IN THE COURT OF APPEAL (CIVIL DIVISION) **CA-2023-002546**

(linked with CA-2023-002537)

ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL

B E T W E E N:

(1) RYANAIR DAC

(2) STORM GLOBAL LIMITED (FORMERLY MCGINLEY AVIATION)

Appellants

- and -

JASON LUTZ

Respondent

RESPONDENT'S REPLACEMENT SKELETON ARGUMENT ("AWR SKELETON")

---

1. This skeleton argument is submitted on behalf of the Respondent, Mr Lutz. In this skeleton he is referred to as the "Claimant" as he was below and the other parties are referred to as "Ryanair" and "MCG", as in the EAT.

2. On 26 April 2018 the Claimant entered into a contract with MCG and Dishford [**SB/11/53-61**]: *Terms and Conditions of Contract for Services as a Co-Pilot*. Ryanair was described as the "hirer", MCG as the "Contractor", and the Claimant as the "Company Representative". It was for a five-year fixed term: see Schedule 1 [**SB/11/60]**.

3. In a judgment of Employment Judge Housego (the 'EJ') sent to the parties on 5 April 2022 [**CB/18/266-295**], the Employment Tribunal ("ET") held that the Claimant was supplied to work "temporarily" for and under the supervision and direction of Ryanair as hirer within the meaning of regulation 3(1)(a) of the Agency Workers

Regulations 2010 ('**AWR**') because his appointment was for a temporary period of five years and was not permanent: see §§17, 102, 107 [**CB/18/271,290,292**]. In reaching that conclusion, the EJ referred to and applied a trilogy of EAT decisions: ***Moran v Ideal Cleaning Services*** [2014] ICR 442; ***Brooknight Guarding v Matei***, UKEAT/0309/17/LA; and ***Angard Staffing Solutions v Kocur*** [2020] ICR 1541: see §§111-120.

4. Both Ryanair and MCG challenge the ET's reasoning and finding that the Claimant was supplied to work "temporarily" for Ryanair as the end user within the meaning of regulation 3(1)(a) of AWR. In light of the close factual and legal overlap between the appeals of Ryanair and MCG on the interpretation of "temporarily" in AWR, these submissions will address the grounds of both Ryanair and MCG. A separate skeleton addresses MCG's grounds 1-3, that the Claimant was not "employed" for the purpose of the Civil Aviation (Working Time) Regulations 2004 and was not a "worker" for the purpose of the EU Charter or AWR. The grounds of appeal addressed in this skeleton are as follows:

   (1) Both Ryanair and MCG assert that the trilogy of EAT authorities relied upon by the ET on the meaning of "temporarily" were wrongly decided (Ryanair, Ground 1 [**CB/4/56**]; MCG, Ground 5 [**CB/2/18**]). Both suggest that "temporarily" should be interpreted to mean "short-term".

   (2) Alternatively, Ryanair asserts that the ET misdirected itself in law by failing to decide whether the Claimant had been supplied "temporarily" by reference to the "purpose and nature" of the work for which he was supplied to Ryanair (Ryanair, Ground 2) [**CB/4/56]**).

   (3) If Ryanair succeeds on either Ground 1 or 2, then it contends that on the facts found by the ET, it could only have decided that the Claimant was not supplied to work "temporarily" and was not therefore an "agency worker" (Ryanair, Ground 3

[**CB/4/57]**). Properly analysed, Ryanair's Ground 3 is not a free-standing ground of appeal, but is contingent upon it succeeding in respect of Grounds 1 or 2.

(4) MCG advances a general challenge to the decision that the Claimant was supplied "temporarily" to Ryanair (MCG, Ground 4 [**CB/2/18**]).

5. The Claimant resists both appeals for the reasons set out in the judgments of the ET and EAT, and for the reasons set out in each of the Respondent's Notices.

6. These submissions will address (i) the legal framework; and (ii) the ET's findings; before (iii) addressing each of the grounds of appeal.

Legal Framework

7. The AWR implement the Directive on temporary agency work (Directive 208/104/EC) (the "**Directive**"). The Directive was introduced under former Article 137(2) of the then Treaty (now Article 153) in order to achieve the objectives of Article 151 (ex. Article 136) to improve working conditions (see too recitals (1) and (2)). Its aim, according to Article 2, is to "ensure the protection of temporary agency workers and to improve the quality of temporary agency work". To that end, it establishes a "protective framework for temporary agency workers" (recital (12)), by giving agency workers the same basic working and employment conditions as if they were directly employed. The Directive only lays down minimum standards, so that Member States may introduce provisions which are more favourable to workers (Article 9). Its scope is defined in Article 1.

8. A "temporary agency worker" is defined in Article 3(1)(c) as follows:

> a worker with a contract of employment or an employment relationship with a temporary-work agency with a view to being assigned to a user undertaking to work temporarily under its supervision and direction.

The question under the Directive as to whether an individual is assigned "temporarily" is prospective (i.e. at the point of the inception of the assignment), and not retrospective.

9. Regulation 3(1) of AWR defines "agency worker" as follows:

> (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.
> …

10. Reflecting the provisions in the Directive, AWR confer important rights for agency workers. Regulation 5 provides the substantive right to parity in respect of the same "basic working and employment conditions" (further defined in regulation 6) after completion of a 12-week qualifying period with the same hirer (regulation 7). Those basic working and employment conditions are those that are "ordinarily included" in the contracts of employees or workers of the hirer.

11. From the inception of any assignment, agency workers have rights to access collective facilities and amenities provided by the hirer (regulation 12), and the right to be informed by the hirer of relevant vacant posts, so as to be given the "same opportunity" as a comparable worker to find "permanent employment" with the hirer (regulation 13(1)).

"Temporarily"

12. The EAT has now considered the meaning of "temporarily" in regulation 3(1)(a) on four occasions. In ***Moran***, Singh J (as he then was) reviewed the legislative history of the Directive, deciding that "*temporarily*" within the meaning of regulation 3(1) means "*not permanent*" rather than "*short-term*": §41. The distinction is a binary one, between indefinite, open-ended contractual assignments and those terminable on a condition

being satisfied, such as the termination of a fixed period or completion of a specific project: see §§41-3. The EAT was clear that a fixed-term contract could be *"of many months or perhaps even years"* but still be temporary: §41. This interpretation is in harmony with the Directive. Singh J acknowledged that the ET *"… did not fall into the error of interpreting "temporary" to mean short term…"*: §42. In view of the fact that the claimants had been supplied to the end user on an *"open-ended"* basis, they fell outside the scope of the AWR because they had been placed on a permanent rather than on a temporary basis.

13. In ***Brooknight***, the EAT followed ***Moran***: §§20-22. In that case, it seems the worker had a permanent zero hours contract with the agency, Brooknight, under which he was assigned to work for Mitie as and when required. The EAT held that the contract was not *"necessarily"* determinative, though it provided evidence as to what work the parties understood and intended the worker would carry out: §25. In light of the factual evidence that the Claimant was placed at sites as *"cover"*, the Tribunal was entitled to find that, despite his contract, he was not in fact assigned to permanent work but was, rather, working on a succession of fixed duration assignments: §26.

14. ***Angard*** also followed ***Moran*** in circumstances where the claimants had a permanent contract with the agency, Angard, and worked on many occasions over four years on a succession of fixed-term engagements: see ET findings at §§35-40, cited by the EAT at §10. The grounds of appeal were that the ET had erred in ignoring (a) the *"reality"* of the existence of an indefinite/permanent relationship; and (b) the permanent contract with Angard, which was determinative: §16. Dismissing the appeal, the EAT held that the issue was not whether the relationship with the agency was permanent (§51). The documents between the agency and worker may contain sufficient particulars for the Tribunal to identify whether the supply is temporary or not (§51). Where those documents merely provide the "umbrella" for individual assignments, a Tribunal may need to examine the factual nature of the supply to the hirer, and for this purpose should examine the contractual documents and communications between the agency and the worker (§§52-4). But in most cases the initial contract and

dealings between the agency and worker will set the parameters for supply (§57) - as they did on the facts of ***Angard***, where the contract provided for assignments with a termination end date, so that each assignment was time limited (§§61, 64).

Factual Background & the Tribunal Decision

15. The factual findings, in so far as they are relevant to the ET's decision that the Claimant fell within regulation 3(1)(a) AWR, are summarised below.

16. The contract between the predecessor of MCG and Ryanair for the supply of pilots dated 28 December 2011 [**SB/10/45-52**], began on 20 December 2011 and itself was for a fixed five-year term, though it seems it continued after that date: see clause 2 and ET at §27 **[CB/18/273].**

17. On 10 August 2017, in response to an advert, the Claimant applied to Ryanair to become a pilot: ET §29 **[CB/18/273]**. He was later informed by MCG that he had passed the assessment and that it was Ryanair's "*chosen contractor for cadets*". He "*had no choice*" about this; it was "*not negotiable*": §§31, 34, 43, 66 **[CB/18/273-275,281]**.

18. Subsequently, the Claimant was "*installed*" into a new company, Dishford Port Limited ("**Dishford**") without his knowledge: §§68-69[1] **[CB/18/282-283].** On 26 April 2018 the Claimant entered into a contract with MCG and Dishford: *Terms and Conditions of Contract for Services as a Co-pilot* (the "**Contract**") [**SB/11/53-61**]. Ryanair was described as the "*hirer*", MCG was the "*Contractor*", and the Claimant was the "*Company Representative*". The Claimant personally initialled each page of the Contract to confirm his acceptance. He individually agreed "*to be bound by the aforementioned terms and conditions of this contract for services*": §69.4 **[CB/18/283]**.

19. The Contract was unequivocally clear that it was for limited fixed-term and was not a permanent assignment: "*Term means the term of this Contract, specified in Schedule 1*". In

[1] The ET's findings in relation to a previous five-year fixed-term contract with Sudeley Ltd are at §§39- 40, 51 [**CB/18/274-275,277**]. The Claimant never undertook any work for Ryanair under that contract.

turn Schedule 1 provided that *"This is a contract for a period of five (5) years"*. The parentheses serve to emphasise its limited and fixed temporal extension. There was nothing in the Contract terms providing for its renewal prior to or on expiry. The express five-year term was never varied (clause 1(m) provided that the terms could be *"varied in writing by mutual agreement…"*).

20. The Claimant's uncontradicted evidence was that his understanding was that his engagement ended after five years. No witness for MCG or Ryanair suggested that he was ever told anything different, either at the point of supply or subsequently. The Contract with MCG, therefore, envisaged a temporary, five-year assignment of the Claimant and not a permanent one. No one suggested that the term did not reflect the reality of the situation, or was a sham.

21. In fact, later correspondence with the Claimant underlined that the Contract was for a five-year fixed term: see letters dated 10 July 2018 **[SB/13/65]**.and 29 November 2018 **[SB/14/66]**.

22. The ET did not find that any pilot was automatically given a new five-year contract. Of the *"very few"* pilots who stayed on past the five-year mark, no one was simply allowed to *"roll on past the five-year point"* §§77-9 **[CB/18/284]:** those few individuals were given a new five-year contract. Further, in fact *"very few pilots"* entered into a new contract beyond the five year fixed-term. The ET accepted the evidence of Captain Morais that this was *"really quite unusual"*: §78 **[CB/18/284]**. Moreover, because the supply of pilots only began in 2011, by the time of the Claimant's dismissal (in 2019), at most there can only have been one renewal of any individual pilot's fixed term.

23. The Claimant *"repeatedly"* pressed Ryanair to become a directly employed pilot on a permanent contract of employment on more than one occasion, but to no avail: see §§44, 48 **[CB/18/275-276]**.

24. In light of its findings, the ET held, unsurprisingly, that the Claimant was supplied to

work temporarily for Ryanair because his appointment was for a temporary period of five years and was not permanent: see §§17,102,107 **[CB/18/271,290,292**]. Even taking Ryanair's case at its highest, and assuming that the contracts were renewed for the few pilots who remained at the end of the five-year term - which was not what the ET found at §77 **[CB/18/284**] - each assignment was still temporary §108 **[CB/18/292**]. On that basis the ET decided whether a five-year term was temporary or not: §110 **[CB/18/292]**. It found that *"here, there was a fixed five-year term. It was not indefinite"* and that on the facts, "*… by definition it is definite in time. It is, definitively, for five years"*: §115 **[CB/18/293]**. In reaching that conclusion, the EJ referred to and applied the trilogy of EAT decisions: ***Moran***, ***Brooknight***, and ***Angard***: see §§111-120 **[CB/18/292-294]**.

25. The EAT judgment summarises the relevant legal principles at §§92-102, and 111-120. **[CB/11/195-198,202-206]**. Its conclusions as to the application of those principles to the question of whether the Claimant was a temporary agency worker are set out at §§200 - 202 **[CB/11/236-238]**. The Claimant commends the EAT's analysis.

SUBMISSIONS

Ryanair Ground 1; MCG Ground 5

26. The ET was correct to find that the Claimant was supplied to Ryanair to work "temporarily" for the purpose of regulation 3(1)(a) of AWR, and the EAT was correct to uphold that decision for the reasons it gave and the following additional reasons. Correctly construed, the term "temporarily" in regulation 3(1)(a) AWR means not permanent, just as the EAT held in ***Moran*** and endorsed in ***Brooknight*** and ***Angard***.

27. Both Ryanair and MCG assert that *"temporarily"* means *"short-term"*: Ryanair §20 [**CB/4/64**]; MCG §68 [**CB/2/36**]. Both suggest that the trilogy of EAT authorities were wrongly decided and should not be followed. However, before the EAT MCG positively accepted that they were "*correctly decided*": EAT §195 [**CB/11/235**]. MCG further relies upon ***Brooknight*** in support of its submissions in respect of Ground 5 (skeleton §69 [**CB/2/36]**), indicating it does not contend that ***Brooknight*** was wrongly decided. ***Brooknight*** followed and faithfully applied the guidance of Singh J (as he then was) in ***Moran***. It is to be observed that MCG's submissions at §§68 **[CB/2/36]** do

not provide reasons in support of Ground 5 or address the purpose of AWR. For those reasons, these submissions will focus primarily on the submissions advanced by Ryanair; but these apply equally to MCG's Ground 5.

28. First, AWR implement the Directive and under the ***Marleasing*** duty must be interpreted, so far as is possible to achieve the result of the Directive. That is not problematic here because regulation 3(1)(a) largely mirrors the definition of "temporary agency worker" in Article 3(1)(c).

    (1) The overarching aim of the Directive is to improve the living and working conditions of all temporary agency workers, and in particular to improve the quality of temporary agency work: see Recitals (1) and (2). The Directive also gives effect to the principle of equal treatment as set out in Article 5 - a general principle of EU law - as regards temporary agency workers: see ***Betriebsrat der Ruhrandklinik v Ruhrhandklinik*** [2017] IRLR 194 at §§34-37; ***JH v KG*** Case C-681/18 A-G Sharpston at §§38-42, 54; CJEU §§40, 51-54; ***LD v ALB Fils Kliniken GmbH*** ECLI:EU:C:2023:505 §55. It therefore gives effect to rules of Community social law of particular importance which cannot be interpreted restrictively: see the approach adopted in relation to the related Fixed-Term Directive, referred to in Recital (5) of the Directive, in Case C-407/05 ***Del Cerro Alonso v Osakidetza*** [2008] ICR 145 at §§26-28 and 36-38.

    (2) To interpret "*temporarily*" as meaning "*not permanent*" chimes with the protective purpose of the Directive.

29. Second, the Directive's broad and inclusive scope is reinforced by Recital (5) and Article 3(2). Recital (5) expressly referred to the fact that when the Fixed-Term Directive was introduced, it was intended that a similar agreement would be considered in respect of temporary agency work, and for that reason agency workers were excluded from that Directive. Article 3(2) ensures fixed-term agency workers are protected under the Directive because it prohibits Member States from excluding

atypical workers from the rights conferred by the Directive solely because of their status, including "*fixed-term contract workers*". There is nothing to the point that Article 3(2) is framed by reference to the requirement that Member States shall not exclude such workers "*solely*" because of their status: Ryanair §27 [**CB/4/67**]. In any event, the Commission's proposal for the Directive powerfully indicates that fixed-term workers and other workers were intended to fall within scope[2].

30. Third, the Directive adopts a binary "bright-line" juxtaposition between employment contracts or relationships with a view to being assigned to work "temporarily" in contrast to assignments which are permanent or of indefinite duration. This is evident from the following:

(1) Recital (15) makes express reference to the fact that *"employment contracts of an indefinite duration"* are the general form of the employment relationship, acknowledging that workers with a *"permanent contract"* with their agency fall outside the scope of the Directive because of the "*special protection such a contract offers"*: see ***Moran*** §34.

(2) Article 5(2) gives effect to Recital (15) and permits the exemption from the principle of equal treatment as regards pay in cases where the temporary agency worker has a "*permanent*" contract of employment with the agency and continue to be paid in between assignments.[3] Even then, this derogation has been restrictively defined.[4]

---

[2] See *Commission Proposal on working conditions for temporary workers*, 20 March 2002 COM (2002)149 final (p.13): "… it is specified that a State may not exclude a worker from the scope of the directive on the grounds that he has a fixed-term contract, … or is on temporary work. The latter clause is intended to end the legal uncertainty which may surround temporary work in some Member States where the very varied interpretation of temporary workers' contracts may deprive them of the protection of labour legislation".

[3] Domestically, this exemption was abolished with effect from 6 April 2020 by the Agency Workers (Amendment) Regulations 2019 SI 2019/724 because workers were being deprived of rights to parity in circumstances where this exemption was being abused.

[4] See Report from the Commission to the European Parliament, The Council, The European Economic and

(3) Recital (15) and Article 5(2) serve to illustrate the binary dichotomy used in the Directive – the distinction is between "*temporary*" and "*permanent*" assignments to the user undertaking. There is no intermediate status falling between the two. The necessary implication is that workers who do **not** have an indefinite or permanent contract with their agency fall within the scope of the Directive because they work "temporarily" and do not have any equivalent "*special protection*".

(4) This distinction is further borne out by Article 6 which confers rights for agency workers to 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 rights conferred do not extend to be informed of non-permanent posts which are vacant (i.e. fixed-term). The necessary implication is that the workers within the scope of the Directive are those who do not have permanent employment.

31. All these protective purposes are ignored by Ryanair and MCG in their skeleton arguments. Ryanair only refers to the hirer's need for flexibility in Recitals (9) and (11) as somehow suborning the other aims: Ryanair skeleton §34. [CB/4/68].

32. Fourth, agency workers engaged on fixed-term non-permanent contracts who perform the same work as directly employed workers of the hirer are in no less need of equal treatment in respect of improved working conditions than those who provide short term cover. Ryanair's interpretation of AWR will result in a category of workers who do not have permanent employment but who are excluded from the equal treatment protection of the Directive, even though their employment relationship is not substantially different from directly-engaged employees. Such a restricted scope

---

Social Committee and the Committee of Regions on the application of Directive 2008/104/EC on temporary agency work, 21 March 2014 COM (2014) 176 final where the Commission confirmed at para. 4.2.1: "… As a derogation from the principle of equal treatment, Article 5(2) is to be interpreted restrictively. It does **not** concern temporary agency workers on fixed-term contracts, and can only be applied to those working under a permanent contract of employment…"

runs contrary to the protective purpose of the Directive and infringes the principle of equal treatment and non-discrimination which underpins the Directive (see above).

33. Fifth, if the Directive was intended only to apply to workers who are assigned to work "*short-term*" under the supervision and direction of the hirer, it would say so (cf. Ryanair §31 **[CB/4/68]**).[5]

34. Sixth, as well as changing "*temporarily*" to mean "*short-term*", Ryanair's narrow approach to construction would infringe the principle of legal certainty which informs both EU and domestic law: cf. Ryanair skeleton §37. **[CB/4/70]**. Legal certainty is a "fundamental principle of EU law": see ***R (Association of International Tankers) v Secretary of State for Transport*** [2008] ECR I-4057 at §69. The underlying premise is that rules imposing obligations on persons should be clear and precise so that they may know their rights without ambiguity: see ***Administration des Douanes*** etc [1981] ECR 1931 §17. It applies equally to implementing legislation which must be made with specificity, precision, and clarity: ***Mulligan v Minister for Agricuture*** [2002] I-ECR 5719 §§37, 47. It is also a principle of domestic construction.

35. Further:

    (1) Ryanair provides no basis for identifying when a fixed-term contract will be of sufficient length so as not to be short-term: it *"does not contend that it is possible to specify any particular duration of assignment which should be considered 'short-term'…"*(§32 **[CB/4/68]**). It offers no clarity other than to suggest that an assignment which is for a *"very long duration"* would fall out of scope: skeleton §36(b)(i). That is hardly illuminating.

[5] Note Directive 2014/66/EU on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer. Where the EU intends to impose a qualifying condition expressed to be "short-term" it does so expressly, and specifies the period which is deemed to be short-term. See Art. 21(1) which defines short term as a period of up to 90 days in any 180 day period.

(2) Ryanair asserts that it will not *"necessarily depend"* solely on the duration of the assignment, but is a nebulous question of *"fact and degree"* in respect of which Employment Tribunals are meant to consider the *"relevant context"* taking into account the *"purpose and nature of the work"*, including the hirer's *"need for flexibility"*: §33 **[CB/4/68]**. The acute and impossible uncertainty of such a test in practice is immediately obvious, as is the potential to undermine the protective purpose of the Directive.

(3) The construction contended for by Ryanair is not only anti-purposive, but it produces arbitrary results as well as the potential for inconsistent application by Tribunals. Absent any clarity, one Tribunal might regard an assignment as "short-term", another may reach a different decision in respect of an assignment lasting the same duration.

(4) There is no room for considering the *"purpose and nature of the work"*: Ryanair §33 **[CB/4/68]**. Article 3(1)(c) of the Directive poses a prospective and exclusively temporal question, namely whether the putative agency worker's contract or employment relationship with the agency was *"with a view to being assigned to a user undertaking to work temporarily"* under its supervision. The primary meaning of "temporary" is lasting for a limited period or not permanent. There is no basis in the language of the Directive or AWR for introducing a further definitional factor, involving a consideration of the *"purpose"* or *"nature"* of the work, or whether it satisfies the hirer's need for *"flexibility"* save and insofar as those matters shed light on whether the worker is supplied to work temporarily: EAT §201 [**CB/11/237**]. Properly viewed, Ryanair's focus on the hirer's need for flexibility displaces the correct question to instead focus onto the hirer's needs and intentions rather than whether the worker was assigned to work temporarily under the supervision and direction of the hirer. In substance, Ryanair's formulation is an undisclosed attempt to rewrite the Directive and AWR.

(5) Ryanair's reliance on other legislation is a distraction: skeleton §37 **[CB/4/70]**). It seeks to rely upon the meaning of what constitutes a service provision change for

the purposes of regulation 3(1)(b) of the Transfer of Undertakings (Protection from Employment) Regulations 2006 ("TUPE") and what a *"short-term rental property"* means for the purposes of the Levelling-up and Regeneration Act 2023 to suggest that its formulation does not give rise to uncertainty. This submission is heterodox. First, the concept of a service provision change is of purely domestic origin (rather than deriving from the Acquired Rights Directive). Second, it is impermissible to rely upon an entirely unconnected provision of domestic primary or subordinate legislation as an aid to construing the Directive on temporary work. Third, and to state the obvious, neither the Directive nor AWR makes any reference to *"short-term"*. Fourth, had the Directive intended to confer protection to only short-term assignments, this would have been made clear.

36. Seventh, there is also the further unintended consequence of Ryanair's position (and MCG's suggestion that the Directive applies to *"short-term cover"* at MCG §64 [**CB/2/35**]), namely that any attempt to limit protection to individuals on "short-term" assignments will encourage evasion of the principle of equal treatment and the important rights conferred by Articles 5 and 6 by the establishment of placements which are not perceived to be short-term. That ill-accords with the legislative purpose behind the Directive.

37. Eighth, in enacting AWR, Parliament equally chose to use the word "temporarily" and not "short-term". Importantly, regulation 3(1)(a) does not prescribe an upper limit beyond which employment is deemed not to be temporary. To the extent that this is more favourable to workers than the Directive requires, that is permissible under the Directive: see Article 9.

38. Nineth, the dichotomy between contracts where the individual is supplied "temporarily" versus assignments which are permanent or of an indefinite duration is one which is borne out by rulings of the CJEU. Quite independently, those decisions validate the prescient reasoning of Singh J (as he then was) at §41 of ***Moran***.

39. ***JH v KG*** Case C-681/18 ECLI:EUC:2020:823 concerned a referral for a preliminary ruling from Italy, in which a worker sought to argue that the repeated use of successive temporary assignments was an abuse. AG Sharpston stated that: *"the word temporary means 'lasting for only a limited period of time'; 'not permanent'"* which she contrasted with the Directive's references in Recital (15) and Article 6 to employment contracts of indefinite duration: §§50-51. The CJEU agreed with AG Sharpston, juxtaposing the reference to employment contracts of an *"indefinite duration"* in Recital (15) and the references to access to *"permanent employment"* in Article 6(1) with employment relationships *"… which are temporary, transitional or limited in time, and not permanent employment relationships…"*: §§61-62.

40. ***LD v ALB Fils Kliniken GmbH*** ECLI:EU:C:2023:505 concerned a referral by the German Federal Court as to whether the Directive applied to a transfer of an undertaking where an individual's duties were assigned to a third party transferee but where the individual had exercised their right to object: see §§29(1), 38. The CJEU confirmed that *"…the term 'temporarily', set out in Article 1(1) … is not intended to limit the application of temporary agency work to jobs which are not permanent or must be performed to provide cover, as that term characterises* ***not*** *the job which must be occupied at the user undertaking but the arrangements for the assignment of a worker to that undertaking…"* §43. Referring to Recital (15) and Article 6, the CJEU reaffirmed that *"it is clear from the case-law of the Court that that directive refers exclusively to employment relationships which are temporary, transitional or limited in time, and not permanent employment relationships …"* §50.[6]

41. The CJEU rulings in ***JH v KH***, and ***ALB Fils*** chime together, attesting to the broad scope of application of the Directive. They underscore the binary dichotomy between "temporarily" as distinct from contracts which are permanent or of indefinite duration. The Directive is **not** concerned with the nature of the work undertaken, the type of post to be filled, or whether the worker is providing "cover" within the user

[6] By virtue of s.6(2) EUWA - the version in force from 31.12.20 to 31.12.23, the CA "may" have regard to anything done by the CJEU after IP completion day in so far as it is relevant.

undertaking: cf. MCG's suggestion to the contrary at §§71.2, 71.6 [**CB/2/36-37**]. Rather, in the context of the protective framework established by the Directive, "temporarily" means *"limited in time"* in the sense of being *"not permanent"*.

42. These rulings correspond with the analysis of Singh J (as he was) in ***Moran*** at §41. This is dispositive of Ryanair's submissions in support of Ground 1 and MCG's Ground 5 (in so far as it appears to suggest that the Directive only applies to *"short-term cover"* at §64).

43. Both Ryanair and MCG, however, rely upon ***JH v KG*** in support of their case that temporarily means short-term: Ryanair skeleton §§29-30 **[CB/6/66-67];** MCG §§52, 69 [**CB/2/31,36]**. They rely on §§67-69 of ***JH***. But this is to read those passages out of context. The CJEU was addressing not the definition of "temporary agency worker" as defined in Article 3(1)(c) but a different issue concerning whether there was an abuse of the Directive to the detriment of the worker, contrary to Article 5(5).

44. Article 5(5) requires Member States to take appropriate measures to prevent the misuse of the principle of equal treatment in Article 5, in particular by *"preventing successive assignments designed to circumvent the provisions of this Directive"*. Article 5 is therefore intended to operate to protect the worker and to prevent successive assignments circumventing protections: see AG Sharpston at §§49, 56-7; CJEU at §§42, 47, 54-55, 57-58 (referring to the *"clear purpose of [the] Directive being to protect temporary agency workers and to improve the conditions of temporary agency workers"*).

    (1) In ***JH*** the worker sought a declaration that he was engaged in a permanent employment relationship which was "concealed" behind 8 successive temporary agency contracts and 17 extensions: §§22, 67. He invoked Article 5(5) in order to secure its protection and to contend that he should have a permanent contract of employment with the user undertaking owing to the abuse: §23.

    (2) It is in the specific context of abuse by means of successive assignments, that the CJEU observed at §69 that where they result in an overall period of service that is

longer than what can reasonably be regarded as "*temporary*", then that "*could be indicative" of misuse of "successive assignments"*. The risk against which Article 5(5) seeks to guard is that repeated renewals conceal what is in reality a permanent relationship, to the detriment of the worker: see ***KG*** §67. Clearly, that analysis applies only to successive assignments to which Article 5(5) applies, rather than initial assignments: §69. Article 5(5) has no application here, because the Claimant has **not** been placed on "*successive assignments*". There is only one assignment on the facts found by the ET for a fixed-term of 5 years.

(3) More fundamentally, Ryanair and MCG's attempt to rely upon ***KG*** inverts the very purpose of Article 5(5). The purpose of that Article is to prevent successive assignments undermining the purpose of the Directive to protect agency workers and improve the conditions of temporary agency work: see CJEU at §§58-59. But Ryanair are relying on it to deny the Claimant any protection whatsoever. If he is denied the protection of the Directive or AWR he will not become a permanent employee or otherwise obtain any protection. It contradicts the purpose of Article 5(5) for Ryanair and MCG to stipulate that the Claimant had to be engaged on a fixed-term period of five years, yet then to rely upon that express stipulation as an "abuse" which means he is taken outside the scope of the Directive and the important rights to equal treatment that it confers. Nor can they rely on the UK state's failure to take steps to prevent abuse by them. Quite apart from the internal contradiction of such an argument, if the end result is more favourable to workers than the Directive requires, that is permissible under Article 9.

45. Drawing the above points together, properly construed, the Directive and AWR pose a binary question: is the worker supplied on a temporary basis (in which case they are in scope), or on a permanent/indefinite basis (in which case they fall out of scope)? That was the conclusion of the EAT in ***Moran*** after consideration of the language, history and purpose of the Directive: see ***Moran*** §§24-39, 41, 50. It produces a clear, straightforward test for Tribunals, and provides agency workers, temporary work agencies, and hirers with an accessible understanding of when the AWR are engaged,

in contrast to the multifactorial question beset with uncertainty advanced by Ryanair. The current position does not give rise to *"considerable uncertainty"* as suggested: Ryanair skeleton §37(a) **[CB/4/70]**. Four separate divisions of the EAT have adopted the same construction, namely that regulation 3(1)(a) poses a binary question. The CJEU rulings belie any uncertainty as to when the Directive applies.

46. Neither Ryanair nor MCG seek to suggest that to interpret "temporarily" as meaning not permanent is an impermissible meaning of the concept, it is the concept's natural meaning. Once account is taken of the purposes of the Directive, it is obvious that this is the correct interpretation.

47. To address two points raised specifically by MCG in support of Ground 5:

    (1) It is unclear why or upon what basis the various factors relied upon at §71 [**CB/2/36-37**] are said to be at all germane to the correct question of whether the Claimant was supplied temporarily for the purpose of regulation 3(1)(a) AWR. They are not relevant. The fact that some of the factors may relate to the issue of whether the Claimant worked under the supervision and direction of Ryanair as hirer is immaterial to the issue on appeal, namely whether he was supplied temporarily.

    (2) MCG's parting suggestion at §72 [**CB/2/37**] that the Claimant was supplied on an ongoing basis as in ***Moran*** is a direct challenge to the ET's factual findings (in the absence of any perversity appeal). That analysis is wrong. The arrangements in which the cleaners were assigned in ***Moran*** "*were indefinite in duration and therefore permanent and not temporary*" (§42) **[CB/4/74]**. Here the Claimant was assigned on a temporary five-year fixed-term.

48. Finally, there is nothing that Ryanair or MCG can point to in the legislative history, context or language which supports their case. In reality, the attempt to define

"temporarily" as meaning "short-term" would amount to legislation, not interpretation.

Ryanair Ground 2

49. Ryanair asserts in the alternative that if *"temporarily"* does not mean *"short-term"* and the duration of the supply is of no relevance, that the ET misdirected itself in law by failing to apply what it suggests is the approach *"required"* by ***Brooknight***. It contends that the ET should have considered whether the Claimant was supplied temporarily by reference to *"the purpose and nature of the work for which he was supplied to Ryanair"*: skeleton §39.

50. The Claimant relies upon and repeats the submissions advanced in response to Ryanair's Ground 1. Both Article 3(1)(c) of the Directive and regulation 3(1)(a) AWR focus on the whether the worker was supplied *"temporarily"* or not. The *"purpose"* or *"nature"* of the work that the agency worker is assigned to do is not germane to the correct question: see ***ALB Fils*** §43. This is dispositive of Ryanair's assertion that the Directive only applies in situations which *"satisfy the hirer's need for flexibility"* on an *"as and when needed"* basis to provide cover, to satisfy seasonal fluctuations in demand, or otherwise to satisfy the hirer's *"ongoing need for the work to be done"*: Ryanair §44(b) **[CB/4/75]**. "Temporarily" is about time alone.

51. Ground 2 in any event is premised on a misreading of ***Brooknight***, and an erroneous suggestion that the EAT provided an *"important refinement or clarification"* of the approach adopted in ***Moran*** as to whether the assignment is open-ended in duration or terminable upon some other condition: Ryanair skeleton §§40-41 **[CB/4/73-4]**.

52. In ***Angard*** the EAT observed that in some cases the documentation created at the inception of the worker/agency relationship will "*… contain all the particulars of the supply or supplies which are contemplated, including sufficient terms to enable the tribunal to identify, from that documentation alone, whether that supply … will … be to work temporarily or not…"* §52. That will obviously be so where the practice reflects the written contract

and where nothing is ever said to the individual to suggest that the "*true agreement*" was anything different to that specified. That analysis applies to the facts of this case.

53. In contrast, ***Brooknight*** was a case where the contractual documentation did not contain all the information necessary to enable the ET to determine whether the supply was temporary or not. The claimant was engaged on a zero hours contract with the agency which did not contain sufficient particulars to yield the answer as to whether the assignment was either temporary or permanent/of indefinite duration. The relevant contractual right was that the individual was assigned on a "*required only basis as and when requested*": EAT §4. The individual worked for 21 months, but the issue was whether the assignment was indefinite or whether this was to be viewed as a series of one or more short-term assignments: EAT §7.

54. The claimant contended that simply because he was engaged on a zero hours contract where the agency was under no obligation to provide him with work, then it followed that he satisfied regulation 3(1)(a). It was within that context that HHJ Eady QC (as she then was) accepted the respondent's submission that it was "*possible to carry out work for a particular entity pursuant to a zero-hour contract on an entirely indefinite basis*" (at §§24-25). In *that* situation, the ET was required to focus on the work the claimant performed to see whether in fact he was supplied indefinitely or not, rather than confining its analysis to the terms of the contract.

55. In that type of situation (unlike the present facts), the ET should focus on the "*purpose and nature of the work*", not in some abstract sense as Ryanair suggests, but to address the fundamental question of "*is it temporary or permanent?*" (indeed, Ryanair extrapolates an erroneous principle by relying upon a fragment of a sentence). On the facts, the ET was entitled to find that the claimant was not supplied indefinitely, but was used to provide cover: see EAT §§ 25 – 27 [**CB/11/175-176**]. The EAT's analysis of ***Brooknight*** in the present case at §§201 - 202 is correct.

56. Rather than the EAT seeking to refine or clarify ***Moran*** as Ryanair suggests §40

[**CB/4/73**], properly analysed, the EAT in ***Brooknight*** was faithfully applying the dichotomy between "temporarily" vs. permanent/indefinite: see ***Brooknight*** §§20-23, 25, 28. It endorsed and followed the interpretation of "temporarily" of the EAT in ***Moran***: see EAT §§21-23. The EAT was not advocating that in every case it would be necessary to consider the *"purpose and nature"* of the work as the EAT correctly decided in this case at §201 [**CB/11/237**].

57. In any event, the evidential picture which featured in ***Brooknight*** was not present on the current facts. Here the written terms were sufficient to answer the question: the Claimant was not assigned to work permanently or indefinitely for Ryanair because he was engaged under a five-year fixed-term contract. There is no appeal against the ET's finding, and no suggestion that the fixed-term period did not reflect the true terms of the agreement between the Claimant and MCG.

Ryanair Ground 3

58. Ground 3 is parasitic on Ground 1 or Ground 2 succeeding.

59. Even if "temporarily" means short-term, it does not follow that Ryanair succeeds in its appeal. The only possible conclusion is that the Claimant's individual contract was made *"with a view"* to his being assigned to work temporarily for Ryanair (Article 3(1)(a)) because the contract was for a fixed-term of five years. On the evidence, there was no basis for disregarding that term. The unchallenged evidence of the Claimant was that he understood that his assignment ended after five years. No witness for Ryanair suggested anything different was ever communicated to him. In his case the documents were sufficient to provide all the information about the nature of his supply: ***Angard***, §52. In those circumstances, there was only one answer to the question under Article 3(1)(c) and regulation 3(1)(a) that the Claimant's contract was made *"with a view"* to him being assigned to work temporarily: Ryanair §46(a) [**CB/4/76**].

60. Alternatively, Ryanair's reliance upon the *"purpose and nature"* of the assignment,

poses the wrong question as to whether the supply was part of Ryanair's ongoing/indefinite need for "pilots" (in the plural). The correct question is not whether Ryanair had an ongoing demand for the supply of both directly employed and contractor pilots generally, but is a more limited question of whether the Claimant (as an individual worker) was a person engaged *"with a view"* to being assigned to Ryanair as the hirer to work temporarily under its supervision and direction: cf. Ryanair §46(b) **[CB/4/76]**. The focus of both Article 3(1)(c) and regulation 3(1)(a) is on the supply of the individual. To focus on the general needs of the user undertaking will again defeat the protective purpose of the Directive and AWR because it will take individuals out of scope who are, on any view, individually supplied to work temporarily. Contrary to §47 **[CB/4/76]**, the ET did not make any findings that the Claimant was supplied on an indefinite basis:

61. The fact that the *"nature"* of the Claimant's work was *"exactly the same as that of pilots who were permanent employees of Ryanair"* supports (rather than detracts from) from his falling within the scope of the Directive and regulation 3(1)(a) AWR. Regulation 5, and the principle of equal treatment which underlies Article 5(2), is premised on the agency worker doing the same job as if he had been directly recruited (see regulation 5(1) and Article 5(1)). AWR recognises that the comparison can be made with employees of the hirer performing the same or similar duties: that is the foundation of the principle of equal treatment. A contrary conclusion offends the protective purpose of the Directive, denying the Claimant the right to the same basic working and employment conditions that it seeks to confer: Ryanair §46(b) **[CB/4/76]**. It is liable to jeopardise the attainment of the Directive's objectives because it will enable agencies to exclude individuals from the principle of equal treatment *"even though the employment relationship between those persons and the temporary work agency is not substantially different from the employment relationship between employees having the status of workers under national law with their employer"*: ***Betriebsrat***, §§35-7.

MCG Ground 4

62. MCG's submissions in support of this ground are difficult to follow. Addressing them in a slightly different order, three points appear to be advanced (i) the ET focussed on the "*wrong written contract*" §61 [**CB/2/34**]; (ii) the ET/EAT erred in (somehow) failing to consider the "*entirety of the evidential mosaic*"; and (iii) "*in fact*" the Claimant was carrying out work on "*an indefinite basis*": §§52, 64, 71.2 [**CB/2/31,35-36]**.

63. Wrong contract. As to (i), MCG suggests that the ET "*did not ask the relevant question*" as to the nature of the supply from the agency to the hirer and the contract between the Claimant and MCG was the "*wrong written contract to focus upon*" because it "*said little*" about the arrangements in existence between MCG and Ryanair: §§51, 61 [**CB/2/31,34]**. It suggests that the ET should have decided whether the Claimant was temporarily supplied **not** by reference to the contract he entered into with MCG which governed the assignment, but rather by reference to a different contract between MCG and Ryanair dating from 2011 to which he was not even a party: §64 [**CB/2/35]**. This submission is contradicted by the very EAT authorities which MCG cites in its skeleton, **all** of which have focused on the contract between the agency and the individual worker: see ***Brooknight*** §25 (cited by MCG at §53 [**CB/2/31]**), ***Angard*** §§46, 50, 52 (cited by MCG at 54-58 [**CB/2/32-34]**). MCG positively endorses ***Angard*** as correctly deciding that the relevant focus is on the relationship between the agency and the worker which was "*determinative*": §54 [**CB/2/52]**. However, ***Angard*** did **not** examine the nature of the contract between Angard and Royal Mail – which is irrelevant to the statutory question.

64. The statutory question under regulation 3 is **not** whether the contractual relationship between the temporary work agency and the hirer is for temporary supplies of workers. That submission is inconsistent with the language of regulation 3 and Article 3(1)(c), both of which direct attention to the supply of the individual worker not the overarching relationship between the agency and the worker. If that were the intention, regulation 3 and Article 3 would use different wording, and define an agency worker by reference to whether the relationship between agency and hirer is temporary. Once again, MCG's analysis would contradict the protective purpose of

the Directive endorsed in ***Betriesbsrat*** and ***JH***. Whenever there was an on-going need for agency workers, individuals will be taken outside the scope of the Directive and AWR.

65. The correct question is not what arrangements may or may not have existed between the agency and hirer (which may well provide a framework for general and ongoing supplies of labour), but rather whether the Claimant was supplied temporarily. As the CJEU held in ***AN Fils*** the proper focus is on "*the arrangements for the assignment of a worker to that undertaking…*" §43. Here, the relevant contract between the Claimant and MCG was dispositive. The ET's approach was not "*legally erroneous*" as MCG suggests: §65 **[CB/2/35]**. Likewise, the EAT's reasoning does not disclose any error: §201 [**CB/11/237**].

66. Evidential and factual mosaic. As to (ii) and (iii), these are undisclosed perversity challenges. At §52 MCG suggests that the correct issue was whether the supply by MCG of the Claimant to Ryanair "*… was in fact structured as an indefinite arrangement rather than, say, a temporary 'assignment'…*" **[CB/2/31]**. At §61, it criticises the "*factual findings*" made by the ET and suggests that more were needed **[CB/2/34]**. This is wrong. At §64 MCG now asserts by reference to the Ryanair/MCG contract that the supply of the Claimant "*was necessarily on this perpetual basis, not as short-term cover*" **[CB/2/35]**. Further, at §71.2 it argues that "*in fact*" the Claimant was carrying out work on "*an indefinite basis*" **[CB/2/36]**. It relies upon these factors in support of its contention that the ET (somehow) erred in failing to consider the "*entirety of the factual matrix*".

67. These points are not open to MCG to take at this late stage, particularly where no perversity challenge was before the EAT. It was not in dispute that the contract signed by the Claimant to work as a pilot supplied to Ryanair was for a fixed-term of five years. There is no evidence that he was ever told anything different about the temporal extent of his supply to Ryanair. In summary:

    (1) The EAT set out the facts supporting the ET's finding that the Claimant was supplied for five years at §203 [**CB/11/238**].

(2) The EAT recorded *"… Neither [Ryanair] nor [MCG] identified any findings or evidence that pointed in a different direction in respect of the initial five-year period…"*.

(3) Further, the EAT again accurately recorded that *"… there was no suggestion that an indefinite arrangement was made"* at §204 [**CB/11/238**].

(4) Reflecting the reality of the situation, it was conceded that the Claimant *"could not have insisted on an extension"* of this period, either on an indefinite basis or on a new five-year contract: §204 [**CB/11/238**]. MCG did not assert otherwise.

(5) The ET *"legitimately found that the supply was for a fixed term of five years"*: §207 [**CB/11/239**].

68. These were all findings that were open to the ET on the evidence before it, and disclose no error of law. The Claimant goes further: on the undisputed evidence that the Claimant's individual supply was for a fixed-term of five years, no other conclusion was open to the ET than the one it reached.

Conclusion

69. For the above reasons, the Court of Appeal is invited to reject both appeals. The ET did not err in law, and the EAT was correct to uphold its decision that the Claimant was a temporary agency worker for the purpose of regulation 3(1)(a) for the reasons it gave.

MICHAEL FORD KC

STUART BRITTENDEN KC

14 June 2024

14 February 2025