Appeal No. UKEAT/0050/20/JOJ

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 19 May 2020
Judgment handed down on 10 July 2020

Before

HIS HONOUR JUDGE AUERBACH

(SITTING ALONE)

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(1) ANGARD STAFFING SOLUTIONS LIMITED (2) ROYAL MAIL GROUP LIMITED	APPELLANTS
MR D KOCUR AND OTHERS	RESPONDENTS

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellants	Mr B Carr (One of Her Majesty's Counsel) Instructed by: DAC Beachcroft LLP St Paul's House 23 Park Square South Leeds LS1 2ND and Weightmans LLP 100 Old Hall Street Liverpool, L3 9QJ
For the Respondent Mr Kocur	Mr N Caiden (of Counsel) Direct Public Access
For the other Respondents	Mr A Ohringer (of Counsel) Instructed by: Irwin Mitchell LLP 40 Holborn Viaduct, London EC1N 2PZ

SUMMARY

AGENCY WORKERS

The Employment Tribunal found that the lead Claimant before it, Mr Kocur, was an agency worker within the meaning of Regulation 3 **Agency Worker Regulations 2010**. An appeal against that decision was dismissed.

The issue turned on whether, pursuant to Regulation 3(1)(a), Mr Kocur was "supplied" by the agency – Angard – to "work temporarily" for the hirer – Royal Mail. The Tribunal had correctly directed itself in accordance with **Moran v Ideal Cleaning Services Limited** [2014] IRLR 172 that "temporary" meant "not permanent". Having found as a fact that each and every assignment was for a defined period by reference to a particular shift or shifts, it properly concluded that Mr Kocur was supplied to work temporarily. It properly considered that this conclusion was not affected by the fact that Mr Kocur's contract with Angard was open-ended, nor by the fact that he was exclusively supplied to Royal Mail, nor by the fact that he had been regularly and repeatedly supplied in this way over the course of a period of some four years.

A cross-appeal, to the effect that the Tribunal erred by not proactively considering and determining whether it was an abuse of process for Royal Mail and Angard to have sought to dispute Mr Kocur's status as an agency worker at all, was also dismissed. However, as the appeal had failed on its merits, the Tribunal's decision in any event stood.

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HIS HONOUR JUDGE AUERBACH

Introduction

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1. This appeal concerns the meaning of "agency worker" in Regulation 3 of the **Agency Workers Regulations 2010** ("the **2010 Regulations**"). Regulation 3(1) provides:

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

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2. "Temporary work agency" is defined in Regulation 4. Regulation 4(1) provides:

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> **"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."**

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3. The meaning of "agency worker" has been considered twice before by the EAT, in **Moran v Ideal Cleaning Services Limited** [2014] ICR 442 and **Brooknight Guarding Limited v Matei** [2018] UKEAT/0309/17. The **2010 Regulations** do not define the word "temporary", or its cognate "temporarily". In both those cases, the key issue was whether, on a correct understanding of the meaning of "temporarily" in the context of the wider definition of an "agency worker", the worker concerned was or was not an agency worker. That same issue faced the Employment Tribunal ("the Tribunal") in this case. The substantive issue raised by this appeal is whether the Tribunal erred in its understanding, and application to the found facts, of the definition of "agency worker", and the guidance thereon in **Moran** and **Brooknight**.

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4. In the Tribunal there were multiple Claimants. I will refer to them as "Mr Kocur" (being the designated lead Claimant, Mr D Kocur) and the "Raczynska Claimants" (being Miss E

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Raczynska and all the other Claimants). The Respondents were Angard Staffing Solutions Limited and Royal Mail Group Limited. I will refer to them as "Angard" and "Royal Mail".

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5. In a reserved Judgment following a Preliminary Hearing ("PH") held on 15 August 2019, the Tribunal (Employment Judge D N Jones) held that Mr Kocur is an "agency worker" within the meaning of Regulation 3 and that Angard is a "temporary work agency" within Regulation 4. Angard and Royal Mail appeal against that decision. Mr Kocur and the Raczynska Claimants maintain that the Tribunal's substantive decision was correct. Mr Kocur cross-appeals that the Tribunal should, in any event, have decided that Angard and Royal Mail should not be permitted to run the argument that he was not an agency worker, as this was an abuse of process, applying the so-called rule in **Henderson v Henderson** (1843) 3 Hare 100.

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6. In the Tribunal, Mr Kocur represented himself and one other Claimant, Ms Roberts. Miss Raczynska and all the other Claimants were represented by Mr Ohringer of counsel. Angard and Royal Mail were represented by Mr Boyd of counsel. At this appeal hearing counsel were: Mr Caiden for Mr Kocur, Mr Ohringer for the Raczynska Claimants, and Mr Carr QC (drawing on a skeleton co-authored by Mr Boyd) for Angard and Royal Mail.

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The Facts and the Tribunal's Substantive Decision

7. The factual context found by the Tribunal was as follows. Royal Mail employs 130,000 staff. At Leeds mail centre it has 805 permanent staff. Angard is a company in the Royal Mail group. It has 17,343 employees. They are "employed to provide a flexible resource to work for Royal Mail at its centres throughout the country." Angard does not provide employees to any other organisation. Its employees are managed by managers seconded from Royal Mail. The two companies are parties to a Secondment Agreement and a Support Services Agreement.

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8. I will set out the Tribunal's more particular findings regarding Mr Kocur, in full:

> **"9. Mr Kocur received a formal offer of employment from Angard in a letter dated 15 January 2015. He signed a statement of terms and conditions of employment, which were standard terms, on 26 January 2015. His job title was flexible resourcing employee.**
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> **10. Paragraph 1.2 states:** ***'you are employed by Angard but you shall be seconded to the Royal Mail Companies during any period of engagement (an"Engagement") ... During an Engagement you shall remain employed by Angard and your terms and conditions of employment shall be governed by this statement. You shall carry out any work that is reasonably required of you by Angard at Royal Mail's request. You should continue to report to and be managed by Angard but shall report on day-to-day matters to Royal Mail as notified to you from time to time.'***
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> **11. Paragraph 1.4 states,** ***'Angard operates as an employment business in relation to you for the purposes of the Conduct of Employment Agencies and Employment Businesses Regulations 2003 and will seek to find you work as a flexible resourcing employee. Angard undertake to pay you for all work done by you whether or not it is paid by Royal Mail'.***
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> **12. Paragraph 2 of the statement provides for the circumstances in which the 'Engagements', the supply of Angard's employees, was to be take place. Paragraph 2.2 states that the details of any engagement to Royal Mail would be communicated verbally at the start of any engagement, including information of the place of work, the time to report, the start date and end date of the engagement (the Agreed Period). Paragraph 2.3 defines this as 'Engagement Confirmation' and states that** ***'any Engagement will be for the Agreed Period only and will terminate on the end date stated in the Engagement Confirmation.'***
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> **13. In practice, notification of the engagements was not verbal but by text, inviting Mr Kocur to contact a telephone number if he could work a particular shift. The text would usually give more than two hours' notice of the work opportunity. If Mr Kocur replied, the shift would be confirmed unless it had been taken up by another employee. More recently, since towards the end of 2018, communications have been by email.**
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> **14. Royal Mail use agency staff to cover additional demand and to cover unexpected need, such as sickness absence. Although some other agencies are used by Royal Mail, Angard predominantly provides the agency workers for mail processing work.**
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> **15. On a weekly basis an assessment of the additional resource at the Leeds mail centre is made by Mr Kellett and an order placed for Angard staff every Thursday for the following week. There is also a daily assessment which can lead to a request for additional Angard staff at much shorter notice, for that or the following day. The Angard staff work operational grade duties, sorting mail and parcels. The selection of which particular employees are to be offered shifts is made on behalf of Angard by an agency, Reed, and at the weekend by shift managers of Royal Mail at the mail centre. The weekend shift managers are provided with a list of available Angard workers from which to select.**
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> **16. Paragraph 3 of the statement of terms of employment with Angard contain the conditions for termination of the employment. The employee may give Angard one week's notice of termination. Angard may give one week's notice after four weeks of continuous employment and an additional week for each continuous year of service between two and twelve years. A further clause provides for automatic termination without notice if more than 90 days have expired since the commencement date without an engagement having been undertaken or no engagement has been undertaken in the last 90 days. Mrs Westwood said that this clause was never used and that 8,000 employees who had not completed an engagement within the last three months were still engaged under their contracts. That is over 45% of Angard's workforce.**
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> **17. Between January 2015 and January 2019, Mr Kocur worked regularly and frequently on shifts at the Leeds mail centre. In January 2019 he was suspended, and that is the subject of one of his complaints. Records show that Mr Kocur worked one or more shifts every month between the period. On average he worked two shifts and a total of 11 hours per week. Almost invariably his engagement was for one shift, being a number of set hours within a day. Occasionally he had a longer engagement, usually in the busy Christmas season. One was a four week engagement at the Castleford mail centre between 26 November 2018 and 21 December 2018."**

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9. Turning to the law, the Tribunal cited the relevant provisions of the **2010 Regulations**, after also considering those of the parent Directive, **2008/104/EC** (the "**2008 Directive**"). It also referred to the decisions in **Moran** and **Brooknight**. After summarising the rival submissions, it set out its analysis and conclusions. At [32] and [33], noting that neither the **2008 Directive**, nor the **2010 Regulations**, defined "temporary" or "temporarily", the Tribunal derived from **Moran** and **Brooknight** the following propositions: "Work is permanent if it is open-ended or indefinite. Work is temporary if it is terminable upon some other condition being satisfied, such as the expiry of a fixed period or completion of a specific project …".

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10. I set out the next section of the Tribunal's reasoning in full:

> **"34. I do not accept the submission of Mr Boyd that Mr Kocur's employment is indefinite because it continues for the single purpose of performing work for Royal Mail until he resigns or is dismissed for a particular reason irrespective of how many shifts he does or the gap between them. That 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.**
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> **35. Mr Kocur's employment with Angard is indefinite, in the sense that it is determinable on notice by either party. The automatic termination upon failure to undertake an engagement after 90 days is permanently waived by Angard. So, the contract of employment with Angard is a permanent one albeit with no guarantee of any actual work; a commonly called zero hours contract. There is nothing significant about that. Regulation 3(1)(b) requires a contract of employment with the agency, or something similar, as a condition for the application of the AWR.**
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> **36. It is not the contract of employment with the agency which must be temporary for the purpose of the Directive of AWR, but the work which is undertaken for the hirer:** ***'supplying individuals to work temporarily for and under the supervision and direction of the hirer'.***
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> **37. In Mr Kocur's case that work is always time limited, whether by reference to his contract of employment or how his work has been discharged over the four years from January 2015 to January 2019. Paragraph 2.2 and 2.3 of the standard terms could not be clearer. The engagement is defined by reference to the start and end dates of work to be done by Mr Kocur for Royal Mail. It is described as "the Agreed Period". The Engagement terminates, expressly, on the end date, although there is provision for an earlier termination by one week's notice or employment with Angard ceases. It is impossible to categorise this is as an open-ended arrangement. Each supply of work to Royal Mail is time limited.**
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> **38. In practice, this is put into effect by communications of texts or emails which specify the start and end of the engagement as well as the place of work. The engagements fall within the definition of assignments within Regulation 2 of the AWR:** ***'a period of time during which an agency worker is supplied by one or more temporary work agencies to work temporarily for and under the supervision and direction of the hirer'.*** **Every engagement over the four years was for a finite period.**
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> **39. This way of supplying workers is to cater for a shift, or series of shifts, which the permanent staff of Royal Mail could not cover. That is why Mr Kocur's job description was**

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a flexible resourcing employee. The planning to meet those additional demands of sorting mail was done on a weekly and daily basis. That meant Mr Kocur did not know if he would be called upon to work from one week to the next. Although he worked every week between January 2018 and January 2019, Mr Kocur had no advance knowledge of that until an offer came with at most a week's notice, save for the four week period of successive shifts at Castleford preceding Christmas. In short, there is no guarantee of work in any period. Looking at the pattern of work over four years, one can see some fallow periods of 2 or 3 weeks. That is what one would expect. Supplementing the permanent workforce with agency staff is to cater for unforeseeable ebbs and flow in work. Such unpredictability is in the nature of temporary work. The defined periods of work to provide cover is fatal to the argument that it is not temporary. That can be seen from the reasoning in *Brooknight.*

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40. I therefore find that Mr Kocur was supplied by Angard on many occasions between January 2015 and January 2019 to work temporarily for Royal Mail. That establishes that Angard was a temporary work agency for the purpose of Regulation 4 and Mr Kocur was an agency worker for the purpose of Regulation 3. His case is not similar to *Moran.* The noteworthy feature of that case was that the work undertaken by all claimants at the hirer's premises was terminable only by the giving of notice. It was open-ended.

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41. The arrangement between Angard and Royal Mail in the Secondment and the Support Services Agreement is of no significance. Royal Mail uses other agencies who supply workers to a number of different hirers. I do not read the Directive or the AWR as limiting their application to agencies which supply workers to only more than one hirer. In the course of submissions, the Tribunal invited comment on whether the use of the plural in Regulation 4 (1)(b) and (b) to *the supply ... to hirers* was relevant. It was not an argument Mr Boyd had raised in his written submissions, but he did seek to draw support from this drafting of the legislation.

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42. I was not satisfied that this particular wording was intended to restrict temporary agency work to circumstances in which there was only more than one hirer. That was not suggested in *Moran.* Nor would such an interpretation further the objective of the Directive, to provide rights to workers whose employment is temporary. Why would it matter if temporary work was for one or more than one hirer, given the benefits the legislation was intended to bestow?

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43. In her witness statement, Mrs Westwood suggested that the arrangement was that Mr Kocur was a permanent employee of one company which seconded him to another company within its group. The use of the term secondment implies something more permanent. There is no issue between the parties that during the period of supply Royal Mail had the supervision and direction of Mr Kocur. For the reasons given, I am satisfied that the supply was for a specific task of cover and for a finite period. Insofar as the use of the term secondment connotes something of a more permanent placement, it is not an appropriate word to describe the supply of work which took place."

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The Authorities

11. In **Moran** workers were employed for many years by Ideal Cleaning Services Limited. From the start of their employment they were placed with a company called Celanese Acetate or

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its predecessor. The EAT (Singh J as he then was) noted at [17] that the Tribunal found that this was "to all intents and purposes a permanent assignment." The workers "had contracts of indefinite duration with Ideal whereby they had been placed long-term at Celanese." The

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Tribunal had concluded that they were not agency workers within Regulation 3 "because they were not supplied by Ideal to Celanese to work temporarily". That conclusion was upheld.

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12. At [41] Singh J said this:

> **"The word "temporary" can mean something that is not permanent or it can mean something that is short term, fleeting etc. The two are not necessarily the same: for example a contract of employment may be of a fixed duration of many months or perhaps even years. It can properly be regarded as temporary because it is not permanent but it would not ordinarily be regarded as short term. I should add that by permanent I do not mean a contract that lasts forever, since every contract of employment is terminable upon proper notice being given. What is meant is that it is indefinite, in other words open-ended in duration, whereas a temporary contract will be terminable upon some other condition being satisfied, for example the expiry of a fixed period or the completion of a specific project."**

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13. On a correct reading of the Tribunal's decision it had concluded that "the arrangements under which the Appellants worked were indefinite in duration and therefore permanent and not temporary." [42] It had found that they "were working at the second Respondent's premises on a permanent and not temporary basis." [43] At [50] Singh J concluded:

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> **"In my judgment the concept of 'temporary' in the Regulations and the Directive means not permanent. On the facts found … the Appellants were placed by the first Respondent with the second Respondent on a permanent and not a temporary basis."**

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14. In **Brooknight**, Mr Matei was employed by Brooknight as a security guard on a zero hours contract. Most, but not all, of its guards were supplied to Mitie. There were periods when Mr Matei was not required to do any work and not paid. On one occasion he was assigned to work for a different client as weekend cover. The Tribunal found that the zero hours contract gave Brooknight complete discretion as to Mr Matei's hours, he could be placed at any site when Brooknight considered it appropriate, and he always viewed himself as cover.

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15. Before the EAT it was argued that it was wrong to focus on the contract being zero hours, as an individual who had such a contract could still be supplied to a hirer indefinitely. HHJ Eady QC (as she then was) said:

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> **"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 Regulation 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 Regulation 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 [2000] 1 AC 51, the House of Lords was concerned with the statutory definition of redundancy ("work of a particular kind", see section 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.**
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> **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).**
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> **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."**

The Grounds of Appeal

16. The over-arching ground is that the Tribunal misinterpreted and/or wrongly applied the two foregoing authorities on the meaning of "temporary" and "to work temporarily". The sub-grounds, which to some extent overlap, assert that it erred in the following ways:

(a) By giving overriding weight to the fact that, notwithstanding that Mr Kocur had worked "one or more shifts every month between … January 2015 and January 2019" there was no guarantee of work in any particular period. This ignored the reality of the indefinite, open-ended and permanent relationship between the parties;

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(b) By confusing whether the nature of each of Mr Kocur's assignments was temporary with whether the nature of the overall working relationship he had with Angard was temporary. The nature of an assignment is not determinative of the Regulation 3 issue;

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(c) By failing properly to weigh in the balance the importance of the exclusive nature of the relationship between the parties. Mr Kocur's place of work, contractually and factually, was only ever Royal Mail; and the work he and other employees of Angard did was only ever for Royal Mail.

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(d) By concluding that, notwithstanding the indefinite nature of the terms of his contract with Angard, the arrangement under which Mr Kocur worked for Royal Mail could not be characterised as open-ended, as each supply of work to Royal Mail was time-limited.

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The Arguments on the Appeal

17. As is normal, the oral arguments before me developed points in the written skeletons, and responded to particular points made by opponents in their skeletons. But, as sometimes happens, they also took off in some more novel directions. What follows are summaries of what seem to me to be the most significant submissions made for each party. Although, at the Hearing, I heard from Mr Carr, then Mr Ohringer, then Mr Caiden, followed by reply from Mr Carr, I will simply summarise the main points emerging overall, of, first, Royal Mail and Angard's submissions, then those for Mr Kocur, then those for the Raczynska Claimants.

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Angard and Royal Mail's Arguments

18. Developing ground (a), Mr Carr QC submitted that the absence of a guarantee of work did not, of itself, mean that the supply arrangement was not permanent. It was plainly a fact that, on a week by week basis, and over a four-year period, save for "some fallow periods of 2 or 3 weeks", Mr Kocur was, on an indefinite and ongoing basis, assigned by Angard to work for Royal

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Mail as its exclusive customer, and pursuant to a contract which allowed him to be sent to work for Royal Mail and no-one else.

19. If the Tribunal was right, then, under a zero-hours contract, there could never be anything other than a temporary supply. But suppose that Mr Kocur had had a zero-hours contract with Royal Mail itself, and had worked "regularly and frequently" under it over a period of four years. The only sensible conclusion would be that such arrangements were "permanent" and not "temporary". Though there might be uncertainty as to precisely when he would provide his services, the *arrangements* under which he did so would be permanent.

20. Similarly, said Mr Carr, had Mr Kocur's contract with Angard required him to work at Royal Mail for one shift per week, he would be outwith the **2010 Regulations**. It was difficult to see why his zero-hours status should make the difference, and mean that he fell within the **2010 Regulations**. Further, Mr Kocur was not working temporarily under Royal Mail's direction and supervision. There was only one hirer, and his working under Royal Mail's direction was an indefinite state of affairs until the employment with Angard ended. The Tribunal's conclusion was inconsistent with **Moran**, and with **Brooknight**, in which the flexibility to move Mr Matei to different end users, and from job to job, was so material.

21. This Tribunal's finding, at [35], that there was nothing significant in the contract between Angard and Mr Kocur being permanent, showed a failure correctly to apply **Moran**, which made it clear that such a feature *is* relevant. Indeed it was the core reason, said Mr Carr, citing **Moran** at [17], why the EAT upheld the Tribunal's decision in that case. In oral submissions he indicated that he did not contend that the permanent nature of Mr Kocur's contract with Angard meant that there necessarily could not, in law, be a temporary supply pursuant to it. But it was a significant

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feature of the factual matrix in this case, when it came to applying the multi-factorial test, and the Tribunal had failed to have proper regard to it.

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22. Developing ground (b) Mr Carr argued that the Tribunal had erred, at [38], by drawing on the definition of "assignments" in Regulation 2. There was nothing in Regulation 3 to indicate that the question of whether work is to be regarded as temporary was to be determined by looking at the nature of the particular individual assignments. That defined term was present in

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Regulation 2 specifically for the purposes of the qualifying period requirement in Regulation 7, where the word "assignment" was specifically used. It did not feature in Regulation 3 and was irrelevant to it. The same was true of Article 3 of the **2008 Directive**.

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23. Developing ground (c), the Tribunal erred in giving no regard to the fact that, contractually, and in practice, Mr Kocur was seconded to work exclusively for Royal Mail. In

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Moran the fact that the workers worked solely for Celanese, and on an open-ended and permanent basis, was a significant factor supporting the conclusion that they were not working temporarily. Conversely, in **Brooknight**, the fact that Mr Matei could be, and was, assigned other than to Mitie, and provided to it only as and when required, was crucial to the case going

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the other way. Once again in oral submissions Mr Carr made clear that he did not argue that exclusivity was decisive, or that it was legally necessary that there be multiple hirers for an assignment to be legally capable of being temporary. But it was an important feature of the

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factual matrix in this case, which the Tribunal had wrongly neglected. In this case it was clear that Royal Mail had an ongoing, open-ended need for additional labour, which was assessed and ordered every week, and Mr Kocur was supplied to meet that open-ended need.

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24. Developing ground (d), the Tribunal was wrong, at [37], to find that, as each supply of work was time-limited, it was therefore impossible to categorise the relationship as an open-ended arrangement. It wrongly failed to have regard to the fact that the parties had contracted on the basis that Mr Kocur would be engaged to work for Royal Mail on a permanent and ongoing basis, the only matter requiring determination being the particular occasions on which he would be required to work for them from time to time.

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25. In oral argument Mr Carr developed his analysis of the authorities. In **Moran** the indefinite or permanent nature of the employees' contracts had been central to the Tribunal's reasoning. See [22] of the Tribunal's decision, cited by the EAT at [17], and [8] of the Tribunal's decision, cited by the EAT at [14]. Singh J's reasoning at [41] and [42] focussed on the contractual position as central to a determination of the nature of the arrangements. But one also had to consider what arrangements were made pursuant to the contract. In that case the contract contemplated a permanent assignment, and that was borne out by the arrangements made pursuant to it in practice.

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26. The discussion in **Brooknight** at [25] and [26] showed that one needed to consider what arrangements were contemplated on day one of the relationship. Those were comprised of the over-arching contractual arrangement, and other arrangements by which the individual came to work for the hirer. The approach was a multi-factorial one. It was not a purely contractual test. The contract was a source, or feature, or integral part, of the arrangements, but it was not the whole picture. The fact that the contract was a zero-hours contract was not necessarily, by itself, determinative. In that case Mr Matei's contract was zero-hours *and* it provided for him to be moved to different sites, *and* this was in fact what happened.

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27. In the present case the contract established a permanent arrangement pursuant to which Mr Kocur was supplied to the single end-user. This was central to the overall nature of the arrangement. The mere fact that the contract left the specific hours to be determined did not make the arrangement, or the supply, temporary. The Tribunal erred by treating the fact that the contract was a zero-hours contract as effectively determinative. It failed to attach weight to the exclusive nature of the supply. The lack of exclusivity was fundamental to the reasoning in **Brooknight**, the presence of exclusivity fundamental to the reasoning in **Moran**.

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28. In response to his opponents' arguments, Mr Carr disavowed any reliance on an **Autoclenz v Belcher** [2011] ICR 1157 (SC) type of argument.

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Mr Kocur's Arguments

29. Mr Caiden submitted that the Tribunal had correctly understood and applied the authorities to the found facts in this case. The appeal was an attempt to reargue the case.

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30. The policy of the legislation required some certainty at the outset. It could not be right that whether an individual was an agency worker turned on the happenstance of how often they worked shifts in practice. The determinative factor was whether the work was open-ended and of indefinite duration, or not.

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31. As to ground (a), the Tribunal's conclusion at [39], that there was no guarantee of work in any period, was not purely based on the terms of Mr Kocur's contract, but drew on its various findings of fact about what happened in practice and in reality. Alternatively, if Angard and Royal Mail were seeking to argue that the factual reality belied the contract, they could not run that argument, for reasons that were advanced by the Raczynska Claimants.

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32. As to ground (b) the Tribunal had not confused the nature of the assignments with the nature of the overall working relationship. Under Regulation 3(1)(a) the only live issue in this case was whether Mr Kocur was "to work temporarily for" Royal Mail. Although the term "assignment" did not appear in Regulations 3 or 4, the definition of "assignment" in Regulation 2 used the identical wording of Regulation 3(1)(a), with the addition of the reference to the "period of time" during which the worker is supplied. Similarly, Article 3(1)(c) of the **2008 Directive** referred to a worker who had a contract or relationship with an agency "with a view to being assigned…to work temporarily."

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33. The focus of Regulation 3, and the approach in **Brooknight**, was on the assignment, in the sense of the work that the individual was supplied to do. It mattered not that, as things turned out, Mr Kocur did many shifts over several years. The supply happened at the outset. At the outset, or, as Mr Caiden put it, at the point of supply, there was no permanence.

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34. As for ground (c), it sought to import an additional requirement which Regulation 3 did not contain. There is no requirement for the agency to have more than one client, or to be able to send the worker to more than one client. The introduction of such a requirement would be open to abuse, enabling temporary work agencies to avoid the **2010 Regulations** by setting up one company per client. The protection, or not, of the worker would also be dependent on the vagaries of whether the agency, from time to time, had more than one client.

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35. In relation to ground (d) the Tribunal was not wrong in reaching the conclusion that it did, notwithstanding the permanent nature of Mr Kocur's contract with Angard. Regulation 3(1)(b) required that Mr Kocur have an employment or worker contract with the agency. It did not

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provide that the existence of a permanent contract with the agency would preclude his being an agency worker. Other provisions, such as Regulation 10 (though recently revoked), expressly contemplated that such a contract could be permanent.

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Raczynska Claimants' Arguments

36. Angard and Royal Mail relied upon the fact that the Claimants' contracts with the agency were of indefinite duration, and on the fact that they worked solely for the putative hirer. However, submitted Mr Ohringer, neither of these features took their work outside the definition of agency work, and there was no good reason why they should.

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37. It was noteworthy that the Explanatory Memorandum accompanying the **2010 Regulations** referred to the definition being based on that in the **Working Time Regulations 1998**. That latter definition even applied to workers assigned to hirers on a permanent basis. The non-statutory guidance from the Department for Business, Innovation and Skills indicated that an in-house bank which placed temporary workers into an associated company would be a temporary work agency. **Moran** held that an assignment can be temporary though it is not short term. **Brooknight** confirmed that, in deciding whether the Regulation 3 definition is fulfilled, the Tribunal should not confine itself to considering the contract with the agency.

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38. In relation to ground (a) the Tribunal rightly focussed on the relationship between the worker and the hirer, and, following **Brooknight**, considered the reality of that relationship. Given its findings that Mr Kocur did not know whether he would be working from one week to the next, and that each assignment was usually for one shift, it properly concluded that the assignments were temporary.

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39. Angard and Royal Mail could not (if they were seeking to do so) rely upon **Autoclenz v Belcher** [2011] ICR 1157 (SC) to argue that the Tribunal should have put aside the contract terms. The doctrine adumbrated in that case applies only to assist a putative worker who lacks any real bargaining power, not an employer or hirer. In any case it only applied where the purported terms of the contract were inconsistent with the true agreement. That was not so here.

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40. In relation to Grounds (b), (c) and (d), Mr Ohringer's written submissions were along similar lines to those of Mr Caiden. More generally, the Claimants were just the sort of atypical workers who the **2008 Directive** and the **2010 Regulations** were intended to protect. It was not irrelevant that the Respondents' own documentation regarded them as agency workers. Although the label given by the parties was, as with employment status, not decisive, if there was ambiguity, it could be taken into account (by analogy with **Massey v Crown Life Insurance Co** [1978] ICR 590); and any ambiguity should be resolved in the worker's favour.

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41. Developing his arguments orally, Mr Ohringer submitted that the concepts of "supply" and "assignment" were synonymous. Under Regulation 3(1)(a) the question was whether the supply was to work temporarily – that is, was the individual supplied on one or more temporary assignments, or, rather by way of a single permanent assignment? The contract was central, because it explained the basis on which the supply was made. There was a need for some certainty from the outset, so that the individual knew where they stood.

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42. In oral argument Mr Ohringer went further. He submitted that the question of whether someone was sent to work temporarily was a contractual question. He suggested that there was a difficulty with what HHJ Eady QC had said in **Brooknight** at [25]. There, he submitted, she seemed to be applying an **Autoclenz** approach, but this was not permissible. However, it was

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not the basis on which she decided the case. She decided it, at [26] and [27], on the basis that the security guards were in fact contracted to provide flexible cover. Mr Caiden, also, it seemed to me, striking out on a new and different path, endorsed this argument, and went so far as to submit that, if I considered [25] to be part of the ratio of **Brooknight**, I could and should disregard this, as being inconsistent with the underlying purpose of the Directive.

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The Appeal – Discussion and Conclusions

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43. For an individual to be an agency worker for the purposes of the **2010 Regulations** there are (subject as provided in the remainder of Regulation 3) two conditions, one set out in Regulation 3(1)(a) and the other in Regulation 3(1)(b). Regulation 3(1)(b) requires there to be a contract between the worker and the temporary work agency, of a certain kind.

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44. Regulation 3(1)(a) requires the Tribunal to determine, in the given case, whether the worker is supplied to work temporarily for and under the supervision and direction of a hirer. That requires the Tribunal, in particular, to make a finding of fact about the basis on which the worker is supplied to work for the hirer, and then to decide whether the supply to work on that factual basis amounts to a supply to work temporarily, applying the guidance in the authorities.

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45. The natural meaning of the words of Regulation 3(1)(a) is that it directs attention to the basis on which the worker is actually placed, designated, directed or sent to go and do work for a hirer, on one or more specific occasions. In common parlance, it refers to the basis on which the worker is to work pursuant to a particular assignment or engagement, on a particular occasion. That is the natural meaning of "supplied", and particularly of being "supplied … *to work* temporarily" (my italics) for and under the supervision of the hirer.

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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.

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47. 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 Regulation 2 it adopted the word "assignment" to refer to that. This does not contrast with the language of Regulation 3(1)(a). Rather, it chimes with it – in fact, as Messrs Caiden and Ohringer pointed out, building on it by merely adding the reference to the time period, and the definitional term.

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48. Where, or how, do the terms of the contract between the agency and the worker fit into this exercise? By this, I mean the initial contractual documentation issued or created when the relationship is first formed. As HHJ Eady QC explained in **Brooknight**, that material forms part of the evidential and factual matrix upon which the Tribunal may draw, when coming to its conclusion on the Regulation 3(1)(a) question; but it is not necessarily determinative. In view of how the arguments developed in the present appeal, I shall explore a little further why that is.

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49. As has been noted, it is a necessary element of the Regulation 3 definition, that there be a contract between the worker and the agency, of either of the two types referred to in Regulation 3(1)(b). Further, I would venture, the particular basis on which a particular supply is made, will, whether it is, in the **Moran** sense, temporary or permanent, ordinarily have contractual effect as between the worker and the agency. If, for example, the agency offers the worker, work on a particular shift with a particular hirer, and the worker accepts, the worker will then be obliged to work that shift, and the agency to pay the worker for doing so.

50. Against that background, the communications or documentation between the agency and the worker, issued or created when the relationship is formed, should, ordinarily, be considered by the Tribunal, as they may well cast significant evidential light on the basis on which the subsequent supply or supplies are in fact made; but they will not necessarily or automatically do so, nor be determinative in that regard. I note the following particular points.

51. First, to repeat, the issue for the Tribunal is *not* whether the *overarching relationship* between the agency and the worker is temporary or permanent. Terms, or provisions, which go to *that* question, will therefore not, as such, provide the answer to the question with which the Tribunal is concerned. Secondly, what light the initial documentation casts on the question with which the Tribunal is concerned, namely whether the worker is, on the given occasion or occasions, supplied to work temporarily, will be fact-sensitive, and vary from case to case.

52. In some cases the documentation created when the relationship is first formed, will contain all the particulars of the supply or supplies which are contemplated, including sufficient terms to enable the Tribunal to identify, from that documentation alone, whether that supply or supplies will, if carried out accordingly, be to work temporarily or not. In other cases, however,

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the terms of that documentation will provide the framework or umbrella under which a supply or supplies are to be made, but with the details of each such supply to be made pursuant to it, being left to be determined in further future communications.

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53. Further, cases where the initial documentation provides the umbrella or framework may themselves, I think, potentially divide into two kinds. In some cases, the initial documentation may contain provisions, which indicate whether the assignment or assignments that the parties

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are contemplating will be temporary or permanent in nature, although the details of each individual one have yet to be determined. But in other cases, the framing of the initial documentation may be such that it would be *possible*, consistently with its terms, for either a

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temporary or a permanent assignment to be given to the worker. As HHJ Eady QC observed in **Brooknight** at [25], the contract may create no *obligation* on the agency to provide work, and may *allow* the worker to be moved from site to site. But if the worker is *in fact* then supplied to

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work for a single hirer on an open-ended basis, then that supply would not be temporary.

54. While these distinctions may be of some general assistance to the Tribunal as an analytical tool, it cannot be assumed that the initial documentation in the given case will, necessarily, neatly

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or straightforwardly fit into one or other of the foregoing categories. Further, even if, in the given case, the initial documentation indicates that an assignment, or assignments, of a particular type was intended or contemplated, it is always possible that the parties may later agree to do

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something different. 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

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to that supply, or otherwise, should all be considered for the evidential contribution that they make to its overall determination of that factual question.

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55. **Moran**, I would suggest, was a case in which the provisions of the general contract themselves envisaged a permanent supply, *and* that was what in fact happened. It is clear from [42], [43] and [50] that the Tribunal's decision was upheld because of its findings that the "arrangements" were not temporary, that the workers were "working … on a permanent and not temporary basis" and that they were "placed on a permanent and not a temporary basis". **Brooknight** was a case where the workers' zero-hours contracts gave the agency complete flexibility to move the guards from job to job. That was properly regarded as relevant by the Tribunal, because it cast light on whether the parties intended or envisaged that the workers would be given temporary or permanent assignments. But what was then critical to the outcome, was the finding that this was a power which was *in fact* exercised and utilised, in order to deploy Mr Matei on a number of temporary cover assignments. The outcome would have been different, had the Tribunal found as a fact that the power had not been used in that way, and had he, in fact, been given a permanent assignment.

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56. I therefore confirm that, in so far as it was suggested during the course of oral argument by Messrs Ohringer and/or Caiden (departing, I think, from their skeletons) that paragraph [25] was not part of the ratio of **Brooknight**, that that decision did not correctly state the law, and/or that I was not bound to, and should not, follow it, I disagree.

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57. Messrs Caiden and Ohringer expressed a concern that parties needed some certainty at the outset of the relationship, as to the worker's status, and that this should not be subject to the vagaries of changing work patterns from time to time. As to that, I suspect that, in most cases, the initial contract, or other features of the initial dealings between the agency and the worker, will set out parameters and logistics which clearly reflect whether the parties are contemplating

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that the worker is to be supplied to work temporarily or permanently. Even where the documentation in theory allows for the possibility of both, the nature of the arrangements that are in practice contemplated will, I suspect, usually be clear.

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58. Further, 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

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example, the nature, frequency or duration of individual supplies or assignments, or in other details of individual assignments, will not make any difference for Regulation 3 purposes if they do not in fact bespeak a change from supplying someone to work temporarily to supplying them

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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

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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,

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then the worker may either gain, or lose, protection, accordingly, as the case may be.

60. In the present case, at [12] – [15], the Tribunal made findings of fact both about the terms

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of Mr Kocur's contract with Angard *and* about what happened in practice. It noted that the contract envisaged "engagements" the details of which would be communicated verbally, including start and end dates. That, in itself, suggested that what was contemplated was that there

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would be assignments to work temporarily. But the Tribunal also made findings about what actually happened. It made findings about how offers of specific engagements were made and

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accepted. It found that agency staff were used to cover both additional demand and absences; and it made findings about how needs for agency staff were assessed, and orders placed by Royal Mail, weekly, or sometimes daily. It found that these demands were identified, and filled, by reference to particular shifts; and it made findings as to the regularity and frequency with which, under these arrangements, Mr Kocur himself in fact worked such shifts.

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61. Overall, in summary, the Tribunal made findings about the wider context, about the relationship between Royal Mail and Angard, about Mr Kocur's contract, about what actually happened, both generally at Leeds, and in Mr Kocur's own case; and it found that what happened in practice was just what the contract envisaged would happen. As it commented at [46] (cited more fully below): "In this case, in all material ways, the practice reflected the written agreement from first to last." These were unchallenged, unassailable, findings of fact.

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62. The Tribunal's summary of the law, including the decisions in **Moran** and **Brooknight**, is not, as such, criticised. It is indeed correct.

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63. After summarising the principal submissions on each side, the Tribunal considered each of those submissions in turn. At [34] – [36] it considered what the significance might be, of the fact that Mr Kocur's contract with Angard was indefinite, subject only to notice, and provided for him only ever to be supplied to one hirer, being Royal Mail. 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.

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64. The Tribunal then went on, at [37] – [39], to conclude, correctly, drawing on its findings of fact, that Mr Kocur's work was, on each occasion when he was supplied, always time-limited, and that this was not, in practice, affected by the frequency or number of such assignments, or the fact that they continued to occur over a period of years. It properly found at [38] that: "Every engagement over the four years was for a finite period." It went on to properly find at [39] that: "The defined periods of work to provide cover is fatal to the argument that it is not temporary."

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65. The Tribunal went on rightly to conclude that there was no reason to suppose that the Directive was not intended to apply where the agency supplied workers to only one hirer.

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66. Ground (a) of the appeal contended that the Tribunal, in fixing on the fact that there was no guarantee as to the timing or duration of each assignment, ignored the reality of the overall open-ended relationship. However, the Tribunal rightly directed itself that it had to consider the nature of each supply. Nor do I accept that it, perversely, ignored, or failed to attach sufficient weight to, the nature of that overall relationship. It made findings about it. I can see nothing in the facts it found about the overall nature of the relationship that should have led it to reach a different conclusion in relation to the nature of each supply. For essentially the same reasons, ground (b) also fails. The Tribunal was right to focus on the nature of each assignment; and, as I have explained, the Regulation 2 definition of "assignment" works in harmony with the Regulation 3 definition of "agency worker", and the Tribunal did not err by drawing upon it.

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67. Nor, did the Tribunal err, as suggested by ground (c), by failing to attach sufficient weight to the fact the supply in this case was exclusively to work for the single hirer, Royal Mail, with which Angard was also, itself, associated. It being, rightly, conceded that this was not an automatic barrier to Regulation 3 applying, this, too, amounted to a perversity challenge. But the

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Tribunal, once again, did consider this aspect; and I can see nothing in the facts found about this aspect that ought to have led it to a different conclusion on the nature of the supply.

68. Finally, the Tribunal did not, as per ground (d), err by concluding that the "arrangement" was not open-ended, by failing to have proper regard to the fact that each supply was pursuant to an open-ended contract of employment. The Tribunal properly asked itself whether Mr Kocur was supplied to work temporarily, drawing on the evidence of what was contemplated by that contract, about that, *and* what other evidence it had about what actually happened in practice. It specifically considered the open-ended nature of that contract. It did not err in concluding that this did not, as such, have any bearing on the nature of the supply.

69. For all of these reasons the appeal is dismissed.

Mr Kocur's Cross-Appeal

70. In the final three paragraphs of its Reasons, the Tribunal said this:

> "44. I have reached the conclusion that Angard is a temporary work agency and that Mr Kocur is an agency worker without having had regard to the various written statements of Angard, over a period of time, that the AWR apply and generate particular rights after 12 weeks service. One such document was sent to Mr Kocur after the response was filed stating he was not an agency worker because of the decision of ***Moran.*** It informed him of his pay rise from the beginning of April 2019 and the effect after 12 weeks of service of the AWR. An advert of 20 July 2019 for a casual mail sorter made reference to an increase to the rate of pay to match Royal Mail permanent employees after 12 calendar weeks 'in line with the Agency Workers Regulations'. The Guide for Royal Mail Managers provided by Angard concerning its standards and operating procedures, stated that after 12 weeks of service Angard workers have the AWR qualification with the entitlement to the same pay, breaks and annual leave as Royal Mail staff. In her evidence, Mrs Westwood said that Angard and Royal Mail had worked on the assumption the AWR applied.
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> 45. I agree with Mr Ohringer, that it is surprising that such a large organisation with a substantial human resource facility should seek to depart from its own advertisements, correspondence and guidance to managers and staff on the applicability of the AWR. I agree with that interpretation, which seems to have been consistent up until the present set of cases. No such point was taken in either of Mr Kocur's earlier claims. But my decision is not based upon such written declarations of the respondents.
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> 46. It is not unusual for courts and tribunals to scrutinise working practices and all relevant circumstances to see whether any written contract or statement of particulars truly reflects the common intention of the parties and therefore the actual agreement. The written particulars may not do so because they were not what was actually agreed, were poorly drafted or because, with the passage of time, the arrangement had moved on. In this case, in all material ways, the practice reflected the written agreement from first to last. The written particulars and practice explained the purpose and nature of the supply of work. What was unusual was for the party which drafted

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> the detailed standard terms of engagement to invite a departure from their clear meaning when it had consistently publicised its stance that its workers fell within the ambit of the AWR."

71. Mr Kocur's cross-appeal contends that the Tribunal erred, at [45], because it should have concluded that the failure by Angard and Royal Mail to raise, in earlier proceedings, the argument that he was not an agency worker, was a bar to the point being raised in the present litigation. The Tribunal erred, because it did not apply the rule in **Henderson v Henderson** so as to reach that conclusion. Alternatively, it misunderstood or misapplied that rule.

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72. As the appeal has failed, this cross-appeal, strictly, falls away. But, as it was fully argued before me, and, had I considered it first, success upon it would have been enough, in Mr Kocur's case, to cause the appeal to fall way, I will address it.

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Cross-Appeal – The Arguments

Mr Kocur

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73. Mr Caiden identified that in previous litigation, involving Mr Kocur, Angard and Royal Mail, in both 2016 and 2018, in which he asserted that his rights under the **2010 Regulations** had not been honoured, Angard and Royal Mail accepted in their pleadings that Mr Kocur was an agency worker within Regulation 3.

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74. The principle in **Henderson v Henderson** is an expression of a doctrine of public policy regarding the conduct of litigation in a manner that amounts to an abuse of process. See the discussion in **Johnson v Gore Wood** [2002] 2 AC 1, especially in the speech of Lord Bingham of Cornhill at 22E and 31D-E. It not only protects litigants against such abuse, but helps to safeguard the proper and efficient administration of justice, and to avoid wastage of the Court's time, as well as promoting consistency of decision-making. Although deciding whether the rule

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bites will involve consideration of multiple factors, there can, in a given case, be only one correct answer. See: **Aldi Stores Limited v WSP Group plc** [2008] 1 WLR 748.

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75. As the doctrine is concerned with public policy, not merely private law rights, it is not necessary for the other party to the litigation specifically to plead or raise it. If the Tribunal is aware of the material facts that potentially put it into play, it has a duty to address and determine the issue on its own initiative. Alternatively, following the approach in **Langston v Cranfield University** [1998] IRLR 172, the point is so well established that, in a case to which it might be applicable, the Tribunal should consider it as a matter of course.

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76. In the present case, Mr Kocur, who was a litigant in person before the Tribunal, had complained in the course of a letter to the Tribunal, of the change in stance on the part of Royal Mail and Angard on this point, which he had described as a "stark inconsistency." He had written that they were "clearly abusing the process in the Employment Tribunal for their own ends." The fact that he had not, in terms, raised the argument that they should therefore be prevented from raising the point now, did not matter. The Tribunal had the material facts, and the issue, sufficiently before it, and should have engaged with it.

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77. For the same reason, it was not open to Angard and Royal Mail to assert that, on the basis that Mr Kocur had not raised the point in the Tribunal, he should not now be permitted to raise it for the first time before the EAT. Alternatively, this was an exceptional type of case in which, applying the guidance in **Secretary of State for Health v Rance** [2007] IRLR 665, the EAT should permit the point to be run. There was no factual dispute about what had occurred, the EAT was in a position to determine the point, and there could be only one right answer to it. It was a potential knock-out point for Mr Kocur. The issue was of wider significance.

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78. As to the substance, the only proper conclusion was that Angard and Royal Mail could and should, if at all, have raised the issue in the earlier litigation. It was not peripheral to the earlier litigation, which also involved claims under the **2010 Regulations**. The point had been positively conceded, but could have been disputed. In raising the point now, they sought to rely on **Moran**, but this authority dated from 2013 and was actually cited by their counsel in written submissions in the previous litigation. All factors pointed one way. The only right answer was that this part of the Grounds of Resistance to the current claims should have been struck out by the Employment Tribunal as an abuse of process.

Angard and Royal Mail's submissions

79. Mr Carr QC did not dispute that, in earlier litigation with Mr Kocur, the Respondents had not run the defence that he was not an agency worker within scope of the **2010 Regulations**; and they had, in fact, positively accepted that he was.

80. However, the **Henderson v Henderson** point was *not* specifically raised or run by Mr Kocur, or the Raczynska Claimants, in the Tribunal below. A submission had been made by Mr Ohringer in those proceedings, drawing on the various references in various Angard documentation, to agency workers and to the **2010 Regulations**. However, that submission was not by way of raising a **Henderson v Henderson** point. In its decision, the Tribunal referred to the various documents at [44] and expressed its agreement with Mr Ohringer, that it was "surprising" that such an organisation should seek to depart from its own statements. While it also observed that "[n]o such point was taken in either of Mr Kocur's earlier claims", the Tribunal was not, there, responding to a **Henderson v Henderson** point. The Tribunal had not erred in adjudicating, or failing to address, the point. No such point was before it.

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81. Further, said Mr Carr, even though he was a litigant in person in the Tribunal below, Mr Kocur could reasonably have been expected to run the point there, had he wanted to. Some reference to the rule in **Henderson v Henderson**, including discussion of what, in lay terms, it means, had been made during the course of the hearing of one of his earlier claims. In correspondence in the present litigation the solicitors for the Raczynska Claimants had also referred to the *possibility* that Mr Kocur *might* run such an argument, which *might* then affect the conduct of the litigation going forward. But Mr Kocur did not *in fact* raise the point, and so the Tribunal did not consider it at the PH giving rise to this appeal and cross-appeal.

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82. In **Johnson v Gore Wood** Lord Bingham, at 31A-F, stressed that a finding that a party *could* have raised a claim or issue in previous litigation was not by itself enough for the rule to bite. The failure to do so must also be found to amount to an abuse. This requires a thorough examination of all the facts and circumstances of the given case. Had this argument been raised in the present case, that would have been a task for the Tribunal. The burden would also have been on Mr Kocur to show that there *had* been an abuse. See the **Aldi Stores** case at 758A.

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83. As Lord Millett observed in **Johnson** at 59D-E, unlike the doctrine of *res judicata*, the principle was not a rule of substantive law, but "a procedural rule based on the need to protect the process of the court and the defendant from oppression." Mr Carr accepted that the doctrine *could*, in principle, be invoked in relation to someone seeking to raise a defence that had not been run in previous litigation. However, an abuse would be harder to establish, in relation to the raising of a new defence, then in relation to the raising of a new claim. Further, had Angard and Royal Mail been prevented from running a defence that was meritorious, Mr Kocur would have had a windfall.

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84. The nature of the issue was, therefore, such that it neither could nor should be raised, and adjudicated, by the Tribunal on its own initiative. As the issue was not live before this Tribunal, it had not attempted the fact-sensitive exercise which **Johnson** indicated was needed. It was not wrong not to do so. The suggested analogy with **Langston** was misplaced.

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85. If the **Henderson v Henderson** issue had been properly raised, and identified for consideration at the PH, Angard and Royal Mail would have had the opportunity to present evidence of the explanation for why the point had not been contested in the previous litigation. That might have included investigation of privileged material and careful consideration of whether any such material should be placed before the Tribunal. Mr Carr stressed that he did not know precisely what the explanation was, or whether there was any such material that would have been placed before the Tribunal. His point was that, because the issue was not identified as live before the Tribunal, no consideration had been given to this question, and Angard and Royal Mail had not had a fair opportunity to consider, and present, their case on it.

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86. Like the Tribunal, the EAT did not have all the relevant evidence and facts before it, and could not conduct itself undertake an evaluative exercise in relation to whether there was an abuse. This was therefore not the type of case in which the EAT could or should, exceptionally, permit the point to be introduced for the first time on appeal. See the guidance in **Rance** at [50], sub-point (7). If the EAT nevertheless considered that the point was live before it, given the lack of evidence and information that might be relevant to the issues, it remained the case that there was no basis on which it could be properly concluded that there had been an abuse.

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Mr Kocur – Reply

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87. In brief oral reply Mr Caiden made the following points.

88. First, the doctrine called for a broad merits-based judgment as to whether a party was abusing the process of the Court by raising an issue which could have been raised before (see **Johnson** at 31D). The suggestion that it was less likely to apply where what was at issue was the raising of a defence was an unwarranted gloss. Secondly, Mr Carr's "windfall" point was misconceived. If it was right, it could be run to defeat the invocation of **Henderson v Henderson** in every case. Thirdly, Royal Mail and Angard had previously *conceded* the point. Whatever the position regarding previous advice, that could not possibly justify the change of course on a point such as this. Sufficient facts had been shown to establish an abuse.

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Cross-Appeal – Discussion and Conclusions

89. It appears to me, from the correspondence leading up to the PH on 15 August 2015 that I was shown, that the Raczynska Claimants' solicitors flagged up the *possibility* that it might be open to Mr Kocur to raise what amounted to a **Henderson v Henderson** argument. But they argued that, in any event, the Tribunal should, at the PH, at least consider making deposit orders on the agency-worker status issue, in respect of their clients' claims.

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90. Mr Kocur, for his part, did not actually raise the argument that it was an abuse of process for the Respondents to contest the status issue, because they could and should, if at all, have raised it *in the previous litigation*. Rather, his submission was that the defence that he (and his colleagues) were not agency workers should be struck out, or made the subject of deposit orders in every case, because of its poor prospects of success, and/or because of the Respondents' (alleged) failure to comply with orders concerning preparations for the PH, and/or because it was an abuse for them to take a stance which so starkly contrasted with that which Angard had taken in its *dealings and documentation* with its employees over years hitherto. The Tribunal, however,

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decided the status issue on its merits at the PH; and it was the arguments about the significance of the prior dealings and documentation issued by Angard, to which Mr Ohringer referred, but which the Tribunal, in the closing paragraphs of its Reasons, indicated it had not relied upon in coming to its decision on that issue.

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91. I appreciate that Mr Kocur might, no doubt, consider that the material common point of substance is that, by taking the status point in this litigation, Angard and Royal Mail were – wholly unacceptably in his view – executing a complete reversal of stance *both* from their acceptance and assertion in previous documents and dealings with them, that he and his colleagues were agency workers, *and* from their acceptance and assertion of that in previous litigation. Nevertheless, the difference between these two assertions was, in terms of legal significance, and the potential ramifications for this litigation, real, and of importance.

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92. I therefore agree with Mr Carr QC that the **Henderson v Henderson** point was not one that had been raised by Mr Kocur, as such, or otherwise identified, prior to this PH, as a live issue concerning the status defence, or one that, for *that* reason, fell to be determined at this PH. Nor was it raised by Mr Kocur, or Mr Ohringer, as such, during the course of the PH itself. There could, therefore, have been no error by the Tribunal overlooking to consider a live issue that had been identified for consideration at this PH, or during it, by one or more of the parties.

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93. However, the primary basis on which Mr Kocur, and Mr Caiden on his behalf, sought to advance the cross-appeal, was that the Tribunal erred in not considering the **Henderson v Henderson** point on its own initiative. I do not think that the **Rance** line of authority presents any obstacle to the cross-appeal put in *that* way being considered. The very *premise* of the cross-

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A appeal advanced in that way is that the underlying argument had not been raised before the Tribunal below, but that it nevertheless erred in failing proactively to consider it.

B 94. Further, even if Mr Carr's arguments that, on the facts and information available to the Tribunal, there was not necessarily only one right answer to the **Henderson v Henderson** point, were right, that would also not, I think, be enough to dispose of the cross-appeal. If the Tribunal had erred in failing proactively to *consider* the point, then the cross-appeal would succeed; and C (subject to the outcome of the appeal) such arguments might then have a bearing on whether the point needed to be remitted to the Tribunal for substantive consideration.

D 95. I turn then, to whether it *was* an error for the Tribunal not to have proactively considered the **Henderson v Henderson** point, even though it was not specifically pleaded or raised by Mr Kocur. True it is, that the Judge at this PH was aware that there had been previous litigation in E which the contention that Mr Kocur was not an agency worker was not raised. Further, as I have noted, the fact that this *could* give rise to a **Henderson v Henderson** argument had been flagged up by the solicitors for the other Claimants in the run up to this particular PH. However, what I have to decide is whether, given that Mr Kocur, nevertheless, did not raise it, it was an error of F law for the Tribunal not to have proactively raised and adjudicated the point at this PH. I do not think it was. I say that for the following reasons.

G 96. First, I do not agree that the nature of a **Henderson v Henderson** issue is such that the Tribunal or Court has a peculiar duty to raise it proactively, wherever it is apparent that there might be some basis for it. I do not think that follows merely from the fact that an abuse of this H sort is said to have implications beyond the impact on the parties themselves, nor because the doctrine is viewed as one of public policy. There is an important scholarly discussion in another

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case cited to me, **Virgin Atlantic Airways Limited v Zodiac Seats UK Limited** [2014] AC 160, as to whether the so-called rule in **Henderson v Henderson** is, truly, a procedural rule distinct from the doctrine of *res judicata*, or in fact a sub-species of it. But I can see nothing in the discussion in that case, or in **Johnson**, to indicate that, because of these features, some such additional duty falls on the Court or Tribunal, to spot, and proactively raise, a potential issue of this type. The EAT should be very circumspect before acceding to an invitation to place such a positive obligation upon an Employment Tribunal.

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97. Secondly, it is indeed clearly established that, for the **Henderson v Henderson** argument to succeed, it is not sufficient that the party concerned *could* have raised the issue in prior litigation. There must also be a finding that, in all the circumstances of the case, it would be an abuse of process for them to be permitted to do so now. The raising of this contention may therefore potentially give rise to a need for further evidence or fact-finding; and to impose a proactive duty on the Tribunal to raise and adjudicate it, would give rise to the possibility of the parties being required to do more work, and incur more cost, in order to address a contention that no party had in fact sought to have adjudicated in the given case.

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98. Finally, **Langston v Cranfield University** [1998] IRLR 172 was concerned specifically with the essential sub-issues that should be treated as implicitly and automatically in play, when a complaint of unfair dismissal by reason of redundancy is raised, having regard to established authority about considerations relevant to complaints of that particular sort. It is not authority for any wider proposition such as would assist Mr Caiden's argument on this point in this case.

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99. For the foregoing reasons, the cross-appeal fails. I do not, therefore, need to say anything more about the other arguments that I heard in relation to it.

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Outcome

100. For the foregoing reasons both the appeal and Mr Kocur's cross-appeal are dismissed. As the appeal has been dismissed, the Tribunal's Judgment stands.

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