If a company uses a combination of agency workers and employees, do these two groups have the same rights when it comes to applying for other vacancies?

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***Kocur v Angard Staffing Solutions Ltd & anr* : [2022] EWCA Civ 189**

If a company uses a combination of agency workers and employees, do these two groups have the same rights when it comes to applying for other vacancies? That was the question explored by the Court of Appeal in *Kocur v Angard Staffing Solutions Ltd & anr.*

Regulation 13(1) of the Agency Workers Regulations 2010 ('AWR') reads:

> *13.—(1) An agency worker has during an assignment the right to be informed by the hirer of any relevant vacant posts with the hirer, to give that agency worker the same opportunity as a comparable worker to find permanent employment with the hirer.*

The ET and EAT had to interpret this provision. The Appellant argued that it meant that agency workers should have the same rights both to receive information about vacancies and to apply and be considered for those vacancies. The ET agreed with this.

The EAT disagreed, finding that the provision was much narrower and only extended to the 'right to be informed' i.e. the right to be notified of the vacancies and be given the same level of information about the vacancies as employees.

The Court of Appeal agreed with the EAT and dismissed the appeal. It looked back at Article 6(1) of the European Agency Workers Directive (which was the basis for Regulation 13(1) AWR) in order to interpret the domestic statute. The directive reads as follows:

> *Temporary agency workers shall be informed of any vacant posts in the user undertaking to give them* ***the same opportunity*** *as other workers in that undertaking* ***to find permanent employment****. Such information may be provided by a general announcement in a suitable place in the undertaking for which, and under whose supervision, temporary agency workers are engaged.*

Amongst his various arguments, the Appellant interestingly cited the French version of Directive, explaining that the phrase highlighted in bold above could be better understood reading the French which states 'la même possibilité…d'obtenir un emploi permanent'. I.e. where the English talks about *finding* employment, which perhaps is open to a wider interpretation, the French uses the word *obtenir* [i.e. 'obtain' in English]. This, the Appellant said, supported the argument that the purpose of the Directive was to confer a right to apply for and therefore *obtain* a job rather than just be informed of the vacancy.

More significantly, the Appellant argued that a simple right to the same information was meaningless without a corresponding right to be able to apply and be considered for that vacancy. I.e. simply being notified of a vacancy that they can then cannot apply for is of no use at all.

The Court of Appeal agreed with the EAT. It construed Article 13(1) purposively (as it had to) in line with the Directive. This meant analysing the purpose of the Directive in line with the following interpretative techniques:

1) *Analysis of Recitals*: reading the additional information explaining the Directive;
2) *Analysis of substantive provisions*: reading the Directive as a whole;
3) *Analysis of legislative drafting techniques*: if the broader right argued for is not expressly specified in the Article does this mean there was no intention to create that right?
4) *Analysis of effects and consequences*: if there are adverse consequences to the broader right, then one would expect such consequences to be addressed in the recital. If they are not, then it implies that there was no intention to create the right.

The Court recognised that the Directive dealt with competing interests – i.e. the need for employer flexibility and the need to protect agency workers. In light of that, it found that the relatively limited right to information was a way of balancing those competing interests.

It also found that a right to mere information was not meaningless – it was a real advantage and, for example, gave the agency workers an advantage over external candidates. It explained that the intention was not to aid *securing employment* but *helping to find* employment. Equally, it found

that although ‘obtenir’ was wider than ‘find’ that the meaning was still restricted to assisting a worker obtaining work which was not the same as giving the worker a right to apply.

It held that had the right been a right to apply for the job, then the Directive would have provided more information on how that would work (as it does do for the way in which information should be provided). It agreed with the EAT that it would be surprising if employers were not allowed to give preferential treatment for vacancies to its own employees and could also be put in a position that even employees in a redeployment pool after redundancy could not be preferred over agency workers. Such a right would be very valuable to agency workers and so one would expect it to be expressly mentioned in the Directive.

Comment

At first sight, Regulation 13(1) looks like it *could* mean that agency workers should have the same chance to apply for vacancies as employees. However, in a very clear judgment, the Court of Appeal have provided numerous reasons why that simply could not have been the legislative intention.

Agency Workers therefore should be provided with the same information about vacancies as employees, but in terms of actually getting the role, employers can still give preferential treatment to employees who apply and can even ring-fence internal vacancies for employees.

The case is also a useful reminder of the four stages of analysis used to purposively interpret Directives and of the fact that we often still need to go back to the Directive to understand our own legislation.

28 February 2022

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