IN THE COURT OF APPEAL **CA-2023-002537**
(linked with CA-2023-002546)

B E T W E E N:

STORM GLOBAL LIMITED

Appellant

- and -

JASON LUTZ

Respondent

REPLACEMENT SKELETON ARGUMENT ON BEHALF OF THE RESPONDENT, MR JASON LUTZ

Introduction

1. This skeleton argument is submitted on behalf of the Respondent, Mr Lutz.

2. The appeal is against the judgment of the Employment Appeal Tribunal dated 30 November 2023 [**CB/10/163-164**] sent to the parties on 5 April 2022, dismissing the Appellant's appeal against the decision of the employment tribunal (Employment Judge Housego (the "EJ")) [**CB/18/266-295**].The appeal is linked with the appeal brought by Ryanair DAC against the same judgment (CA-3023-002546).

3. In this skeleton, Mr Lutz is referred to as the "Claimant" and the Appellants in the two appeals are referred to as "Ryanair" and "MCG" (the former name of Storm Global Limited), as in the proceedings below.

4. **The issues**. There are five issues on this appeal, corresponding to the five grounds of appeal.

   (1) First, MCG challenges the conclusion of the employment tribunal ("ET") that the Claimant was a "crew member" within the meaning of regulation

3 of the Civil Aviation (Working Time) Regulations 2004 ("CAWTR").

(2) Second, MCG contends that the EAT was wrong to conclude that Article 31 of the EU Charter of Fundamental Rights (the "EU Charter") requires a different outcome from that under CAWTR.

(3) Third, MCG argues that the ET and EAT were wrong to conclude that the Claimant was "employed by" MCG for the purpose of the definition of "agency worker" in regulation 3(1) of the Agency Worker Regulations 2010 ("AWR"). (Note: the phrase "employed by" does not in fact appear in regulation 3(1) of AWR).

(4) Fourth, MCG contends that, in determining the question whether the Claimant was supplied to work "temporarily" for the purpose of regulation 3(1)(a) of AWR, the ET and EAT should have focussed on the nature of the supply of workers from MCG to Ryanair.

(5) Fifth, MCG seeks to argue that the trilogy of EAT decisions on the meaning of "temporarily" in regulation 3(1)(a) of AWR were wrongly decided, contending that the term means 'short term'.

5. There is a very significant overlap between grounds (4) and (5) and the points made by Ryanair in its appeal about the meaning of "temporarily" in the AWR. To avoid needless duplication, the legislative provisions on "temporarily", the relevant findings of the ET on "temporarily", and MCG's grounds (4) and (5) are all addressed in a separate skeleton from the Claimant provided in respect of Ryanair's appeal (the "AWR skeleton") [**CB/8/134-158**]. This skeleton addresses issues (1) to (3) above. It may convenient if the Court reads this skeleton first, since the issue of worker status under CATWR and AWR is the logical starting point.

The Legal Framework

6. **CAWTR**. These Regulations were made under s.2(2) of the European

Communities Act 1972 in order to implement the provisions of the European Agreement on the Organisation of Mobile Staff in Civil Aviation (the "Aviation Agreement), given effect by Directive 2000/79/EC (the "Aviation Directive").

7. The key provision of CAWTR is regulation 4(1), which states:

> (1) A crew member is entitled to paid annual leave of at least four weeks, or a proportion of four weeks in respect of a period of employment of less than a year.

8. For the purpose of this provision:

(1) A "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" (regulation 3).

(2) "Flight crew" is defined as meaning "a person employed to act as a pilot, flight navigator, flight engineer or flight radiotelephony operator on board a civil aircraft" (regulation 3).

(3) Regulation 3 states that "employment" means "employment under his contract, and 'employed' shall be construed accordingly"; and it defines employer as the undertaking in the UK "by whom a crew member is... employed".

9. **The Aviation Directive and Agreement**. The Aviation Agreement was made under former Article 139(2) of the TFEU (now Article 155), by which agreements between management and labour could lead to Directives improving the working environment to protect workers' health and safety.

10. Mobile staff in civil aviation were excluded from the scope of the original Working Time Directive 93/104/EC (the "WTD"), applying to "ordinary" workers. The reason for this was that workers in these sectors are required to spend time away from their home, so that adjustment of some of the provisions

in WTD were necessary.[1] The overarching purpose of the Aviation Agreement/Directive, which is a health and safety measure, is to protect crew members on civil aircraft, including pilots, against fatigue and long hours. The preceding Commission White Paper highlighted one of the central risks against which legislation was meant to protect:[2]

> Flight time limitations are necessary, because it has long been recognised that serious performance degradation could occur as a result of flight crew fatigue. Aviation presents combinations of factors that influence fatigue not encountered in other professions. Personnel are required to evaluate situations, take decisions and perform well under stress during long work periods, sometimes at night and after crossing many time zones. It is therefore necessary to protect such personnel not only against short-term fatigue but also from the possible effects of fatigue built up over the course of time.

11. The Aviation Directive adopted a right to paid annual leave corresponding to Article 7 of WTD but modified the provisions in the WTD on e.g. working time and rest periods (see clauses 8 and 9 of the Aviation Agreement). As to the key provisions of the Aviation Directive:

    (1) The Directive left Member States free to define terms which are not specifically defined in the Aviation Agreement, provided they are compatible with the Agreement: see recital (12) to Directive.

    (2) The Directive and Agreement only define minimum standards, with the consequence that a Member State may adopt provisions which are more favourable to workers: see Directive recital (15), Article 2(1)(2).

    (3) Clause 2(2) of the Aviation Agreement defines "mobile staff in civil aviation" as meaning "crew members on board a civil aircraft, employed

---

[1] For the history, see AG Trstenjak in ***British Airways v Williams*** [2012] ICR 847, §§39-43.

[2] See *White Paper on Sectors and Activities Excluded from the Working Time Directive* (COM)(97) 334 final, Brussels 15.7.1997 at §44.

by an undertaking established in a Member State". The employer is not further defined.

(4) Clause 3 of the Aviation Agreement gives "mobile staff in civil aviation" an entitlement to paid annual leave of at least four weeks, echoing the wording of Article 7 of the WTD.

12. Neither the Aviation Directive nor the Aviation Agreement defines a "crew member". Accordingly, these are matters for a Member State to define - see recital (12) - provided the national definition respects the minimum standard in the Aviation Directive/Agreement.

13. The ***Marleasing*** duty to interpret CAWTR, so far as is possible, to achieve the result of the Aviation Agreement applies to these proceedings because CAWTR were passed before "IP completion day": see s.5 of the European Union (Withdrawal) Act 2018 ("EUWA 2018"). [3] This duty is unaffected by the Retained EU Law (Revocation and Reform) Act 2023, s.3 of which removes the principle of supremacy of EU law from domestic law from the end of 2023 but which, by s.22(5), does not apply "in relation to anything occurring before the end of 2023".

14. **The EU Charter of Fundamental Rights**. Article 31 of the EU Charter gives every worker a right to paid annual leave. It is directly and horizontally effective against private parties: see ***Max Plank v Shimizu*** [2019] 1 CMLR 35. Because the Claimant's claim **[CB/19/296-316]** was begun before "IP completion day", 31 December 2020, he can continue to rely on the direct effect of the Charter: see s.5(4) and §39 of Schedule 8 EUWA 2018.

15. **AWR**. The background to AWR, which implement the Temporary Agency Work Directive 2008/104/EC, is set out in the AWR Skeleton.

---

[3] The Explanatory Notes to s.5, at §104, explain that the supremacy principle encompasses the ***Marleasing*** duty.

16. **Decisions on agency workers**. A series of domestic judgments have held that an agency worker will only be an employee of the user undertaking to which he is assigned to work where it is necessary to imply a contract in accordance with common law rules. Almost invariably, the express contract between the individual and the agency explains the working arrangements and payments, so that no implication of a contract of service with the user/hirer is necessary: see ***James v Greenwich LBC*** [2008] ICR 545, per Mummery LJ at §§41-2.

17. **The *Allonby* decision**. The judgment of the Court of Justice ("CJEU") in ***Allonby*** is relevant to this appeal because it analyses the EU concept of "worker" in the context of a triangular agency relationship. College lecturers, formerly directly employed by their college, were engaged by an agency and supplied to work under the direction of the college: see AG at §45, CJEU §19. Ms Allonby's only contract, which said she was self-employed, was with the agency, ELS, who paid for her services: CJEU, §29. She brought two claims under former Article 141, contending that while with ELS, (i) she was entitled to equal pay with a man employed by the college; (ii) she was entitled to access the Teacher's Superannuation Scheme. The two questions referred by the CA are at §39. On the first question, the CJEU decided she could not compare herself with a man employed by the college because there was no "single source" for their pay when she worked for ELS: §§4648.

18. As regards the second question, the claim against the college settled and the CJEU held Mrs Allonby could not compare herself directly with the male comparator employed by it, given the absence of a single source for pay: §§55-57. The ECJ went on to address whether she could claim against the Secretary of State or ELS because a smaller proportion of female than male workers were employees, who alone were eligible to join the pension scheme: see part (ii) of question (2) at §39 and issue at §58. To answer that second question, it was necessary to address whether Mrs Allonby was a "worker" for the purpose of Article 141 while she was working under a contract with ELS. The CJEU gave guidance on the issue at §§66-72. In particular, it stated:

> 71. The formal classification of a self-employed person under national law does not exclude the possibility that a person must be classified as a worker within the meaning of article 141(1) if his independence is merely notional, thereby disguising an employment relationship within the meaning of that article.
>
> 72. In the case of teachers who are, vis-á-vis an intermediary undertaking, under an obligation to undertake an assignment at a college, it is necessary in particular to consider the extent of their freedom to choose their timetable, and the place and content of their work. The fact that no obligation is imposed on them to accept an assignment is of no consequence in that context...

See too the reference to "merely notional" independence in §79. A claim could therefore potentially be brought, in reliance on statistical evidence, against the agency, ELS, *qua* employer: §§80-81.

The ET decision on CAWTR

19. The ET's findings relevant to the CAWTR claims (and worker status under AWR) include the following. They are relevant because of how MCG seeks to characterise its role here.

20. In the introductory section, the EJ explained that MCG "manages the pool" of contractor pilots and "organises everything" for them **[CB/18/267/§2**] and contractor pilots were "treated identically" by Ryanair as directly employed pilots **[CB/18/267/§3].**

21. After setting out the relevant legal provisions, in a summary section **[CB/18/267-270]**, the EJ explained why he concluded the Claimant was "crew member", employed by MCG, for the purpose of CAWTR. He noted that CATWR did not require a common law contract of employment, and the Claimant had a contract with MCG "which governed his work with Ryanair" **[CB/18/270/§13],** adding that it would be "extraordinary" if CAWTR did not apply to the Claimant because it was a health and safety regulation **[CB/18/270/§14].** He also found the Claimant was a "worker" **[CB/18/271/§15]**, not in business on his own account, who was an "agency worker" of MCG **[CB/18/271/§16**], a conclusion underlined by §20 **[CB/18/272].**

22. As to the "facts found" section in the EJ's reasons at §§25-85 **[CB/18/273-285]**:

(1) The EJ referred **[CB/18/273/§27]** to the contract between MCG and Ryanair dated 28 December 2011 [**SB/10/45-52**]. Under that contract, MCG (defined as the 'Supplier') undertook to procure for Ryanair the services of pilots via "Service Companies" (see "Definitions"). MCG agreed to arrange for those services to be provided (clause 3); to "maintain a pool of pilots to support the contraction and expansion of the Ryanair operation at short notice" (clause 4); to make those services available to Ryanair (clause 5); to specify to "Company Representatives" (the pilots) the required training and collect bonds (clause 13); to indemnify Ryanair against losses arising from the provision of services (clause 15); and to confirm pilots and their service companies were responsible for tax (clause 16). The contract required MCG to execute appropriate agreements with service companies and pilots, who were to be contracted through MCG to provide contract services to Ryanair only and be supervised by them (clauses 23, 26).

(2) After Ryanair advertised for pilots, Mr Loadwick of MCG emailed the Claimant to inform him he had been successful at interview and MCG would arrange and prepare him for his "Type Rating" course: §§32-3 **[CB/18/273-274]**. Mr Loadwick then told him where his induction week would be **[CB/18/274/§35]**. Later he told the Claimant that he had to set up an Irish limited company, initially Sudeley Ltd, complete a next of kin sheet for MCG, and told him that his training contract would be with his limited company: §§39-42 **[CB/18/274-275]**.

(3) Subsequently, the Claimant was told to sign a contract with a new limited company that had been set up for him, Dishford Port Ltd **[SB/11/53-61]**. Mr Lutz had no input into this document and knew no one at Dishford: §§49-50 **[CB/18/276];** the EJ made further findings about how this was imposed on the Claimant without his instructions at **[CB/18/283-284/§§69-72]**. The relevant contract, dated 7 May 2018 **[SB/11/53-61]**, is referred to by EJ at §§51-3 **[CB/18/277]**. It was between MCG, Dishford and the Claimant

personally: the Claimant initialled each page and signed an undertaking at the end that he agreed to be bound by it. Ryanair, defined as the "Hirer", was not a party. The "Work" meant the Work set out in Schedule 1, to provide services of the Claimant for a period of five years. After 12 months MCG agreed to provide a minimum of 450 hours per annum to the Company Representative (Schedule 1, §3). MCG also undertook to take reasonable endeavours to offer the Work, though it was under no obligation to do so (clause 1(e)). The Service Company agreed to provide information to MCG about tax payment (clause 1(f)). The Company Representative had to be available from March to October and three of the other four months of each year, as specified by MCG, which would also consider requests for other periods free of flying (clause 1(l)). MCG was to procure that Ryanair had in force full liability insurance for pilots (clause 1(q)). MCG paid fees for the scheduled flying hours provided by the pilots (clause 2). MCG had the right to terminate the agreement in the event of various acts of Dishford or the Claimant, such as serious misconduct: see clause 5.

(4) It was arranged for the Claimant to sign an opt out from the Conduct of Employment Agencies and Employment Business Regulations 2003: **[CB/18/277/§55]**.

(5) At around this time, the Claimant was sent a "FAQ" document issued by MCG **[SB/12/62-64]**. It told him "You will be working under a McGinley Aviation contract" and described him as one of "our contractor pilots".

(6) At §75 **[CB/18/284]** the EJ found that the interposition of Dishford as the service company for pilots was a "fiction" in practice (see too §§69-72, 89 **[CB/18/286,286]**). The Claimant was not a worker of Dishford: §91 **[CB/18/287]**. As to remuneration, "MCG paid Mr Lutz via a service company they set up": §91 **[CB/18/287]**.

(7) In December 2017, MCG emailed the Claimant and others about an enhancement to their bonus payments. The EJ held that MCG was

implementing Ryanair's policy: see §84 **[CB/18/285]**.

(8) On 10 July 2018 [**SB/13/65**] MCG told the Claimant he would be based at Stansted from 1 August 2018: §73 **[CB/18/283]**.

(9) On 12 December 2018, MCG sent a letter to the Claimant about a missed shift, quoted by the EJ at §61 **[CB/18/279]**, describing him as a "service provider to [MCG} and....a member of our pool of pilots". It reminded him that "you need to be clear on your contractual obligations" and that he was expected to fulfill "the most basic element of any employment contract, to report for duties".

(10) In July 2019 MCG wrote to the Claimant [**SB/15/67-68],** approving his request to work a new roster pattern: see §75 **[CB/18/284].** The letter informed him that he had no contractual right to any particular roster pattern and MCG had the right to alter his working hours.

(11) In December 2019, MCG took action to terminate the Claimant's services following a request from Ryanair: see §85 **[CB/18/285].** The letter terminating his services [**SB/16/69-70]** referred to the investigation and meeting undertaken by MCG.

23. Next, under the title 'Law applied to the facts', the EJ directed himself in accordance with ***Uber BV v Aslam*** [2021] ICR 657 that he was not to be guided exclusively by the written documents: see §§88-90 **[CB/18/286-287]**. He held it was "inconceivable" that Claimant was not worker **[CB/18/286/§90**], adding that as "Ryanair and MCG set up the situation and as MCG paid Mr Lutz via a service company they set up, he was a worker for them" **[CB/18/287/§91**]. He went on to find that the Claimant plainly fell within the terms of the Aviation Directive **[CB/18/287/§§94-95**]. He supported his conclusion by reference to the purpose of CAWTR **[CB/18/288/§97**].

24. Under a section entitled "Temporary Work" [**CB/18/290**], the EJ considered ***Allonby*** at §102-3. Allonby is not relevant to the question of "temporarily" and

the Claimant submits, when the reasons are read fairly, the EJ was addressing the guidance given in ***Allonby*** on the worker question, just as the EAT held: see EAT **[CB/11/222-223/§§154-155**]. At §103 **[CB/18/290]**, the EJ concluded that the Claimant was, for this purpose in the same position as Mrs Allonby.[4] That interpretation is supported by the EJ's statement in §104 **[CB/18/291]** that the Claimant's "independence was entirely notional", echoing the terminology of "merely notional" used in ***Allonby*** at §§71, 79. He supported that conclusion by the factors he set out at §104 **[CB/18/291]**. See too §122 **[CB/18/294]**.

Appeal Grounds: General

25. Worker status is a question of fact for an employment tribunal and, absent a misdirection of law, a tribunal's finding can only be challenged if it could not reasonably have reached the conclusion under appeal: ***Uber*** per Lord Leggatt at §118, cited by the EAT at §65 **[CB/11/186]**. The EAT also cited the established authorities on the approach of appellate courts to employment tribunal decisions at §§64-5 **[CB/11/185-186]**.

26. The starting point here is the surprising consequences of MCG's construction of CAWTR and AWR. The logic of MCG's submission, though not spelt out, is that an agency worker will never be employed by the agency for the purpose of CAWTR and nor for the purpose of the Aviation Agreement. This is because the essence of a triangular agency relationship is that the agency worker is assigned to work under the direction or control of the hirer. On MCG's analysis the individual cannot be a worker of the agency because he does not work "for" it and is subject to the hirer's direction and control: MCG skeleton §22 [**CB/2/22**]. But nor will the agency worker be a worker of the hirer for the purpose of CAWTR because he has no contract with it and it is not necessary to imply one: see ***James***, above. By these means, individuals who are not genuinely independent contractors, such as the Claimant, and who fall within the protected class of "crew members" (and do the same job as employees who are crew members) will be denied the important health and safety protections of CAWTR.

---

[4] The reference to §45 is to the opinion of AG Geelhoed in ***Allonby***.

27. Moreover, the logic of MCG's argument is that an agency worker can never be a "worker" for the purpose of the Agency Work Directive or AWR. On their argument, the fact of working "for" the hirer and being under its direction and control - constituent elements of the legislative definition of "agency worker" - have the effect of depriving the individual of worker status and taking him outside the scope of the legislation. The impossibly absurd but logical result is that the Directive and AWR will protect no one.

MCG Ground (1): "Crew Member" under CAWTR and the Aviation Agreement

28. In respect of this ground of appeal, MCG challenges the ET's conclusion that the Claimant was "employed" by MCG under his contract with them.

29. It was and is not in dispute that:

    (1) For the purposes of regulation 3 of CAWTR, the Claimant acted as a pilot on board civil aircraft and so was a member of 'flight crew'; he did so pursuant to a contract with MCG to which he personally was a party (and no other contract explained his acting as a pilot); and MCG was an undertaking established in the UK,

    (2) The Claimant was not in business on his own account, and neither MCG nor Ryanair were a customer or client of a business he ran: see ET, §§20, 46, 104, 122.6 **[CB/18/272,276,291,294]**.

    (3) There was a complete imbalance of power in the arrangements and the Claimant had no say in them: see ET §§34, 39, 66-69, 89 **[CB/18/274,281-283,286]**.

30. **EU law**. The Claimant makes the following points in relation to the position under EU law.

31. First, as the ET explained **[CB/18/270/§14]**, the Aviation Agreement is both a health and safety measure and protects fundamental social rights and so it should have a wide reach: see, among many others, ***Stringer v Revenue and***

Customs [2009] ICR 932, GC, §22 (working time); ***Pfeiffer v Deutsches Rotes Kreuz*** [2005] ICR 1307, GC, §52 (health and safety). The important aim of protecting crew members against fatigue applies just as much to pilots engaged via an agency as directly employed pilots.

32. In other, closely related, contexts the CJEU has held that Member States cannot exclude protection from individuals who perform comparable work to direct employees because that may jeopardise the attainment of the objectives of the Directive: see ***Del Cerro Alonso v Osakidetza*** [2008] ICR 146 per AG Maduso at §15, CJEU at §29; ***O'Brien v Ministry of Justice*** [2012] ICR 955 per AG Kokott §§25-53, CJEU at §§34-36, 42-51. Those considerations apply equally here.

33. Second, and reflecting its aim, clause 2 of the Aviation Agreement uses wide language, applying to any crew member who is "employed" by an undertaking established in a Member State. For example, the definition is not linked to national law and practice. The language is even wider than the WTD, which confers protection on "workers" and which itself has been interpreted broadly in light of the health and safety purposes underpinning the WTD: see ***Union Syndicale Solidaires Isère v Premier Ministre*** [2011] IRLR 84, §§21-32; ***Fennoll v Centre D'Aide Par Le Travail*** [2016] IRLR 67, §§19-35. The same must apply to the Aviation Agreement: see ***British Airways v Williams*** [2012] ICR 847 at §16.

34. Third, in EU law the division is between workers, on the one hand, and independent economic operators, or undertakings, on the other: see ***FNV Kunsten Informatie en Media v Staat der Nederlanden*** [2015] 4 CMLR 1 at §§21-42 (in which the CJEU cited ***Allonby***). For this purpose, "workers" include the false self-employed who are in a situation comparable to employees or perform the same activity as directly-employed workers: see ***Kunsten***, §§31, 42.

35. Fourth, it is clear on the unchallenged findings of the ET that the Claimant was not operating as an independent undertaking. Rather, he was performing exactly the same type of duties as directly employed pilots, he was not conducting a

business and his independence was "entirely notional": see ET at §§3, 20, 104 **[CB/18/267,272,291]**. The starting point is, therefore, that he was a worker as a matter of EU law. The health and safety purposes of the Aviation Agreement and the wide language of Clause 2 supports that interpretation: members of the protected class, "crew members" should be protected unless they are genuinely independent undertakings operating their own business. Moreover, MCG do not dispute this, though they seem to suggest the employment relationship under EU law was with Ryanair rather than with them: see skeleton §26, 27 **[CB/2/24]**.

36. However, fifth, in the context of triangular agency relationships, EU legislation *presupposes* that there is or can be an employment relationship with the agency, despite the fact that the worker is subject to the direction and control of the hirer and may be said to be working "for" the hirer. For instance:

(1) Council Directive 91/383/EEC, which aims to ensure agency workers and fixed-term workers have the same protection under health and safety directives as direct employees, applies to "temporary employment relationships between a temporary employment business which is the employer and the worker, where the latter is assigned to work for and under the control of an undertaking and establishment making use of his services" (Article 1).

(2) Likewise, the Agency Work Directive applies to workers with a "contract of employment or employment relationship with a temporary work agency, who are assigned to user undertakings to work temporarily under their supervision and direction (Article 1(1)).

Yet on MCG's argument such individuals cannot be workers or in an employment relationship with the agency as a matter of EU law because, MCG say, they are not subject to the agency's direction and are not working "for" it.

37. Sixth, MCG's argument is inconsistent with ***Allonby***. Just like the Claimant here,

in ***Allonby*** after she was engaged via the agency, ELS, Mrs Allonby was providing services to and for the College; just like the Claimant, Mrs Allonby was directed by the College and was subordinate to it, doing the same work as she had done before as an employee: see AG §10, 45, CJEU §19, 72. On MCG's case she could, therefore, not have been a worker as a matter of law because she was not working "for" ELS and the College was her "boss" which directed her. The claim against ELS should therefore have been dismissed. But this is precisely what the CJEU did not do. The EAT was correct in its analysis of ***Allonby*** at §§86-92 and, in particular, that neither the fact of Mrs Allonby performing services for the College, nor being subject to its factual control, was inconsistent with worker status.

38. Seventh, the very point on which MCG relies arose in ***Betriebsrat der Ruhrlandklinik v Ruhrlandklinik*** [2017] IRLR 194. Ms K, a member of the association of nurses, was assigned to work for a third party, Ruhrhandklinic. The question from the German court asked if she was a "worker" for the purpose of the Article 1(2) of the Agency Work Directive when she worked under the "functional and organisational instructions" of the hirer: AG §17. Addressing that issue and after referring to the familiar criteria for "worker" in cases such as Allonby at §25, AG Saugmandsgaard ØE stated at §26 (emphasis added):

> The situation at issue in the main proceedings appears to meet all those conditions [*ie the EU definition of worker*] since the members of the association of nurses carry out their professional activities for and under the direction of the medical and healthcare institutions to which they are periodically assigned by that association, which pays them remuneration in returns.

The CJEU's judgment is fully consistent with the AG's opinion. In light of the question referred, the AG's opinion and how the CJEU framed the issue at §22, it is necessarily implicit in its judgment that Mrs K was not precluded from being a worker because she was working under the direction of the hirer: §§27-37. If such direction were fatal to worker status, the CJEU would have said so. On the contrary, the Directive's objectives counted against excluding Mrs K (§§34-7) and the CJEU gave a strong steer to the national court that she was a worker (§38).

39. Eighth, in any event the question of who a worker is working "for" is opaque in an agency arrangement and is not part of the language of the Aviation Agreement. It could be said the worker is working "for" the hirer or "for" the agency, the body which paid him. The ET found as a fact that here Mr Lutz was working "for" MCG at §91 **[CB/18/287]** and it cannot be suggested that finding is perverse.

40. Ninth, MCG does not dispute that ***Allonby*** applies to the concept of "employed" in the Aviation Agreement and hence CAWTR: see skeleton §20 **[CB/2/21]**. The EJ correctly directed himself in substance in accordance with ***Allonby*** at §103 and applied it at §§103-104 in concluding the Claimant was a worker **[CB/18/290-291]**. Consequently, an appellate court must be slow to conclude the EJ misapplied the guidance of the CJEU and should only do so where such a misapplication is clear from the language: see ***DPP Law Ltd v Greenberg*** [2021] IRLR 238 at §§57-58. No such error is present here.

41. Tenth, it cannot be said no reasonable tribunal applying ***Allonby*** could properly conclude that the Claimant was a worker of MCG. There was ample evidence here to support that conclusion, shown by the factual findings summarised above and the matters to which the EJ referred at §104 **[CB/18/291]**. The contractual and factual functions performed by MCG went far beyond merely placing the Claimant with Ryanair: the Claimant performed services under the direction of another person, for which he received remuneration from MCG under the contract which governed the arrangement, and his work was identical to that of a direct employees. He fell squarely within the worker concept elucidated in the context of triangular relationships in ***Allonby*** and ***Betriebsrat***. The EAT was therefore right to uphold the EJ on this ground: see EAT judgment §§153-155 **[CB/11/221-223]**. The Claimant goes further: it was, on the facts found by the ET, the only possible conclusion open to it.

42. **Domestic law**. To the extent necessary, the Claimant relies on the points set out

below to support the analysis.

43. First, it was common ground that CAWTR must be interpreted, so far as is possible, to achieve the result required by the Aviation Directive/Agreement. There is no difficulty in interpreting the term "employment" in regulation 3 CAWTR in accordance with its EU parent in Clause 2 of the Aviation Agreement and with the elucidation of "worker" in ***Allonby***. MCG does not suggest otherwise, and nor does it contend the EJ was wrong to decide the Claimant was a "crew member" within the meaning of the Aviation Agreement (judgment §2 **[CB/18/266]**).

44. Second, a purposive construction of CAWTR points to the same result. CAWTR were intended to ensure that health and safety protections of the Aviation Agreement were given full effect in domestic law. To that end, CAWTR deliberately adopted wide language. For example, unlike s.230 of the Employment Rights Act 1996 and regulation 2 of WTR, regulation 3 of CATWR does not require that the individual undertakes to do or perform personally any work or services "for" another party to the contract: see EAT §148 **[CB/11/220]**. There is no basis for "reading in" such a requirement, especially in implementing legislation which may be more favourable to the worker than the Directive requires.

45. Third, the Claimant contends that in an agency relationship, EU law assumes that the relevant employment relationship is with the agency and not with the hirer: see above §36. The definition in regulation 3 is harmonious with this because it links employment to the contract (which is with the agency). But, to the extent that the UK legislator had a *choice* in giving effect to EU law in a triangular agency relationship, it was not required as a matter of EU law to impose liability exclusively on the hirer: it was entitled to impose duties on the person with whom the worker had a contract. In linking duties to a contract, the UK therefore acted within the scope of its freedom to define terms in the Aviation Agreement while ensuring it achieved the result required by that Agreement: see recital (12) of the Aviation Directive. The end result is better than MCG's interpretation of CAWTR, under which the UK legislator will have failed to protect those who do fall within the protected class of vulnerable, dependent crew members engaged via an agency.

46. **MCG's other arguments**. In light of the above, MCG's other points can be dealt with briefly.

47. Skeleton §16 **[CB/2/20].** MCG here seeks to introduce new factual findings that it was no more than a payroll service. This is inconsistent with its rights and duties under the contracts with Ryanair and the Claimant, with what it did in practice (see §22 above), and with the ET's express finding that there was ample evidence to show it was far more than a payroll operation [**CB/18/286/§84**].

48. Skeleton §19 **[CB/2/21]**. MCG apparently accepts that the EJ should have applied ***Allonby***; but that is exactly what he did do.

49. Skeleton §22 **[CB/2/22]**. MCG wrongly interprets ***Uber*** - a case in which there was no issue about a triangular agency relationship - as somehow having narrowed the meaning of ***Allonby*** when it comes to agency workers. The EAT was right to describe this submission as "far fetched" and to reject it at §146.

50. Skeleton §§22-27 **[CB/2/22-24]**. These submissions are wrong for the reasons already explained: see above. It is wrong that an agency relationship cannot amount to "employment" because the worker is assigned to the user and works for it; and it is wrong that ***Allonby*** was "not an employment status case at all", when it has repeatedly been treated as such by CJEU, as well as in ***Uber***.

51. Skeleton §30 **[CB/2/25]**. ***Uber*** does not mean that the written contract should be ignored: see ***Ter-Berg v Simply Smile Manor House Limited*** [2023] EAT 2. As the ET found here at §13 [**CB/18/270**], and the EAT accepted at §153 [**CB/11/221-222**], the written contract "governed" the Claimant's work with Ryanair: it was the source of the power for Ryanair to direct him, the source of his pay, and the source of MCG's powers over him, including to dismiss him (which it in fact exercised).

52. Skeleton 31 **[CB/2/25]**. Regulation 36 of the WTR applies where there is no worker's contract between the individual and the agency: see regulation 36(1). It is wrong to infer from this a legislative intention that agency workers who *are* workers should not be protected under WTR, let alone under CAWTR.[5] The intention of CAWTR was to comply with EU law and the concept of "employment" in the Aviation Agreement. This is not a policy point: it is statutory interpretation in accordance with the purpose of CAWTR and its parent Directive.

53. Skeleton §33 **[CB/2/26]**. There was no issue in ***Uber*** about the implication of a contract. In the case of agency workers, if the employment relationship is only with Ryanair (as MCG seem to contend), then the consequence will be that CAWTR have failed to achieve the result mandated by EU law. This is because there will be no contract between the worker and the putative employer, just as in ***James***. By such means are social rights rendered illusory.

54. Skeleton, §35 **[CB/2/26-7].** The issue in the present case is not "redolent" of ***Dacas v Brook Street*** [2004] ICR 1437, which concerned the common law contract of service which the ET had found as a fact was not present: Mummery LJ at §64.[6] The definition of "employment" in CAWTR falls to be interpreted in line with the Aviation Agreement and it is obvious that the EU concept of employment/worker is broader than the common law concept: see, for instance, ***R (IWGB) v Secretary of State for Work and Pensions*** [2021] ICR 372.

Ground 2: the EU Charter

55. Under this ground MCG contends that the "ET and EAT were wrong conclude that Article 31 of the EU Charter requires a different outcome from the outcome under CAWTR".

---

[5] Note the requirement in regulation 2 WTR that worker works "for" the other party, absent from CAWTR.

[6] Although it is perfectly possible for there to be a contract of employment between an agency and an individual for the period of an assignment: see ***McMeechan v Secretary of State for Employment*** [1997] ICR 549.

56. The Claimant does not understand this ground of appeal, even as amplified in the revised skeleton which MCG submitted after permission was granted. The ET did not find that the EU Charter requires a different answer to CAWTR. Nor did the EAT.

57. The ET decided that the Claimant was a "worker" for the purpose of the EU Charter: see judgment at §4 **[CB/18/266**]. As the EAT explained at §157 [**CB/11/223-224]**, MCG did not challenge that finding on its appeal to the EAT and, when this issue was raised with MCG's counsel, he incorrectly stated that the Claimant was not seeking to enforce any rights under the Charter. That was incorrect because the Claimant's pleaded claim included a separate complaint under Article 31 of the Charter: see claim form [**CB/19/309,315/§§4(f),41**]. In addition, one of the issues on the agreed List of Issues was whether the Claimant was a "worker" for the purpose of the Charter: see §1(3) [**SB/9/43**]. Further, after MCG sought to have §157 amended when the draft EAT judgment was circulated so as to read "Mr Brown KC said in reply that the position under the EU Charter was irrelevant as Mr Lutz was not seeking to enforce rights under it such as would result in a different outcome", the EAT declined to do so: see EAT §214 [**CB/11/241**].

58. Without prejudice to the appeal ground being based on a false premise, the Claimant makes the following points

59. First, "worker" for the purpose of the Charter has the same meaning as in the WTD: see ***Fennoll***, §§25-27. For the reasons set out above, the EJ was entitled and right to find the Claimant was a "worker" for the purpose of the EU Charter.

60. Second, in support of its appeal ground, in its revised skeleton argument MCG raises various arguments that if a claim under CAWTR failed, then Article 31 of the EU Charter could not reverse that result (see §39 [**CB/2/27**]). But this is wrong. As the EAT observed at §82, MCG did not dispute that Article 31 of the Charter was directly and horizontally effective against it. The GC in ***Max-Plank v Shimizu***

[2019] I CMLR 35 definitively decided that the right to paid annual leave in Article 31 was mandatory, unconditional and enforceable against private parties: §§74-80. ***R (Rostami) v Secretary of State for the Home Department*** [2013] EWHC 1494 (Admin), cited by MCG, had nothing to do with Article 31. It does not, and could not, affect the judgment of the CJEU in ***Shimizu***.

61. Third, MCG makes other arguments about whether Article 31 of the Charter can give rise to quantifiable rights to paid annual leave (skeleton §39-44 **[CB/2/27-29]**). But this was not the issue before the ET. The sole issue, as set out on the agreed List of Issues, was whether the Claimant was a "worker" for the purpose of Article 31 of the EU Charter. The implications the ET's finding have not yet been explored and MCG's arguments stray far beyond the agreed issue. For the avoidance of doubt, however, MCG is wrong on its interpretation of ***Sequeros v Council of European Union*** ECL:EU:C:2020:676. Both AG Kokott (§62) and the CJEU (§§111-117) were clear that Article 31(2) guarantees the provision of a minimum of four weeks' annual leave - exactly the same as CAWTR.

62. Fourth, MCG has still not offered any cogent explanation why it did not raise this point below. As a result, this is not one of the exceptional cases in which a new point should be permitted to be taken on appeal: see ***Mayor and Burgess of London Borough of Brent v Johnson*** [2022] EWCA Civ 28,Lewison LJ at §§37-42.

Ground 3: AWR and Worker Status

63. This ground is that "the ET and EAT were wrong to conclude that the Claimant was a crew member 'employed by' MCG for the purpose of AWR".

64. The ground of appeal is based on two false premises. First, The ET never addressed this point. This was because it only arose during submissions to the EAT, and led to an amendment of MCG's notice of appeal. The matter is explained in the EAT judgment at §§7-8 **[CB/11/169-170**]. The amended ground stated that MCG denied the Claimant was an agency worker for the purpose of AWR.

65. Second, and more fundamentally, the words "employed by" which MCG relies

on in its grounds of appeal do not appear in the relevant regulation of AWR, regulation 3(1)(b), at all. Regulation 3(1) states 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.

See too the anti-avoidance provisions in regulation 3(3)-(5), discussed below.

66. It is not (or is no longer) in dispute that (i) the Claimant had a contract with MCG; (ii) MCG was a "temporary work agency" for the purpose of regulation 3(1)(b);[7] (iii) under his contract with MCG, the Claimant was required to perform work and services personally; and (iv) neither MCG nor Ryanair were client or customers of a business carried on by the Claimant for the purpose of regulation 3(2) - see ET §§20, 101 [**CB/18/272,290**].

67. MCG argument is totally without merit. Nothing in the purpose, language, history, or context of the Agency Worker Directive or AWR supports it.

68. First, the purpose of AWR and the Agency Worker Directive is to protect agency workers - that is, workers who are assigned to work for a hirer and are subject to its direction and control. If, *pace* MCG, the fact of being under the direction and control of a hirer and working "for" it takes individuals out of scope, both AWR and the Directive will have failed spectacularly to achieve their purpose. So will Directive 91/383/EEC in the health and safety sphere.

69. Second, MCG's submission is inconsistent with the language of Article 1 of the Directive. It applies to workers who have a contract of employment or "employment relationships with a temporary work agency who are assigned to

[7] See the definition in regulation 4. MCG does not challenge the EAT's rejection of its appeal on this matter, dealt with at §§160-163 of the EAT's judgment.

user undertakings to work temporarily under their supervision and direction". If the fact of working under the user undertaking's supervision and direction (and working "for" it) means an individual cannot have an "employment relationship" - as MCG contends at e.g. §22 of its skeleton **[CB/2/22]** - the Directive can apply to no one. (Directive 91/383/EEC will also apply to no agency workers either because none of them can be in an "employment relationship" with an agency by virtue of their "for and under the control of" the undertaking making use of their services). It is hard to imagine a more extreme contradiction of the purpose of the Directive and AWR.

70. Third, MCG's argument is inconsistent with ***Betriebsrat***, above. There, the question from the national court expressly raised the issue of whether Mrs K was not a 'worker' under the Agency Work Directive because she was subject to the hirer's functional instructions. If that were decisive for defeating worker status, it is inconceivable the CJEU would not have said so. Instead, both the AG (§26) and the CJEU (§38) gave a very strong steer that Mrs K was a "worker".

71. Fourth, this ground of appeal is inconsistent with the language, context and history of regulation 3(1) AWR. It is permissible for the definition in national law to be more favourable to workers than that in the Directive: see Article 9. The definition of agency worker in regulation 3 is extremely wide, and deliberately so. For example:

(1) The definition of "agency worker" does not state that the agency worker must be a worker at all. It is a *sui generis* definition.

(2) As originally drafted, the definition of agency worker in regulation 3(1)(b)(ii) referred to an individual who had a "contract to perform work and services personally for the agency" (our emphasis). The words "for the agency" were deleted by the Agency Workers (Amendment) Regulations 2011, SI 2011/1941. According to §7.2 of the accompanying Explanatory Memorandum, the amendment was "made to avoid any unintended narrow construction of part of the wording for [*sic*] the definition of

'agency workers'". MCG's submission, that a person working "for" a hirer cannot be an agency worker, contradicts the purpose of that amendment.

(3) Regulation 3(4)-(5) treat an individual as being an agency worker in various circumstances, expanding the width of the section. These are anti-avoidance provisions, designed to ensure that the interposition of additional intermediaries in the supply chain does not prevent an individual as having been "supplied" by an agency and nor do various types of arrangement which might, on a literal reading of regulation 3(1)(a), mean an individual falls outside the scope of AWR. Underlining a legislative intention of a wide meaning, regulation 3(5) is not to be read as limiting the generality of regulation 3(1)-(4): see regulation 3(6).

72. Fifth, as set out above, regulation 3 does not use the words "employed by" which, according to MCG's ground of appeal, the ET and EAT wrongly construed or applied.

Grounds (4) and (5): Temporarily under AWR

73. As explained above, these grounds significantly overlap with Ryanair's appeal on "temporarily" and are dealt with in the separate skeleton addressing both appeals on that issue.

Conclusion

74. For the reasons set out above, the Claimant requests that the Court of Appeal dismisses the appeal. In any event, in light of the ET's factual findings, the only possible answer was that the Claimant was a "crew member" for the purpose of CAWTR, was a "worker" under Article 31 of the EU Charter, and fell within regulation 3 of AWR even though he worked under the direction of Ryanair.

MICHAEL FORD KC
STUART BRITTENDEN KC
14 June 2024
14 February 2025