The interpretation of Reg 13(1) AWR 2010: Angard Staffing Solutions Limited and anor v Kocur and anor

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Angard Staffing Solutions Limited and anor v Kocur and anor UKEAT/0105/19/JOJ and UKEAT/0209/19/JOJ)

Interpretation of regulation 13(1) of the Agency Workers Regulations 2010 – right to be informed of a relevant vacant post with the hirer, and to give that agency worker the same opportunity as a comparable worker to find permanent employment with the hirer.

Summary

1. This appeal is in respect of two appeals involving the same parties (agency workers who worked for the Royal Mail). The appeals were heard consecutively. Whilst the appeals contain ten grounds (five on each side), this article focuses on the one ground concerning the scope of the rights conferred on agency workers by the Agency Workers Regulations 2010 ("the AWR"), which implements Directive 2008/104/EC of 19 November 2008 (Temporary Agency Work – "the Directive") into domestic law.

2. Briefly, the EAT found that the meaning and effect of Article 6.1 of the Directive into regulation 13(1) of the AWR was not intended to treat agency workers as if they were direct hires. The right is limited (my emphasis) to a right to be informed of vacant posts and goes no further than that. Angard and Royal Mail's appeal on this issue was allowed.

Issue

Internal Vacancies – is the obligation under regulation 13 satisfied if the hirer notifies the agency worker of a relevant vacant post, without giving the agency worker the same opportunity to apply for, and be considered for, that post as a comparable directly employed worker would have had?

3. Briefly, the practice in this case was to notify all workers of internal vacancies but agency workers were not permitted to apply.

4. The ET held that regulation 13(1) of the AWR extended an obligation to grant the agency worker the same opportunity to apply for relevant vacant posts as the comparable worker.

5. Angard and Royal Mail contended that the ET had misinterpreted regulation 13, and that the obligation was satisfied if agency workers were informed of the relevant vacancies, even if they were not given the opportunity to apply for them.

Held

6. The AWR were made to implement the Directive into domestic law. As with the normal principles of domestic legislation implementing an EU Directive, the provisions of the AWR must, so far as possible, be read in a way which gives the effect to the meaning and purpose of the provisions of the Directive that they were designed to implement.

7. The EAT looked at the language within the Directive. On literal reading of the first sentence of Article 6.1, the EAT found that the right granted does not go any further than the right to be made aware of any vacant posts - and there is no suggestion that the right goes any further than that [at para.47]. It strongly suggests that Article 6.1 does not intend to confer a right for agency workers to apply for or to be considered for jobs on the same terms as workers who are employed by the hirer, which is very different from a right to be simply informed of vacancies [at para.48].

8. Whilst at first sight it makes no sense to impose an obligation on the hirer to inform agency workers of vacant posts where there may be nothing the agency worker can do with the information (the same information as internal candidates), the right to be informed is a valuable right, albeit limited in scope. To explain, if a vacancy opens to external candidates, that agency worker will have already been informed about the vacant posts and its details, and therefore puts them in a better position than other job seekers. This explains the second half of the wording of Article 6.1 [at para.53].

9. On examining the general purpose and scope of the Directive in determining the meaning and effect of Article 6.1, the EAT found that it supports the conclusion that the right is limited to simply inform of vacant posts. Further, the aim of the AWR is not to provide equal treatment in almost every respect between agency workers and comparable direct employees (which is supported by Article 5 of the Directive) because the intention of the

Directive is not to treat agency workers as direct hires as it is a more tenuous and flexible arrangement than an employment relationship [at para.58].

10. The EAT followed the case of *Coles v Ministry of Defence* [2016] UKEAT/0403/14/RN which considered regulation 13 of the AWR and Articles 5 and 6 of the Directive. The Claimant in Coles argued the Respondent was in breach of its obligations by denying him the opportunity to apply for the position he temporarily held as an agency worker when he was told of the post, because existing permanent employees placed in a redeployment pool would have preference. The EAT considered this case to be correctly decided and agreed with the reasoning and conclusions of Langstaff J.

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