EMPLOYMENT TRIBUNALS

Claimant: Glen Richards

Respondents: (1) London Borough of Enfield
(2) Source 24/7 Recruitment Limited

Heard at: Bury St Edmunds (CVP) **On:** 28th February 2024 and 12th March 2024

Before: Employment Judge R Wood; Mr B McSweeney; Mr C Surrey

Appearances

For the Claimant: Mrs Richards (claimant wife)
For the First Respondent: Mr Menzies (Counsel)
For the Second Respondent: Miss Leadbetter (Counsel)

RESERVED JUDGMENT

1. The first respondent breached regulation 5 of the Agency Worker Regulations 2010 in respect of the claimant.

2. The second respondent breached regulation 5 of the Agency Worker Regulations 2010 in respect of the claimant.

3 The first respondent is to pay to the claimant the sum of £417.96 to the claimant in respect of it's breach under regulation 5 of AWR. This is a gross figure. The first respondent will be liable for any tax due on this figure.

4. The second respondent is to pay to the claimant the sum of £417.96 to the claimant in respect of it's breach under regulation 5 of AWR. This is a gross figure. The second respondent will be liable for any tax due on this figure.

5. The claim against the first respondent under regulation 17(2) of AWR is dismissed.

6. The claim against the second respondent under regulation 17(2) of AWR is dismissed.

DECISION

Claims and Issues

1. Page numbering referred to in square brackets in these reasons are to pages in the bundle, unless otherwise stated.

2. This is a claim brought under the Agency Worker Regulations 2010. In or around June 2021, the claimant was engaged by the second respondent, Source 24/7 Recruitment Limited (hereinafter referred to as "24/7") to carry out duties as a waste loader on behalf of the first respondent, London Borough of Enfield (hereinafter referred to as "the Council"). This was a standard 'tripartite' agency relationship between the parties in the case: 24/7 as recruitment agency, providing the claimant's services to their client, the council.

3. The claimant registered with 24/7 on 21st June 2021. He immediately began to work at the council as a refuse loader. In summary, there were disputes and alleged discrepancies in respect of the claimant's pay throughout his engagement with the council, which he says amounts to a breach go regulation 5 of AWR. In particular, it is alleged that the claimant was not paid the same as refuse loaders employed directly by the council. It is also alleged that the claimant was not paid a Christmas bonus which directly employed staff received.

4. On 9th June 2022, the council indicated that it would not offer him any further work. The claimant alleges that this was the result of him seeking to asset his rights as an agent worker, which he submits is a breach of regulation 17(2) of AWR.

5. The respondents resist the claim. The council states that the claimant was not doing the same work as a directly employed loader as direct employees had some specific public facing responsibilities which agency staff were not required to perform. In any event, 24/7 argue that they were not aware of any disparity in pay and had done all that it reasonably could have done to ensure that the claimant's pay was complaint with AWR. The council denied that there as a Christmas bonus to any staff.

6. As for the alleged breach of regulation 17(2), the council assert that the decision not to offer the claimant further work was taken due to issues relating to misconduct. 24/7 submit that this was the decision of the council, and that 24/7 continued to attempt to find the claimant further work with other clients.

Procedure, Documents and Evidence Heard

7. The Hearing took place on 28 February and 12 March 2024. The claim was heard via remote CVP hearing. We first of all heard testimony from the claimant, Glen Richards. We also heard from the respondents' witnesses:

Sue Davis (the council's agency workforce manager); Lambros Stefanou (the council's waste service supervisor); Antonia Austin (24/7's client services manager); and Nick Weekly (head of client services for 24/7). Each of the aforesaid witnesses adopted their witness statements and confirmed that the contents were true. We also had an agreed bundle of documents which comprises 345 pages. We also had the benefit of helpful written submissions from all three parties, in addition to their oral submissions.

8. In coming to our decision, the panel had regard to all of the written and oral evidence submitted, even if a particular aspect of it is not mentioned expressly within the decision itself.

Legal Framework

9. The relevant legislation is to be found in the Agency Worker Regulations 2010 ("AWR"). respect of the allegations of direct discrimination is contained in the Equality Act 2010 ("the Act").

10. Regulation 5(1) of AWR reads as follows:

> *"**5.**—(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."*

11. Regulation 17(2) of AWR states:

> *"17(2) An agency worker has the right not to be subjected to any detriment by, or as a result of, any act, or any deliberate failure to act, of a temporary work agency or the hirer, done on a ground specified in paragraph (3).*
>
> *(3) The reasons or, as the case may be, grounds are—*
>
> *(a)that the agency worker—*
>
> *(i) brought proceedings under these Regulations;*

(ii) gave evidence or information in connection with such proceedings brought by any agency worker;

(iii) made a request under regulation 16 for a written statement;

(iv) otherwise did anything under these Regulations in relation to a temporary work agency, hirer, or any other person;

(v) alleged that a temporary work agency or hirer has breached these Regulations;

(vi) refused (or proposed to refuse) to forgo a right conferred by these Regulations; or

(b) that the hirer or a temporary work agency believes or suspects that the agency worker has done or intends to do any of the things mentioned in sub-paragraph (a).”

12. In the case of pay, which is what we are concerned with here, an agency worker is given the right to be paid, on each pay-day, what the comparator would be paid. mere suspicion on the part of an agency worker that his or her rights under the AWR have been violated will probably not be enough to found a complaint under the Regulations. As a result, regulation 16 gives agency workers the right to request information in writing from the agency or hirer relating to their duties.

13. Any information provided under regulation 16 is admissible as evidence in any proceedings under the AWR. Furthermore, a tribunal can draw any inference it considers just and equitable to draw (including an inference that the agency or hirer has infringed the right in question) where there has been a deliberate failure to provide information, or where any written statement supplied is evasive or equivocal.

14. Regulation 14(1) and (2) provides that both the hirer and agency shall be responsible for any breach of regulation 5 to the extent that it is responsible for the infringement. Similar principles apply to regulation 17(2) (regulation 14(7)).

15. However, regulation 14(3) provides a defence for the temporary worker agency where it can establish that: it has obtained, or has taken reasonable steps to obtain, relevant information from the hirer about the basic working and employment conditions in force at the hirer’s business and the relevant terms and conditions of comparable employees; where it has received this information, it has acted reasonably in determining the basic working and employment conditions to which the agency worker would be entitled at the end of the qualifying period; and where it is responsible for applying those basic working and employment conditions to the agency worker, it has ensured that the agency worker has been treated accordingly.

16. The burden of proof is upon the claimant to establish that a breach of AWR has occurred. He must do so on a balance of probabilities.

Findings

17. Based on the evidence that we heard and read, the Employment Tribunal made the following primary findings of fact relevant to the issues that we had to determine.

18. The claimant registered with 24/7 on 21st June 2021. The relevant form appears at page 123 of the bundle [123]. It doesn't contain anything of particular relevance to this case. In the bundle, it is followed by a puzzling document which is entitled 'Contract for Services' and is dated 1 July 2021 [128]. On it's face, it is an agreement between the claimant and a company called Bazuliv Limited (who are not a party to the case). We were told by Miss Austin of 24/7 that Bazuliv Ltd was 24/7's pay roll provider. She stated that Bazuliv are the employers and that they issue agency workers with the contracts. She conceded that it was very confusing but that it was the consequence of them outsourcing their pay roll function.

19. We too found it confusing. It is not at all clear to us what the contractual significance of this document was in terms of the tripartite relationship already described. However, we thought it relevant not least because of the references it made to the claimant's purported employment status and entitlements as an agency member of staff. At various points, the agreement states that the claimant is to be engaged on a self-employed basis (para.1.9). It further suggests that the claimant's work does not meet the criteria for an agency worker as defined by the Agency Worker Regulations ("AWR") (para.1.10). It also asserts that he is not entitled to benefits such as holiday pay (para.1.11). In our judgment, this document is potentially misleading as to a number of salient issues in this case. We were unable to obtain any satisfactory explanation from 24/7 as to its content.

20. We are satisfied that this document had a confusing impact on the claimant at the time because he sent an email to 24/7 on 17 January 2022, quoting from the document [145] and querying whether it was inconsistent with his statutory rights, whether he was self employed, and whether he was entitled to holiday pay. It was our view that he never received a satisfactory answer to his query about this agreement.

21. The claimant's role as waste loader involved accompanying a refuse collector on domestic refuse collections around the streets of Enfield, emptying the various types of waste bin. A crew tended to be made up of two loaders and a driver. These crews were typically made up of a mixture of agency crew and permanent staff i.e. those who had been employed directly by the council. It was clear that there were significant numbers of agency staff doing the same job as the claimant. There were also many permanent staff occupying the same role.

22. We were told the information relating to pay structure for specific council roles is fed into a procurement system referred to as 'Matrix'. So far as we could glean, someone within the council would input the pay rates for an agency loader and a permanent loader. This is then accessible to any agency filling these roles.

23. It was difficult to work out what checks were carried out when pooling this pay information, and making sure it did not fall foul of AWR. We were not shown a written policy for the council or 24/7about this. We were told that matrix automatically updated the pay rates at the 12 week point of service, so as to achieve pay parity between agency and permanent staff. It did not appear to have operated properly in the claimant's case, because his pay did not increase at that stage.

24. This brings us to an important issue in the case. We were told that until matters changed in November 2022, loaders who were permanent staff were required to perform additional 'public facing' duties which agency staff with ostensibly the same job title did not. We were told that these extra duties might include dealing with queries (such as requests for a new bin) or complaints from customers during the rounds. These encounters would need to be logged and dealt with. Miss Davies of the council told us that agency staff were not expected to deal with these types of issues.

25. We were told that this distinction was significant in terms of the council's pay structure. It meant that permanent loaders were awarded scale 3 pay, whereas agency loaders were entitled to pay on scale 2. Depending on where the respective members of staff was on the two pay scales, this could represent a very substantial difference in the hourly rate of pay. There has been a lack of documentary evidence on the detail of the pay structure, but doing the best we can, scale 2 appeared to vary between £11.41 and 11.82 per hour at the relevant time; scale 3 we are told was between £12.03 and £12.24.

26. In November 2022, and after the claimant had ceased working for it, the council engaged in a review of the appropriate rates of pay for its agency staff. In part, we find that this was the result of the issues raised by the claimant. It was a review of the loader role, as well as others. It was a process carried out by Miss Davies of the council, together with representatives of HR, and maybe staff based on site. The outcome was that, in terms of the loader position at least, that the distinction made in terms of the duties, was unsustainable. By this, we understood that the council accepted that the distinction i.e. public facing responsibilities, did not reflect the realities on the ground.

27. Importantly, this led to a review of the claimant's pay, along with other loaders who had been employed through agencies. In the claimant's case, the outcome was that he was reimbursed the difference between his pay and a directly employed loaders pay for the entirety of his service with the council in 2021-2022. This took place in or about January 2023.

28. We accept Miss Davies' testimony as to this review. We were concerned about the lack of contemporaneous documentary evidence relating to the process. However, after consideration we were prepared to accept what Miss Davies told us about it. In doing so, we noted that her evidence on this issue was not really challenged by the claimant.

29. In late 2021 and early 2022, the claimant began to raise queries with, in turn, the council and then 24/7, concerning perceived shortfalls in relation both to fellow agency loaders, and permanent loaders.

30. On 24 January 2022 (if not earlier) we find that it should have been clear to 24/7 that the claimant was querying his rights as an agency worker having reached 12 weeks of service. In particular, he raised the question of holiday pay. But in our view, the claimant's requests were clearly broader in scope and should have been dealt with as such by the respondents. The claimant was expressly comparing his pay with that of a permanent council loader [148][142].

31. In May 2022, the claimant's queries were centred on his hourly rate of pay, which he sought to compare to other agency loaders, and permanent loaders, who it appeared to him are being paid at a higher rate [150]. We note that notwithstanding he was in fact being paid a reduced hourly rate compared to other agency staff, and to permanent loaders, there was a reluctance on the part of 24/7 to address the issue. Anomalies were attributed to length of service [149].

32. On 7 June 2022, the claimant emailed Miss Davies of the council to state "*Many Thanks for sorting this for me. However can you please confirm if I am on the same rate/holiday allowance as a direct Enfield employee as I believe that is what I'm entitled to according to employment law after 12 weeks of service*".

33. Later the same day, Miss Davies responded by saying "*Yes I can confirm your pay and annual leave is the same as an employee on the same grade.*". In our view, this was not an answer to the claimant's query which was not limited to those on scale 2 but included 'direct employees'.

34. On the same day, the claimant put the question again, in our view trying to make his request more specific: "*I was told the direct employees on my same grade get paid £12.98 per hour and have a holiday allowance of 24 days excluding bank holidays. The direct workers also get double time and 1 day or triple pay for bank holidays. However as mentioned already my current rate is £11.82 and my holiday allowance is 20 days excluding bank holidays and I get double pay for bank holidays so doesn't seem like the same. Can you explain further.*".

35. Again Miss Davies answered very promptly. She stated "*Your pay grade is scale 2 which is £11.82 per hour. Your annual leave entitlement is 33 days including bank holidays. I would suggest you need to query your holiday*

with your agency.". Again, it is our judgment that Miss Davies again failed to deal with the query about AWR in the context of loaders.

36. In the meantime, on 3rd June 2022, the claimant was part of a crew which was running late and decided to 'drop roads', which was a means of shortening the round. On 6th June 2022, Mr Sheppard (the claimant's line manager) had a heated discussion with the claimant whereby he made clear that he was very unhappy about the decision to drop roads.

37. On 9th June 2022, the claimant was contacted and told he would not be offered further work with the council. We note that in the days that followed, the claimant made repeated requests of 24/7 for an explanation as why he had not been booked. No adequate explanation was forthcoming save to state that it was the client's decision whether to engage staff, and not the agency.

38. The claimant's wages/holiday pay queries as compared to other scale 2 loaders were not resolved until the very end of June 2022. In short, the respondents accepted that the claimant was 'entitled' to £11.82 per hour on scale 2, and was also entitled to 33 days holiday per year. This was the appropriate rate of pay for a scale 2 loader.

39. It remains unclear to us how these errors could have occurred, or why they were not identified and resolved much more quickly. We were told by Miss Davies that holiday pay was the responsibility of 24/7, and that it had been paid by the council a sum which reflected a holiday entitlement of 33 days. This, she suggested, should have been clear on 'Matrix'. As for the hourly pay rate, we were surprised to find that Miss Davies adopted a relaxed view about the long running error. She didn't explain why the underpayment had occurred but made clear it it was a common problem. Miss Davies stated that mostly staff were not troubled by underpayment followed by backdated lumps sums. She said many preferred it. We do not accept that it is, in general terms, acceptable to workers to to be underpaid for long periods of time. Neither should it be acceptable to a responsible employer. The fact is that the claimant was not once paid the proper rate for his work, even on scale 2, until he stopped working for the council. This is an unattractive situation.

40. On 29th June 2022, the claimant wrote to 24/7 explaining that he suspected he had been discriminated against because he had raised the question of his legal rights under the AWR's, and that it was this which had resulted in the withdrawal of work from the claimant by the council. In response, 24/7 undertook to seek an explanation from the council but in the meantime agreed to offer the claimant other work [153].

41. 24/7 sent a letter to the claimant dated 29th July 2022 [183], which set out an explanation, as it saw, for the council's decision to cease to offer him work. It noted 'site requirement for staff; poor time keeping; and misdirection of drivers'. It further suggested that there had been no discriminatory motivation for no longer booking the claimant. In essence it was suggested

that the failure to pay annual leave had been 24/7's error. Moreover that pay rates were processed through the matrix procurement system and that this would not involve the bookings managers at Enfield council.

42. The Tribunal has not seen any contemporaneous supporting evidence of these alleged behavioural issues. Mr Lambros explained that there was no note of any performance or disciplinary related processes in respect of the claimant. There was no note of any of the discussions/meetings which were said to have taken place between the claimant and Mr Sheppard/Mr Lambros which had resulted in the withdrawal of work. There was no record of lateness, or of the complaints made about the claimant 'misdirecting drivers'. It is perhaps trite to say that this level of failure to keep records about such issues is inconsistent with ACAS guidance, albeit we accept that the guidance does not directly apply to agency workers. We asked Mr Lambros about this. It seemed to be his view that as an agency worker, he did not receive the same kind of process in this regard as a permanent member of staff might expect.

43. In July, Mr Weekly of 24/7 stated that it had had difficulties contacting the claimant because it appeared he had changed his mobile telephone number. The claimant denied this. However, it was apparent from an email dated 29 July 2022 that the claimant had indeed recently acquired a 'new number' [182]. That been said, he appeared not to have changed his email address, and we are not clear at all why there should have been a problem with communicating offers of work in July. We note that there were several emails in July, which were either to or from the claimant, and which had been cc'd to Mr Weekly.

44. In early August 2022, 24/7 offered the claimant some work. One position was not available when the claimant arrived. He was later given work for Broxbourne Council by 24/7, and was offered a permanent post from 1st November 202 [184]. However, this did not come to fruition because Broxbourne Council revoked the offer on or about 23 October 2022 due to what is suggested were behavioural issues [185]. The claimant discusses the nature of the these issues in an email dated 26 October 2022 [192], which are set out by Broxbourne Council at page 203. We accept that there was some dispute as to whether the claimant had been prepared to wear certain work clothing, and that he refused to carry out non-loading work. This resulted in the claimant walking off site.

45. It appears that Nick Weekly of 24/7 arranged for an extension of the claimant's probationary period which would have meant that the new start date for the permanent position was 1st December 2022 [190]. However, the claimant indicated that he was no longer prepared to carry out work through 24/7. We note that Broxbourne Council are not a party to this claim, and as such no criticism is made of them. We understand that the relevance of this part of the background is in relation to remedy.

46. In January 2023, the claimant agrees that he received a further sum, back dated, which represented the remaining deficit between his actual pay from

the council, and what a directly employed loader would have been paid. Notwithstanding that parity has been achieved retrospectively, the claimant says that there was nonetheless a breach of regulation 5 of AWR.

47. The claimant engaged in early conciliation with ACAS between 1st August 2022 and 12 September 2022. He lodged his claims on 17 August 2022 and 17 September 2022. There has been a rather complex history to the progress of these claims, with which we need not concern ourselves here. The parties have provided an agreed list of issues which appear in a case management order produced by Employment Judge Hawkesworth dated 5 February 2024. These provide the structure of our decision, which is based on the findings of fact we have made.

Reasons and Decision

48. We turn first to the alleged breach of regulation 5 of AWR. It is agreed that the claimant was an agency worker.

49. We find in favour of the claimant in respect of both respondents. It is apparent that there was a failure on the part of the council to pay at the correct pay scale. As already stated, permanent loaders were paid at scale 3. Agency loaders at scale 2. At the time, the disparity was justified by reason of additional public facing responsibilities taken on by direct employees. I am afraid we found this explanation to lack credibility. Firstly, it seemed to us that it did not reflect what happened in practice. We were told in clear terms that all agency loaders were on scale 2, and all directly employed loaders were scale 3. In our judgment, the distinction was to do with their employment status, and not their duties.

50. In practice, teams were made up of a combination of agency and direct employees. We were told that sometimes teams were made up of three agency staff. On 3rd June, it was the council's position that the claimant was the most senior member of the team. In such circumstances, we felt that it was likely that dealing with queries from the public was not limited to direct employees. We were told that in these circumstances, someone from the site would come out and deal with the query. We did not accept this evidence. For these reasons, the justification or the disparity in pay seem rather arbitrary.

51. In additional to these findings, were also relied on the November review, wherein the council retrospectively took the decision that there was no objective justification for the disparity between agency and direct worker's pay. Mr Menzies asked us not simply to follow this decision, but to look at the overall situation in a 'forensic' way. We have done so. However, it would be difficult to find that the disparity was justified when the council itself had come to a different conclusion only a few months later, and also decided to back date the claimant's pay to June 2021.

52. It follows that the appropriate comparable employee is a loader on scale 3, as the claimant was 'doing the same job' as a directly employed loader on

scale 3. In our view this was clear evidence of a breach of regulation 5 on the part of the hourly rate of pay by the council.

53. Further, we find against 24/7 on the basis that throughout most, if not all, of his employment for the council, the claimant was not receiving the same holiday entitlement as a permanent loader. He was receiving 28 days whereas a permanent loader was entitled to 33 days. There appeared to be no dispute between the parties in respect of this issue. We were told, which we accept, that the council were in fact making payments to 24/7 to reflect 33 days holiday entitlement, which was simply not being passed on to the claimant. This constitutes a breach of regulation 5 by 24/7.

54. The claimant agrees that, following a back-payment in January 2023, he has now received the same basic pay and holiday pay that a comparable direct employee would have been paid, but says that there was a breach of regulation 5 prior to that payment. We agree with the claimant. Notwithstanding efforts to rectify the situation by the respondents after the event, we find that both were in breach at the time when the cause of action accrued. The claimant reached 12 weeks of service in September 2021, at which point he was entitled to the same rate of pay as a directly employed loader. This did not happen in September 2021, or at any point during his service with the council. He was not fully reimbursed until January 2023.

55. On behalf of the council, Mr Menzies suggested that this wa snot the end of our considerations as a matter of law. He submitted that if there is a breach, the next issue is whether there is liability for such a breach on the part of the council. He went on (para.32 of his closing submissions):

> "Liability is not of a 'strict' nature. As far as the First Respondent is concerned the relevant part of the Regulations is Regulation 14(2) which states: (3) The hirer shall be liable for any breach of regulation 5, to the extent that it is responsible for that breach….This provision was considered by the Court of Appeal in *Amissah and others v Trainpeople.co.uk Ltd and another [2019] EWCA Civ 125 at paragraph 27* where it was stated: '*The basis of apportionment is the extent of the parties' relative "responsibility" for the breach. The term is not defined. Essentially the same language is used in section 2(1) of the Civil Liability (Contribution) Act 1978 where it well established that "responsibility" refers both to the degree to which each wrongdoer contributed to the occurrence of the breach and the degree of their relative fault, for short, causation and culpability. The present context is not the same but it is analogous; and it seems to me that the language naturally has the same meaning in regulation 14 (and to anticipate, regulation 18…)'*…Thus, it can be seen that the touchstone for liability is causation and culpability. Of course, in terms of causation, there is a nexus between the actions of the First Respondent and the outcome. However, the point here is in relation to culpability. It is submitted that the First Respondent is not culpable. If there was a breach it was because practices

> changed over a period of time and, when this was brought to the attention of those involved, changes were made and sums paid. In the absence of any statutory provision which imposes a form of strict liability, it cannot be consistent with the statutory purpose of these Regulations, to, in effect, penalise a Respondent which does the right thing."

56. With respect to Mr Menzies thoughtful and helpful submissions, we do not agree with him on this point. It is our view that regulation 14 is concerned with apportionment of responsibility. Whether a breach of regulation 5 has occurred is dictated by whether the provisions of that regulation have been complied with or not.

57. We acknowledge that in January 2023, the council reimbursed the claimant, following the review of the loader role in November 2022. But this was 18 months after the claimant has commenced working for the council. The disparity which the council eventually recognised, had been in place for at least that long, if not much longer. It is our view that the council could have done more to have identified this problem earlier. We also find that the council was sluggish in its response to the claimant's attempts to highlight the issue of pay. In particular, Miss Davis could and should have more 'curious' as to whether the claimant was right about the disparity between agency and direct loaders. As such, we find that the council both caused and was culpable for the breach. It may have done the right thing, but only when it was too late. The same applied to 24/7 in our view.

58. Applying regulation 14 to the question of apportionment of responsibility, we find that the council was 100% responsible for the breach of regulation 5 in respect of the hourly rate of pay; and that 24/7 were 100% responsible for the breach in respect of holiday pay.

59. We are also asked to consider whether the claimant was paid less by way of a £500 Christmas bonus for Christmas 2021, payable in January 2022, than a comparable 'direct' employee would have been paid? The claimant's case on this point was weak. He appeared to accept that it was based on suspicion, having talked to colleagues. We have seen no other evidence that there was a Christmas bonus paid to staff. We therefore dismissed this aspect of the claim.

60. This brings us to the claim under regulation 17(2) of AWR against both respondents. It is worth making the point that this is a very different cause of action to that brought under regulation 5. The agreed list of issues under regulation 17(2) are as follows:

> 2.1 Did the claimant assert his rights as an agency worker as follows:
>
> 2.1.1 To the first respondent: in emails starting on 7 June 2022 at page 168-169 of the hearing bundle;

2.1.2 To the second respondent: in emails starting on 14 January 2022 at page 147-148 of the hearing bundle.

2.2 Did the respondent(s) refuse the claimant work at the first respondent?

2.3 By doing so, did it subject the claimant to detriment?

2.4 If so, was it because the claimant asserted his rights as an agency worker?

61. The parties agree that the claimant did assert his rights as an agency worker as alleged in paras. 2.1.1. and 2.1.2 above. This was consistent with the evidence we read and heard. We make this finding.

62. Moreover, we find that the council did refuse the client work on or about 9 June 2022. Again, this is not disputed by the council. It is also accepted that this must amount to a detriment to the claimant in that in the following months he was sometimes out of work, and might otherwise may have worked for the council during that period and beyond.

63. However, we find that 24/7 were not a party to this refusal. In our judgment, 24/7 were simply acquiescing with the view expressed to them by their client, namely that they wee not happy with the claimant, and did not want to offer him further work. This was the evidence we read and heard on this point, both at the time, and in oral testimony to the Tribunal. It is consistent with the Tribunal's understanding of how this kind of tripartite arrangement tends to work in practice. There is clearly some pressure on an agency to comply with the express wishes of their client, if they wish to continue to place other agency staff with that employer in the future. In a sense, this approach benefits the agency and other staff.

64. It could be said that 24/7 might have been more inquisitive as to the reasons for the refusal of work. It took several works to provide the claimant with a explanation for the refusal. This might have been completed more hastily in an ideal world. However, we could see nothing sinister about 24/7's response. It accepted the explanation provided to it by the council at face value, namely that there had been conduct issues. They were plausible explanations. Indeed, as we will touch upon below, the claimant accepts that he did 'drop roads' on 3 June 2022, and did have a heated exchange with his supervisor on 6 June 2022 about that issue.

65. We therefore find that 24/7 did not refuse to offer work with the council. Indeed, they continued to offer the claimant other work for a number of months afterwards, in a way which is consistent with this type of tripartite contractual relationship. For this reason, we dismissed this aspect of the claim against 24/7.

66. The key question for us under regulation 17(2) for us is then whether the claimant was refused work by the council because the claimant asserted his rights as an agency work?

67. At first glance, the chronology of this was seems to strongly support the claimant on this issue. Having raised AWR issues on 7 June 2002, his work is withdrawn two days later. However, the evidence needs to be scrutinised more closely.

68. The council asserts that the withdrawal of work was the result of disciplinary concerns that it had about the claimant. In particular, that on 3 June 2022, he had been part of a team which had agreed to drop several roads on a round as a way of completing it more quickly. Indeed, the claimant does not dispute that this happened, or that he had a conversation with his supervisor a few days later during which the latter had been very unhappy.

69. It was our view that this would have potentially constituted serious misconduct for any employer providing a public service. It was clearly a potential disciplinary issue. It is therefore credible that it might have given rise to the decision to withdraw work.

70. Having looked at the evidence as a whole, it was our view that the claimant was, for much of the time, a conscientious worker. However, we also find that he could be problematic. He appears to have been person prone to get into conflict with those engaging him. We accept that there were two occasions when he did not attend work (in March and April 2022) and that there were others when he came to work late. These issues, together with the dropping of roads, was the reason for the withdrawal of work.

71. We note that the claimant had very similar issues, a few months later, at Broxbourne Council. This was an unrelated employer who was clearly impressed by the claimant initially, but then encountered problems later. We find that there was a pattern here when it came to the claimant's general conduct at work. This served to reinforce our view that it was perceived misconduct that prompted the withdrawal of work and not AWR related concerns.

72. In order to have established this case under regulation 17(2), the claimant would have needed to have persuaded us that there was a fairly broad conspiracy between the Miss Davis and those others concerned with pay related issues, and staff on site. The conspiracy would also have needed to extend to telling lies to the Tribunal about this issue. It was our impression of the council's witnesses we heard from that they were truthful and at times unsophisticated. It was not our impression that they were trying to mislead us. We concluded that there was a degree of dysfunction, both in the way the council communicated internally, and the way it provided information to 24/7. For instance, it seems to us highly unlikely that Miss Davis, having been contacted by the claimant raising AWR concerns, would have had the inclination or motivation to contact the

claimant's site to request or insist that they withdraw work. She did not strike us as that sort of person. Significantly, it was not really put to her on that basis by the claimant in cross examination. It was not suggested to any witnesses that they were being untruthful to the Tribunal.

73. We spent some time considering whether we could and should draw inferences from Miss Davis' failure to remind to the claimant's concerns on 7 June 2022. However, we concluded that this shortcoming was to do with the lack of prominence of AWR issues in Miss Davis' mind. Perhaps there was a lack of training and systems in place in relation to agency worker rights. Whatever the reason, we are satisfied that it was the result of dysfunction within the organisation in relation to pay structures in general terms, as well as agency worker rights. We bear in mind here that the council failed to pay the claimant the correct wage even compared to other agency workers, let alone directly employed staff.

74. Ultimately, the burden of proof is on the claimant to establish that the reason for the withdrawal of work (or at least a significant reason for it) was the claimant asserting his rights as an agency worker. In our judgment, he has failed to do this on a balance of probabilities. We therefore dismiss the claim against both respondents under regulation 17(2) of AWR.

75. We then turn to questions relating to remedy.

76. Since the claimant was reimbursed, and the disparity between agency and directly employed loaders has been corrected, we can see no purpose in making a declaration or a recommendation in this case. Of course, he is no longer engaged with the council or 24/7.

77. It follows that because the claimant has been fully reimbursed for his losses, there is no loss flowing from the breaches of regulation 5 by the respondents. Of course, any award will be subject to the minimum in regulation 18(13) of two weeks' pay unless the tribunal consider that is not just and equitable.

78. In our judgment, it remains just and equitable to award the minimum amount of two weeks pay. As we have found, both respondents were in serious error in not, at any point during the claimant's service with the council, managing to pay him the appropriate rate of pay. It was a fundamental breach of their obligations toward the claimant in our view. It was of great surprise to us that some of the witnesses still remained fairly relaxed about this failure. For this reason, we award two weeks pay to the claimant which is £417.96 x 2 = £835.92. This is a gross figure. We apportion this between the respondents on a 50/50 basis, which means that each respondent is to pay to the claimant the gross sum of £417.96.

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Employment Judge R Wood

Date: 5 April 2024

Sent to the parties on: 9 April 2024.....

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For the Tribunal Office