CA-2023-002537 linked with CA-2023-002546

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL

B E T W E E N :

STORM GLOBAL LIMITED

Appellant

-and-

JASON LUTZ

Respondent

REPLACEMENT SKELETON ARGUMENT OF STORM GLOBAL LIMITED FOR THE HEARING OF THE MAIN APPEAL BETWEEN 1 AND 3 APRIL 2025

A. INTRODUCTION

1. Appeal time estimate: 2 days.

2. This is Storm Global Limited's[1] ("**MCG**") skeleton argument on its appeal against the Judgment of the Employment Tribunal (EJ Housego), sitting in the East London Hearing Centre, dated 5 April 2022 **[CB/18/266-295]**, upheld by the EAT (Heather Williams J, Mr Nick Aziz, Mr Andrew Morris) by Judgment dated 30 November 2023 **[CB/10/163-164] [CB/11/165-241]**.

3. This appeal ("**Appeal 1**") **[CB/1/3-25]** is linked with appeal number CA-2023-002546 brought by Ryanair DAC ("**Ryanair**") ("**Appeal 2**") **[CB/3/39-54]**. PTA for both appeals was granted by Elisabeth Laing LJ on 21 May 2024 **[CB/14/248-251] [CB/15/252-253]**.

4. C is an airline pilot. He brings statutory claims against Ryanair, the well-known Irish airline, and MCG, which provided certain outsourced services to Ryanair and C. The

[1] Storm Global Limited was previously known as MCG Aviation Limited. Its name changed on 26 May 2022, after the ET hearing below. It is referred to as MCG in the judgments below and, therefore, referred to as "MCG" in this skeleton argument.

appeal arises following a Preliminary Hearing at which the ET determined (as against MCG) that:

4.1. Mr Lutz ("**C**") was a crew member "*employed by*" MCG within the meaning of regulation 3 of the Civil Aviation (Working Time) Regulations 2004 (SI 2004/756) ("**CAWTR**") and also within the meaning of clause 2 of the European Agreement on the Organisation of Mobile Staff in Civil Aviation, implemented by Directive 2000/79/EC.

4.2. C was (therefore) within the definition of a "*crew member"* within the CAWTR.

4.3. C was a worker for the purposes of the essential principle of EU law reflected in Article 31 of the Charter on Fundamental Rights of the EU.

5. The ET determined (as against both Ryanair and MCG) that by reference to the Agency Worker Regulations 2010 (SI 2010/93) ("**AWR**") C was an "*agency worker*" within the meaning of regulation 3(1) of the AWR as:

5.1. C was "*supplied by*" MCG to work "*temporarily*" for and under the supervision and direction of Ryanair.

5.2. C had a contract with MCG to perform work or services personally.

6. The EAT upheld these conclusions and dismissed appeals by MCG and Ryanair.

B. GROUNDS

7. MCG appeals on 5 grounds:

7.1. Ground 1. The ET and EAT were wrong to conclude that C was a crew member "*employed by*" MCG for the purpose of the CAWTR.

7.2. Ground 2. The ET and EAT were wrong to conclude that Article 31 of the EU Charter requires a different outcome from the outcome under the CAWTR.

7.3. Ground 3. The ET and EAT were wrong to conclude that C was a crew member "*employed by*" MCG for the purpose of the AWR.

7.4. Ground 4. The services provided were outside the scope of the AWR because they were not "*temporary"* in any event.

7.5. Ground 5. The EAT Authorities relied on by the ET and EAT on the meaning of *"temporarily"* in reg. 3(1)(a) of the AWR are wrongly decided.

8. MCG supports Ryanair's appeal on similar and additional grounds.

C. KEY LEGISLATION

(1) CAWTR

9. Regulation 3:

> *"3. Interpretation*
>
> *In these Regulations– ...*
>
> *"crew member" means a person employed to act as a member of the cabin crew or flight crew on board a civil aircraft by an undertaking established in the United Kingdom;*
> *...*
> *"employment" in relation to a crew member, means employment under his contract, and "employed" shall be construed accordingly;..."*

10. There is no dispute that C was a "*crew member*". The issue under the CAWTR is whether C was "*employed by*" MCG as a crew member under a contract.

(2) AWR

11. Regulation 3:

> *"3.— The meaning of agency worker*
>
> *(1) In these Regulations "agency worker" means an individual who—*
>
> *(a) is supplied by a temporary work agency to work temporarily for and under the supervision and direction of a hirer; and*
>
> *(b) has a contract with the temporary work agency which is—*
>
> *(i) a contract of employment with the agency, or*
>
> *(ii) any other contract with the agency to perform work or services personally.*
>
> *(2) But an individual is not an agency worker if—*

(a) the contract the individual has with the temporary work agency has the effect that the status of the agency is that of a client or customer of a profession or business undertaking carried on by the individual; or

(b) there is a contract, by virtue of which the individual is available to work for the hirer, having the effect that the status of the hirer is that of a client or customer of a profession or business undertaking carried on by the individual.

(3) For the purposes of paragraph (1)(a) an individual shall be treated as having been supplied by a temporary work agency to work temporarily for and under the supervision and direction of a hirer if—

(a) the temporary work agency initiates or is involved as an intermediary in the making of the arrangements that lead to the individual being supplied to work temporarily for and under the supervision and direction of the hirer, and

(b) the individual is supplied by an intermediary, or one of a number of intermediaries, to work temporarily for and under the supervision and direction of the hirer.

(4) An individual treated by virtue of paragraph (3) as having been supplied by a temporary work agency, shall be treated, for the purposes of paragraph (1)(b), as having a contract with the temporary work agency.

(5) An individual is not prevented from being an agency worker—

(a) because the temporary work agency supplies the individual through one or more intermediaries;

(b) because one or more intermediaries supply that individual;

(c) because the individual is supplied pursuant to any contract or other arrangement between the temporary work agency, one or more intermediaries and the hirer;

(d) because the temporary work agency pays for the services of the individual through one or more intermediaries; or

(e) because the individual is employed by or otherwise has a contract with one or more intermediaries.

(6) Paragraph (5) does not prejudice the generality of paragraphs (1) to (4).”

12. Regulation 4:

“The meaning of temporary work agency

4.—(1) In these Regulations "temporary work agency" means a person engaged in the economic activity, public or private, whether or not operating for profit, and whether or not carrying on such activity in conjunction with others, of—

(a) supplying individuals to work temporarily for and under the supervision and direction of hirers; or

(b) paying for, or receiving or forwarding payment for, the services of individuals who are supplied to work temporarily for and under the supervision and direction of hirers.

(2) Notwithstanding paragraph (1)(b) a person is not a temporary work agency if the person is engaged in the economic activity of paying for, or receiving or forwarding payments for, the services of individuals regardless of whether the individuals are supplied to work for hirers."

(3) European Agreement on the Organisation of Mobile Staff in Civil Aviation

13. Clause 2:

"2. "Mobile staff in civil aviation" means crew members on board a civil aircraft, employed by an undertaking established in a Member State."

(4) Charter on Fundamental Rights of the EU

14. Article 31:

*"**Fair and just working conditions***

1. Every worker has the right to working conditions which respect his or her health, safety and dignity.

2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave."

D. GROUND 1 - THE ET WAS WRONG TO CONCLUDE THAT C WAS A CREW MEMBER "*EMPLOYED BY*" MCG.

15. Ground 1 raises a status question: did MCG "*employ"* C as a pilot?

16. MCG's business is essentially the supply of ancillary payroll and administrative services associated with pilots. MCG employs a Managing Director and two administrative staff. Its services are far less extensive than the typical employment agency model (for example as considered by the Court of Appeal in the agency worker context in ***James v Greenwich BC*** [2008] IRLR 302).

17. MCG does not operate an airline.

18. C did not claim that he was employed by Ryanair. Accordingly, the question before the ET was not whether C was an employee and, if so, of whom. The question was whether C was employed by MCG. This arose from a (presumably tactical) decision on the part of C not to contend that he was employed as a crew member by Ryanair (which, unlike MCG, does operate an airline). C's actual engagement was through a service company, 'Dishford', by a contract dated 7 May 2018 **[SB/11/53-61]**.

19. The ET erred in finding that the contractual relationship between C and MCG was properly described as "*employment*" in the autonomous EU law sense (on application of ***Allonby*** [2004] IRLR 224; ***Uber BV v Aslam*** [2021] ICR 657 [36]). There was nothing in the Judgment, or the underlying evidence, that properly supported the contention that MCG *"employed*" C. C was not "*employed"* under the contract in question and the ET and EAT were wrong to conclude otherwise.

20. It is common ground that "*employed by"* does not denote a (common law or ERA) contract of employment. In respect of protective legislation derived from EU law, the autonomous EU definition applies. In EU law there is no single definition of 'worker' and worker status is not dependant on the existence of a contract; it refers instead to an 'employment relationship' (***O'Brien v Ministry of Justice***, Case C-393/10 [2012] IRLR 421 §30 citing C-85/96 ***Martínez Sala*** [1998] ECR I-2691, §31, and C-256/01 ***Allonby*** [2004] IRLR 224, §63).

21. In ***Uber BV v Aslam*** [2021] ICR 657 UKSC at [72], Lord Leggatt JSC said as follows (emphasis added):

> *"…. Although there is no single definition of the term "worker", which appears in a number of different contexts in the Treaties and EU legislation, there has been a degree of convergence in the approach adopted. In Allonby v Accrington and Rossendale College (Case C-256/01) [2004] ICR1328; [2004] ECRI-873 the European Court of Justice held, at para 67, that in the Treaty provision which guarantees male and female workers equal pay for equal work (at that time, article 141 of the EC Treaty): "**there must be considered as a worker a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration".** The court added (at para 68) that the authors of the Treaty clearly did not intend that the term "worker" should include "independent providers of services who are not **in a relationship of subordination with the person who receives the services**". In the EU case law which is specifically concerned with the meaning*

of the term "worker" in the Working Time Directive, the essential feature of the relationship between employer and worker is identified in the same terms as in para 67 of the Allonby judgment: Union syndicale Solidaires Isère v Premier ministre (Case C-428/09) [2010] ECRI-9961, para 28; Fenoll v Centre d'Aide par le Travail "La Jouvene" (Case C-316/13) [2016] IRLR67, para 29; and Sindicatul Familia Constanța v Direcția Generală de Asistență Socială și Protecția Copilului Constanța (Case C-147/17) [2019] ICR211, para 41. As stated by the Court of Justice of the European Union (CJEU) in the latter case, "It follows that an employment relationship"—ie between employer and worker—"implies the existence of a hierarchical relationship between the worker and his employer" (para 42).

22. The issue is therefore whether C provides services "*for and under the direction of"* MCG and/or has a "*relationship of subordination with"* MCG, which is the "*person who receives the services".* In other words, in fact, not legal form, who was C providing the services for? Who was directing C? To whom was C subordinate in fact? Colloquially, who (if anyone) was C's boss? (Specifically given C's pleaded case, was MCG C's boss?)

23. All of the ET's factual findings were that MCG did not receive the services, direct C, or act as his 'boss'. This is clear from the following findings:

    23.1. At [10]: "*Mr Lutz was a first officer on Ryanair's Boeing 737s. He had to pass Ryanair competency assessments. He had a Ryanair uniform. He was rostered by Ryanair. No one could possibly think that he was other than part of the crew of the planes he flew. The planes could not fly without him being there as part of the crew*."[2] **[CB/18/270]**

    23.2. C was employed "*in the operations of Ryanair"* [12] **[CB/18/270]**;

    23.3. C was an integral member of the crew of the planes he flew [15] and an "*integral part of the airline"* [16] **[CB/18/271]**;

    23.4. MCG had "*almost no communication with [C] after he started flying for Ryanair before being dismissed"* [16] **[CB/18/271]**;

[2] At [11], the ET said "*so the first two issues must be resolved in favour of the Claimant".* As the first two issues concerned whether MCG employed C, not Ryanair, the fact that the ET considered that its findings at [10] "*resolved"* the issues, when MCG was not mentioned, evidences its erroneous approach.

23.5. Every aspect of C's engagement with Ryanair was structured as Ryanair dictated [20] **[CB/18/272]**;

23.6. All pilots (employed and contracted) were integrated into a single pool [27] **[CB/18/273]**;

23.7. Ryanair, not MCG, was responsible for rostering [27] **[CB/18/273]**;

23.8. MCG did not "*procure"* any pilots [28] **[CB/18/273]**. C did not apply to MCG for a role (he applied directly to Ryanair) [29] **[CB/18/273]**. If successful they would be sent to MCG to "*process"* [28] **[CB/18/273]**.

23.9. C sent his CV and was interviewed by Ryanair, not MCG [28] **[CB/18/273]**; C was trained to Ryanair's requirements, not MCG's [30] **[CB/18/273]** and [37]; **[CB/18/274]** Ryanair told C "*when and where"* he would be trained [104.2] **[CB/18/291]**;

23.10. There was no action taken by C that was not directed by Ryanair [44] **[CB/18/275-276]**;

23.11. C booked annual leave and time off directly with Ryanair, not MCG [59] **[CB/18/279]**;

23.12. C was issued with two Ryanair ID cards [3] **[CB/18/267]**;

23.13. BALPA negotiated collectively with Ryanair (not MCG) [84] **[CB/18/285]**;

23.14. C was required to wear a Ryanair uniform [10] **[CB/18/270]** and [90] **[CB/18/286-287]**;

23.15. Ryanair, not MCG, allocated C's base at Stansted [104.8] **[CB/18/291]**;

23.16. C swapped shifts directly through Ryanair's Crew Dock system with no reference to MCG [74] **[CB/18/283-284]**;

23.17. Following a disciplinary hearing at Ryanair's headquarters in Dublin, Ryanair decided they no longer wished for C to fly its aircraft (inevitably resulting in MCG terminating the Dishford contract) [85] **[CB/18/285-286]**.

24. The ET (and EAT) failed properly to apply ***Uber BV v Aslam***. The ET did, for example not ask how and to what extent C "*for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration"* by reference to MCG (noting that MCG does not use any pilot services at all and C was remunerated by Dishford directly and Ryanair ultimately).

25. The EAT further erred in its analysis of the CJEU's decision in ***Allonby***. ***Allonby*** was not an employment status case at all. It simply establishes the proposition that an individual can be employed by an agency when providing services to an end-user. The same uncontroversial proposition arises as a matter of domestic law. However, whether the individual *is* employed by either entity requires analysis of the tests summarised in ***Uber BV v Aslam***. It is also uncontroversial that an arrangement involving "*notional*" independence will not prevent an individual from being employed in the relevant sense (EAT/[88]) **[CB/11/194]**.

26. The EAT noted at EAT/[143] **[CB/11/217]** that it was not asked to consider whether, as a matter of EU law, C might have rights as against Ryanair. That was not an issue as a consequence of C's decision not to claim any such rights. That is relevant to the EAT's conclusion at EAT/[150] **[CB/11/221]** that the protective legislation would, contrary to its conclusions, potentially not confer rights on C. In fact, C may have such rights; the fact that he has elected not to pursue those rights, if they exist, is a matter for him. Certainly it is no part of the statutory approach to impose liabilities upon MCG because of C's tactical pleading decisions.

27. The overall (flawed) logic of the EAT's approach was that by reason of the arrangement being tripartite, it was permissible to treat the ***Uber BV v Aslam*** test as being satisfied *vis-à-vis* the agency (MCG) if there was sufficient control, subordination, direction *etc* vis-à-vis the user (Ryanair). In other words, liabilities that might be supposed to sit with the person who (otherwise) meets the ***Uber BV v Aslam*** definition of an employer can simply be switched to another legal person if the arrangements are tripartite and on the authority (only) of ***Allonby***.

28. There is no justification for this approach. It is not supported by ***Allonby*** in any sense. ***Allonby*** concerned the entities with whom an Article 141[3] equal pay comparison could

[3] Now Article 157 TFEU.

be made. It did not concern the tests necessary for the establishment of bilateral employment rights, such as holiday pay. It does not establish that a court can treat two independent entities as interchangeable in order to secure employment rights for an individual. Nothing in C's skeleton argument before the EAT even suggested such a conclusion.

29. The positions of Ryanair and MCG are not interchangeable in any event. The only permissible approach was to consider whether the ET's findings supported the existence of a European employment relationship between MCG and C on their own terms and irrespective of Ryanair. Nothing in ***Allonby*** allows one to 'look through' the person who putatively satisfies the relevant test and impose statutory obligations elsewhere.

30. The EAT considered the relevant factors at EAT/[153]-[155] **[CB/11/221-223]**. However, as to the factors at [153] **[CB/11/221-222]**:

    30.1. The existence of a written contract with MCG (and the absence of a written contract with Ryanair) is immaterial. In ***Uber*** itself, there was no written contract. The issue is whether the relationship is properly characterised as employment in the relevant sense irrespective of the formal contractual arrangements.

    30.2. The fact that "*the bargaining power was all with Ryanair"* does not indicate the existence of an employment relationship between C and MCG. Similarly, the fact that Ryanair and MCG decided the payment arrangements did not indicate the existence of employment as opposed to a non-employment relationship.

    30.3. The further factors taken from the Dishford contract were not reflected in the ET's actual findings (no doubt as the Dishford contract did not in fact represent the entirety of the bargain). It was not open for C to cherrypick aspects of the Dishford contract which suited his case which were not reflected in the ET's Judgment (whilst also attacking the Dishford contract as sham in any event).

31. As to the policy point in EAT/[150] **[CB/11/221]**, the scope of protection in this field is a matter for Parliament. It is notable that the CAWTR do not include any provision in the form of regulation 36 of the Working Time Regulations 1998 which expressly extends their scope to agency workers (as they would not normally otherwise be in

scope). On the EAT's analysis, regulation 36 of the 1998 Regulations would be redundant in any event as agency workers would already be in scope. The clear inference of regulation 36 is that, when Parliament wishes for agency workers to have express protection, it provides such protection. It has not done so under the CAWTR which points firmly against the approach adopted in this case. This may strike some as unsatisfactory, but that is not a relevant consideration.

32. The case advanced by C is far beyond even the "*radical alternative"* description of EU law in Mr Ford KC's *Industrial Law Journal* article[4] discussing the possibility of arguing, under EU law, for an employment relationship with the client (here Ryanair) but not the contractor company. The Ryanair model is discussed at p. 709. If the ET was correct to conclude that C ought to have statutory protection, it did not follow, simply as a consequence of how C argued the case, that such rights were to be secured by a conclusion that MCG were the employer.

33. The error of both ET and EAT was to seek to fill the gap created by C's own case and the fact that he did not allege that he was "*employed by*" Ryanair. C's explanation (that he had no written contract with Ryanair) is irrelevant; the drivers in ***Uber*** had no written contract with the entity against whom they asserted their rights.

34. None of the evidential indicators of an employment relationship, as identified by Lord Leggatt in ***Uber***, were present in any sense. C provided no service to MCG. There was no direction by MCG, nor subordination to MCG. The ET's conclusions that MCG had "*almost no communication with [C] after he started flying for Ryanair before being dismissed"* [16] **[CB/18/271]** should have been treated as a compelling contra-indicator. Similarly, the fact that every aspect of Mr Lutz's engagement with Ryanair was structured as Ryanair dictated was similarly dispositive.

35. The erroneous outcome is redolent of ***Brook Street Bureau (UK) Limited v Dacas*** [2004] ICR 1437 (CA). In ***Dacas***, the Claimant's services as a cleaner were supplied by the Respondent agency, Brook Street, to Wandsworth Borough Council. For five or six years she worked a regular five-day week at a hostel run by the Council in Streatham.

[4] *The Fissured Worker: Personal Service Companies and Employment Rights*) ILJ (2020) 49(1): 35 discussing the possibility of arguing, under EU law, for an employment relationship with the client (here Ryanair) but not the contractor company.

Following termination, the Claimant brought a claim for unfair dismissal against both Brook Street and the Council. The ET dismissed that claim on the basis that she was employed by neither Respondent. The EAT found that she was employed by Brook Street. On appeal to the Court of Appeal, the Claimant did not argue that the Council was her employer, but sought to uphold the EAT's decision. The Court of Appeal restored the Tribunal finding that she was not employed by Brook Street and, having of its own motion joined the Council as Respondent in the Court of Appeal, would have remitted the question of whether the Council was her employer to a fresh ET for re-hearing. But, since there was no appeal by the Claimant against the ET's finding that she was not so employed, the original ET decision stood.

36. MCG submits that the ET's factual conclusions are sufficient to allow the Court of Appeal to substitute a finding that C was not employed by MCG. Remission is unnecessary.

E. GROUND 2 - THE ET AND EAT WERE WRONG TO CONCLUDE THAT ARTICLE 31 OF THE EU CHARTER REQUIRES A DIFFERENT OUTCOME FROM THE OUTCOME UNDER THE CAWTR.

37. The EAT erred at [157] **[CB/11/223-224]** in concluding that Article 31 of the EU Charter provides an alternative answer to the case.

38. C, presumably, seeks to assert the right to "*an annual period of paid leave".* Article 31 does not specify the "*annual period of paid leave".* Rather, that is a matter for further EU law (Council Directive 2000/79/EC) and domestic law (the CAWTR). The complexity of the individual rights is illustrated by, e.g., the EAT's judgment in ***British Airways Plc v De Mello and ors*** [2024] EAT 53 ("***De Mello***").

39. Article 31 of the Charter is not capable of making a difference in isolation. If (as MCG alleges) the ET and EAT have erred in concluding that C was *"employed by"* MCG, and therefore has directly enforceable rights against MCG under the CAWTR, then C's claim for holiday pay has failed as a matter of domestic law (which is the only source of specified holiday entitlement). Any claim under the EU Charter cannot reverse the failure of the claim under the CAWTR (as it would be tantamount to allowing the claim under the CAWTR to succeed, when *ex hypothesi*, it has failed). The EU Charter, in isolation, does not establish any *specific* (i.e. quantifiable) rights which the ET could

then compute, as it did in ***De Mello***. Whereas some negative prohibitions and equality rights may require no specific further implementation, the same cannot be said for prescriptive rights, such as annual leave. It is no answer for C to say that the relevant right is that provided for by the CAWTR as his claim has *ex hypothesi* failed under that provision.

40. It follows that it makes no difference that C has brought a claim under the Charter as it is not an independent vehicle for the enforcement of rights even if it has horizontal effect: ***R. (Rostami) v Secretary of State for the Home Department*** [2013] EWHC 1494 (Admin) §28-30. The relevant rights in this case are secured only through the domestic legislation (here the CAWTR). This has been MCG's consistent position throughout the litigation – in this case, irrespective of the effect of the EU Charter, the claim must stand or fall by reference to domestic provisions.

41. This was recognised by the CJEU in ***European Commission and Council of the European Union v Francisco Carreras Sequeros*** Case C-119/19 P and C-126/19 P:

> *"Article 31(2) of the Charter enshrines, for every worker, the right to a period of paid annual leave, but does not specify the exact duration of that period (see, to that effect, judgments of 6 November 2018, Bauer and Willmeroth,C-569/16 and C-570/16, EU:C:2018:871, paragraph 85, and of 6 November 2018, Max-Planck-Gesellschaft zur Förderung der Wissenschaften,C-684/16, EU:C:2018:874, paragraph 74). Therefore, as the Advocate General noted in point 64 of her Opinion, the fundamental right to paid annual leave affirmed by that provision of the Charter requires, at least as regards the duration of that leave, concrete normative expression".*

42. Advocate-General Kokott said at [63]-[64]:

> *"63 It needs to be given concrete expression because Article 31(2) of the Charter itself does not specify the duration of paid annual leave, which is a condition for its guarantee. The duration of leave thus differs from other guarantees under Article 31(2), such as payment during leave or the beneficiaries who are covered by the fundamental right without further concrete normative expression.*
>
> *64. The fundamental right to leave is therefore dependent, at least as regards the duration of paid annual leave, on concrete normative expression."*

43. Insofar as relevant, in relation to EAT/[157] **[CB/11/223-224]**, the Charter point arose only in oral submissions and without reference to any written submissions. MCG did

not assert in its written argument that C had not brought claims under the EU Charter (it noted the contrary; see §3.3 referring to the ET's conclusion under the EU Charter and §13, setting out Article 31). MCG's submission was that the argument was irrelevant for the reason set out in this ground 2.

44. If MCG is wrong about that and it is (somehow) conceptually possible for the ET and EAT to conclude that C can establish an express right to some quantifiable amount of annual leave by reference to Article 31, then (a) MCG will say before the Court of Appeal that such conclusion is wrong (withdrawing any concession made to the contrary); and (b) MCG reserves the right to say that there is no minimum amount of annual leave provided by Article 31 such that the conclusion does not avail C in any event. C does not claim that there is any quantifiable amount of annual leave provided for by Article 31 in any event.

45. As to the further points in R's §19 Response **[SB/1/3-5]**:

45.1. §4 **[SB/1/3]** (referring to EAT/§157) **[CB/11/223-224]** records a statement from the author that if C were a worker "*under EU law"* he "*must*" come within regulation 2. The context of the question was whether if C were a worker in the autonomous EU sense, he would be protected under regulation 2 (as to which the answer is, and always has been, 'yes'). Whether C is a worker employed by MCG in the autonomous EU sense has been squarely disputed throughout and it is misleading for C to use this oral exchange as some form of back-door concession of the entirety of MCG's case.

45.2. As to §5 **[SB/1/3-4]**, MCG does not challenge the factual findings of the ET. They support the conclusion advocated by MCG that C was not employed by it. C ultimately bears the burden of proof in this regard. It is not for MCG to demonstrate that C was on business on his own account. MCG does not understand why C states that it is seeking to "*depart from" **Allonby***. Nothing in MCG's skeleton argument below or in this court is to that effect. MCG submitted before the EAT that ***Allonby*** in fact says very little other than establishing that employment relationships are conceptually possible in a tripartite relationship. They plainly are: whether there is such a relationship requires analysis of the ***Uber v Aslam*** factors. That is, or should be,

uncontroversial. Certainly C's case now (contrary to the very scant analysis of ***Allonby*** in the written argument below), that ***Allonby*** is the complete answer to the appeal is itself far-fetched and betrays a misunderstanding of its different context (equal pay comparison) and conclusions. MCG disputes that its conclusion results in an "*impossible result"* of no statutory protection for C. That is not impossible: (a) Parliament decides the scope of statutory protection and the CAWTR differ from the WTR; and (b) C has elected not to assert statutory protection against Ryanair.

F. GROUND 3. THE ET AND EAT WERE WRONG TO CONCLUDE THAT C WAS A CREW MEMBER "*EMPLOYED BY*" MCG FOR THE PURPOSE OF THE AWR.

46. As C was not employed by MCG, he does not satisfy reg. 3(1)(b) of the AWR and is not therefore a temporary agency worker under the AWR. MCG relies on the analysis under grounds 1 and 2 above.

47. It does not matter (cf R's Answer §6) **[SB/1/4]** that the words "*for the agency"* have been removed from the AWR. If C has no contract with MCG (as he is not a worker) he is outside scope.

G. GROUND 4 - ERROR IN APPROACH TO WHETHER THE SERVICES PROVIDED BY MCG WERE "*TEMPORARY*"

48. The ET erred in concluding that the arrangements were not "*temporary*" within the meaning of reg 3(1)(a) of the AWR.

(1) Principles

49. Reg 3 provides as follows:

> *"3.— The meaning of agency worker*
>
> *(1) In these Regulations "agency worker" means an individual who—*
>
> *(a) is supplied by a temporary work agency to work temporarily for and under the supervision and direction of a hirer; and*
>
> *(b) has a contract with the temporary work agency which is—*
>
> *(i) a contract of employment with the agency, or*

> *(ii) any other contract with the agency to perform work or services personally.*

50. As will be apparent:

50.1. Reg. 3(1)(a) concerns the supply of the worker from the temporary work agency to the hirer (which must be a supply "*to work temporarily for…"* the hirer).

50.2. Reg. 3(1)(b) concerns the contract between the agency and the individual (which can be permanent or temporary).

51. The focus of this ground is upon reg. 3(1)(a), namely the supply from the agency (MCG) to the hirer (Ryanair). If the worker is not "*supplied temporarily"* to the hirer, then the AWR do not apply. This, therefore, requires consideration of the nature of the supply from agency to the hirer. The ET failed to appreciate this and did not ask the relevant question at all, focussing on the nature of the arrangements as between C/Dishford and MCG (i.e. Reg. 3(1)(b), not reg. 3(1)(a)). The EAT in turn wrongly concluded that the ET's findings were sufficient to support a conclusion that reg. 3(1)(a) was satisfied.

52. In ***Moran v Ideal Cleaning Services Ltd*** [2014] IRLR 172, EAT, Singh J concluded that the proper meaning of the words "*temporary"* is "*not permanent"* (leaving aside the fact that nothing in life is permanent). Accordingly, the issue is whether the supply by MCG of C to Ryanair was in fact structured as an indefinite arrangement rather than, say, a temporary 'assignment' (such as in the nature of 'cover' for another employee). This approach is consistent with the approach taken by the CJEU in ***JH v KG*** *[2021] ICR 94* (see §69).

53. This is clear from ***Brooknight Guarding Ltd v Matei*** (2018) UKEAT/0309/17. HHJ Eady QC (as she then was) said at [25]-[27]:

> *"25. On the whole, I agree with the Respondent that the terms of the contract will not necessarily be determinative of agency worker status. The focus under reg 3(1)(a) is on the purpose and nature of the work for which the work is supplied: is it temporary or permanent? The underlying contract – as will necessarily have been found to exist for the purposes of reg 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. Although*

in Murray v Foyle Meats Ltd [[1999] IRLR 562,] [2000] 1 AC 51, the House of Lords was concerned with the statutory definition of redundancy ("work of a particular kind", see s 139 of the Employment Rights Act 1996), I agree that the same kind of factual analysis is required for present purposes. 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.

26. In the present case, the ET was entitled to have regard to the complete flexibility afforded to the Respondent under the zero-hour contracts it offered to its security guards. It was relevant, in particular, that the contract gave it the flexibility to move individuals from job to job. Of course, if that power was never exercised, its relevance might be diminished, but the ET was entitled to have regard to the fact that it had been utilised in the Claimant's case. 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).

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. That finding by the ET was, moreover, not solely derived from the Claimant's evidence but was also corroborated by Mitie's characterisation of the services supplied by the Respondent as being on a "required only basis" and usually "connected to additional cover that our customer base has requested". Although the ET had regard to the zero-hours nature of the Claimant's contract and the relatively short duration of his employment with the Respondent, I do not read its conclusion as being dependent upon those matters. They were relevant parts of the background, but I cannot see that the ET saw these as determinative of the question of the Claimant's status. It is also right that the ET had regard to the contractual flexibility clause allowing the Respondent to assign the Claimant to different sites and customers as it saw fit but again I do not read its Judgment as stating that was determinative, rather, it found it was a relevant factor because it reflected the reality of the relationship in practice. These were all, therefore, matters to which the ET was entitled to have regard but the most significant part of its reasoning was based upon its finding as to the nature of the work done for clients such as Mitie and, specifically, as to the nature of the Claimant's role as a cover security guard.'"

54. In ***Angard Staffing Solutions Ltd v Kocur*** [2020] ICR 1541 (EAT), HHJ Auerbach recorded at [10] the correct conclusion of the ET (at [34]) that the focus upon the relationship between the agency and worker was determinative. As the tribunal put it there: "*[t]hat is to confuse the terms of employment of Mr Kocur and Angard with the*

terms upon which he is supplied by Angard to Royal Mail." HHJ Auerbach repeated the point at [45], [46], [54] and [63].

55. The EAT said at [46]:

> *"The focus of the Tribunal's enquiry 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, 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.*
>
> *So 'supply' is the word that Parliament has chosen to describe the act of the agency designating or sending the worker to do the work, job or task in question. Two common-parlance nouns to describe the work, job or task itself are 'assignment' or 'engagement'. For the purposes of the qualifying period provisions Parliament needed to adopt a word to describe the period or duration of the work which the worker was supplied to do, and in reg 2 it adopted the word 'assignment' to refer to that. This does not contrast with the language of reg 3(1)(a). Rather it chimes with it…"*

56. At [54], the EAT said:

> *"…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."*

57. Further at [58]-[59], the EAT said as follows:

> *"58. I suspect that, in most cases, the parties will start as they mean to go on. There will either be a single supply, whether to work temporarily or not, or a number of supplies, all to work temporarily. Further, at the risk of stating a tautology, variations or fluctuations in, for example, the nature, frequency or duration of individual supplies or assignments, or in other details of individual assignments, will not make any difference for reg 3 purposes if they do not in fact bespeak a change from supplying someone to work temporarily to supplying them to work permanently (or vice versa), in the Moran sense.*
>
> *59. But, all that said, at the end of the day, to repeat, what matters is what in fact happens in practice; and, in a given case, that could change. Parliament has decided that workers should have the protection of the 2010 Regulations only if, and for so long as, they are supplied to work temporarily (and subject*

to the qualifying period and other conditions), but not if or when they are not so supplied. If there is, at some point in an ongoing relationship, a change in that respect, then the worker may either gain, or lose, protection, accordingly, as the case may be."

58. At [63]:

> *"It rightly noted that it was not the contract with the agency that had to be temporary for the 2010 Regulations to apply (referring, clearly, to the general terms of that contract, as to termination of that relationship), but the basis of the work for which Mr Kocur was supplied to the hirer pursuant to it."*

59. The necessary approach, in the circumstances, was to consider the entirety of the evidential mosaic and to determine what contribution, if any, was made by the contractual documentation. The ET and EAT erred in failing properly to adopt this approach.

(2) Erroneous focus on the written contract between C and MCG

60. The EAT erred in concluding that the 5-year term of the contract between C *and MCG* (ie the Dishford contract) **[SB/11/53-61]** was decisive of the issue of whether C was supplied *to Ryanair* on a temporary basis.

61. The Dishford contract was the wrong written contract to focus upon, in that it said little, if anything, about the arrangements reached between MCG and Ryanair. Moreover, on application of ***Kocur***, the ET erred in treating the contract as decisive, rather than as being an evidential tool to assess alongside the remainder of its findings. The ET did not approach the question correctly and its factual findings do not support the conclusion reached. The matter should have been remitted for reconsideration with proper factual findings.

62. The ET's evidential finding regarding the supply arrangements between MCG and Ryanair was ET/[27] **[CB/18/273]** which states:

> *"27. Ryanair had a five-year agreement with Storm McGinley Supports Services Ltd, dated 28 December 2011. The parties agree that this is still the relevant document between Ryanair and MCG. MCG (it appears to have been the same company) was called "the Supplier" to Ryanair. MCG agreed to procure Service Companies for Ryanair, and these service companies would have "Company Representatives" (who would be the pilots). MCG agreed to provide a pool of pilots to support the expansion and contraction of Ryanair services at short notice. Plainly this was intended to provide skilled and trained*

> *pilots to deal with seasonal increases in flights, without them being employees. It was intended to be a series of temporary assignments with gaps in between. That has some relevance to the assessment of the arrangement at its start. However, by the time Mr Lutz came on board the rostering was of all pilots, employed and contracted, on the same basis. The contracted pilots became even more integrated when Ryanair agreed that for seniority purposes all pilots were one pool. The agreement says that "Company Representatives" were not intended to be Ryanair employees, nor be deemed to be so. That Ryanair and MCG deem it so does not make it a fact, of course. In the agreement MCG is expressed not to be an agent of Ryanair."*

63. In relation to the separate contract (between C/Dishford and MCG), and which also contained a 5-year term, the ET found at ET/[115][5] **[CB/18/293]** that:

> *"At the expiry of five years any contracted pilot who remained was, without exception, issued with a new five-year contract."*

64. The primary contract for this purpose was the 2011 contract between MCG and Ryanair which had simply carried on in perpetuity. As the ET concluded, it started as a means of supporting expansion and contraction at short notice (to deal with season fluctuations), but "*by the time Mr Lutz came on board",* the rostering of <u>all pilots</u>, i.e. permanent and contracting, was "*on the same basis"* i.e. *qua* permanent appointments and not fluctuating cover. It follows that the supply of C was necessarily on this perpetual basis, not as short-term cover.

65. MCG accepts that the 5-year provisions in both contracts would be capable of being part of the evidential mosaic on the ***Kocur*** approach. However, the primary issue was the correct characterisation of the supply (of C) by MCG to Ryanair. The ET did not anywhere direct itself to the proposition that it was required to consider the supply of C by MCG to Ryanair. Its conclusions were focussed solely on whether the 5-year fixed term in the contract between C and MCG was temporary or permanent. C repeats this erroneous approach in his Respondent's Answer at §§8-9 **[SB/1/4-5]**, going as far as to say that the ET was "*bound"* by the fact of the 5-year fixed term contract between MCG and C to conclude that the supply from C to Ryanair was time-limited. That approach confuses the arrangements between MCG and C with the (actual) issue of the nature of the supply from MCG to Ryanair. It is therefore legally erroneous.

[5] At ET/[77] the language was "*almost invariably".*

66. The ET therefore failed to make factual findings relevant to the issue before it. As the ET concluded at ET/[27] **[CB/18/273]**, the contract between MCG and Ryanair had been in place since December 2011 with supplies of numerous pilots made on an ongoing basis since then. The ET erred in finding at [102] **[CB/18/290]** that the existence of a 5-year term in the Dishford contract (between MCG, Dishford and C) was determinative of whether the *supply* from MCG to Ryanair (under a separate ongoing contract) was temporary. The ET's conclusions at [102]-[104] **[CB/18/290-291]** confused the issue with the separate employment status issue.

67. The EAT stated at EAT/[203] **[CB/11/238]** that the ET made findings "*consistent with"* the proposition that C was supplied to Ryanair "*for five years".* However, the necessary approach was to consider the evidential mosaic in its totality. Simply making some findings that are "*consistent with"* a particular outcome is not the same as reaching that outcome on proper analysis of the facts. This was fundamentally a matter for the ET and not the EAT and should have been remitted in circumstances where the ET had not considered the correct question at all.

H. GROUND 5 – EAT AUTHORITIES ARE WRONGLY DECIDED IN RELATION TO THE PURPOSE OF THE AWR

68. The EAT Authorities relied on by the ET and EAT on the meaning of *"temporarily"* in reg. 3(1)(a) of the AWR were wrongly decided in that on its proper construction *"temporarily"* means *"short-term".*

69. The correct question is to ask whether the arrangements, irrespective of the contractual terms, were "*indefinite"* or not (***Brooknight Guarding Ltd v Matei*** (2018) UKEAT/0309, per HHJ Eady QC §25-26). This point was made clear by the CJEU in ***JH v KG*** [2021] ICR 94 where the Court held §69 that *"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.".*

70. The ET's central conclusions were that the contractor pilots were engaged in precisely the same way as employed pilots [3] **[CB/18/267]**. The supplies were in no sense

"*assignments*" for the purpose of "*cover*". As was clear from the Judgment, they were ongoing supplies directly into Ryanair's permanent workforce [27] **[CB/18/273]**.

71. MCG further notes the following:

71.1. It was C's case that there was no difference as between himself and Ryanair's directly employed pilots. This was accepted by the ET at [3] **[CB/18/267]** and [27] **[CB/18/273]**.

71.2. C did not provide cover (cf the security guards in ***Brooknight***). As put in ***Brooknight*** at [25], C "*in fact"* was carrying out work on "*an indefinite basis"*.

71.3. The framework agreement between MCG and Ryanair was for the ongoing provision of pilots (EAT Bundle [125]-131]) **[SB/10/45-52]**. There were no short-term supplies.

71.4. The regulatory framework as to minimum/maximum flying time, rest and breaks is consistent with permanent supply.

71.5. Ryanair had no flexibility. There are regulations governing how many hours can be flown over a certain period so as to ensure adequate rest periods.

71.6. The rostering arrangements demonstrate that Ryanair treated C the same as directly employed pilots and not as temporary 'cover': [3] **[CB/18/267]** and [27] **CB/18/273]**. They were not individual flying 'engagements' or 'assignments'.

71.7. MCG had no knowledge of actual shift arrangements or rostering. It could not therefore only make permanent supplies.

71.8. Ryanair held a disciplinary hearing and terminated C's services. This would be wholly unnecessary for a temporary supply (as there would be nothing to terminate).

72. Taking all of the circumstances together, the proper characterisation is of a supply made on an ongoing basis (as in ***Moran***), and not (cf ***Brooknight*** and ***Kocur***) a series of temporary "*assignments*".

I. CONCLUSION

73. The Court of Appeal is invited to allow the appeal.

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EDWARD BROWN KC

TIM WELCH

Essex Court Chambers

42BR

ebrown@essexcourt.com

tim.welch@42br.com