Neutral Citation Number: [2024] EAT 23

Case No: EA-2021-001299-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 29 February 2024

Before :

MRS JUSTICE HEATHER WILLIAMS DBE

- -

Between :

EMELIA DONKOR-BAAH

Appellant

- and –

1) UNIVERSITY HOSPITALS BIRMINGHAM NHS TRUST
2) SARAH SALTER
3) STUART CASSON
4) 4 RECRUITMENT SERVICES LIMITED

Respondents

- -
- -

Naomi Ling (instructed by Advocate) for the **Appellant**
Madeline Stanley (instructed by Bevan Brittan LLP) for the **1st – 3rd Respondents**
Tom Wilding (instructed on a direct access basis) for the **4th Respondent**

Hearing date: 31 January 2024

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JUDGMENT

SUMMARY

Agency workers

The claimant appealed from the judgment of the Employment Tribunal ("ET") striking out her claims against the first and fourth respondents ("R1" and "R4") that were based on regulation 5 of the **Agency Workers Regulations 2010/93** ("**AWR**").

R4 was a temporary work agency who supplied the claimant to R1, the hirer, to work nursing shifts in a hospital. The claimant booked her shifts with R1 on a shift by shift basis. Following an alleged incident during the night shift on 10 February 2019, at 2.30am the claimant was told to end her shift early and go home. Her case was that she was suspended at this point, that her suspension continued until 6 November 2019 when she was told that she could re-commence booking shifts with R1 and that she was entitled to be paid for this period of suspension pursuant to regulation 5 **AWR**, as R1's own employees or workers would have been paid during a period of suspension. R1 and R4 disputed the claim, contending that her assignment with R1 had terminated when she was sent home at 2.30am on 10 February 2019 and that, accordingly, she could not have been suspended by R1 thereafter, who had no ongoing relationship with her.

The ET found that the claimant's assignment was terminated when she was sent home at 2.30am on 10 February 2019 and that accordingly there was no suspension of her relationship with R1 and her claim under the **AWR** for suspension pay had no reasonable prospects of success.

On appeal, and now represented by counsel, the claimant did not positively challenge the ET's conclusion as to the termination of her assignment. However, she argued that, read together, regulations 5, 7 and 8 **AWR** gave rise to an overarching "Agency Relationship" between an agency worker and a hirer, that was capable of subsisting beyond individual assignments and that it was this relationship which had been suspended by R1.

The claimant was permitted to argue this new point of law, but it was rejected by the Employment Appeal Tribunal on its merits. The entitlements conferred on agency workers by regulation 5 **AWR** relate to the period of an assignment, when the agency worker is working for the hirer. This is apparent

from the nature of the entitlements, the language of regulation 5(4), the scheme of the **AWR** which defines an agency worker in regulation 3(1) by reference to their supply to a hirer and in terms consistent with the definition of "assignment" in regulation 2, and the terms of **Directive 2008/104/EC on Temporary Agency Work**, which the **AWR** implements. Furthermore, regulations 7 and 8 do not support the existence of the alleged overarching "Agency Relationship".

MRS JUSTICE HEATHER WILLIAMS:

Introduction

1. I will refer to the parties as they were known below. The claimant appeals from the judgment of Employment Judge Mark Butler ("the EJ") sitting in the Birmingham Employment Tribunal ("ET") promulgated on 22 October 2021, following an Open Preliminary Hearing on 28 September 2021. The ET struck out the claims based on regulation 5 of the **Agency Workers Regulations 2010/93** ("**AWR**") made against the first respondent ("R1") and the fourth respondent ("R4"), on the basis that they had no reasonable prospects of success.

2. R4 is a temporary work agency ("TWA") who supplied the claimant nurse to undertake shift work at R1's hospital. Whilst she brings other claims against the respondents, it is accepted that there is no claim under the **AWR** in respect of the second and third respondents. Accordingly, it is agreed that in so far as they were joined as parties, the appeal against those respondents should be dismissed.

3. Following a hearing under rule 3(10) of the **Employment Appeal Tribunal Rules 1993** (as amended) on 1 February 2023, permission to proceed to a full hearing was granted by HHJ James Tayler, on the basis of amended grounds of appeal. The claimant had appeared in person before the ET, but was represented by Ms Ling of counsel, at the rule 3(10) hearing and at the substantive appeal hearing.

4. The claimant was sent home during her shift on the night of 9 – 10 February 2019. She said that she was suspended at this point and that her suspension continued until 6 November 2019, when she was told she could re-commence booking shifts with R1. Relying on regulation 5 **AWR**, she claimed that she was entitled to be paid during this period of suspension, as R1's own employees or workers would have been paid during a period of suspension. R1 and R4, on the other hand, contended that the claimant's working with R1 was terminated when her 9 – 10 February 2019 shift was brought to an end and that her assignment with R1 concluded at that point. A Preliminary Hearing was listed to determine: (i) the date on which the claimant's assignment with R1 ended; and (ii) depending on the outcome of that issue, to consider the applications made by R1 and R4 that the claimant's claim under regulation 5 **AWR** be struck out or subjected to a deposit order. The EJ held that the claimant's assignment with R1 terminated at 2.30am on 10 February 2019, that her agency working relationship with R1 was brought to an end at that point and that, accordingly, she was not suspended.

He concluded that it followed from this that her **AWR** claims against both R1 and R4 had no reasonable prospects of success.

The amended grounds of appeal

5. During the appeal hearing, Ms Ling indicated that Ground 7 was no longer pursued. The remaining grounds of appeal are as follows:

> "1. The ET erred in law in failing to identify the correct test for whether an agency arrangement to which Regulation 5 of the [**AWR**] applied ('an Agency Arrangement') had been terminated.
>
> 2. The ET erred in law in failing to identify the correct test for whether an Agency Arrangement had been suspended.
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> 3. The ET erred in apparently concluding that a suspension from an Agency Arrangement was possible only where they had been a 'block booking' of shifts. The ET failed to give proper consideration to whether suspension was possible where there had not been shifts booked in advance. The ET should have concluded that suspension was possible where shifts had not been booked in advance.
>
> 4. The ET erred in law in failing to consider between which parties communications need to pass to either terminate or suspend an Agency Arrangement.
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> 5. If the communications between the hirer and the agency worker were relevant to terminate or suspend an Agency Arrangement, the ET erred in law in failing to identify and treat as material the words used between Mr Casson and the Appellant at 2.30am on the morning of 10 February.
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> 6. If the communications between the hirer and the agency worker were relevant to terminate or suspend an Agency Arrangement, the ET erred in law in failing to identify and treat as material the statements made by the Respondent in the Temporary Staffing Complaints Form and the email from Sarah Salter dated 11 February 2019 to the effect that shifts would not be booked 'whilst an investigation takes place'.
>
> 7. …..
>
> 8. The Employment Tribunal also erred in law in failing to treat the contractual documentation (contract and handbook) issued by the Fourth Respondent to the Appellant as material to the question of whether or not the Agency Arrangement had been terminated or suspended.
>
> 9. The Employment Tribunal's conclusion at paragraph 25 of the judgment that the Agency Arrangement had been terminated rather than suspended was perverse, relying as it did on the information supplied by the Appellant at Box 4 of the ET1, while ignoring her assertions in the grounds of complaint that the Agency Arrangement had been restricted/suspended.
>
> 10. The Employment Tribunal failed to give adequate reasons for its conclusions."

6. In her skeleton argument for this hearing, Ms Ling clarified, firstly, that the "Agency Arrangement" referred to in her amended grounds was better described as an "Agency Relationship"; and secondly, that her core submission was that, read together, regulations 5, 7 and 8 **AWR** gave rise to an overarching Agency Relationship between an agency worker and the hirer in respect of the rights set out in regulations 5 and 6, and

that this relationship subsisted, or was capable of subsisting, between individual assignments and could give rise to a suspension. References to an Agency Relationship in this judgment are to the sense in which Ms Ling used this phrase.

7. R1 raised objection to this line of argument in its answer, and Ms Stanley maintained the objection in her skeleton argument and oral submissions. This was on the basis that this was not how the case had been argued below, where the focus had been upon whether the particular assignment had terminated. I address this objection at para 72 below.

8. It appeared from the terms of the amended grounds that the claimant's argument was now focused on the Agency Relationship contentions, rather than any challenge to the EJ's finding that the assignment with R1 was terminated at 2.30am on 10 February 2019. This impression was reinforced by para 61 of Ms Ling's skeleton argument, where she said: "*The judge concluded that not only had the assignment ended, but the 'relationship' had ended and the Regulation 5 claims were therefore to be struck out. It is the latter two conclusions that are challenged in this appeal*" (emphasis added). However, from the summary she gave at the outset of her oral submissions, it appeared that Ms Ling was now seeking to challenge the ET's conclusion as to the termination of the assignment. I pointed out that if she wished to do this, she would need to make an application to re-amend her grounds of appeal. After having had a chance to take instructions, Ms Ling made an oral application to re-amend her grounds, so that in Grounds 1, 2, 4 – 6, 8 and 9 references to the "Agency Arrangement" would be preceded by the words "the assignment and/or". Ms Stanley and Mr Wilding objected to the proposed amendment. In the event, Ms Ling later clarified in her submissions in reply, that whilst she did not concede that the assignment came to an end at 2.30am on 10 February 2019, she did not positively contest this finding. She explained that she had primarily made the amendment application because she did not want it to be said against her case, that because she had not contested the assignment finding, she must be taken to have accepted that the Agency Relationship also came to an end at the same time. As I do not propose to decide the appeal on that basis, and accordingly the perceived need for the application to re-amended the grounds of appeal falls away.

9. As I set out in more detail below, in addition to relying on the EJ's reasoning, Ms Stanley advanced two additional reasons as to why the ET's judgment should be upheld. Firstly, she said that on any view the claimant's assignment ended at 7.30am on 10 February 2019 at the end of her booked shift, even if it did not terminate at 2.30am, as the EJ found. Secondly, she submitted that in any event the claimant's claim did not

give rise to a case under regulation 5 **AWR** with reasonable prospects of success; in particular as a "suspension" is a qualitatively different management action depending on whether it related to an employee of R1 or to an agency worker in the position of the claimant.

The material facts and circumstances

10. The claimant is a Band 5 Staff Nurse. She undertook nursing shifts for R1 from 2017 onwards. Initially this was via a different agency. On 26 March 2018 she entered into a "*Contract of Services for Temporary Workers*" with R4. Clause 1 of the agreement defined a number of terms. An "*assignment*" meant "*the period during which the Temporary Worker is supplied to render services to the Client*". The "*Client*" meant the person or body requiring the services of the Temporary Worker; and the "*Employment Business*" was R4. The terms of the agreement included the following:

> "2.1 These Terms constitute a Contract of Services between the Employment Business and the Temporary Worker/Contractor; they govern all assignments undertaken by these parties. However, no contract shall exist between the Employment Business and the Temporary Worker/Contractor between assignments.
> 4.1 The Employment Business will endeavour to obtain suitable assignments for the Temporary Worker/Contractor.
> 4.2 The Temporary Worker/Contractor acknowledges that the nature of temporary work may mean that there could be periods when no suitable work is available and agrees that: the suitability shall be determined by the Employment Business and that the Employment Business shall incur no liability should it fail to offer or secure appropriate opportunities.
> 10. The Employment Business or Client may, without prior notice or liability, instruct the Temporary Worker/Contractor to end an assignment at any time. This will then be confirmed in writing.
> 10.2 The Temporary Worker/Contractor may terminate an Assignment at any time without prior notice or liability…
> 10.3 The Temporary Worker/Contractor acknowledges that the continuation of an assignment is subject to and conditioned by the contract entered into between the Employment Business and the Client…"

Agreed findings of fact

11. The EJ made the following unchallenged findings of fact in relation to the claimant's shifts with R1:

> "21. The claimant booked onto a shift with the first respondent on a shift by shift basis. The claimant was not on a block booking with the first respondent. The claimant would identify shifts that she wanted to work and fill in the necessary request. The fourth respondent would email the claimant to confirm the booking and ask the claimant to confirm the booking by phone…
>
> 22. On 8 February 2019, the claimant identified and completed a booking request in respect of two shifts. A booking was made by the claimant to work a shift starting at 19.30 on 09 February 2019 and finishing at 7.30 on 10 February. This booking was made at 13.20 on 8 February 2019…A second booking was made by the claimant to work a shift starting at 19.30 on 10 February 2019 and finishing at 07.30 on 11 February 2019. This booking was made at 13.18 on 08 February 2019…
>
> 23. Whilst working the shift that was taking place between the hours of 19.30 on 09 February and 7.30 on 10 February, Ms Chesney, the nurse in charge of that night shift, issued a report to Senior nurse, Mr Casson, identifying a number of matters.

> 24. On the basis of Ms Chesney's report, Mr Casson made the decision to bring the claimant's shift to an end, and sent her home at 2.30am. The claimant accepted under cross examination that she was sent home at 2.30am. And this is consistent with the documentary evidence…
> …
> 26. The first respondent cancelled all future shifts that the claimant had booked before the incident on 10 February 2019 at 02.30. The claimant accepted this under cross examination.
> …..
> 28. The claimant was never given a further shift by the first respondent after the 10 February 2019."

12. I will set out and address the controversial parts of the EJ's reasoning later in this judgment. This includes paras 25 and 27, which I have not reproduced at this stage.

Contemporaneous documentation

13. In support of Grounds 4, 5, 6 and 8 of the grounds of appeal, Ms Ling relied upon various contemporary documents which she submitted evidenced the terms on which the claimant was asked to leave her shift on 10 February 2019. In particular she relied upon:

i) A "*Temporary Staffing – Complaints Form*" completed by the Emergency Department Matron, which stated: "*The behaviour resulted in the site lead advising [the claimant] to be sent off duty whilst an investigation takes place. Due to the above concerns we strongly feel that this individual member should not be booked for shifts for the foreseeable future until an appropriate investigation is [sic] taken place*". The form also recorded that the decision taken was: "*To remove from duty and withdraw future booking until an investigation is concluded*";

ii) An email sent on 11 February 2019 at 11.58am by Sarah Salter, an Acting Operational Manager with R1, to R4, which said: "*Please see below complaint received. [The claimant] will be unable to book any future shifts until this matter has been resolved and investigated by yourselves. Can you ensure all pre-booked shifts are cancelled*". The text then reproduced extracts from the complaints form, including the passage that I have set out in the previous sub-paragraph;

iii) An undated internal email sent by Stuart Casson to Angela Birmingham which summarised his account of events and included: "*I then listened to The Band 6 Sisters and felt asking her to go without prejudice and informed her that this incident would need an investigation and she would be informed by her Agency as to an Action plan*". He also said that the claimant

was "*rostered for a Night shift on Sunday...I have put this shift back out to bank whilst statements are written by all the Staff involved*".

The ET claim

14. The claimant completed her ET1, dated 8 May 2020, without legal assistance. It included claims for race discrimination, bullying and harassment, victimisation, breach of contract, "*detriments*" and "*wrongful termination of assignment*". In section 5 of the form, she described her job as "agency worker" and stated that her employment began on 31 December 2017 and ended on 9 February 2019.

15. In the accompanying details of her claim, the claimant described her "detriments" claim as:

> "less favourable treatment to actual comparators, wrongful early termination of assignment, breach of contract, suspension/restriction, failure to allow me work at other departments and sites of the trust, suffered reputational damage, loss of earnings, unlawful deductions from wages, unable to find alternate/suitable shifts that pay the same rate, failure to follow trust policies and ACAS guidelines to my formal grievance, unable to work for other agencies to mitigate loss due to delay in grievance process, injury to feelings resulting in fear and panic of going to work."

16. After listing the claims I have referred to, she went on to say in the first paragraph of her particulars of claim that she qualified for equal treatment with R1's directly employed staff under the **AWR**. She set out her account of events on 9 and 10 February 2019, including that Mr Casson had told her not to turn up for her next night shift as he would be sending an email to her agency "*to advise them to book me shifts on other departments or sites of the trust whilst [R1] investigate the allegations made*".

17. At para 4 under the heading "*Claims/Damages*" the claimant said:

> "Having qualified for equal treatment (AWR 2010) at time of the suspension I believe I was entitled to suspension with full pay as would have happened to a permanent employee whilst the investigation continues and therefore Claim damages for loss of income and unlawful deductions as a result of the restrictions imposed..."

18. At para 13 she referred to the "*decision to terminate my assignment early and send me home without considering a reasonable alternative*...". At para 15 she described what she said were acts of victimisation. They include: "*early termination of my assignment...decision to suspend me and restrict me from working on other sites of the trust without any proper investigation*...". In paras 18 and 19, in relation to claims for direct discrimination and under the **AWR**, she referred to being suspended/restricted from working in other areas and departments of R1. In para 22 she said that she claimed financial loss "*for this wrongful termination of my assignment and ongoing suspension*".

The Preliminary Hearing before EJ Cookson

19. On 1 June 2021 an Open Preliminary Hearing took place before EJ Cookson, who made a number of case management orders, including:

> "2. There will be a preliminary hearing on 28 September 2021 at 10am to be conducted by CVP unless directed otherwise by the tribunal...
>
> 3. The purpose of this hearing is to determine:
>
> (a) the date on which the claimant's assignment with the first respondent ended. (The reason why this it [sic] will be in accordance with the overriding objective for this issue to be determined on a preliminary basis is set out below) unless the employment judge determining this issue finds it is impossible to determine this issue without making a decision which making findings of fact would embarrass the final tribunal based on the evidence he or she is presented with;
>
> (b) depending on the outcome of the preliminary determination and entirely subject to the discretion of the employment judge determining the preliminary issue, the hearing may then go on to consider the first and fourth respondents' applications for the claimant's claim under Regulation 5 of the Agency Worker's [sic] Regulations should be struck out or subject to a deposit order;
>
> (c) case management orders required for the final hearing unless previously determined."

20. EJ Cookson's reasons for directing the further Preliminary Hearing were explained at paras 47 – 53 of her Record of the Preliminary Hearing. In para 47 she summarised the claimant's claim under regulation 5 **AWR**, namely that she said she was suspended between the incident in February 2019 and the conclusion of her grievance later that year and that if she had been permanently employed by R1 she would have received full pay for that 35 week period of suspension, a claim she valued at £1,300 per week. In para 48 EJ Cookson recorded that R1 and R4 argued that the claimant was not suspended and that her assignment was brought to an end by R1 during the night of 9 / 10 February 2019. Further, that in any event R1's disciplinary procedure was not a right covered by regulation 5 **AWR**. She also noted that R4 argued that the claimant was not entitled to be paid under the terms of her agreement if she was not working. In para 49 she recorded the claimant's rejoinder that this was a claim about pay, and so was within regulation 5; that R4 did not confirm to her in writing that her assignment had been ended; and that the 11 February 2019 email from R1 to R4 referred to her being "*sent off duty*" and to there being further investigations.

21. Having summarised the rival contentions, EJ Cookson continued:

> "50. In terms of these arguments, a breach of regulation 5 is concerned with what the agency worker would be entitled to if they were permanently employed and the determination of liability under Regulation 14 may have to consider the provisions of Regulation 14(3) amongst other things...I cannot say that these are questions which are so clear it could be said that the claimant's claims have no or little reasonable prospect of success based on the information before me. That is because there is also a factual dispute about whether, as a matter of fact, the claimant was still

> assigned to the first respondent or not after 11 February 2021 [2019]. That is the straightforward factual dispute which is at the heart of this particular claim. I cannot determine that at this hearing.
>
> 51. I considered whether this is a matter which should simply be left to the final hearing. The fourth respondent points out that this is the only claim against it and points out that potentially it would have to be involved in what is currently a 15-day trial in relation to what is [a] discrete and limited issue. Both first and fourth respondents maintain that this claim is without merit because the assignment had clearly ended.
>
> 52. It seems to me that the claimant's claim under regulation 5 would only be sustainable if, as a matter of fact, her assignment was not terminated on or around 11 February 2019 as the respondents allege and her assignment as a matter of fact and law continued. The respondents assure me that this is an issue which could be determined without risk of embarrassment to the final tribunal hearing in relation to the other claims...I am satisfied that bearing in mind the implications for the fourth respondent, this would be in accordance with the overriding objective and it may reduce the number of issues to be determined at the final hearing if the dates of the assignment is determined as a preliminary issue. That would be to the benefit of the parties..."

The EJ's Reasons

22. As the EJ explained at para 9 of his Reasons, the claimant gave evidence at the hearing on 28 September 2021, as did Ms K Sanders on behalf of R4. No witness evidence was called by R1. At para 12 the EJ reproduced para 3 of EJ Cookson's order (para 19 above), At para 13 he summarised the parties' respective contentions, noting that the claimant's position was that she was suspended on 10 February, that this continued until 6 November 2019 when she was told she could re-commence booking shifts with R1 and that she should have been paid for this period, as a non-agency member of R1's staff would be paid when on suspension. He also noted that R1 and R4 submitted that the claimant's working with R1 ended on 10 February 2019, that there was no suspension and therefore the claim for suspension pay had no basis and should be struck out. The EJ then observed:

> "14. The claimant's claim under Regulation 5 of the [**AWR**] is reliant on her assignment with the first respondent continuing and having been suspended from around 10 February up until 06 November 2019. If this is not the case, then the claim brought under the [**AWR**] has no reasonable prospects of success."

23. Ms Ling submits that this paragraph discloses a key error of law in that the EJ held that the **AWR** claim was only viable if her assignment with R1 continued. She says that he failed to appreciate that an Agency Relationship could have continued even if the particular assignment was at an end.

24. At para 17 the EJ said he had been conscious to ensure that in deciding the preliminary issues he did not make findings that could cause difficulties to the tribunal that heard the final merits hearing.

25. At paras 19 – 20 the EJ set out the powers under the **Employment Tribunal Rules of Procedure 2013** ("the **ET Rules**") to strike out a claim or to make a deposit order. He did not set out the provisions of the **AWR**.

26. In two unnumbered paragraphs immediately under the heading "*Findings of Fact*", the EJ gave the following indications:

> "Where there is a reference to certain aspects of the evidence that have assisted me in making our findings of fact this is not indicative that no other evidence has been considered. My findings were based on all of the evidence and these are merely indicators of some of the evidence considered in order to try to assist the parties understand why I made the findings that we did.
>
> I did not make findings in relation to all matters in dispute but only on matters that I consider relevant to deciding on the issues currently before me. I have been extremely careful to try and avoid making any findings of fact that are best left to the tribunal at the final hearing, and which could potentially embarrass that tribunal."

27. Ms Ling disputed aspects of the EJ's findings that are contained within the following paragraphs:

> "25. The claimant was never told by the first respondent that she was being suspended. This is because the first respondent was not suspending the claimant but it was terminating the claimant's assignment with it at 2.30am on 10 February 2019. Although the claimant denies this, and seeks to argue that the first respondent did not terminate her assignment at that time, it is more likely than not that the first respondent ended the claimant's assignment at this time. The shift records…clearly record the claimant's 09/10 February 2019 shift as being ended at 2.30am. The claimant accepts that she was told to end her shift and go home at this time. The claimant records in her claim form that her employment ended on 9 February 2019…, as well as recording in her particulars of claim that there had been a wrongful termination of her assignment…I do not accept the claimant's explanation that these references in her claim form and the date given by her was to a misunderstanding as English was not her first language. And the reason why I do not accept this is that the claimant has never requested an interpreter despite being aware that she could, and therefore must have confidence in her ability to communicate in English in this process. The documents that she has produced and the way that she presented herself today supports that she has a good working understanding of the English language: she was able to answer questions, cross-examine Ms Sanders and make closing submissions. And further, my findings above and the claimant's position in her claim form is consistent with the claimant not being able to make future bookings until an investigation was completed…And is further supported by the email of 11 February 2019 from Ms Salter to the fourth respondent where it is stressed that the claimant 'will be unable to book any further shifts' and to '…ensure that all pre-booked shifts are cancelled'. All of this is consistent with the evidence of Ms Sanders.
>
> 27. The fourth respondent in effect treated the claimant as if she had been suspended with pay at 2.30 on 10 February 2019, and paid her for the full shift that she was engaged to do. However, this suspension was only for this shift, as the claimant was booked on a shift by shift basis, and this suspension came to an end when the shift ended at 07.30 on 10 February 2019. This was the unchallenged oral evidence of Ms Sanders. She accepted that the fourth respondent suspended the claimant with pay at this time. That the fourth respondent paid the claimant for the full shift. And that the suspension only covered the duration of the shift on 09-10 February 2019, as the claimant was not engaged on a block booking."

28. The last three paragraphs of the EJ's reasoning appeared under the heading "*Conclusions*", where he said:

> "29. Given the findings, above, the claimant's agency working with the first respondent came to an end at 02.30 on 10 February 2019. The claimant was not engaged in a block booking with the first respondent from which she was suspended.
>
> 30. The matter was confused somewhat by the fourth respondent treating the claimant as suspended with full pay for the duration of the shift across 09 and 10 February 2019. But this does not alter the fact that the claimant's agency working relationship with the first respondent was brought to an end on 10 February 2019.

> 31. The claimant's Agency Worker claim against both the first and fourth respondent is brought on the basis that she was suspended by the first respondent from the date of the incident until the conclusion of her grievance, that being 06 November 2019. As there was no suspension in the relationship between the claimant and the first respondent, and I have concluded that the relationship was ended on 10 February 2019, it follows then that the claim brought by the claimant under Regulation 5 [**AWR**] against both the first respondent and the fourth respondent has no reasonable prospects of success. And is therefore struck out pursuant to Rule 37."

The legal framework

The approach of the appeal tribunal

29. It is well-established that the decision of an ET must be read fairly and as a whole, without focusing merely on individual phrases or passages in isolation and without being hypercritical: Popplewell LJ in **DPP Law Ltd v Greenberg** [2021] EWCA Civ 672, [2021] IRLR 1016 ("**Greenberg**") at para 57, citing Mummery LJ's judgment in **Brent v Fuller** [2011] EWCA Civ 267, [2011] ICR 806 at 813. It is equally well-established that a tribunal is not required to identify all of the evidence relied upon in reaching its conclusions of fact; and it is not legitimate for the appellate tribunal to reason that a failure by the ET to refer to particular evidence means that it was not taken into account in reaching the conclusions expressed in the decision: per Popplewell LJ in **Greenberg** at para 57(2) and (3).

30. I also bear in mind Singh LJ's observation in **Sullivan v Bury Street Capital Ltd** [2021] EWCA Civ 1694, [2022] IRLR 159 at para 42: "*...what is required is adequacy, not perfection. An ET is not sitting an examination*." The question is whether the ET "*identified the correct issue, applied the relevant principles to that issue and whether it reached findings it was entitled to reach on the material before it*": **Stuart Delivery v Augustine** [2021] EWCA Civ 1514, [2022] ICR 511 at para 34.

The Temporary Agency Work Directive

31. The **AWR** implements **Directive 2008/104/EC on Temporary Agency Work** ("the **AWD**"). The **AWR** must, so far as possible, be read in a way which gives effect to the purpose of the Directive; per Green LJ (giving the leading judgment) at para 9 in **Angard Staffing Solutions Ltd v Kocur** [2022] ICR 854 ("**Angard No.3**"). The parties agreed that the **AWD** is relevant to this appeal because the subject matter of these proceedings took place before the end of 2023 (**Retained EU Law (Revocation and Reform) Act 2023**, section 22(5)). The **AWD** must therefore be treated as retained EU law pursuant to sections 4 and 5 of the **European Union Withdrawal Act 2018**, which retains the relevance of EU Directives and the supremacy of

EU law respectively. I turn firstly to the operative provisions of the Directive.

32. The scope of the Directive is set out in Article 1.1:

> "This Directive applies to workers with a contract of employment or employment relationship with a temporary work agency who are assigned to user undertakings to work temporarily under their supervision and direction."

33. The aim of the **AWD** is addressed in Article 2:

> "The purpose of this Directive is to ensure the protection of temporary agency workers and to improve the quality of temporary agency work by ensuring that the principle of equal treatment, as set out in Article 5, is applied to temporary agency workers, and by recognising temporary work agencies as employers, whilst taking into account the need to establish a suitable framework for the use of temporary agency work with a view to contributing effectively in the creation of jobs and to the development of flexible forms of working."

34. Article 3.1 contains a number of definitions, including:

> "(b) 'temporary work agency' means any natural or legal person who, in compliance with national law, concludes contracts of employment or employment relationships with temporary agency workers in order to assign them to user undertakings to work there temporarily under their supervision and direction;
>
> (c) 'temporary agency worker' means a worker with a contract of employment or an employment relationship with a temporary work agency with a view to being assigned to a user undertaking to work temporarily under its supervision and direction;
>
> (d) 'user undertaking' means any natural or legal person for whom and under the supervision and direction of whom a temporary agency worker works temporarily;
>
> (e) 'assignment' means the period during which the temporary agency worker is placed at the user undertaking to work temporarily under its supervision and direction;
>
> (f) 'basic working and employment conditions' means working and employment conditions laid down by legislation, regulations, administrative provisions, collective agreements and/or binding general provisions in force in the user undertaking in relation to…(ii) pay."

35. Article 5 contains the core principle of the **AWD**, namely that the "*basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job*".

36. Article 9 provides that the **AWD** is without prejudice to the right of Member States to introduce provisions which are more favourable to workers than those contained in the Directive.

37. The recitals are relevant in determining the purpose of the measure and assist in guiding the interpretation of its substantive terms: per Green LJ at para 13, **Angard No.3**.

38. Recital (1) states that it is designed to ensure "*full compliance with Article 31 of the Charter*". Recital (9) indicates that the European Commission considered that "*new forms of work organisation and a greater diversity of contractual arrangements for workers and businesses, better combining flexibility with security,*

would contribute to adaptability" and refers to the European Council's endorsement of "*the common principles of flexicurity, which strike a balance between flexibility and security in the labour market and help both workers and employers seize the opportunity offered for globalisation*". As Green LJ observed at paras 11 – 12 in **Angard No.3**, the **AWD** seeks to "*strike a balance between the competing interests of improving both worker security and employer flexibility*" (see also paras 46 – 48 to similar effect). Recital (11) refers to temporary agency work meeting undertakings' "*need for flexibility*" and the need of employees to "*reconcile their working and private lives*", and contributing to "*job creation and to participation and integration in the labour market*". Recital (12) notes that the **AWD** establishes "*a protective framework for temporary agency workers which is non-discriminatory, transparent and proportionate, while respecting the diversity of labour markets and industrial relations*". Recital (14) states that the "*basic working and employment conditions applicable to temporary agency workers should be at least those that would apply to such workers if they were recruited by the user undertaking to occupy the same job*".

39. In **Angard No.3**, Green LJ rejected the appellant's argument that the purpose of the **AWD** was to accord a high degree of primacy to the position of temporary employees, relative to permanent workers and to the hirer. He said:

> "50. …this is not a Directive which in relative terms seeks to give priority to one interest over another and in particular to prioritise temporary workers over permanent workers or over hirers. It is a measure which endeavours to strike a pragmatic balance between a variety of different competing objectives without creating any hierarchy of interests. It is not therefore possible to point to any particular purpose and conclude that it has enhanced *relative* weight and justifies expanding the scope of any given right beyond its natural language." (Emphasis in original.)

The Agency Workers Regulations

40. Regulation 2 of the **AWR** includes the following definitions:

> "'assignment' means a period of time during which an agency worker is supplied by one or more temporary work agencies to a hirer to work temporarily for and under the supervision and direction of the hirer;
>
> 'hirer' means a person engaged in economic activity, public or private, whether or not operating for profit, to whom individuals are supplied, to work temporarily for and under the supervision and direction of that person;"

41. It is agreed that R1 was a "hirer" within the meaning of regulation 2. A TWA is defined in regulation 4 and it is agreed that R4 is a TWA.

42. Regulation 3 addresses who is an "agency worker". As relevant, it states:

> "**3. – The meaning of agency worker**

(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."

43. As I have already indicated, regulation 5 identifies the nature of the "agency worker's" rights. It 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 condition are –

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

(b) where A would have been recruited as a worker, the relevant terms and conditions that are ordinarily included in the contracts of workers of the hirer;

whether by collective agreement or otherwise, including any variations in those relevant terms and conditions made at any time after the qualifying period commenced.

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

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

(b) the relevant terms and conditions of that comparable employee are terms and conditions ordinarily included in the contracts of employees, who are comparable employees of the hirer, whether by collective agreement or otherwise.

(4) For the purposes of paragraph (3) an employee is a comparable employee in relation to an agency worker if at the time when the breach of paragraph (1) is alleged to take place –

(a) both that employee and the agency worker are –
(i) working for and under the supervision and direction of the hirer; and

> (ii) engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification and skills; and
>
> (b) the employee works or is based at the same establishment as the agency worker or, where there is no comparable employee working or based at the establishment who satisfies the requirement of sub-paragraph (a) works or is based at a different establishment and satisfies those requirements.
>
> (5) An employee is not a comparable employee if that employee's employment has ceased."

44. The reference to "*terms and conditions*" in regulation 5(2) and (3) means the terms and conditions listed in regulation 6(1). The list encompasses: *"(a) pay; (b) the duration of working time; (c) night work; (d) rest periods; and (e) annual leave*".

45. Regulation 6(2) provides:

> "(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)."

46. In addition to regulation 5, Ms Ling placed particular emphasis upon regulation 7, which sets out the 12 weeks qualifying period that applies before an agency worker can take advantage of the regulation 5 entitlements. It says (as relevant):

> "**7. - Qualifying period**
>
> (1) Regulation 5 does not apply unless an agency worker has completed the qualifying period.
>
> (2) To complete the qualifying period the agency worker must work in the same role with the same hirer for 12 continuous calendar weeks, during one or more assignments.
>
> (3) For the purposes of this regulation and regulations 8 and 9, the agency worker works in "the same role" unless-
>
> (a) the agency worker has started a new role with the same hirer, whether supplied by the same or by a different temporary work agency;
>
> (b) the work or duties that make up the whole or the main part of that new role are substantively different from the work or duties that made up the whole or the main part of the previous role; and
>
> (c) the temporary work agency has informed the agency worker in writing of the type of work the agency worker will be required to do in the new role;
>
> (4) For the purposes of this regulation, any week during which the whole or part of which an agency worker works during an assignment is counted as a calendar week.
>
> (5) For the purposes of this regulation and regulations 8 and 9, when calculating whether any weeks completed with a particular hirer are continuous, where –
>
> (a) the agency worker has started working during an assignment and there is a break, either between assignments or during an assignment, when the agency worker is not working,
>
> (b) paragraph (8) applies to that break, and
>
> (c) the agency worker returns to work in the same role with the same hirer,

any continuous weeks during which the agency worker worked for that hirer before the break shall be carried forward and treated as continuous with any weeks during which the agency worker works for that hirer after the break.

(6) …

(7) …

(8) This paragraph applies where there is a break between assignments, or during an assignment, when the agency worker is not working, and the break is:

(a) for any reason and the break is not more than six calendar weeks;

(b) wholly due to the fact that the agency worker is incapable of working in consequence of sickness or injury, and the requirements of paragraph (9) are satisfied;

(c) related to pregnancy, childbirth or maternity and is at a time in a protected period;

(d) wholly for the purpose of taking time off or leave, whether statutory or contractual, to which the agency worker is otherwise entitled which is-
(i) ordinary, compulsory or additional maternity leave
(ii) ordinary or additional adoption leave;
(iii) paternity leave;
(iv) time off or other leave not listed in sub-paragraph (d)(i), (ii) or (iii); or
(v) for more than one of the reasons listed in sub-paragraph d(i) to (iv);

(e) wholly due to the fact that the agency worker is required to attend at any place in pursuance of being summoned for service as a juror … and the break is for 28 weeks or less;

(f) wholly due to a temporary cessation in the hirer's requirement for any worker to be present at the establishment and work in a particular role, for a pre-determined period of time according to the established custom and practice of the hirer; or

(g) Wholly due to a strike, lockout or other industrial action at the hirer's establishment; or

(h) Wholly due to more than one of the reasons listed in sub-paragraphs (b), (c), (d), (e), (f) or (g)."

47. To understand the legislative scheme, it is also necessary to consider regulation 8:

"**8. – Completion of the qualifying period and continuation of regulation 5 rights**

Where an agency worker has completed the qualifying period with a particular hirer, the rights conferred by regulation 5 shall apply and shall continue to apply to that agency worker in relation to that particular hirer unless –

(a) that agency worker is no longer working in the same role, within the meaning of regulation 7(3), with the hirer; or

(b) there is a break between assignments, or during an assignment, when the agency worker is not working, to which regulation 7(8) does not apply."

48. It is unnecessary for me to refer to regulation 9 in any detail. It is an anti-avoidance provision, which sets out certain circumstances in which an agency worker is to be treated as having completed the qualifying period, where the most likely explanation for the structuring of their assignments is that the TWA or the hirer

intended to prevent the agency worker from being entitled to the rights conferred by regulation 5.

Suspension and termination

49. As HHJ Auerbach observed in **Agbeze v Barnet Enfield and Haringey Mental Health NHS Trust** [2022] IRLR 115 ("**Agbeze**"):

> "55. …The term 'suspension' is commonly used to describe a situation in which a conventional employee is told, in respect of a period during which they would normally be required by their contract to work or be available for work, and would normally be entitled to be paid accordingly, that they are not only not required to work, but are positively required not to work and/or attend at the workplace. In such a case the starting point is that such a management direction will not, without more, deprive them of their underlying contractual right nevertheless to continue to be paid in respect of that period, unless the contract expressly so provides. Importantly, in such cases, the underlying right to be paid derives automatically from the contract itself, and so the employer's fiat cannot unilaterally take it away."

50. The case law in respect of the right of conventional employees to be paid during a period of suspension was analysed by the Court of Appeal in **Gregg v North West Anglia NHS Foundation Trust** [2019] EWCA Civ 387, [2019] ICR 1279; see in particular Coulson LJ's summary of the principles at paras 52 – 54 and 71. It is unnecessary for me to address this in detail, as Ms Stanley clarified at the hearing that for the purposes of this preliminary issue it was not asserted that R1's employees and/or workers were not entitled to pay during a period of suspension, given that the ET should take the claimant's case at its highest for the purposes of the strike out application.

51. However, in light of Ms Stanley's second additional ground, I return to **Agbeze.** The claimant in that case was engaged as a bank worker by the respondent to supply services as a heath care assistant. He was not supplied via a TWA. The express terms of his contract with the Trust included: (a) that its terms did not generally apply outside periods when he was providing bank services; (b) there was no obligation on the Trust to offer any work, nor on him to accept any offer of work; (c) there were no regular hours, which were as required and agreed; and (d) remuneration would be according to the duties offered. His contract provided at clause 13 that where misconduct issues occurred "your account may be suspended". After a particular concern arose, the claimant was not permitted to work for the Trust for around three months and was not paid during this time. He brought an unlawful deduction from wages claim, claiming that he was entitled to be paid during this period of "suspension" at the average rate that he had been previously earning, relying on an alleged implied term that "*if an organisation for whom a person is working suspends the person, then, in the absence of an express terms to the contrary, the organisation has to pay the employee*". HHJ Auerbach dismissed the

appeal, holding that the ET had been right to conclude that there was no implied term that the claimant, had right during the "suspension" period to be paid his average wages.

52. As will be clear from my earlier summary of the claim made in this case, Ms Donkor-Baah relies upon the **AWR** rather than on an implied term in her contract. However, the reasoning in **Agbeze** is of note because of the distinction drawn by HHJ Auerbach between the suspension of a conventional employee and the "suspension" of someone in the position of Mr Agbeze. He emphasised that the nature of the claimant's contract was that the availability of work and the willingness of the claimant to do it, were not sufficient to trigger an entitlement to wages, which only arose if the respondent chose to offer an assignment and the claimant chose to accept it (para 54). HHJ Auerbach then said:

> "54. …for the purposes of the issue raised by this appeal, there is a fundamental difference between a contract the basic architecture of which is of that sort…, and a conventional employment contract, which itself provides for guaranteed and required work and hours, and correspondingly guaranteed and required pay, so long as the employee is reading, willing and able to work.
>
> 55. Corresponding to that distinction is an important distinction between the legal implications of action taken by the employer, which may, nevertheless, in both types of case, be described as 'suspension'. [The passage I have cited at para 49 then appeared]
>
> 56. But the particular provision within cl 13 of the claimant's contract referred to suspension in a different sense, being the possibility that, during a disciplinary investigation 'your ability to work on the bank may be reviewed' and 'your account may be suspended'. The reference to 'your account'…was to the claimant's registration on the bank. The substantive step being contemplated here is that the claimant might be treated as not eligible to be *offered work* during the period of that suspension. But the underlying contract itself would not have automatically conferred on him the right to be paid wages during some or all of that period. That would only have arisen had the respondent elected to offer him work (which the contract did not oblige it to do), and had he taken up that offer.
>
> 57. …I am therefore inclined to think that the failure of cl 13 to address the question of whether a suspension of the claimant's account would be with or without pay did not leave a gap in the express contractual provisions overall. The position was already catered for by the other express terms of the contract. If that is right, then, reading the contract as a whole, the express terms of the contract occupied the field, providing the answer to the question whether the claimant was entitled to be paid in the period in question – in the negative – and there was no room, therefore, for the implication of a different implied term." (Emphasis in original.)

53. In accordance with usual contract law principles, the question of whether a contract of employment has been terminated is answered by reference to an objective assessment of how the parties' actions are to be reasonably interpreted, rather than by reference to their subjective intentions: **Willoughby v CF Capital plc** [2011] EWCA Civ 1115, [2012] ICR 1038, per Rimer LJ at para 26. Whilst the relationship between the claimant, as an agency worker, and R1, as the hirer, was governed by the **AWR**, rather than by a contract, counsel were agreed that an objective test should be applied to the question of whether an assignment was terminated and, in so far as there was any overarching Agency Relationship, to the question of when that came

to an end.

The parties' submissions

The claimant's submissions

54. Ms Ling submitted that, read together, regulations 5, 7 and 8 **AWR** created a status, a relationship between the agency worker and the hirer, that entitled the agency worker to the rights set out in regulations 5 and 6. Whilst different to a contractual relationship, it was analogous in the sense that it was of an overarching, umbrella nature and whilst it existed, the rights in regulations 5 and 6 were conferred on the agency worker. She submitted that the Agency Relationship arose once the 12-week qualifying period had been undertaken and that it subsisted between assignments conferring the protection of the **AWR** "*until the circumstances identified by Regulation 8 arise*".

55. In turn, she submitted that the circumstances did not fall within regulation 8(a) or (b), as, in particular, there was no "break" between assignments or during an assignment, as the Agency Relationship was suspended. There was a distinction between a hirer determining to suspend an agency worker, on the one hand, and simply not offering them further shifts, on the other.

56. Ms Ling contended that her approach was consistent with the purpose and policy of the **AWD**. She said it preserved the hirer's need for flexibility, but was also fair to the agency worker; and, consistent with the reasoning of the Supreme Court in **Uber BV v Aslam** [2021] UKSC 5, [2021] ICR 657 that where rights are conferred by legislation, they should be interpreted as far as possible so as to give effect to the statutory purpose.

57. Ms Ling submitted that comparable employees of R1 would be entitled to pay when suspended because there was no term in their contract gainsaying this basic position. As comparable employees would be paid whilst suspended, the claimant was entitled to be treated in the same way. Additionally, Ms Ling emphasised the breadth of regulation 6(2), which I set out at para 45 above, noting that it was not, in any event, confined to contractual entitlements.

58. Accordingly, she said, the EJ had erred in treating the Agency Relationship as having ended simply because the assignment had been terminated; he should have addressed whether there was a termination or a suspension of that relationship; and to do that he needed to ask himself whether R1, its servants or agents, had used words or conduct that would have led a reasonable observer to understand that the relationship had been

brought to an end. In fact, to terminate the Agency Relationship R1 would have had to make clear that there was no possibility of any shifts being offered to the claimant in the future, so as to extinguish any possibility that another shift could be offered to her within a six week period so as to permit the continuation of regulation 5 rights pursuant to regulation 8(a) and 7(8)(a).

59. In so far as the respondents submitted that the termination of the assignment was the only issue before the ET at the Preliminary Hearing, this was clearly not the case, as the order made by EJ Cookson specifically contemplated that a finding that the assignment was terminated would not necessarily lead to a decision that the claimant's **AWR** claim should be struck out.

60. As regards Ground 3, Ms Ling argued that the EJ erred in treating the absence of a block booking as material; it was possible to be suspended from an Agency Relationship conferring rights under regulation 5, whether or not future shifts had been booked and whether by way of block booking or not.

61. In relation to Grounds 4 – 6 and 8, Ms Ling submitted that all the available evidence indicated that the claimant was sent off shift and told that she would not be booked for shifts in the foreseeable future, but only whilst an investigation was pending. The contemporaneous documentation was only consistent with the proposition that the Agency Relationship had been suspended, rather than terminated.

62. As regards Ground 9, she submitted that the contents of the particulars of claim showed that the claimant regarded herself as suspended (rather than her relationship with R1 having been terminated) and that her regulation 5 **AWR** claim was brought on that basis. In these circumstances, it was perverse for the EJ to rely on the entries on the ET1 (para 14 above) as probative of a termination, rather than a suspension. It also indicated that he had failed to have regard to these other material aspects of her particulars of claim.

63. Ms Ling explained that Ground 10 was an alternative to Grounds 4 – 6 and 8; she contended that the EJ's findings were not **Meek** complaint (**Meek v Birmingham City Council** [1987] IRLR 250) as he did not adequately explain how he had reached the conclusion to strike out the claims.

The respondents' submissions

64. Ms Stanley submitted that the ET had asked and answered the key question posed, namely when the claimant's assignment with R1 had come to an end; and that the ET's conclusion on this point was based on unassailable findings of fact. There was nothing to suggest that the ET had failed to apply the correct test. In turn, as the claimant's assignment with R1 had come to an end at 2.30am on 10 February 2019, she could not

have been suspended thereafter by R1, who had no ongoing relationship with her.

65. As I have already foreshadowed, Ms Stanley argued that it was not open to the claimant to raise the Agency Relationship argument on appeal, when it had not been the way that her case was put before the EJ. In any event, she contended that there was no basis upon which the ET could or should have found that an Agency Relationship subsisted in respect of the claimant's work for R1 outside of the periods covered by the assignments. The **AWR** does not envisage such a relationship; regulation 5 does not give rise to entitlements outside of those periods of time that constitute assignments undertaken by the agency worker. This is evident, she said, from the nature of the regulation 5 right which is to "*the same basic working and employment conditions*" as those of employees and/or workers of the hirer in respect of their "*relevant terms and conditions*" identified in regulation 6. The nature of these entitlements was that they applied to periods where work was being undertaken for the hirer. Furthermore, there was no need for there to be a legally significant relationship between the agency worker and the hirer outside of the assignments in order for the **AWR** scheme to operate. Ms Stanley also relied upon the language of Article 5 **AWD**, which made clear that the rights conferred by the Directive applied during the period when the agency worker was undertaking an assignment.

66. Ms Stanley acknowledged that there might be an ongoing relationship between agency worker and hirer between shifts in circumstances where an assignment comprised multiple shifts, but, on the EJ's findings, that was not the situation in this case.

67. Ms Stanley also submitted that Grounds 4 – 6 and 8 disclosed no error of law. The first instance tribunal was not required to mention every piece of evidence before it and the appellate tribunal should presume that all relevant evidence and factors were in the first instance tribunal's mind. Furthermore, there was nothing in the documentation relied upon by Ms Ling that was inconsistent with the EJ's findings.

68. As regards Ground 9, Ms Stanley said that it was not perverse for the EJ to have relied upon the information in the claimant's ET1 form. It was obviously relevant and the weight he attached to it was a matter for him. The threshold for establishing perversity is a high one: **Yeboah v Crofton** [2002] IRLR 634. Ground 10 should also be rejected; the EJ's decision contained sufficient reasoning and the adequacy of the reasons had to be seen in the context of the limited issues that were before him. The Agency Relationship contention now raised by Ms Ling is a novel point that the EJ cannot be criticised for failing to address of his own volition.

69. As I have already mentioned, Ms Stanley also submitted that the ET's judgment should be upheld on different grounds (para 9 above). As regards the second of these points, Ms Stanley submitted that under her

contract with R4, R4 had no obligation to offer the claimant any minimum number of assignments and the claimant had no entitlement to be paid outside of the periods when she was undertaking particular assignments. Even if the terminology of "suspension" had been used, the suspension of one of R1's employees was a qualitatively different management action to the "suspension" of the claimant. R1 had a contractual obligation to pay its employees an annual salary in monthly instalments unless and until their contract of employment was terminated. In that context, a reference to an employee being "suspended" is a reference to R1 preventing that individual from attending work notwithstanding the ongoing obligation on the part of R1 to offer work and to pay that employee pursuant to the terms of their contract of employment. By contrast, there was no continuing obligation to offer work or to pay the claimant on the part of either R1 or R4. In short, the claimant was not subject to a management action which excluded her from the workplace notwithstanding an ongoing entitlement to be offered work and to be paid for that work; the claimant was simply not permitted to book further shifts.

70. Mr Wilding adopted Ms Stanley's submissions in so far as they were relevant to the position of R4. He emphasised that the EJ's conclusion as to the termination of the assignment was a question of fact, which it was open to him to make and which was reflective of the contract between the claimant and R4. He said that the contract between R4 and the claimant was not terminated and she had been entitled to take up assignments from other clients, but this claim was solely about the ending of the assignment between the claimant and R1. Accordingly, and in specific response to Ground 8, the agreement between the claimant and R4 was irrelevant to the question that the ET was required to answer. Moreover, there was nothing to indicate that the EJ had failed to take account of all relevant material.

Discussion and conclusions

The preliminary objection to the Agency Relationship contention

71. As I have indicated, Ms Stanley submitted that it was not open to Ms Ling to pursue an appeal that was centred on the proposition that, for the purposes of the **AWR**, an Agency Relationship subsisted between the claimant and R1 even if her particular assignment had been terminated, as this was not the way that the case had been put before the ET.

72. I appreciate that the general position is that a party will not be permitted to raise issues of law on appeal that were not part of the submissions made to the ET: **Jones v Governing Body of Burdett Coutts**

School [1999] ICR 38 CA. However, I exercise my discretion to permit the Agency Relationship contention to be pursued in this appeal for the following cumulative reasons:

i) The issue raised is essentially a legal point. Ms Ling does not suggest that any additional factual material or factual findings were required in order to determine it. She relies upon what she submits is the correct construction of regulations 5 – 8 **AWR**;

ii) The respondents have had sufficient notice of the point and were able to respond to it fully;

iii) HHJ James Tayler permitted the appeal to proceed at the rule 3(10) hearing in circumstances where it is apparent that the Agency Relationship contention was a key part of Ms Ling's submissions and lay at the heart of her amended grounds of appeal; and

iv) The claimant was unrepresented below.

The Agency Relationship contention

73. As I have indicated earlier, Ms Ling does not positively challenge the ET's finding that the claimant's particular assignment with R1 was terminated at 2.30am on 10 February 2019 (para 8 above). She was right not to do so. Not only was this a finding that was open to the EJ to make, it was plainly a correct finding. The claimant booked her work with R1 on an individual shift by shift basis (para 11 above). On the EJ's unassailable factual findings, she was told to end her shift and go home part of the way through the relevant shift, her booked shift for the next night was cancelled by R1 and she was never told that she was being suspended. Furthermore, when I put the point to Ms Ling during submissions, she accepted that if the claimant had undertaken a further shift with R1 in the future, this would have been a new assignment.

74. Accordingly, I approach matters on the basis that the claimant's assignment with R1 was terminated by R1 at 2.30am on 10 February 2019, but the question for me is whether, as Ms Ling submits, the claimant was entitled to payment during the ensuing period of investigation ("suspension pay") under regulation 5 **AWR**, pursuant to an overarching Agency Relationship that extended beyond the particular assignment and was suspended during the material period.

75. For the reasons that I explain in the paragraphs that follow, I reject Ms Ling's submission that the provisions of the **AWR** gave rise to an overarching Agency Relationship between the claimant and R1 that extended beyond the termination of her assignment with R1 and was such as could give rise to an entitlement to suspension pay.

76. Firstly, as Ms Ling fairly accepted, there are no earlier authorities that she can refer to that support her argument, albeit an equivalent contention does not appear to have been raised previously.

77. Secondly, there appears to me to be considerable force in Ms Stanley's submission that the entitlements conferred by regulation 5 concern the kinds of rights that are applicable during the period of an assignment, when the agency worker is working for the hirer, rather than, for example, a broader right not to be treated less favourably than the hirer's employees/workers. The regulation 5(1) entitlement is to the "*same basic working and employment conditions*" as the agency worker would be entitled to if they had been directly recruited by the hirer. In turn, regulation 5(2) provides that the "*basic working and employment conditions*" are the "*relevant terms and conditions that are ordinarily included*" in the contracts of the hirer's employees or workers. However, the "*relevant terms and conditions*" are then confined by regulation 6(1) (para 44 above). Plainly, terms and conditions relating to the duration of working time, night work and rest periods can only be of relevance when an assignment is being undertaken. Whilst Ms Ling emphasised *"(e) annual leave*", the leave would be accrued during the course of an assignment.

78. That the entitlements in regulation 5 are focused on times when the agency worker is actually supplied to work for the hirer is reinforced by the terms in which a "*comparable employee*" is defined in regulation 5(4). It requires that at the time "*when the breach of paragraph (1) is alleged to take place*", both the employee and the agency worker are "*working for and under the supervision and direction of the hirer*" and "*engaged in the same or broadly similar work*".

79. Additionally, as Ms Stanley pointed out, if Ms Ling is correct, it is hard to see how the scheme of regulations 5 - 8 could operate in circumstances where an agency worker is regularly supplied to a number of different hirers and would, on her analysis, have overarching Agency Relationships with each of these hirers between their assignments.

80. Thirdly, regulation 3(1) defines an "agency worker" in terms which echo the definition of an "assignment" in regulation 2. Pursuant to regulation 3(1)(a), an "agency worker" is someone who is supplied by a TWA "*to work temporarily for and under the supervision and direction of a hirer*"; and an "assignment" is a period of time "*during which an agency worker is supplied*" by one or more TWAs to a hirer "*to work temporarily for and under the supervision and direction of the hirer*". The use of the same terminology must have been deliberate. Thus, the scheme of the **AWR** is to focus upon the entitlements of an individual when they are working as an "agency worker". As Ms Stanley put it: "*there is no need for there to be a legally*

significant relationship [between the agency worker and the hirer] *outside of assignments, regulation 3(1)(a) encapsulates everything that is needed to make the system run*".

81. Whilst the central issue in the appeal was a different one, namely whether the agency worker was supplied "temporarily" to work for the hirer, rather than on a permanent basis, I consider that some support for the analysis that I have just set out is afforded by HHJ Auerbach's judgment in **Angard Staffing Solutions Ltd v Kocur** [2020] ICR 1541 ("**Angard No.2**"). In that case the claimants were employed by the first respondent TWA, who supplied staff exclusively to the second respondent, the Royal Mail Group Ltd. The lead claimant's terms of employment stated that he was seconded to the second respondent during any agreed period of engagement to carry out sorting mail and parcels, as requested by the second respondent. On average he worked two shifts per week, but there was no guarantee of work. The claimants brought ET claims relying on regulation 5 **AWR**, claiming an entitlement to the same terms and conditions of comparable workers employed directly by Royal Mail. The ET found that the lead claimant's work with the hirer was time limited rather than open-ended, with each engagement being for a finite period, so that he was supplied by the agency over a four-year period to work "temporarily" for the hirer. HHJ Auerbach dismissed the respondents' appeal, emphasising that the words "*supplied…to work temporarily for and under the supervision and direction of a hirer*" in regulation 3(1)(a) directed attention to the basis on which the worker was actually placed, or directed, to work for a hirer, and required a finding as to whether the supply was made on the basis that the worker would continue to work for the hirer indefinitely or on the basis that it would cease at the end of a fixed period (paras 45 – 47 and 65). He concluded that the ET was right to find that on each occasion the lead claimant was supplied on a time limited basis and that this was not affected by the frequency or number of such assignments or the fact that they continued over a number of years (para 65). The analysis in **Angard No.2** as to the correct approach to "temporarily" in regulation 3(1)(a) was recently endorsed in **Ryanair DAC v Lutz** [2023] EAT 146 (paras 116 – 120).

82. It is of note that the question whether the "temporarily" element of the regulation 3(1)(a) criteria is present (and, in turn, whether the regulation 5 entitlements arise) is focused upon the nature of the particular assignment with the hirer, rather than on the extent of an overarching relationship said to continue between assignments. However, the significance of **Angard No.2** goes further, in light of the EAT's consideration of ground (b) of the respondent's appeal in that case, which was that the ET had erred by "*confusing whether the nature of each of Mr Kocur's assignments was temporary with whether the nature of the overall working*

relationship he had with Angard was temporary. The nature of an assignment is not determinative of the regulation 3 issue" (para 16). This submission was developed orally, counsel for the respondents submitting that there was nothing in regulation 3 to indicate that "*the question of whether work is to be regarded as temporary was to be determined by looking at the nature of the particular individual assignments*" (para 22). Counsel for Mr Kocur disputed that contention, amongst other points, submitting that the concepts of "supply" and "assignments" were synonymous (paras 32 and 41).

83. In rejecting the respondents' submission, HHJ Auerbach explained the position as follows:

> "45. The natural meaning of the words of regulation 3(1)(a) is that it directs attention to the basis on which the worker is actually placed, designated, directed or sent to go and do work for a hirer, on one or more specific occasions. In common parlance, it refers to the basis on which the worker is to work pursuant to a particular assignment or engagement, on a particular occasion. That is the nature meaning of 'supplied' and particularly of being 'supplied…to work temporarily' (my italics for and under the supervision of the hirer).
>
> 46. The focus of the tribunal's inquiry should therefore be on the basis on which the worker is supplied to work, on each such occasion…
>
> 47. So 'supply' is the word Parliament has chosen to describe the act of the agency designating or sending the worker to the work, job or task in question. Two common parlance nouns to describe the work, job, or task itself are 'assignment' or 'engagement'. For the purposes of the qualifying period provisions Parliament needed to adopt a word to describe the period or duration of the work which the worker was supplied to do, and in regulation 2 it adopted the word 'assignment' to refer to that. This does not contrast with the language of regulation 3(1)(a). Rather, it chimes with it – in fact as [counsel] pointed out, building on it by merely adding the reference to the time period, and the definitional term.
>
> 65. …The tribunal was right to focus on the nature of each assignment; and, as I have explained, the regulation 2 definition of 'assignment' works in harmony with the regulation 3 definition of 'agency worker' and the tribunal did not err by drawing upon it." (Underlining added for emphasis.)

84. Fourthly, I accept that the terms of Article 5 **AWD** inform the interpretation of the **AWR** provisions. Article 5 states that the entitlement to equivalent basic working and employment conditions "shall be, for the duration of their assignment to a user undertaking" (para 35 above; emphasis added). Ms Ling sought to draw support from the fact that the underlined phrase does not appear in regulation 5 **AWR** and that domestic provisions may go further than the **AWD** in the level of protection provided (para 36 above). However, for the reasons that I have identified at paras 77 – 83 above, it was unnecessary for Parliament to include this wording in regulation 5 and therefore I do not consider that its absence supports Ms Ling's position. By contrast, regulation 13 **AWR** does provide in terms that the "*right to be informed by the hirer of any relevant vacant posts with the hirer, to give that agency worker the same opportunity as a comparable worker to find permanent employment with the hirer*" only applies *"during an assignment*". The presence of this clarification

or caveat is explicable by the fact that, absent its inclusion, the nature of a right to information might be thought to be a broad one indicating a span of entitlement that was not confined to periods when the agency worker was supplied to the hirer (in contrast to the regulation 5 and 6 rights).

85. Fifthly, absent a position where the regulation 5 rights relate to the period of an agency worker's assignment and are in fact attributable to a broader, umbrella Agency Relationship, it is hard to see how and when the entitlements come to an end. Ms Ling submitted that the answer lay in regulations 7 and 8, but I do not accept that it does. Regulation 7 deals with the initial 12-week qualifying period that applies (which, for obvious reasons, may be comprised of one or more than one assignment). Regulation 8 provides that once the qualifying period has been completed, the rights conferred by regulation 5 "*shall apply and continue to apply*" unless the agency worker starts a "*new role*" with the hirer (as defined by regulation 7(3)) or there is a break between assignments or during an assignment that is longer than the six week period referred to in regulation 7(8). Accordingly, regulation 8 addresses the situations where the agency worker has to go back to square one and start their 12-week qualifying period again in order to acquire the regulation 5 rights and can no longer rely on an earlier 12-week qualifying period. It does not say or suggest that an individual can continue to rely upon the entitlements referred to in regulations 5 and 6 during a period when they are not assigned to work for the hirer provided the situations identified in regulation 8(a) and (b) do not apply, a contention that was key to Ms Ling's argument. Such an interpretation of regulation 8 would make no sense; it would apparently mean that in all situations other than those specified in regulation 8(a) and (b), the overarching Agency Relationship and the regulation 5 and 6 entitlements would continue, even, where for example, a hirer had told the agency worker in the plainest of terms that their working relationship was at an end. Ms Ling was not able to suggest a convincing answer to this point when I put it to her.

86. Accordingly, I do not consider that there was an overarching Agency Relationship in this instance which continued after the termination of the claimant's assignment with R1. In turn, it follows that the claimant was not thereafter suspended by R1, as there was no ongoing relationship to suspend and, she had no ongoing relationship with R1 for the purposes of the regulation 5 and 6 rights that she relies upon.

87. For the avoidance of doubt, I accept that if, (contrary to my conclusions), Ms Ling was correct about the existence of an overarching Agency Relationship between the claimant and R1 and that there was a suspension of that relationship, it might not amount to a "break" within the meaning of regulation 8(b). I only mention this because Ms Ling put some emphasis on this point. However, this does not arise in light of the

conclusions that I have already explained.

88. Sixthly, I do not accept that Ms Ling's interpretation is required in order to protect agency workers and reflect the purpose and policy behind the **AWD** and the **AWR**. As Green LJ explained in **Angard No.3**, the **AWD** does not seek to give priority to one interest over another (para 39 above).

89. Having addressed and rejected Ms Ling's central submission, I turn to the individual grounds of appeal, which, in light of that conclusion, I can address relatively briefly.

The grounds of appeal

90. Grounds 1 and 2 are predicated on the basis that there was an Agency Relationship which continued, or which was capable of continuing, after the termination of the claimant's assignment with R1, and which the EJ failed to address. As I have rejected that Agency Relationship submission, it follows that the EJ did not err in law in treating the termination of the assignment as determinative of the claimant's case that she was suspended and entitled to suspension pay pursuant to regulations 5 and 6 **AWR**.

91. I have already explained that Ms Ling does not positively challenge the finding that the assignment was terminated (para 8). In so far as it was, nonetheless, suggested that the EJ did not apply an objective test to the question of its termination, I do not consider that his reasoning indicates this. His references to the way that the claimant and Ms Sanders understood the situation were by way of supporting his overall conclusion.

92. Ground 3 is also predicated on Ms Ling's unsuccessful Agency Relationship submission. Furthermore, the fact that the claimant's shifts were booked on an individual shift by shift basis, rather than her having an assignment that comprised a number of shifts booked together as a unit, was plainly material to the question of whether her assignment was at an end when she was sent home at 2.30am on 10 February 2019. I do not read the EJ's reasoning as treating this factor as determinative. It was relevant, and the amount of weight to be given to it was a matter for him.

93. I also reject Grounds 4 – 6 and 8 of the grounds of appeal. Again, they are predicated on the basis of an Agency Relationship existing over and above the particular assignment. More specifically, it is apparent from his reasoning that, contrary to the assertion in Ground 5, the EJ did have regard to communications between the parties. At para 25 he made a finding that the claimant was never told that she was being suspended and that she was told to end her shift and go home at 2.30am on 10 February 2019 (para 27 above). It was open to him to reject the account that the claimant had given as to what she had been told by Mr Casson that was

set out in her particulars of claim (para 16 above). I note for completeness that I have not been provided with any details as to what she said on this topic when she gave her evidence before the EJ. As regards Ground 6, in para 25 of his reasoning, the EJ referred explicitly to the 11 February 2019 email from Ms Salter to R4 (para 27 above). It is also evident from this passage that he took account of the evidence given by Ms Sanders of R4 as to the communications. Grounds 5 and 6 are really a complaint about the weight that the EJ attached to the communications or to particular aspects of them and/or an expression of disagreement with his conclusion. However, his assessment of the facts was a matter for him and perversity is not alleged here (as opposed to under Ground 9). In so far as Ms Ling submitted that additional material should have been taken into account, such as the "*Temporary Staffing – Complaints Form*", which was not referred to expressly by the EJ, that in itself provides no basis for inferring that it was not considered (para 29 above). Furthermore, the EJ specifically indicated that he had had regard to all the evidence, not simply the matters referred to in his reasoning (paras 26 above).

94. In any event, the contents of the complaints form and the 11 February 2019 email did not necessarily undermine the respondents' cases; stating that the claimant would not be booked for further shifts for the foreseeable future until an investigation had taken place, left open the possibility of future shifts with R1, but was not inconsistent with the termination of the existing relationship at that stage.

95. As regards Ground 8, it is not clear to me why the contractual documentation issued by R4 to the claimant was material to the question of whether the relationship between her and R1 had been terminated. When I asked Ms Ling about this during her submissions, she accepted that communications between the claimant and R1 and between R1 and R4 "*took primacy*". I have briefly referred to the claimant's contract with R4 at para 10 above, by way of explaining the background context and also Ms Stanley's second additional ground. However, I do not consider that there was any error of law involved in the EJ failing to refer expressly to this material in respect of the issues before him, in particular given that Ms Ling accepts that it was, at best, of secondary significance.

96. It is apparent from the terms of para 25 of his reasons, that the claimant had given a specific explanation to the EJ as to why she had said in her ET1 and particulars of claim that there had been "wrongful termination" of her assignment and why she had given the date of 10 February 2019 in respect of this. Having heard her evidence and observed her, the EJ was entitled to reject that explanation for the reasons he explained in his para 25. Having done so, it is unsurprising that he mentioned it specifically. It does not follow that he failed to

consider the other passages in the particulars of claim where the claimant had referred to being suspended and to the fact that she was making a claim for suspension pay (paras 15 - 17 above). In any event, it is apparent from his reasoning that this was a subsidiary point, secondary to his findings as to what was said on 10 and 11 February 2019 and his reference to the contents of the shift records. Accordingly, I reject the Ground 9 contention that the EJ's finding in para 25 was perverse because he treated as probative what the claimant had said about termination in her ET1.

97. The EJ's reasoning was relatively compressed. However, as Ms Stanley submitted, it should be seen in a context where, on the basis of the submissions made to him, the central issue was simply whether the assignment had been terminated or not. This was the way that EJ Cookson had framed the issue at para 52 of her decision (para 21 above) and no submission was made to the EJ to the contrary, as shown by his articulation of the parties' respective cases at his paras 13 – 14 (para 22 above). Another relevant point of context is that the EJ was understandably anxious not to make any findings that could embarrass the tribunal at the substantive hearing of the claimant's other claims (para 26 above). Having identified the matters for him to resolve, the EJ then explained why he found that the assignment terminated at 2.30am on 10 February 2019 and that, in consequence, the claimant's claim for suspension pay under the **AWR** had no reasonable prospects of success. The parties knew why they had won or lost. Whilst it would have been helpful for the EJ to have referred to the material provisions of the **AWR**; the failure to do so does not give rise to a viable appeal in circumstances where his reasoning discloses no misdirection as to the legal test or any related error of law. I therefore reject Ground 10; the EJ's reasoning was adequate.

R1's additional grounds

98. As Ms Stanley clarified during her oral submissions, her first additional ground only arose if Ms Ling was positively challenging the EJ's finding as to the termination of the assignment, which proved not to be the case.

99. As I have rejected the nine grounds of appeal, it is unnecessary for me to determine Ms Stanley's second additional ground. Indeed, I am reluctant to do so in circumstances where I may not have the full evidential picture as to the relationship between the claimant and R4 and the EJ did not make findings of fact in relation to this (as he did not need to do so to dispose of the assignment issue). In the circumstances I will simply observe that there appears to me to be force in Ms Stanley's submission (summarised at para 69 above),

particularly in light of the reasoning in **Agbeze** (paras 51 - 52 above).

Outcome

100. I have rejected each of the grounds of appeal for the reasons that I have identified. Accordingly, the appeal is dismissed.