McQuillan is not entitled to any 'back pay' payment because he has already had all his pay. He was paid the same as the employee's increased pay (or more) every week. The employees are worse off because they were paid later.
7. Broadly, the Agency Worker Regulations (AWR) mean that an agency worker should not be paid any less than employees doing the same work. Mr McQuillan was not paid any less than the employees. There is therefore no breach of the AWR.

Full reasons

8. The claimant claims for breach of regulation 5 of the Agency Worker Regulations 2010 (AWR).

The claims and issues

9. The issues which had to be determined were discussed at the start of the hearing. The overarching issues for me to determine are:
 - 9.1 Is the claim out of time, and if so is it just and equitable to extend time?
 - 9.2 Was the claimant engaged on the same basic working and employment conditions relating to pay as he would have been entitled to had he been recruited other than by using the services of a temporary work agency?
10. Mr. Chaudhuri had prepared a comprehensive list of the legal issues, but it was agreed that, in essence, the fundamental issues for me to determine in order to answer the questions set out above were:
 - 10.1 Should the terms and conditions relating to 'pay' in the claimant's contract include the element referred to as a 'daily bonus'?

- 10.2 Was the lump sum ('back pay') given to workers not engaged using the services of a temporary work agency on 17 December 2021 paid pursuant to a relevant term or condition relating to pay, and therefore part of the basic working and employment conditions to which the claimant would have been entitled had he been recruited other than by using the services of a temporary work agency?

Witnesses

11. I heard from the following witnesses:
- 11.1 The claimant
 - 11.2 Peter Howitt for the respondent (HR director)
12. I found all witnesses to be doing their best to give truthful evidence to the best of their recollection.

Findings of fact

13. The respondent is an employment agency, The claimant was engaged as a professional LGV driver under a contract for services as an agency worker with the respondent on 15 February 2021.
14. Under the contract the claimant was offered assignments with accompanying rates of pay that he could accept or decline. His assignments were for Wincanton at the Morrisons site.
15. The 'pay' that the claimant was entitled to would include an hourly rate that would normally be the same, and in any event not less than, the rate paid by the client company to their employees. This is known as the Parity Rate.
16. Where the Parity Rate does not attract sufficient drivers, the respondent often agrees a higher pay rate for agency drivers. In this instance, from 11 July 2021 the respondent chose to increase the pay for agency drivers by adding a daily uplift of £30 Monday to Friday and £35 Saturday for weekend shifts. This was described variously as a 'daily bonus payment' or a 'daily agency retention bonus' Other than the label, this was not a bonus in the ordinary sense of the word.
17. Both the 'basic pay' (accrued at the hourly rate) and the 'daily bonus', were notified to the driver when the assignment was offered. Like the basic pay, the bonus was paid as a matter of course if the driver accepted the assignment and carried out the work. I accept Mr Howitt's evidence that, historically, this was often how part of basic pay was labelled.
18. In 2021 the drivers employed directly by Wincanton negotiated a pay rise through their union. The pay rise came into effect on 17 December 2021. The evidence is not entirely clear on this issue, but I find, on the balance of probabilities based on Mr. Howitt's understanding of the situation, that the

contracts of the employed drivers were amended with effect from 17 December 2021.

19. If the claimant's weekly pay is calculated as including his basic pay and the 'daily bonus' he received more pay than an equivalent employee whether before or after the pay rise.
20. From 1 January 2022 the agency drivers' pay was altered to a new 'Parity Rate' to reflect the increase in the employer drivers' pay. At the same time the 'daily bonus' payments were no longer offered as part of the assignments. This resulted in a slight reduction in the claimant's weekly remuneration from 1 January 2022.
21. As part of the negotiated agreement between the trade union and Wincanton it was agreed that the employed drivers would receive a lump sum equivalent to the difference between the pay they had received since 1 August 2021 and the pay they would have received had the pay increase been implemented on 1 August 2021. Mr Howitt sometimes describes this as a 'one-off bonus payment' although it was generally referred to, in my view more accurately, as 'back pay'.
22. The claimant asked a number of times when he was going to receive his 'back pay' and was told that it was being calculated. Ultimately, he was told that he would not receive any sum equivalent to the back pay that had been paid to employees.

The law

23. The AWR provides:

5. Rights of agency workers in relation to the basic working and employment conditions

(1) Subject to regulation 7, an agency worker (A) shall be entitled to the same basic working and employment conditions as A would be entitled to for doing the same job had A been recruited by the hirer—

- (a) other than by using the services of a temporary work agency; and
- (b) at the time the qualifying period commenced.

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

- (a) where A would have been recruited as an employee, the relevant terms and conditions that are ordinarily included in the contracts of employees of the hirer;
- (b) where A would have been recruited as a worker, the relevant terms and conditions that are ordinarily included in the contracts of workers of the hirer, whether by collective agreement or otherwise, including any variations in those relevant terms and conditions made at any time after the qualifying period commenced.

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

- (a) an agency worker is working under the same relevant terms and conditions as an employee who is a comparable employee, and
- (b) the relevant terms and conditions of that comparable employee are terms and conditions ordinarily included in the contracts of employees, who are comparable employees of the hirer, whether by collective agreement or otherwise.

...

6. Relevant terms and conditions

(1) In regulation 5(2) and (3) “relevant terms and conditions” means terms and conditions relating to—

- (a) pay;
- (b) the duration of working time;
- (c) night work;
- (d) rest periods;
- (e) rest breaks; and
- (f) annual leave.

(2) For the purposes of paragraph (1)(a), “pay” means any sums payable to a worker of the hirer in connection with the worker's employment, including any fee, bonus, commission, holiday pay or other emolument referable to the employment, whether payable under contract or otherwise, but excluding any payments or rewards within paragraph (3).

...

24. The EAT in *Kocur v Angard Staffing Solutions Ltd* [2018] IRLR 388 (which went to the Court of Appeal on other points) held that the mechanism by which parity is achieved need not be identical for agency workers and for direct recruits. The EAT said:

27. We agree with both counsel that a term-by-term approach is required by the AWR. The structure of the AWR, whereby only a few stipulated terms and conditions are required to be the same for the agency worker and the employee, and where there is nothing to suggest that the employer or agency can offset the shortfall in respect of one of those terms (eg annual leave) by conferring a greater entitlement in respect of another (eg rest periods), drive one to that conclusion. However, when considering what remuneration an agency worker obtains in respect of annual leave, one is only concerned with a particular term, namely the term dealing with remuneration for annual leave. The Regulations do not prescribe that the mechanism by which parity is achieved must be identical. Thus, an agency worker may be paid for his identical holiday entitlement by means of a lump sum at the end of the assignment, or by means of a higher hourly rate into which an amount for holiday pay has been rolled-up. These methods of payment might differ from that applicable to employees. However, if the result is that the agency worker is paid at least that which is paid to the employee in respect of the same holiday entitlement then there would not be a breach. That approach is not a package-based one, but one which focuses on the term as to remuneration for annual leave.

28. However, the analysis in the preceding paragraph is subject to an important caveat. That is that the payment mechanism deployed must be transparent and the agency worker must be able readily to ascertain precisely what aspect of his

remuneration relates to annual leave. In our judgment, if it is clear on the facts that an agency worker receives remuneration in respect of annual leave which is at least that which employees receive, then, notwithstanding that this may be achieved by a different mechanism, the requirement under reg 5(1) of the Regulations would be met.'

25. This should be read in the light of para 116 of *Kocur v Angard Staffing Solutions Ltd [2021] ICR 987*:

The EAT emphasised that the AWR did not require that agency workers received identical treatment to direct employees in relation to all aspects of matters that were within the scope of "basic working and employment conditions". We agree. As we have said, it may be that a term requiring a payment to be made within a reasonable time can be complied with by making the payment at different times to direct employees and agency workers, respectively. We do not read paragraph 27 of the EAT's judgment in *Kocur 1* to mean that there is a hard-and-fast division between parity, on the one hand, and the mechanism for parity, on the other.

Application of the law to the facts

Is the claim out of time, and if so is it just and equitable to extend time?

26. Given that the claim is only one day out of time, and in the light of the lack of any prejudice to the respondent I determine that it is just and equitable to extend time.

Was the claimant engaged on the same basic working and employment conditions relating to pay as he would have been entitled to had he been recruited other than by using the services of a temporary work agency?

27. I deal first with the question of whether the terms and conditions relating to 'pay' in the claimant's contract include the element referred to as a 'retention bonus'.
28. When determining this issue I bear in mind that a 'term-by-term' approach is required by the AWR. The shortfall in respect of one term, cannot be offset by conferring a greater entitlement in respect of another. However, I find that the basic pay and the sum referred to as a 'bonus payment' form part of the claimant's basic package of remuneration. They are part of the same term. Together they form the amount that the claimant is entitled to be paid simply for turning up and doing a day's work.
29. If the claimant had not been recruited via an agency, his basic package, of weekly remuneration, however labelled, would have been lower than that which he received as an agency worker. This is the case even if the pay rise

had been implemented on 1 August 2021. The label for part of the basic pay for a day's work differs slightly between agency workers and employees, but during the relevant period, the claimant, as an agency worker, received basic remuneration which was at least that which he would have received as an employee. The payment was received at the same time and in the same way.

30. For those reasons, I conclude that there was no breach of the AWR. I find that the claimant was engaged on the same basic working and employment conditions relating to pay as he would have been entitled to had he been recruited other than by using the services of a temporary work agency. That is the case even if the claimant were entitled to pay equivalent to the employee's increased basic pay from 1 August 2021 (the date to which the pay increase was 'backdated' by means of the one off 'back pay' payment). For that reason, I do not need to make a finding as to whether the claimant was so entitled.
31. Mr Chaudhuri also addressed me on the question of whether the one off 'back pay' payment could be seen as a bonus payment which might be argued to separately amount to 'pay' within the AWR. In his submission, for a number of reasons, this argument would fail. I agree, but on the basis that I find the payment was a payment of back pay and not a bonus.
32. The payment was clearly referable to the pay the employee would have received had the pay rise been implemented in August 2021, and therefore a claim for an equivalent payment fails for the reasons set out above. As I have found above, the claimant had already been paid at a higher level than the employee's increased pay during the relevant period and therefore, for the reasons set out above, there is no breach of the the AWR, whether the pay increase was given to the employee on a weekly basis, or whether it was paid in a lump sum at the end of the period.

Employment Judge Buckley

Date: 13 September 2022