Neutral Citation Number: [2022] EWCA Civ 189

Case No: CA-2021-00473 (previously A2/2021/0413)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM EMPLOYMENT APPEAL TRIBUNAL
MR JUSTICE CAVANAGH AND MR P M HUNTER
UKEAT/0105/19/JOJ & UKEAT/0209/19/JOJ

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/02/2022

Before :

LORD JUSTICE BEAN
LORD JUSTICE SINGH
and
LORD JUSTICE GREEN

- -

Between :

DOMINIK KOCUR	**Appellant**
- and -	
ANGARD STAFFING SOLUTIONS LIMITED	**1st Respondent**
ROYAL MAIL GROUP LIMITED	**2nd Respondent**

- -
- -

Nathaniel Caiden (instructed by **Bindmans LLP**) for the **Appellant**
David Reade QC & Grahame Anderson (instructed by **DAC Beachcroft LLP**) for the **1st & 2nd Respondent**

Hearing date: Thursday 20th January 2022

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Approved Judgment

Lord Justice Green :

A. The issue

1. This appeal is concerned with the scope of the rights conferred on agency workers by the Agency Workers Regulations 2010, SI 2010/93 ("*the AWR*"). This implemented the Temporary Agency Workers Directive, 2008/104/EC of 19th November 2008 ("*the Directive*") into domestic law. Regulation 13(1) AWR provides that an agency worker has, during an assignment, the right to be informed by the hirer of any relevant vacant posts with the hirer. This is stated to be "*to give the agency worker the same opportunity as a comparable worker to find permanent employment with the hirer*."

2. The ET held that this express right to *receive* information extended to an implicit right to *apply* for relevant vacant posts. The EAT disagreed. It held that, properly construed in the light of the Directive, the right was only to be notified of the vacancies on the same basis as directly recruited employees coupled to a right to be given the same level of information about the vacancies as the directly-recruited employees. However, there was *no* right to apply, and be considered for, internal vacancies on the same terms as directly employed employees. The obligation was therefore satisfied if temporary agency workers were informed of the relevant vacancies, even if they were not given the opportunity to apply for them.

3. In coming to this conclusion, the EAT followed and approved of a judgment of Langstaff J in *Coles v Ministry of Defence* [2016] ICR 55 ("*Coles*"). There the Ministry of Defence placed a number of direct employees, who were at risk of redundancy, in a redeployment pool. They were then accorded priority consideration for vacancies. The claimant was an agency worker fulfilling a temporary position. His post was advertised as a permanent job on the Civil Service website which he had access to. He was not however eligible to apply for the position which was subsequently offered to a permanent employee from the redeployment pool. The EAT rejected an argument that the Directive required the Ministry to offer temporary agency workers the right to compete with employees from the redeployment pool for the post. At paragraph [51] Langstaff J held:

> "51. In summary, it is clear that the Directive provides a right to information. The right is a valuable right in itself. The purpose of the Directive is to give temporary agency workers the same chance as other workers in the undertaking of the end user to find permanent employment with that end user. It has nothing to say about the terms upon which there should be recruitment for any post. If an employer wishes to give preference to those being redeployed, perhaps to satisfy his obligations to them as his permanent employees, he is entitled to do so, and will not in doing so break any duty imposed by the Regulations or the Directive."

4. The submission of the appellant in this appeal is that Regulation 13 AWR, to be consistent with the Directive, must be construed as conferring upon an agency worker: (i) a right to be *notified* of vacancies; (ii) a right to *apply* for a vacancy; and (iii), a right to be *considered* for a vacancy. The appellant accepts, as a qualification to this, that an employer can set selection criteria such that an applicant can be sifted out if they do not

meet applicable criteria, for instance related to length of service. However, it would be unlawful for an employer to use the mere fact that the applicant is an agency worker as one such criterion.

5. The issue arising on this appeal is whether this analysis is correct. The underlying issue is as to the extent to which temporary agency workers are entitled to non-discriminatory parity of treatment in the workplace with directly employed permanent workers. I would add that it is common ground that the analysis of the issue is unaffected by the departure of the UK from the European Union.

B. The relevant facts

6. The relevant facts are not in dispute and can be taken from the judgments below and summarised shortly. The appellant was employed by Angard for the purposes of the AWR. Angard is an employment agency which is a wholly owned subsidiary of Royal Mail. It provides agency workers exclusively to Royal Mail in order to assist Royal Mail to react to day to day fluctuations in demand for postal workers. As a subsidiary Angard is under the control of Royal Mail which determines the pay and conditions of employment for agency workers employed by Angard. The appellant was supplied by Angard to Royal Mail to work in the Leeds Mail Centre in an operational post grade (*"OPG*").

7. When vacancies for permanent positions for particular shifts or duties in relation to sorting work at the Leeds Mail Office became available, they were put up on the notice board and offered first to OPG operatives who were already in permanent posts and to those in a reserve class of OPG operatives. Agency workers were not eligible to apply for the posts. They could however apply for vacancies when they were advertised externally, and when they did so, they were in competition with all other external applicants. Royal Mail wished to fill the vacancies without increasing headcount. The EAT endorsed a conclusion made by the ET that "*This system of seniority allows those with longer service to seek out more genial posts without external competition*." There is no dispute as to this.

8. The procedure adopted was in accordance with an agreement with the relevant union, the CWU.

C. Legal Framework

The Directive

9. The AWR were made to implement into domestic law the Directive. There is no dispute as to the relevant principles of construction. The AWR must, so far as is possible, be read in a way which gives effect (teleologically) to the purpose of the Directive. The appellant points out, correctly, that the purposive approach adopted towards EU legislation is nowadays on a par with the approach adopted to domestic legislation (see e.g. *Hurstwood Properties v Rossendale BC* [2021] UKSC 16 at paragraphs [9]-[10]).

10. The recitals to a Directive identify the relevant *travaux preparatoires*. In the present case these are (a) the formal 2002 proposal for a directive from the Commission (which

includes an Explanatory Memorandum)[1] and (b) an opinion from 2002 of the European Economic and Social Committee (ECOSOC)[2] on the proposal. These can be valuable in providing factual information both about legislative history and the purpose behind the Directive as finally adopted.

11. The substantive recitals are relevant in determining the purpose of the measure and assist in guiding the interpretation of its substantive terms. In relation to the Directive these describe a variety of different objectives. In particular the Directive strikes a balance between the competing interests of improving the "*security*" of employment for temporary workers, and, taking due account of the need for "*flexibility*" for employers (e.g. Recital 8). There are a number of other purposes identified including recognising both the diversity of labour markets across the Member States and the importance of collective agreements between employer and employee representative bodies. The principal recitals of relevance to this appeal are as follows.

12. Recitals [3] – [9] summarise the legislative history and explain the need to strike a balance between the competing interests of improving both worker security and employer flexibility (described as "*flexicurity*" in Recital [9]):

> "(3) On 27 September 1995, the Commission consulted management and labour at Community level in accordance with Article 138(2) of the Treaty on the course of action to be adopted at Community level with regard to flexibility of working hours and job security of workers.
>
> (4) After that consultation, the Commission considered that Community action was advisable and on 9 April 1996, further consulted management and labour in accordance with Article 138(3) of the Treaty on the content of the envisaged proposal.
>
> (5) In the introduction to the framework agreement on fixed-term work concluded on 18 March 1999, the signatories indicated their intention to consider the need for a similar agreement on temporary agency work and decided not to include temporary agency workers in the Directive on fixed-term work.
>
> (6) The general cross-sector organisations, namely the Union of Industrial and Employers' Confederations of Europe (UNICE) (4), the European Centre of Enterprises with Public Participation and of Enterprises of General Economic Interest (CEEP) and the European Trade Union Confederation (ETUC), informed the Commission in a joint letter of 29 May 2000 of their wish to initiate the process provided for in Article 139 of the Treaty. By a further joint letter of 28 February 2001, they asked the Commission to extend the deadline referred to in Article 138(4)

[1] Brussels, 20.3.2002 COM (2002) 149 final 2002/0072 (COD)).
[2] Proposal for a Directive of the European Parliament and the Council on working conditions for temporary workers (COM (2002) 149 final — 2002/0072 (COD); (OJ 2003 C61/124, 14th March 2003).

> by one month. The Commission granted this request and extended the negotiation deadline until 15 March 2001.
>
> (7) On 21 May 2001, the social partners acknowledged that their negotiations on temporary agency work had not produced any agreement.
>
> (8) In March 2005, the European Council considered it vital to relaunch the Lisbon Strategy and to refocus its priorities on growth and employment. The Council approved the Integrated Guidelines for Growth and Jobs 2005–2008, which seek, inter alia, to promote flexibility combined with employment security and to reduce labour market segmentation, having due regard to the role of the social partners.
>
> (9) In accordance with the Communication from the Commission on the Social Agenda covering the period up to 2010, which was welcomed by the March 2005 European Council as a contribution towards achieving the Lisbon Strategy objectives by reinforcing the European social model, the European Council 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. Furthermore, the December 2007 European Council endorsed the agreed common principles of flexicurity, which strike a balance between flexibility and security in the labour market and help both workers and employers to seize the opportunities offered by globalisation."

13. Recitals [10] and [11] explain how striking this balance contributes to job creation and integration of labour markets. Recital [11] in particular recognises that temporary workers might have characteristics related to their "*working and private lives*" which differentiate them from permanent workers. To foreshadow a point I make later in relation to the application of the principle of non-discrimination, the Directive recognises that temporary and permanent workers are not in all respects comparable and that therefore wholesale parity between the two types of worker might not be achievable as an objective or purpose. Workers might prefer temporary employment for personal and family reasons, and it is well known that in some sectors agency workers receive higher rates of pay than permanent equivalents. Moreover, the very concept of business flexibility recognises that for some undertakings whose business model is characterised by fluctuating demand the ability to hire temporary staff is an important facility:

> "(10) There are considerable differences in the use of temporary agency work and in the legal situation, status and working conditions of temporary agency workers within the European Union.
>
> (11) Temporary agency work meets not only undertakings' needs for flexibility but also the need of employees to reconcile

> their working and private lives. It thus contributes to job creation and to participation and integration in the labour market."

14. Recital [12] explains that the balance struck by the Directive is intended to be "*protective*" and meet the requirements of non-discrimination, transparency, proportionality and which, simultaneously, respects the diversity of labour markets and industrial relations:

> "(12) This Directive 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."

15. Recital [14] explain how the principle of parity between temporary and permanent workers (non-discrimination) should, as a minimum (see "*at least*"), apply to a "*basic*" set of working conditions:

> "(14) The basic working and employment conditions applicable to temporary agency workers should be at least those which would apply to such workers if they were recruited by the user undertaking to occupy the same job."

16. Recitals [15] – [19] refers to the need to respect collective agreements which might depart from the terms of the Directive:

> "(15) Employment contracts of an indefinite duration are the general form of employment relationship. In the case of workers who have a permanent contract with their temporary-work agency, and in view of the special protection such a contract offers, provision should be made to permit exemptions from the rules applicable in the user undertaking.
>
> (16) In order to cope in a flexible way with the diversity of labour markets and industrial relations, Member States may allow the social partners to define working and employment conditions, provided that the overall level of protection for temporary agency workers is respected.
>
> (17) Furthermore, in certain limited circumstances, Member States should, on the basis of an agreement concluded by the social partners at national level, be able to derogate within limits from the principle of equal treatment, so long as an adequate level of protection is provided.
>
> (18) The improvement in the minimum protection for temporary agency workers should be accompanied by a review of any restrictions or prohibitions which may have been imposed on temporary agency work. These may be justified only on grounds of the general interest regarding, in particular the protection of workers, the requirements of safety and health at work and the

> need to ensure that the labour market functions properly and that abuses are prevented.
>
> (19) This Directive does not affect the autonomy of the social partners nor should it affect relations between the social partners, including the right to negotiate and conclude collective agreements in accordance with national law and practices while respecting prevailing Community law."

17. Turning to the substantive provision of the Directive, Article 1, entitled "*Scope*", explains that it 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.

18. Article 2 entitled "*Aim*"**,** on the purpose of the Directive, is a legislative catch-all. It reflects the purposes elaborated upon in the recitals. It is significant because it also recognises that the agencies themselves can be employers, a point of relevance to the rights and obligations set out in Article 6 (below) which include obligations imposed upon the agency employer itself designed to protect temporary workers. Once again it describes the balancing exercise that has been struck between protecting temporary workers and improving the quality of their working conditions, contributing to job creation, and the development of flexible ways of working:

> "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, while taking into account the need to establish a suitable framework for the use of temporary agency work with a view to contributing effectively to the creation of jobs and to the development of flexible forms of working."

19. Article 3 sets out definitions. For present purposes the word "*assignment*" was considered by the Court of Appeal in *Kocur v Angard Solutions Ltd* [2019] EWCA Civ 1185 ("*Kocur 1*") where a similar issue to the present was raised (see paragraph [63] below). The word "*basic*" (as in "*basic working conditions*") is important because it serves to define and limit the scope of the application of the principle of non-discrimination in Article 5. The "*basic*" working conditions are limited. They refer to matters central to a contract of employment that has been accepted (duration of working time, overtime, breaks, rest periods, night work, holidays, pay). They do not extend to the terms upon which the prior appointment process operates:

> "1. For the purposes of this Directive
>
> …
>
> (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 other binding general provisions in force in the user undertaking relating to — (i) the duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays; (ii) pay
>
> …
>
> 2. This Directive shall be without prejudice to national law as regards the definition of pay, contract of employment, employment relationship or worker."

20. Article 5(1), entitled "*The principle of equal treatment*", applies the principle of non-discrimination to the "*basic*" working conditions as defined in Article 3:

> "1. 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."

The phrase "*at least*" makes clear that this is a minimum requirement: Member States may go further but they are not required to. It makes clear, for instance, that there is no objection to a temporary agency worker being paid more than a comparable directly employed worker.

21. Article 6 is the provision upon which Regulation 13 AWR is based. It concerns "*Access to employment, collective facilities and vocational training*". Article 6(1) - (3) create a bundle of rights which seek to improve the position of temporary agency workers. Article 6(1) is concerned with provision of information about vacancies. Article 6(2) seeks to ensure that, in their capacity as employers, agencies do not impose upon agency workers contractual restrictions which prevent them from becoming permanently employed with hirers upon expiry of their assignment. This also makes clear that agencies are entitled to reasonable recompense from hirers for their agency services. Article 6(3) prohibits agency employers from charging fees to workers who become employed by hirers:

> "1. Temporary agency workers shall be informed of any vacant posts in the user undertaking to give them the same opportunity as other workers in that undertaking to find permanent employment. Such information may be provided by a general announcement in a suitable place in the undertaking for which, and under whose supervision, temporary agency workers are engaged.
>
> 2. Member States shall take any action required to ensure that any clauses prohibiting or having the effect of preventing the conclusion of a contract of employment or an employment relationship between the user undertaking and the temporary

> agency worker after his assignment are null and void or may be declared null and void. This paragraph is without prejudice to provisions under which the temporary agencies receive a reasonable level of recompense for services rendered to user undertakings for the assignment, recruitment and training of agency workers.
>
> 3. Temporary-work agencies shall not charge workers any fees in exchange for arranging them to be recruited by a user undertaking, or for concluding a contract of employment or an employment relationship with a user undertaking after carrying out an assignment in that undertaking.
>
> 4. Without prejudice to Article 5(1), temporary agency workers shall be given access to the amenities or collective facilities in the user undertaking, in particular any canteen, child-care facilities and transport services, under the same conditions as workers employed directly by the undertaking, unless the difference in treatment is justified by objective reasons
>
> 5. Member states shall take suitable measures or shall promote dialogue between the social partners, in accordance with their national traditions and practices, in order to: (a) improve temporary agency workers' access to training and to child-care facilities in the temporary-work agencies, even in the periods between their assignments, in order to enhance their career development and employability; (b) improve temporary agency workers' access to training for user undertakings' workers."

22. Article 9, entitled "*Minimum requirements*", confirms expressly that the Directive is an instrument of minimum harmonisation only. Members States may, if they wish, grant more extensive rights but should not, save where otherwise permitted under the Directive, grant levels of protection lower than the stipulated minimum:

> "1. This Directive is without prejudice to the member states' right to apply or introduce legislative, regulatory or administrative provisions which are more favourable to workers or to promote or permit collective agreements concluded between the social partners which are more favourable to workers."

The AWR

23. I turn now to the AWR which implement the Directive. These create certain rights for agency workers which are in place from the commencement of the temporary work assignment (so called "*Day 1 rights*") and other rights coming into being only after completion of a 12-week qualifying period. These are termed "*qualifying periods*" and are defined in Regulation 7 (see below). The right to be notified of vacancies under Regulation 13(1) is a Day 1 right.

24. Regulation 5 implements the principle of non-discrimination in relation to the "*basic*" rights of temporary workers *vis à vis* comparable workers. It is entitled "*Rights of agency workers in relation to the basic working and employment conditions*":

> "(1) Subject to regulation 7, an agency worker (A) shall be entitled to the same basic working and employment conditions as A would be entitled to for doing the same job had A been recruited by the hirer— (a) other than by using the services of a temporary work agency; and (b) at the time the qualifying period commenced. "
>
> (2) For the purposes of paragraph (1), the basic working and employment conditions are— (a) where A would have been recruited as an employee, the relevant terms and conditions that are ordinarily included in the contracts of employees of the hirer; (b) where A would have been recruited as a worker, the relevant terms and conditions that are ordinarily included in the contracts of workers of the hirer, whether by collective agreement or otherwise, including any variations in those relevant terms and conditions made at any time after the qualifying period commenced.
>
> (3) Paragraph (1) shall be deemed to have been complied with where— (a) an agency worker is working under the same relevant terms and conditions as an employee who is a comparable employee, and (b) the relevant terms and conditions of that comparable employee are terms and conditions ordinarily included in the contracts of employees, who are comparable employees of the hirer, whether by collective agreement or otherwise.
>
> (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 that establishment who satisfies the requirements of sub-paragraph (a), works or is based at a different establishment and satisfies those requirements.
>
> "(5) An employee is not a comparable employee if that employee's employment has ceased. …."

25. Regulation 6 equates "*Relevant terms and conditions*" with the definition of "*basic"* rights in Article 3 of the Directive:

> "(1) In regulation 5(2) and (3) 'relevant terms and conditions' means terms and conditions relating to— (a) pay; (b) the duration of working time; (c) night work; (d) rest periods; (e) rest breaks; and (f) annual leave. "
>
> (2) For the purposes of paragraph (1)(a), 'pay' means any sums payable to a worker of the hirer in connection with the worker's employment, including any fee, bonus, commission, holiday pay or other emolument referable to the employment, whether payable under contract or otherwise, but excluding any payments or rewards within paragraph (3)."

26. Relevant "*qualifying periods*" are set by Regulation 7:

> "(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…."

27. Finally, Regulation 13, the provision in issue in this appeal, is headed "*Rights of agency workers in relation to access to employment*". It provides:

> "(1) An agency worker has during an assignment 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.
>
> (2) For the purposes of paragraph (1) an individual is a comparable worker in relation to an agency worker if at the time when the breach of paragraph (1) is alleged to take place— (a) both that individual 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; (b)that individual works or is based at the same establishment as the agency worker; and (c) that individual is an employee of the hirer or, where there is no employee satisfying the requirements of sub-paragraphs (a) and (b), is a worker of the hirer and satisfies those requirements.
>
> (3) For the purposes of paragraph (1), an individual is not a comparable worker if that individual's employment with the hirer has ceased.
>
> (4) For the purposes of paragraph (1) the hirer may inform the agency worker by a general announcement in a suitable place in the hirer's establishment."

D. Appellant's arguments

28. The appellant argues that the EAT erred when finding that the right to be informed under Regulation 13 and Article 6(1) did not extend to a concomitant right to apply and be considered for the notified vacancy. The appellant criticises the EAT for adopting an unduly narrow interpretation of the relevant provisions and contends that they must be construed broadly. A summary of the appellant's arguments is as follows.

29. First, the purpose of Regulation 13 is to ensure access to employment which cannot be achieved simply by affording a limited right to be informed of vacancies. The corollary of a right to receive information is a right to apply and be considered for the notified vacancy. Without the latter, the former is meaningless. By its terms the Regulation goes beyond simply conferring a right to receive information. It expresses as the purpose behind the conferral of that right: "… *to give that agency worker the same opportunity as a comparable worker to find permanent employment with the hirer*". These words, it is argued, implicitly embrace a right to apply and be considered for a notified job. That "*opportunity*" to "*find permanent employment*" is sterilised if a worker is notified of a vacancy that cannot be applied for.

30. Secondly, this conclusion is consistent with a purposive approach to interpretation of Regulation 13 in the light of the Directive. The purposes entail: creating a protective framework for temporary workers; improving the quality and security of their employment; achieving non-discrimination as between temporary and permanent employers; and ensuring that temporary workers are treated proportionality and that their rights have "*effet utile"* (effectiveness). An interpretation which allowed the hirer to treat comparable permanent workers more favourably than temporary agency workers in relation to vacancies would collide with all of these purposes and would be contrary the purposes of the Directive and, hence, the AWR.

31. Thirdly, the EAT ignored the fact that the appellant's argument would not undermine business flexibility which it is acknowledged is a stated purpose of the Directive. This is because even if a (non-discriminatory) right to apply and be considered is accorded to temporary and permanent workers alike that does not prevent employers from *then* applying selection criteria which means that the temporary worker is not appointed. However, the selection criteria cannot be based upon the difference between the status of temporary and permanent workers (see paragraph [4] above). More especially the appellant accepts, therefore, that an employer could, by use of appropriate selection criteria, both protect permanent workers at risk from redundancy and reward long service. In relation to redundancy the appellant in written submissions argued:

> "If the agency worker applied for the post no prejudice is caused, just like if someone what was already an employee but not at risk, both are turned down initially because of the criteria that would apply to all."

In relation to long service the appellant argued:

> "…if an employer wants to reward long term employees it merely needs to have a length of service criterion."

32. Fourthly, a broad interpretation is supported by reference to different language versions of the Directive. For example, under the French version Article 6(1) refers to "*obtenir*" rather than "*trouver*" ("find") in relation to work:

> "**Article 6 Accès à l'emploi, aux équipements collectifs et à la formation professionnelle**
>
> 1. Les travailleurs intérimaires sont informés des postes vacants dans l'entreprise utilisatrice dans le but de leur assurer la même possibilité qu'aux autres travailleurs de cette entreprise **d'obtenir** un emploi permanent. Cette information peut être fournie au moyen d'une annonce générale placée à un endroit approprié dans l'entreprise pour laquelle et sous le contrôle de laquelle ces travailleurs intérimaires travaillent."
>
> (Bold text added)

This emphasises that the Directive confers a substantial right to apply and thereby *obtain* a notified vacancy, not just an inconsequential right to be informed that an unobtainable vacancy exists.

33. Fifthly, the heading to Article 6, which starts with the words "*Access to employment…"*, showed, yet again, that its purpose was in a real and practical sense to provide opportunities to agency workers to *obtain* actual "*employment"*, and this purpose could not be fulfilled by notification of a vacancy from which agency workers were disqualified and which were therefore inaccessible, even if otherwise qualified for the post. The second half of the first sentence of Article 6(1) and Regulation 5(1), which refer to giving agency workers the same opportunity as other workers in the employer's undertaking to find permanent employment, buttresses this conclusion. These words would be otiose if the EAT's interpretation was correct since the right conferred by those provisions would be valueless.

34. Sixthly, as to the judgment of the EAT in *Coles (ibid)* relied upon by the EAT (and summarised at paragraph [3] above) this was distinguishable on its facts. The logic of that ruling was limited to cases where preferential treatment was accorded to direct employees at risk of dismissal for redundancy, which was not the position here where the advantaged pool of direct employees were not at risk of redundancy. The sole differentiating factor here lay in the fact that one category of worker was directly employed and the other was indirectly employed which was a distinction without any relevant or proper difference. As such the differentiation was unjustified discrimination. In any event on the appellant's analysis an employer could use selective criteria in a redundancy case to favour existing directly employed workers. Finally, *Coles* did not bind this Court, even if it did bind the EAT.

35. Seventhly, and finally, Article 6(1) of the Directive has direct effect, and is enforceable directly against Royal Mail, as an emanation of the state. Therefore, *if* Regulation 13 read literally must be construed narrowly, and in a manner which is inconsistent with the broader Article 6(1), this did not prevent the appellant sidestepping Regulation 13, and enforcing Article 6 directly against Royal Mail upon ordinary principles of direct effect.

E. Analysis

36. The issue arising on this appeal is a short point of interpretation. I should start by recording that I agree with the EAT. In my judgment neither Article 6 of the Directive

nor Regulation 13 AWR confer on an agency worker a right which goes beyond a right to be notified. It does not extend to a right to apply and/or to be considered for the notified post.

Literal interpretation

37. It is common ground, and indeed correct, that Regulation 13 AWR must be construed purposively in the light of the Directive so as to achieve conformity.

38. The starting point, and the striking feature of both provisions, is that read literally they are concerned only with a right of notification. The operative part of Regulation 13 AWR provides: "*An agency worker has during an assignment 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*." Article 6 of the Directive is to the same effect: "*Temporary agency workers shall be informed of any vacant posts in the user undertaking to give them the same opportunity as other workers in that undertaking to find permanent employment*." The operative duty is one of notification. Neither provision addresses what happens following notification.

39. To succeed on this appeal the appellant must therefore contend that it is wrong to adopt a literal, and narrow, interpretation of Regulation 13. I would agree that *if* the purpose of the Directive is to equate notification with a right to apply and be considered then, (and subject to the limits of purposive interpretation in which case the appellant's seventh point above at paragraph [35] arises) the court will construe Regulation 13 in a manner which achieves this purpose and conforms to the Directive. The question which follows is whether the purpose of the Directive supports the appellant's contention.

Interpretative techniques

40. The purpose of the Directive can be divined by reference to well established interpretative techniques.

41. *Analysis of Recitals*: First, the Recitals to the Directive are instrumental in identifying both the legislative history (and the relevant *travaux preparatoires*) and the relevant purposes which then guide the construction of the relevant provisions of the Directive, and in due turn, the implementing measure.

42. *Analysis of substantive provisions*: Secondly, the substantive provisions of the Directive read as a whole are also important guides and this includes whether a measure is intended to be a measure of full or only partial harmonisation. This analysis can take into account the legislative history of the measure in question.

43. *Analysis of legislative drafting techniques*: Thirdly, a court will consider whether, as a matter of drafting technique, were the appellant to be correct, one would expect the broad right contended for to be writ large in the legislation. If the broad right contended for would entail careful exposition in legislative form, then the absence of such an exposition can be taken as an indication that the legislature did not intend to create such a right.

44. *Analysis of effects and consequences*: Fourthly, the court can consider what might be said to be any adverse consequences which would arise if the broad construction were correct. The court can assume that *if* the legislature had intended to introduce a measure with such consequences it would have deliberately explained why it was taking that position in the Recitals and catered expressly for the issue in the substantive provisions. It follows that if the court can identify potentially adverse effects then the absence of any analysis or recognition of such consequences is, itself, an indication that the legislature did not intend such a result.

45. I will now consider each of these approaches to construction in turn.

Analysis of Recitals

46. The recitals recognise that the measure balances a number of potentially inconsistent objectives.

47. The first is the desire to improve the "*security*" of employment for temporary workers. The achievement of this objective is not straightforward and can involve conflict between the interests of different types of worker. Increasing the security of employment for temporary workers might be at the expense of that for permanent workers. Such cases can involve situations where the employer wishes to reward the loyalty of permanent staff and take steps to increase their welfare, as in *Coles* (see paragraph [3]), for instance by maximising the chances of their avoiding being made redundant. But by treating permanent staff (relatively) better, temporary staff are disadvantaged because they are offered fewer employment opportunities.

48. The second is the need for "*flexibility*". This also has more than one strand to it. Improved flexibility for temporary workers is a recognised objective. But so is increased flexibility for employers. Again, it is not disputed that it is a permissible purpose for the legislature to wish to enhance employer flexibility. In the Commission Explanatory Memorandum, which accompanied the Commission proposal to the Council and Parliament, the Commission articulated (*ibid* page [3]) the importance of employer flexibility and the need for it to be balanced with the need to improve the quality of employment for temporary workers:

> "Generally speaking, undertakings have seen an increased need for flexibility in managing their labour force, particularly because of the more rapid and greater fluctuations in their order books. Temporary work can thus help to cope with a shortage of permanent staff or a temporary increase in workload, which is particularly important for SMEs, as they are more sensitive than other undertakings to the costs of recruiting and laying off permanent staff. But the benefits accruing from temporary work may be curtailed if the sector suffers from poor social standing and job quality. Undertakings, especially SMEs, have an increasing need for qualified workers with a wide range of skills and need them on a temporary basis too. Quality temporary work can thus provide a more effective response to today's economy's need for flexibility."

49. Other purposes identified in the Recitals include recognising diversity in labour markets and respecting collective agreements between employer and employee representative organisations.

50. The appellant's argument necessarily assumes that the purpose of the Directive is to accord a high degree of primacy to the position of temporary employees relative to permanent workers but also *vis a vis* the hirer. However, 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.

51. One part of the appellant's argument on purpose is that the EAT's conclusion makes the law meaningless which, it is said, cannot have been the object of the legislature. I would disagree. A right to be notified is a real advantage and this is not gainsaid simply by pointing out that the right could have been more generous and far-reaching. In one sense it suffices to say that the right is simply what it is – a limited right to be notified. In the real world this does confer advantages, even if modest, because as the EAT pointed out, it extends to a right to being given the same information about the vacancies as are given to internal candidates and confers an advantage in that agency workers might have advance or more direct notice if, for instance, it is also advertised to external candidates. It meets the objective of transparency which is recognised in Recital [12] as a purpose of the Directive. The right in Article 6(1) is also part of the package of wider rights set out in Article 6(1) – (3) (see paragraph [21] above) which collectively addresses various aspects of the right of an agency worker to obtain "*access*" to permanent employment. Further, as the EAT pointed out, it would not be sufficient to give internal candidates full information about the job, including for example, salary rate, job description and job specification, whilst withholding the same level of information from agency workers. Article 6 and Regulation 13 are given substance if the right is understood as a right to be given equal treatment in relation to the provision of information *about* the vacancy, not just a right to equal treatment to be informed of the existence of the vacancy. The point was neatly encapsulated by Langstaff J in *Coles* at paragraph [34]: "*The information is provided not to secure further employment, but is designed towards helping to find it.*" Where a vacancy arises which is open to the agency worker to apply for, and which the agency worker is a potentially suitable candidate for, there is no danger that the agency worker will miss out because she or he is unaware of the vacancy. The EAT put the point in the following way:

> "51. … In our judgment, the right to be informed of any vacant posts is a valuable right in itself, albeit one that is limited in its scope. It means that agency workers are in a better position than the general public, members of which may well not be aware of any vacancies that have arisen in the hirer's business. Where a vacancy arises which is open to the agency worker to apply for, and which the agency worker is a potentially suitable candidate for, there is no danger that the agency worker will miss out because she or he is unaware of the vacancy. It is true that there

> will be occasions when agency workers will be notified of vacancies but will be told, in the same breath, that they are not eligible to apply for them. There will also be occasions, no doubt, when agency workers are notified of vacant posts which are plainly unsuitable for them, even if the vacancies are not ring-fenced for employees of the hirer. Nonetheless, there is a value in being kept informed of any vacant posts, especially as this means that the agency worker can make an informed judgment as regards whether it is worth applying. The value of the right is enhanced because, as we have said, it extends to a right to be given the same level of information about the job as a directly-employed worker. Fundamentally, therefore, in our view, the purpose of Article 6.1 is to ensure that agency workers are as well-informed about vacancies as the directly-employed colleagues, and do not run the risk of being unaware when a suitable vacancy crops up. As we have said, this places agency workers in a better position than the general public. They have as much information as they would have done if they had been direct recruits. It follows that the right conferred by Article 6.1, and regulation 13, even if is limited to a right to be informed of any vacant posts, is not empty or otiose.
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> 52. In the present case, agency workers were not eligible for the vacancies in question, but that will not always be the case. If the Royal Mail opens out vacancies to external candidates, then agency workers will be in a better position than other job-seekers, as they will have been informed of the vacant posts. There is no blanket obligation to take steps to inform all potential candidates amongst the general public of such vacancies, and so other job-seekers may never find out about the vacancies."

52. At base, the Directive reflects a pragmatic compromise between competing interests. Article 6(1) is part of that compromise. It does not purport to be more than it expressly provides for, namely a limited right to information. There is nothing in an analysis of purpose justifying expanding the right beyond its natural meaning. The task of this Court is to determine *where* the legislature has struck the balance; it is *not* to seek to re-shape the compromise reflected in Article 6 and transposed into Regulation 13 or to introduce new rights simply because, on one view, they might make good sense.

Analysis of substantive provisions

53. I turn now to the substantive provisions of the Directive. As set out in paragraph [38] above on a literal construction Regulation 13 is expressly limited to notification and is silent as to a right to apply or to have that application considered. Does the Directive, when viewed in the round, support the appellant's conclusion that such a literal interpretation is wrong? In my view when read as a whole the Directive does not support the appellant's broad interpretation.

54. First, Article 2, on the aim or purpose of the Directive, explains that whilst protecting agency workers and improving the quality of their employment is important the achievement of that aim must take "*into account*" the need to establish a "*framework*"

which also contributes effectively to the development of "*flexible forms of working*". Given that the Directive balances these conflicting policy objectives then the rights ultimately conferred, for instance in Article 6, necessarily represents a compromise. Viewed thus it is hard for the appellant to challenge the conclusion that the narrow construction of Article 6, as limited to information, is anything more than a deliberate and valid policy choice made by the legislature between a range of possible alternatives.

55. Secondly, the Directive is a measure of minimum harmonisation, as is made clear in Article 9. When construing Article 6 a court cannot expect it to create a solution to all issues arising in the relationship between temporary workers, employers, and permanent workers. The fact that the legislature could have gone further than it did is therefore nothing to the point. The omission from Article 6(1) of a right to apply and/or be considered does not signify that there is a gap to be plugged by recourse to purposive construction. It means that the legislature consciously left it to Member States to decide *whether* they wished to accord additional rights to temporary workers over and above the mere right of notification. The legislative history to the Directive underscores the point. That history is summarised in Recitals [3] – [9] (see paragraph [12] above) and further factual evidence is provided in the ECOSOC Opinion. It is evident from these that the issue of the appropriate level of protection for temporary workers in relation to comparables (i.e. permanent employees) was a controversial one which absorbed the energies of representatives of both workers and employers for six years between 1995 and 2001 at which point it became clear that no agreement could be reached (see Recitals [4] – [7]). It then took the Council and Parliament a further 7 years to promulgate the Directive. Paragraphs [1.1] – [1.8] of the ECOSOC Opinion provides further information. They explain that there had been attempts to address the protection given to temporary workers since the start of the 1980's but, by 1991, with no discernible success. Paragraphs [1.5] – [1.7] explain that in 2000 the Commission sought, in effect, to delegate responsibility to representatives of workers and employers but that this also led to stalemate, importantly, over the precise scope of the duty of non-discrimination as between temporary and permanent workers:

> "1.5. Since no progress was made in the Council on the initiatives described above, the Commission decided to implement the procedure under Article 3 of the Agreement on Social Policy annexed to the Protocol (No 14) on Social Policy annexed to the Treaty establishing the European Community (new Treaty Articles 137 and 138 on social dialogue). Agreements on part-time work and fixed-term contracts reached by three representative organisations, UNICE, CEEP and ETUC (3), were implemented by Council Directives 97/81/EC of 15 December 1997 and 1999/70/EC of 28 June 1999 respectively. The latter emphasised the principle of non-discrimination of workers on the basis of their work contract.
>
> 1.6. In May 2000, the social partners decided to start negotiations on the third section of the Commission's initiative on atypical employment, flexible working time and worker safety, concerning temporary work. However, on 21 May 2001 they had to acknowledge that they were not able to reach an agreement.

> 1.7. The stalemate came when attempting to lay down the terms of comparison for the possibility of equal treatment between a temporary worker and a permanent employee of the user undertaking in question, including working conditions and pay, or of equal treatment between."

56. Standing back, the Directive reflects a partial collection of rights and obligations of variable geometry intended to be a bare minimum. There is no scope for courts to add to those rights, where Member States have chosen not to.

57. Next, Article 5 and the application of the principle of non-discrimination. The appellant places considerable weight upon the incorporation of the principle of non-discrimination into the Directive. The difficulty with the argument is that the principle has limited application under Article 5, which reflects the fact that the positions of temporary and permanent worker were not treated, under the Directive, as comparable in all respects. Article 5 is applicable to "*basic working and employment conditions*". The addition of the qualifying expression "*basic*" indicates that the principle does not apply to facets of employment beyond the "*basic*". That term is defined in Article 3(1)(f) as "*…(i) the duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays; (ii) pay …".* The right to apply for a vacancy is not included within the bundle of rights described as "*basic*". The basic rights are those contained in an extant contract of employment; they are rights arising after the contract has been concluded. They do not relate to the process by which contracts come to be offered. There is no support therefore from Article 5 for the proposition that temporary workers must in relation to *all* aspects of the pre-contract process be given parity with permanent workers.

58. To be fair the appellant does not argue that the principle of non-discrimination is to be applied without qualification or caveat. It is said that the correct way to ensure that the principle of non-discrimination is balanced with employer flexibility is to permit temporary workers to apply for vacancies but then to allow employers to exclude those applicants by ringfencing certain positions by refence to criteria such as the desire to avoid redundancies and/or the desire to reward long service. The short answer to this is that it is simply not what the Directive says. Upon the basis of the recitals to the Directive and the contents of the *travaux preparatoires*, there is no hint of such a solution ever having crossed the minds of the Commission, the Council or Parliament. And yet furthermore, the appellant's argument assumes that when the Directive was adopted (in 2008) temporary workers and permanent workers were treated as comparable in every respect. However, as already observed (see paragraph [13] above) the Directive recognises that temporary workers are not, in all respects, comparable with permanent workers. For instance, Recital 11 of the Directive points out that, relative to permanent employment, temporary workers can meet discrete commercial needs and offer the worker a different work/life balance.

59. I should say something about *Coles*. The EAT in *Coles* construed Article 6 in the same way as the EAT in the present case who, moreover, decided that they were bound to follow that judgment. The appellant says that *Coles* is distinguishable because it was a redundancy case. I disagree. Article 6(1) is drafted in generic terms which do not permit of any distinction being drawn as between workers who are at risk of redundancy and other workers awaiting redeployment. As Langstaff J pointed out (paragraphs [36] – [37]) the effect of the appellant's interpretation would be that, in redeployment cases,

agency workers would be in a better position than those permanent workers outside the redeployment pool. However, on the appellant's analysis Article 6(1) (and hence Regulation 13) prevents the employer from treating agency workers less favourably than permanent employees outside the redeployment pool and therefore more favourably than those within the pool.

60. Finally, as to the reference in the French language version of Article 6(1) the Directive to the expression "*obtenir*" (not "*trouver*") (see paragraph [32] above) this does not assist the appellant. Legislation designed to assist a temporary worker "*obtain*" work does not, by use of that phrase alone, imply that the worker in question has some inalienable right to apply for a job which an employer does not wish to make available to that worker. When viewed in the context of all the other guides to interpretation it would run counter the purpose of the Directive to attach such a supercharged meaning to this one word which would justify preferring it to the narrower English counterpart.

Analysis of legislative drafting techniques

61. Next, if the Council and Parliament had intended to provide a right to apply for a vacancy then, judging by the approach that was taken to the drafting of the Directive, they would have addressed this explicitly. The drafting approach adopted was to spell out the basic right and then to lay down minimum procedural requirements designed to ensure its efficacy. So, in the case of Article 6(1) sets out the right to be notified and then stipulates how the information was to be provided ("*by a general announcement*") and where ("*in a suitable place in the undertaking"* where the temporary agency workers are engaged). A right to apply is a more complex right and would have required detailed unpicking in statutory form. It would have material resource implications for the employer and also potentially adverse consequences for permanent workers. Had this been intended the legislature would have spelled out the right and proceeded to describe how it was to be implemented. Indeed, if the appellant's argument is correct then the legislature would also have had to cater in drafting terms for the complication that employers could use selective selection criteria but not any criteria based upon employment status, a nuanced drafting exercise on any view. The legislature could of course have introduced such a right and duty, but it did not do so, and it is unrealistic to assume that it intended such a right and duty to be introduced by an invisible, unarticulated, side wind.

Analysis of effects and consequences

62. Finally, I consider the position from the perspective of the possible adverse consequences of the appellant's argument and what this means as a matter of interpretation. The EAT was struck by the consequences that would arise upon the appellant's interpretation, and made some observations about effect upon the labour market:

> "59. Standing back, it would be very surprising if the Directive went so far as to impose a positive obligation for employers to give equal treatment to agency workers in relation to applying for, and being considered for vacant posts in the user undertaking, especially when this very valuable right is not even expressly mentioned in the Directive. It would, in our view, be odd if the Directive meant that an employer cannot give

preference to in-house candidates when a vacancy occurs. This is a very common practice, and is generally thought to be a beneficial one, as it is believed to reward loyalty to the employer and to promote morale. Furthermore, whilst the Directive and the AWR prohibit less favourable treatment of agency workers, as compared to direct hires, in relation to pay (amongst other things), there is no prohibition against treating agency workers *more* favourably than direct hires in relation to pay (as the EAT pointed out at paragraph 17 of the judgment in Kocur 1). This may happen because the working life of an agency worker is more uncertain, and hirers may consider it necessary to pay a premium to agency workers to reward them for their flexibility and to compensate them for periods when there may be no work to offer them. In those circumstances, employers may legitimately feel it appropriate to ring-fence internal vacancies for direct hires in order to make it more attractive for workers to take a permanent job, rather than to take more highly-paid temporary work."

60. The position is perhaps clearest in the context of a redundancy situation, as in Coles v Ministry of Defence. a direct employee's position is about to be deleted from the establishment, it is very frequently the case that the employee will be placed in a redeployment pool and will be given preferential treatment as compared to external candidates, or even other internal candidates, in relation to vacancies that exist elsewhere in the establishment. This may be by being slotted-in to the other role, or by being given a guaranteed interview for it. It is highly unlikely that the Directive intended to render this practice unlawful by an invisible and unexpressed side wind by requiring the employer to make any job opportunities in a redundancy situation open to agency workers as well as direct hires, on the same terms. It is beneficial for the direct employees to be given a chance to avoid dismissal for redundancy, and it is also beneficial for the employers who can retain experienced employees in the business, and who can avoid having to make redundancy payments and avoid increasing the headcount.

61. It should also be borne in mind that the right conferred by Article 6.1 and by regulation 13 is a Day 1 right. The entitlement extends to agency workers even if they have only just started a short temporary assignment with the hirer. The claimants in the present appeals had a relatively long-term and stable working relationship with Royal Mail, but the right in Article 6.1 is not confined to such cases. It is difficult to see why an agency worker who has been working for the hirer for a day or two should be entitled to the same rights to apply for and be considered for a vacancy as those who are employed directly by the hirer. It is no answer to this point to submit that the employer can filter out such short-term agency workers by applying a length of service

> criterion to the filling of the vacancy. There will be cases in which an employer wishes to fill a vacancy without using a simple length of service criterion to do so. Accordingly, if the claimants' submission were right, it would mean that there will be cases in which direct employees, in a redeployment pool, who are perfectly competent to fill the vacant post, will lose out to an agency worker."

The consequences identified by the EAT are plausible and, in my view, it is a proper inference to draw that, in the circumstances, the legislature would have legislated explicitly had it intended to create laws with these effects.

Approach to interpretation adopted by the Court of Appeal in Kocur 1

63. Finally, the approach I have adopted to interpretation is consistent with that taken by the Court of Appeal in *Kocur 1 (ibid)***.** The Court there was concerned with the words "*for the duration of their assignment"* in Article 5 of the Directive and *"the duration of working time*" in Regulation 6(1)(b) AWR. The appellant in that case (who is also the appellant in this appeal) had been supplied to work for Royal Mail on a variable hours contract. He was typically offered 20 hours work per week. Article 5 of the Directive provides that there should be parity in relation to "*basic*" terms and conditions which includes working hours. The appellant argued that under Regulation 6, as interpreted in the light of the Directive, he was entitled to parity of treatment with directly employed, permanent, workers who were offered 39 hours per week. The Court of Appeal disagreed. It held that construed naturally the Regulation and the Directive were, in effect, referring only to the (in this case variable) hours for which the agency worker was contracted. There was no basis for taking any broader view, or otherwise limiting or overriding freedom of contract, by reference to purpose as understood from an analysis of the recitals and the substance of the Directive and indeed the broader framework of employee protection (such as the Working Time Directive). The Directive was a compromise balancing employee rights against the needs of employers for flexibility. It followed that the question for the court was simply to identify where the legislature had "*struck that balance*" (paragraph [36]). It had not been struck upon the basis that agency workers were entitled to parity of actual hours with permanent workers. The Court also considered the "*practical consequences*" of the appellant's interpretation (paragraph [35]). If the appellant was correct, then employers would no longer be able to "*address peaks and troughs in their demand for labour by offering variable hours of work for agency workers and that flexibility would thereby be substantially reduced"* (paragraph [36]). This consequence was antithetical to the purpose of the Directive and as such militated against an interpretation which led to that result.

F. Conclusion

64. In my judgment the EAT correctly interpreted Regulation 13. I would dismiss the appeal.

Lord Justice Singh :

65. I agree.

Lord Justice Bean :

66. I also agree.