IN THE COURT OF APPEAL **Appeal No.2023-002546**

ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL

BETWEEN:

RYANAIR DAC

Appellant

-and-

JASON LUTZ

Respondent

APPELLANT'S APPEAL SKELETON ARGUMENT

INTRODUCTION

1. This is the Skeleton Argument on behalf of the Appellant ('**Ryanair**') in support of its appeal against the decision of the Employment Tribunal ('**ET**') sent to the parties on 5 April 2022 **[CB/18/266-295]** as upheld by the Employment Appeal Tribunal ('**EAT**') by its Order dated 30 November 2023 **[CB/10/163-164]**. Permission to appeal was granted by the Order of Elizabeth Laing LJ dated 21 May 2023 **[CB/15/252-253]**, by which she also directed that this appeal be heard together with the linked appeal in Case No.2023-002537. As the Court of Appeal will appreciate, the question on appeal is whether the ET made an error of law, not whether the EAT did (see, for example, ***Robinson v Department for Work and Pensions [2020] IRLR 884*** (CA) per Bean LJ at para.34).

2. At a Preliminary Hearing the ET decided that Mr Lutz (the Claimant) was an *"agency worker"* for the purposes of the **Agency Workers Regulations 2010** ('**AWR 2010**'). In order to fall within the definition of *"agency worker"* within Regulation 3 of the AWR 2010 it was necessary to find that Mr Lutz was supplied to work by a temporary work agency *"temporarily"* for and under the supervision and direction of the hirer. The appeal concerns the interpretation of the word *"temporarily"* in Regulation 3(1)(a)

of the AWR 2010, which implements the **Temporary Workers Directive** (2008/104/EC) (the '**Directive**').

3. Mr Lutz was a contractor pilot whose services were supplied to Ryanair (the putative 'hirer') by an agency called MCG (the putative 'temporary work agency'). The contract between Mr Lutz and MCG was expressed to be for a fixed term of 5 years. The ET (and the EAT) applied the three existing EAT authorities on the meaning of *"temporarily"* (***Moran v Ideal Cleaning Services Ltd [2014] ICR 442***, ***Brooknight Guarding Limited v Matei (EAT/0309/17)*** and ***Angard Staffing Solutions Ltd v Kocur [2020] ICR 1541***) (the '**3 EAT Authorities**'). According to those authorities, an individual is supplied to work *"temporarily"* if the supply is terminable upon some condition being satisfied, such as the expiry of a fixed period or the completion of a specific project. The ET (and the EAT) concluded that, because the contract between Mr Lutz and MCG pursuant to which Mr Lutz's services were supplied to Ryanair was for a fixed term of 5 years, he had been supplied to work *"temporarily"*. The ET (and EAT) reached that conclusion notwithstanding the long duration of the contract and the ET's findings that: (a) such contracts were *"without exception"* renewed on their expiry; and (b) Mr Lutz formed part of the pool of pilots whose services were called upon by Ryanair on an ongoing (indefinite) basis without making any distinction between calling on the services of contractor pilots as opposed to directly employed pilots.

4. In summary, Ryanair appeals on the grounds that:

   (a) The 3 EAT Authorities interpreted the AWR 2010 incorrectly and should be overruled. On a proper interpretation, *"temporarily"* means *"short-term"* (Ground 1);

   (b) Alternatively, applying ***Brooknight***, the correct approach (which the ET and EAT failed to adopt) was to determine whether Mr Lutz had been supplied to work *"temporarily"* by reference to the purpose and nature of the work for which he was supplied to Ryanair. Work which is *"temporary"* satisfies the hirer's need for flexibility, for example, because the hirer needs cover for absent employees or needs to meet seasonal increases in demand (Ground 2);

(c) If either Ground 1 or 2 succeeds, then given its factual findings, the ET could only properly have decided that Mr Lutz was not supplied to work *"temporarily"* and therefore was not an *"agency worker"* (Ground 3).

5. There is a strong public interest in having guidance from the CA for the first time as to the meaning of the word *"temporarily"* in the AWR 2010, especially in circumstances where binding EAT authority has been established without the benefit of proper argument about whether that word means *"short-term"*. Further, the outcome of Mr Lutz's case has broader and more immediate significance for Ryanair. Since the ET's decision, a further 27 contractor pilots have brought claims against Ryanair under the AWR 2010 (albeit one such claim has since been withdrawn). By an order of the Leeds Regional ET Office sent to the parties on 3 February 2023, the claims were stayed pending the decision of the EAT in Mr Lutz's case (and have since been transferred to the East London Region). Ryanair anticipates that the parties to those claims will agree that those claims should remain stayed pending the outcome of this appeal to the CA. In addition, a further claim has been brought by a contractor pilot which raises status challenges (and, separately, disability factors).

BACKGROUND

6. The Judgment and Reasons of the East London ET **[CB/18/266-295]** followed a Preliminary Hearing which was heard over 29 March to 1 April 2022 and which was listed to determine whether Mr Lutz was an 'agency worker' for the purposes of Regulation 3 of the AWR 2010. Only if Mr Lutz is an 'agency worker' does the ET have jurisdiction to hear his claim that he was denied an entitlement to the same basic working and employment conditions as he would have been entitled to if he had been recruited to work as a Co-Pilot directly by Ryanair.

7. Insofar as directly relevant to this appeal, Regulation 3 of the AWR 2010 (*"The meaning of agency worker"*) provides as follows:

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

(a) is supplied by a temporary work agency to work temporarily for and under the supervision and direction of a hirer; and

(b) has a contract with the temporary work agency which is-

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

8. It was not in dispute before the ET (or the EAT) that, notwithstanding Brexit, the AWR 2010 should so far as possible be construed to give effect to the objective of the Directive (applying the principles in ***Marleasing SA v La Comercial Internacional de Alimentacion SA (Case C-106/89)*** and ***Litster v Forth Dry Dock & Engineering Co Ltd [1989] IRLR 161*** (HL)).

9. At the Preliminary Hearing, Ryanair disputed that Mr Lutz satisfied a number of the elements of the definition of 'agency worker' in Regulation 3 of the AWR 2010 in addition to disputing that he was supplied to work *"temporarily"*. The ET found against Ryanair on those issues. By a Notice of Appeal served on 16 May 2022 **[CB/17/259-265]** Ryanair appealed against the ET's decision that Mr Lutz was supplied to work *"temporarily"* and that he had a contract with MCG to perform work or services *"personally"*. The present appeal is, however, limited to appealing the ET's finding that Mr Lutz was supplied to work for Ryanair *"temporarily"*.

10. The key findings of fact made by the ET which are relevant to this appeal are as follows:

(a) It was common ground that Mr Lutz's services as a Co-Pilot were supplied to Ryanair pursuant to a contract entered into between himself, his service company (Dishford Port Limited) and MCG which was signed by Mr Lutz on 26 April 2018 (the '**Dishford Contract**') **[SB/11/53-61]** and that Schedule 1 thereto provided that the contract was *"for a period of five (5) years"* **[SB/11/60]**. (For the purposes of this appeal there is no need to consider the corporate structures used by the parties);

(b) At the expiry of the 5 years, contractor pilots were *"without exception"* issued with a new 5 year contract (ET's Reasons para. 115 **[CB/18/293]** but see also paras. 17 **[CB/18/271]**, 77 **[CB/18/284]** & 108 **[CB/18/292]**);

(c) Contractor pilots did not provide 'cover' for pilots employed by Ryanair. Although Ryanair's contract with MCG dated 28 December 2011 envisaged that the pilots supplied by MCG would be called on to help Ryanair deal with seasonal fluctuations in its need for pilots (ET's Reasons para. 27 **[CB/18/273]**), by the time that Mr Lutz signed the Dishford Contract contractor pilots were rostered for duties on precisely the same basis as employed pilots (ET's Reasons para. 27 **[CB/18/273]**). In other words, contractor pilots formed part of the general pool of available pilots alongside Ryanair's directly employed pilots. Moreover, the ET held that all pilots (including those employed directly by Ryanair) worked the same regular and highly predictable shift pattern (ET's Reasons para. 74 **[CB/18/283]**). They were *"treated identically, day to day, by Ryanair"* (ET's Reasons para. 3 **[CB/18/267]**).

11. In reaching its decision, the ET had regard to the 3 EAT Authorities (ET's Reasons paras. 111-120 **[CB/18/292-294]**). They are the only appellate decisions on the interpretation of the word *"temporarily"* in the AWR 2010. The first is ***Moran v Ideal Cleaning Services Ltd [2014] ICR 442*** (EAT). Singh J (as he then was) held that the meaning of *"temporary"* was *"not permanent"* in the sense of being terminable upon some condition being satisfied such as the expiry of a fixed period or the completion of a specific project. This case set the pattern for the two following decisions. The EAT in para. 41 of ***Moran*** held (450E-G):

> "The word "temporary" can mean something that is not permanent or it can mean something that is short term, fleeting etc. The two are not necessarily the same: for example, a contract of employment may be of a fixed duration of many months or perhaps even years. It can properly be regarded as temporary because it is not permanent but it would not ordinarily be regarded as short term. I should add that by permanent I do not mean a contract that lasts forever, since every contract of employment is terminable upon proper notice being given. What is meant is that it is indefinite, in other words open-ended in duration,

whereas a temporary contract will be terminable upon some other condition being satisfied, for example the expiry of a fixed period or the completion of a specific project."

12. The context in which the EAT held as it did in para. 41 of ***Moran*** is that the claimant alleged that the ET had fallen into error by interpreting *"temporary"* to mean *"short term"*. Significantly, the respondent did not contend that *"temporary"* means *"short term"*. Instead, the respondent argued that the ET had not fallen into that (alleged) error (see paras. 41-42). It follows that, although the ET in Mr Lutz's case was bound by the EAT's interpretation of the word *"temporarily"* in ***Moran***, the EAT in ***Moran*** had not heard argument to the effect that *"temporarily"* does in fact mean *"short term"*. Unsurprisingly, ***Moran*** was subsequently applied by the ETs (and followed by the EAT) in ***Brooknight*** and ***Angard***. In the EAT's reasons for refusing permission to appeal on Ground 1 it stated that an *"established line of authority"* on the meaning of *"temporarily"* already exists and that there is no compelling reason for the CA to consider the matter. Ryanair submits that the EAT failed to have proper regard to the fact that the EAT has never actually heard full argument that *"temporarily"* means *"short term"*.

13. The second of the 3 EAT Authorities is ***Brooknight***. The claimant in that case was supplied pursuant to a zero hours contract and, therefore, had no contractual right to undertake, or be provided with, any work at all. HHJ Eady QC (as she then was) purported to follow ***Moran***. Importantly, however, she held that, in determining whether a putative worker was supplied to work *"temporarily"*, the terms of the contract between the putative worker and the agency will not necessarily be determinative. The focus of the inquiry should be on the purpose and nature of the work for which the worker is supplied:

> "25. …I agree with the Respondent that the terms of the contract will not necessarily be determinative of agency worker status. The focus under Regulation 3(1)(a) is on *the purpose and nature of the work* for which the worker is supplied: is it temporary or permanent? The underlying contract - as will necessarily have been found to exist for the purposes of Regulation 3(1)(b) - may state that there is no obligation to provide or undertake work, and may allow that the worker can be moved from site

to site but if, *in fact*, that individual is supplied to carry out work on an indefinite basis (the *continuing cleaning jobs* in issue in *Moran*, for example), it would not be temporary in nature….That said, the terms of the contract may not be irrelevant: the contract provides evidence as to what the parties understood and intended in terms of the work that the worker might carry out, and the ET is entitled to test the evidence given as to what occurred in practice against the relevant documentary evidence, which would include the contract." (emphasis added by italics)

14. The key finding which led to the conclusion that the claimant in ***Brooknight*** was supplied to work *"temporarily"* was that he was used to provide "cover" as and when required:

> "26…More particularly, however, the ET accepted the Claimant's evidence that, as a matter of practice, he worked as "cover": this was not, on the ET's findings, a case where the Claimant was assigned on an indefinite basis to carry out particular ongoing work; he was, rather, used as a "cover security guard" (as the ET described his position).
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> 27. That finding was, in my judgment, fatal to the Respondent's case. The ET found that the Claimant was being supplied to work to provide specific cover for Mitie, as and when required, and would thus be temporarily working for the fixed duration of the absence being covered."

The EAT was thus considering the purpose and nature of the work.

15. The third of the EAT Authorities, ***Angard***, is another 'cover' case. (NB. The case was appealed to the CA. Although permission to appeal to the CA on the *"temporary"* issue was granted by the EAT, that issue was not pursued in the CA; and the issues which were pursued in the CA are irrelevant to the present appeal). The claimant was engaged by Angard, which was an 'in house' agency in the Royal Mail group which supplied staff exclusively to Royal Mail. The ET found that Royal Mail used agency staff to cover additional demand and to cover unexpected need, such as sickness absence (para. 8). The supply of the claimant was thus episodic. The claimant was notified if there was a shift which required cover and, if he chose to respond, the shift would be confirmed

(unless already taken by someone else). The ET concluded that the claimant was an 'agency worker'. The agency appealed (amongst other things) on the basis that the ET had erred by focusing on whether each assignment to Royal Mail was *"temporary"* rather than on whether the claimant's overall working relationship with Angard was temporary (para. 16). The EAT rejected those grounds of appeal. The EAT (HHJ Auerbach) held that whether a putative worker is supplied to work *"temporarily"* requires focus on the basis on which the putative worker is supplied to work on each particular assignment. See paras. 44-47 and 66 and, in particular, para. 46:

> "46. The focus of the tribunal's inquiry should therefore be on the basis on which the worker is supplied to work, *on each such occasion.* In particular, it should ascertain, applying the guidance in *Moran* [2014] ICR 442, whether that supply is made on the basis that, having embarked on the assignment, the worker will continue to work for the hirer indefinitely (whether full or part time), or on the basis that the work will cease at the end of a fixed period, on the completion of a particular task, or on the occurrence of some other event. If it is the latter, it may be followed by another supply to work for the same hirer temporarily, and then another, and another." (emphasis added in italics)

16. Significantly, the EAT went on (at paras. 49-54) to explain that, leaving aside the fact that Regulation 3 AWR 2010 requires there to be a contract between the putative worker and the agency, the terms of the contract between the two are relevant only insofar as they cast light on the basis on which the putative worker is in fact supplied to work on each engagement for the hirer. What matters is what happens in practice. The EAT expressed its conclusions as follows:

> "54…Ultimately, the question for the tribunal is what was, in fact, the basis on which the given supply or supplies were made; and the contractual documentation and communications between the agency and the worker, whether initially, or in relation specifically to that supply, or otherwise, should all be considered for the evidential contribution that they make to its overall determination of that factual question."

"59. But, all that said, at the end of the day, to repeat, what matters is what in fact happens in practice…"

17. Para. 61 of the EAT's judgment in ***Angard*** made clear that all the factors, including the relationship between Royal Mail and Angard, needed to be taken into account in reaching a conclusion.

18. Against that factual and legal framework, the ET in Mr Lutz's case concluded that Mr Lutz was supplied to work *"temporarily"*. This was based on the following reasoning:

    (a) The ET concluded that, because the contract was for a fixed 5 year term, it was neither *"indefinite"* nor *"permanent"* and, therefore, that Mr Lutz was supplied to do *"temporary work"* (ET's Reasons para. 115 **[CB/18/293]**). The ET drew on the fact that the word "temporary" stems from the Latin for "time" (ET's Reasons para. 17 **[CB/18/271]**) and held that the position was *"binary"*: *"Employed pilots were employed permanently, contracted pilots were not, even if some of them stay a long time"* (ET's Reasons para. 113 **[CB/18/292]**);

    (b) The ET held that it did not matter that, at the expiry of the 5 years, contractor pilots were *"without exception"* issued with a new 5-year contract. The ET referred to ***Angard*** and concluded that the invariable renewal of the 5 year contracts simply meant that there was a succession of temporary assignments (ET's Reasons paras. 17 **[CB/18/271]** & 117-119 **[CB/18/293-294]**); they could not be put together;

    (c) It did not matter that contractor pilots did not provide 'cover' because those who provide 'cover' are *"just one type of temporary worker"* (ET's Reasons para. 116 **[CB/18/293]**); and

    (d) The ET held that, in order for work to be *"temporary"*, it need not be *"flexible"* (ET's Reasons para. 105 **[CB/18/291]**).

19. The EAT's decision will be addressed below in detail where relevant. On the issue of the meaning of *"temporarily"*, the EAT: (a) set out the legal framework at paras. 92-102 **[CB/11/195-198]** and 111-120 **[CB/11/202-207]**; (b) summarised Ryanair's

grounds of appeal at paras. 127-128 **[CB/11/210-211]**; (c) summarised the parties' submissions at paras. 192-194 **[CB/11/234-235]** and 197-199 **[CB/11/235-236]**; and (d) set out its conclusions at paras. 200-212 **[CB/11/236-241]**. The EAT commented (rightly) that the structure of the ET's Reasons was at times not easy to follow (see the EAT's decision at paras.14 **[CB/11/173]** & 132-134 **[CB/11/212-214]**).

GROUND 1

20. The 3 EAT Authorities are wrong, Ryanair submits, insofar as they held that an individual is supplied to work *"temporarily"* if the supply is terminable upon some condition being satisfied, such as the expiry of a fixed period or the completion of a specific project. On a proper construction in the context of the particular provision, *"temporarily"* means *"short-term"*.

21. ***Moran*** drew a binary distinction between a supply which is *"terminable upon some condition being satisfied"* and a supply which is *"indefinite"*. The drawing of such a rigid distinction is: (a) contrary to the purpose of the AWR 2010 and the Directive; and (b) leads to absurd results.

The purpose of the legislation / absurd results

22. It offends against the language and purpose of the AWR 2010 and the Directive to describe an individual as having been supplied to work *"temporarily"* for a hirer in circumstances where the fixed-term contract pursuant to which the individual is supplied has a very long duration. Protection is then unnecessary and was not intended. Further, in ***JH v KG [2021] ICR 94*** the CJEU has itself held that, under the Directive, a period of service may reach a point beyond which its duration exceeds what can reasonably be regarded as *"temporary"*.

23. The aim of the Directive is set out in Article 2 as follows:

> "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."

24. Recital (15) states:

> "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."

25. The Directive thus recognises that those who are engaged pursuant to a contract with an indefinite duration (a permanent contract) do not require protection. However, nowhere in the Directive is it suggested that an individual who is not employed on an indefinite contract (ie. an individual engaged pursuant to a fixed-term contract) necessarily falls within the scope of the Directive (ie. that they must be treated as being supplied *"temporarily"*).

26. The Directive (or the AWR 2010) could easily have expressly defined *"temporarily"* as meaning, for example, *"terminable upon some condition being satisfied, such as the expiry of a fixed period or the completion of a specific project"* (the definition formulated in ***Moran*** and similar to the definition of "fixed-term contract" used in section 1(2) the **Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002**). It did not do so. That is hardly surprising. Such an interpretation would lead to manifestly absurd results in circumstances where, for example, the assignment has a fixed duration of 10, 20 or 30 years. Individuals supplied to work on an assignment of such a long duration cannot properly be described as vulnerable or in need of any greater protection than those who are engaged pursuant to a contract with an indefinite duration or, indeed, be described as working *"temporarily"*.

27. The EAT in Mr Lutz's case concluded in para. 211 of its Judgment **[CB/11/240-241]** that the distinction identified by Singh J in ***Moran*** between a *"temporary"* and *"indefinite"* supply is *"fully borne out"* by the Directive. The EAT referred to Article 3.2, which provides as follows:

> "Member States shall not exclude from the scope of this Directive workers, contracts of employment or employment relationships solely because they relate to part-time workers, fixed-term contract workers or persons with a contract of employment or employment relationship with a temporary-work agency."

The EAT noted that Article 3.2 *"says in terms that Member States are not to exclude fixed term workers from the scope of the Directive"*. That is wrong. Article 3.2 only states that Member States shall not exclude from the scope of the Directive workers *"solely…because they relate to…fixed-term workers"* (emphasis added). The Directive thus expressly envisages that individuals who work pursuant to fixed-term contracts may fall outside its scope so long as they are not excluded solely because they do so. It follows that the Directive does not equate working *"temporarily"* with working pursuant to a fixed-term contract.

28. In its reasons for refusing permission to appeal on Ground 1 **[CB/13/246-247]**, the EAT commented that the decision in ***Moran*** was reached after *"full consideration"* of the Directive and the legislative history of the AWR (and the EAT cross-referred to para. 113 of its Judgment in Mr Lutz's appeal, which set out paras. 41 and 50 of the EAT's judgment in ***Moran***). Aside from the fact that an argument to the effect that *"temporary"* means *"short-term"* was not heard in ***Moran***, there is nothing in the EAT's exposition of the legislative history of the Directive or the AWR 2010 in ***Moran*** (see paras. 18-39) which convincingly supports the conclusion that *"temporarily"* means what the EAT held it did; nor did the EAT make reference to Recitals (9) or (11) of the Directive which, for the reasons set out below, support Ryanair's contention that *"temporarily"* means *"short-term"*.

29. Significantly, in ***JH v KG*** (a case which was decided only after ***Moran*** / the 3 EAT Authorities) the CJEU held that, under the Directive, a period of service may reach a point beyond which its duration exceeds what can reasonably be regarded as

"temporary". The case concerned an individual who was assigned to the defendant undertaking under a series of successive contracts and extensions over the period from 3 March 2014 to 30 November 2016 (see para.22 of the CJEU's decision). The claimant sought a declaration from the Italian court that he was in a permanent employment relationship with the defendant undertaking and that Italian law, which did not place any limit on the number of successive assignments of a worker to the same hirer, was contrary to Article 5(5) of the Directive. The CJEU held as follows:

> "67. In the present case, it is in the light of the foregoing considerations that the referring court is to review the legal classification of the employment relationship at issue in the main proceedings, having regard to both Directive 2008/104 itself and the national law transposing it into Italian law, in such a way as to determine whether, as JH maintains, it is a permanent employment relationship concealed behind successive temporary agency contracts designed to circumvent the objectives of Directive 2008/104, in particular the temporary nature of temporary agency work.
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> 68. For the purposes of that assessment, the referring court may take the following considerations into account.
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> 69. If successive assignments of the same temporary agency worker to the same user undertaking result in *a period of service with that undertaking that is longer than what can reasonably be regarded as "temporary"*, that could be indicative of misuse of successive assignments, for the purpose of the first sentence of article 5(5) of Directive 2008/104." (emphasis added)

30. The CJEU thus concluded that, for the purposes of the Directive, there comes a point where the period over which services are supplied cannot *"reasonably be regarded as "temporary""*. Although the CJEU was considering the overall period of service arising from a number of successive assignments, it is obvious that the duration of an assignment must also be relevant to whether the supply of the putative 'agency worker' is *"temporary"* in the first place (not least because a single very lengthy assignment is as capable of being 'misused' as a succession of shorter assignments).

"Short-term"

31. As the EAT held in ***Moran***, the word *"temporary"* has two potential meanings. Ryanair contends for the reasons set out above that it does not mean *"terminable upon some condition being satisfied, such as the expiry of a fixed period or the completion of a specific project"* (the definition adopted in ***Moran***). Ryanair instead contends that it means *"short-term"*. Such an interpretation makes it plain that, in determining whether the supply is *"temporary"*, ETs should take into account the duration of the assignment.

32. Ryanair does not contend that it is possible to specify any particular duration of assignment which should be considered *"short-term"*; nor does Ryanair contend that whether an assignment is *"short-term"* will necessarily depend *solely* on the duration of the assignment. Instead, Ryanair submits that whether an assignment is *"short-term"* is a question of fact and degree which must be answered by ETs in light of the relevant context.

33. As to what constitutes the relevant context, Ryanair contends that in ***Brooknight*** the EAT correctly identified two matters. ETs should consider the purpose and nature of the work for which the individual is supplied. Ryanair submits that it is in the nature of *"temporary"* (or *"short-term"*) work that it satisfies the hirer's need for flexibility, for example, because the hirer needs work to be done to provide cover or in order to meet periodic variations in demand. The nature of the work itself may be relevant (for example, work may be of a type which is only required seasonally), as would be the degree of integration into the hirer's workforce and whether there is any guarantee that work will be provided.

34. That approach is consistent with Recital (11) of the Directive, which states: *"Temporary agency work meets not only undertakings' need for flexibility but also the need of employees to reconcile their working and private lives"*. The Directive thus expressly envisages that *"temporary"* work is work which meets the hirer's need for flexibility. The focus on flexibility is also apparent from Recital (9), which states that *"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" and which refers to the European Council's endorsement of *"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."*

35. Ryanair does not contend that the 3 EAT Authorities were wrongly decided on their facts. Adopting Ryanair's proposed approach would not have led to different results in those cases:

    (a) In ***Moran***, the claimants were all placed by the work agency with a single hirer, on an indefinite basis, for a number of years. There was no suggestion that they were called on to work only 'as and when needed'. The purpose and nature of the work was clearly not to satisfy the hirer's need for flexibility. The ET (and EAT) correctly held that the claimants were not 'agency workers';

    (b) In ***Angard***, the ET found that the hirer (Royal Mail) used agency staff to cover additional demand and to cover unexpected need, such as sickness absence (para. 8). As was the case in ***Brooknight***, the purpose and nature of the work was to satisfy the hirer's need for flexibility. The ET (and EAT) correctly held in both cases that the claimants were 'agency workers'.

36. It is unsurprising that the results of the 3 EAT Authorities would have been the same if Ryanair's proposed approach had been adopted. This is because, in considering whether the purpose and nature of the work is to satisfy the employer's need for flexibility, it is right that, in addition to considering the duration of the assignment, regard should be had to whether the assignment is indefinite or for a fixed term (albeit this should not be determinative):

    (a) If an individual is supplied in response to the hirer's need for flexibility, the assignment will often be terminable on the expiry of a fixed period or on the happening of an event (such as the completion of a specific project or the return to work of an employee in respect of whom the agency worker is providing cover). Conversely, if the assignment is of indefinite duration, that is likely to be an

indicator that the purpose and nature of the work is not to satisfy the hirer's need for flexibility;

(b) However, it is important that ETs are able to reach conclusions which are consistent with the aim of the Directive where the facts demand it:

(i) There will be cases (like Mr Lutz's) where, although the individual is supplied for a fixed period, it is plain (not least from the very long duration of the assignment and the overwhelming likelihood of extension) that the individual is not supplied *"temporarily"* in response to the hirer's need for flexibility. Such individuals should not fall within the scope of the AWR 2010;

(ii) Equally, there may be cases where, although the assignment is ostensibly open-ended (in the sense that it is impossible at the outset to determine its duration or to identify a specific event which will result in its termination) it is clear that the purpose and nature of the work is to satisfy the hirer's need for flexibility. For example, an employer may know that it needs an individual to help provide cover for several employees who are absent on sick leave; but there may be uncertainty about: (i) when the absent employee(s) will return to work; and (ii) whether their respective workloads when they return to work will necessitate continuing cover. An individual supplied to provide cover on an open-ended basis in those circumstances is in substance being supplied *"temporarily"* and should fall within the scope of the AWR 2010 (whereas, applying the binary ***Moran*** approach, such an individual would fall outside its protection).

37. Interpreting *"temporarily"* as meaning *"short-term"* (in the sense set out above) would not lead to uncertainty:

(a) The existing case law on the meaning of *"agency worker"* under the AWR 2010 in fact gives rise to considerable uncertainty. In ***Brooknight*** itself (in which the EAT followed ***Moran***) the EAT held that it was necessary to consider the purpose and nature of the work for which the individual was supplied. The EAT emphasised that

"each case will necessarily be fact sensitive" (para. 28). Furthermore, in ***Angard***, the EAT expressly acknowledged that whether the individual is supplied to work *"temporarily"* is fact sensitive and may vary from assignment to assignment such that the individual's status as an 'agency worker' may fluctuate over time (see paras. 44-46 & 51-54); and

(b) There is other employment legislation which requires a determination of whether something is *"short-term"* without defining the meaning of that expression by reference to a specified time period. Under Regulation 3(1)(b) and 3(3)(ii) of the **Transfer of Undertakings (Protection of Employment) Regulations 2006** ('**TUPE**'), ETs are required to determine whether, immediately before a 'service provision change' which is alleged to constitute a 'relevant transfer', it is intended that the activities carried on by the organised grouping of employees will, following the service provision change, be carried out by the putative transferee *"in connection with a single specific event or task of short-term duration"* (in which case there will be no 'relevant transfer' under Regulation 3(1)(b)). TUPE contains no definition of *"short-term duration"*. The meaning of Regulation 3(3)(ii) has been considered by the EAT on several occasions. The EAT has held that the question of whether the event or task is of *"short-term duration"* is a question of fact and degree which falls to be determined in light of the context: see ***SNR Denton UK LLP v Kirwan [2012] IRLR 966*** where Langstaff J expressed the following (obiter) views (at paras. 43-44):

> "First, what is short term or long term is inevitably a matter of perspective. Perspective depends on the viewer. The view to be taken here in what is an avowedly employment context is, it seems to me, that of the employee and not that of the historian for whom short term duration may be a very much longer period. It cannot be so short term as to suggest that it is of no great relevance to consider whether there should be a transfer under TUPE or not… but it seems to me that there is more than just the general employment context; there is necessarily the context of the particular employment and the particular relationships. That must vary, inevitably, from case to case. It will be, inevitably, therefore to some extent *a matter of fact and degree*, and, providing the tribunal has regard to the words of the paragraph and the general context

within which to place the particular facts of the case, a finding of fact and degree is unlikely ever to be wrong." (emphasis added)

(c) Further, in ***Heathman Ltd t/a County Contractors v Quadron Property Services Ltd UKEAT/0451/15*** (22 January 2016, Unreported) HHJ Hand QC summarised the correct approach to Regulation 3(3) of TUPE as follows (at paras. 24-26):

"Finally what has to be decided is whether the client intends the new contractor to carry out that activity or activities in the context of a single specific event or of a task of short duration.…It is important for Employment Tribunals in this relatively complicated statutory framework to be left to make the simple factual decisions, which are called for by the text of the statutory instrument."

(d) There are also examples of legislation in a non-employment context which requires a determination of whether something is *"short-term"* and where there is a statutory definition of that expression which does not prescribe a specified period of time. Section 228(1) of the **Levelling-up and Regeneration Act 2023** provides that the Secretary of State must by regulations make provision requiring or permitting the registration of specified *short-term* rental properties in England. Section 228(2) provides that *"Short-term rental property"* means:

"(a) a dwelling, or part of a dwelling, which is provided by a person ("the host") to another person ("the guest")-

(i) for use by the guest as accommodation other than the guest's only or principal residence,
(ii) in return for payment (whether or not by the guest), and
(iii) in the course of a trade or business carried on by the host, and

(b) any dwelling or premises, or part of a dwelling or premises, not falling within paragraph (a) which is specified for the purposes of this paragraph."

The part of the definition which addresses whether the rental property is *"short-term"* (section 228(2)(a)(i)) focuses on the *purpose* for which the property is used

rather than simply considering the *duration* of the rental. There is thus a conceptual parallel with Ryanair's proposed approach to determining whether a putative worker is supplied *"temporarily"* for the purposes of the AWR 2010.

38. In summary, interpreting *"temporarily"* as *"short-term"* is consistent with the purpose of the Directive and avoids the absurd results which flow from disregarding the duration of the putative worker's assignment. Aside from having regard to the duration of the assignment and, save in cases which are clear-cut (such as where the duration of the assignment is plainly long-term), in deciding whether the supply is *"short-term"* ETs should consider the relevant context, including in particular the purpose and nature of the work for which the putative worker is supplied.

GROUND 2

39. Alternatively, if *"temporarily"* does not mean *"short-term"* and if, therefore, the duration of the supply is of no relevance, Ryanair still contends that the ET misdirected itself as to the law by failing properly to apply the approach required by ***Brooknight***. The ET should have determined whether Mr Lutz had been supplied to work *"temporarily"* by reference to the purpose and nature of the work for which he was supplied to Ryanair.

40. Ryanair submits that, although the EAT in ***Brooknight*** purported to adopt the distinction drawn in ***Moran*** between work which is *"open-ended in duration"* and work which is *"terminable upon some other condition being satisfied, for example the expiry of a fixed period or the completion of a specific project"* (para. 22), the EAT refined the approach so as to determine on which side of the line a given case falls. As set out above under Ground 1, the EAT held that what is required is a focus on the purpose and nature of the work for which the individual is supplied (see para. 25 of the EAT's Judgment as set out in para. 13 above). That represented an important refinement or clarification of the approach apparently adopted in ***Moran*** and ***Angard***, which simply asks whether the individual's *assignment* is terminable after a specified duration or on the happening of a specific event. The focus is on the purpose and nature of the *work*. As the EAT put it in ***Brooknight*** (see para. 28):

"The work done by others employed by agencies such as the Respondents might be found to fall on the ***Moran*** side of the line - work properly described as of an indefinite nature - each case will necessarily be fact sensitive" (underlining added).

41. Given the above, in refusing Ryanair permission to appeal on Ground 2 **[CB/13/246-247]**, the EAT was wrong to state that ***Brooknight*** did not indicate a departure from ***Moran***. At the very least there was a refinement or clarification of ***Moran***. The EAT was also wrong to state that Ground 2 overlooks the fact that the focus on the purpose and nature of the work for which the worker is supplied is necessary in order to determine whether the supply is *"temporary or permanent"*.

42. The reasons why the EAT's approach in ***Brooknight*** was correct are set out above under Ground 1 (subject, of course, to Ryanair's contention that ***Brooknight*** was wrong insofar as it said nothing to indicate that the correct approach also requires consideration of the duration of an assignment).

43. In refusing permission to appeal on Ground 2 **[CB/13/246-247]**, the EAT also stated that Ryanair had failed to engage with the EAT's reasons in paras. 202-209 of its Judgment. That is not the case:

    (a) In paras. 202 **[CB/11/237-238]** and 207 **[CB/11/239-240]** (and para. 114 **[CB/11/203]**) of the EAT's Judgment, it held that the significance of the nature and purpose of the claimant's work in ***Brooknight*** (namely, to provide cover) was only relevant because the supply of the claimant was not limited by a period of time in the relevant contractual documentation (the claimant having been engaged on a zero-hours contract). That analysis is (with respect) wrong. The EAT in ***Brooknight*** did not express its analysis in those terms or on that basis. On the contrary, para. 25 of the EAT's judgment is couched in terms of general application;

    (b) Insofar as the remainder of paras. 202-209 of the EAT's Judgment **[CB/11/237-240]** are relevant to Ground 2, the EAT's Judgment proceeds on the basis of its

refusal to accept Ryanair's submission that ***Brooknight*** refines the approach in ***Moran***.

44. Further, it appears that the EAT in this case fundamentally misunderstood what the EAT in ***Brooknight*** meant when it referred to needing to focus on the purpose and nature of the work for which the worker is supplied:

(a) In para. 201 of its Judgment **[CB/11/237]**, the EAT commented that the exercise required by ***Brooknight*** was not *"a broader inquiry into whether the work undertaken by the individual, once supplied, was the same or similar to the work undertaken by permanent employees of the hirer and/or seeing how much the individual was then integrated into the hirer's workforce"*. It commented that the nature of the protection afforded by the AWR 2010 and the Directive *"would be severely undermined if similarities in the work then undertaken or the extent to which the person was treated as part of the workforce was taken to tell against a supply being of a temporary nature"*. Those comments are correct. However, the fact that the EAT made them indicates that it misunderstood Ryanair's case as to what the approach in ***Brooknight*** does require;

(b) Ryanair never contended that the ET should consider whether the work done by Mr Lutz (ie. flying airplanes) was *in itself* the same as or similar to that done by pilots employed directly by Ryanair, or that his degree of integration into Ryanair's workforce was relevant *per se*. Rather, Ryanair's submission was (and is) that, applying ***Brooknight***, the focus must be on the purpose and nature of the work for which the putative worker is supplied. Work which is *"temporary"* is work the purpose and nature of which is to satisfy the hirer's need for flexibility. In other words, the question is: Is the work done by the putative 'agency worker' needed on an 'as and when needed' basis, for example, in order to provide cover or to satisfy seasonal variations in demand by the putative hirer? Or is the purpose and nature of the work to satisfy the putative hirer's indefinite/ongoing need for the work to be done? If the latter, then the purpose and nature of the work (and therefore the basis on which the individual is supplied) is not *"temporary"*;

(c) The ET similarly failed to understand what the ***Brooknight*** approach requires. Contrary to the ET's suggestion (ET's Reasons para. 116 **[CB/18/293]**), Ryanair never contended that the ET could only conclude that contractor pilots work *"temporarily"* if they provide 'cover'. Ryanair's submission was (and is) broader than that. It is that the *purpose and nature* of the work of contractor pilots was identical to that of pilots employed by Ryanair on permanent contracts, namely, to fly as pilots for Ryanair *on an indefinite basis* (rather than on an 'as and when needed' basis).

GROUND 3

45. If either Ground 1 or 2 succeeds, then the only conclusion which the ET could properly have reached on the facts as found by it was that Mr Lutz was not supplied to work *"temporarily"*.

46. If (consistent with Ground 1) *"temporarily"* means *"short-term"* then Mr Lutz was plainly not supplied to work *"temporarily"* given the ET's findings:

(a) As to the duration of the supply, the contract pursuant to which he was supplied was expressed to be for a period of as long as 5 years (ET's Reasons para. 17 **[CB/18/271]**); and in practice, at the expiry of the fixed term of 5 years, contractor pilots like Mr Lutz were *"without exception"* issued by MCG with a new contract (ET's Reasons para. 115 **[CB/18/293]**);

(b) Insofar as it is necessary to look beyond the (very long) duration of the supply and consider the context, it is clear that the purpose and nature of the work for which Mr Lutz was supplied was *not* to satisfy Ryanair's need for flexibility. The ET found that Mr Lutz formed a part of the pool of pilots which included pilots directly employed by Ryanair and that he was rostered for flying duties on precisely the same basis as employed pilots (ET's Reasons para. 27 **[CB/18/273]**). In other words, he was supplied to satisfy Ryanair's ongoing/indefinite need for pilots. The purpose and nature of his work was exactly the same as that of pilots who were permanent employees of Ryanair.

47. If (consistent with Ground 2 above), the duration of the supply is irrelevant and the question whether an individual is supplied to work *"temporarily"* depends entirely on the nature and purpose of the work for which the individual is supplied, then, given the ET's findings as to the indefinite purpose and nature of the work which Mr Lutz was supplied to do, the ET could not properly have reached any conclusion other than that Mr Lutz was not supplied to work *"temporarily"*.

CONCLUSION / DISPOSAL

48. If the appeal succeeds on Ground 1 or 2, the CA is invited to vary the ET's decision pursuant to **CPR 52.20(2)(a)** to reflect the conclusion that Mr Lutz was not supplied to work *"temporarily"* for Ryanair for the purposes of Regulation 3(1)(a) of the AWR 2010.

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