Neutral Citation Number: [2019] EWCA Civ 125

Case No: A2/2017/0040

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM the Employment Appeal Tribunal
Mitting J

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/02/2019

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD SALES
and
LORD JUSTICE MOYLAN

- -

Between :

LONDON UNDERGROUND LTD	**Appellant**
- and -	
ADELAIDE AMISSAH and others	**Respondents**

- -
- -

Ms Lydia Seymour (instructed by **Eversheds Sutherland LLP**) for the **Appellant**
Mr Thomas Linden QC and **Mr David Mitchell** (instructed by **Waring & Co**) for the **Respondents**

Hearing date: 3 October 2018

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Approved Judgment

Lord Justice Underhill:

INTRODUCTION

1. The Claimants in these proceedings were employed, during the period with which we are concerned, by a company which has since been dissolved called Trainpeople.co.uk Ltd ("TP"), which was an agency supplying temporary workers. TP provided the Claimants' services to the Appellant, London Underground Ltd ("LUL"), at a group of underground stations in North-West London ("the Wembley group"). The contract to supply agency workers for the Wembley group stations was originally made between TP and a train operating company called Silverlink, but LUL inherited the arrangement when it took over the stations in 2007. A new contract was entered into between TP and LUL in January 2011 but it expired on 16 January 2013 and was not renewed.

2. The Agency Workers Regulations 2010 came into force on 1 October 2011: they implement EU Directive 2008/104/EC. Putting it very broadly, the effect of regulation 5 of the Regulations is to give agency workers the right to the same terms as to pay (among other things) as they would enjoy if they were directly employed by the hirer: I refer to that for short as a right to equalisation. Both the employer and the hirer may be liable for any breach of that right, but there are provisions for apportionment. TP initially asserted, and LUL accepted, that the Regulations did not apply to the arrangements under which the Claimants were employed, because they fell within the terms of the so-called "Swedish derogation"; but in due course LUL decided that they did apply, and it agreed both to pay TP for the future on the basis that the workers whom it supplied would be paid at the equalised rates and to pay it an amount covering the previous under-payment of the staff in question. TP paid the Claimants on the basis of the correct rates from mid-October 2012 until the termination of the agreement in January 2013, but it never paid them the difference in respect of the earlier period, despite having been put in funds by LUL to do so. It went into involuntary liquidation in November 2013.

3. The Claimants brought the present proceedings on 3 September 2012 against both TP and LUL claiming that their rights under the Regulations had been breached in various respects. The case seems to have proceeded very slowly, and TP went into liquidation before any substantive hearing occurred, leaving the case to proceed in substance against LUL only. Eventually, however, a number of issues of principle were heard by Employment Judge Snelson in the London Central Tribunal over several days in February 2015. The cases of two Claimants – Mr Chellapan and Mr Parekh – were taken as lead cases.

4. The Employment Judge promulgated his Judgment, with clear and full Reasons, on 27 March 2015. Paragraph (3) of the Judgment reads, so far as material:

> "The claims under … reg 5 (1) … in respect of terms governing hourly pay is [*sic*] well-founded and liability therefor is apportioned as to 50% to [LUL]".

He did not have to make any finding about the extent of the difference between their actual pay and the equalised pay to which the Claimants were entitled, but it was

clearly very substantial since some comparators were paid at almost double their rates.

5. A further hearing followed on 14 and 15 October 2015 to work out the consequences of that decision. Notwithstanding his finding that LUL was liable (in part) for the breach which he had found, the Judge held, for reasons which I explain below, that it was not liable to pay any compensation, and he accordingly dismissed the claim (save as regards two weeks' pay under a different provision of the Regulations with which we are not concerned). Although that order was made at the conclusion of the hearing, his Reasons were not sent to the parties until 13 January 2016: again, they are clear and thoughtful.

6. The Claimants appealed to the EAT. By a judgment dated 13 December 2016 Mitting J allowed the appeal and remitted the case to the ET for an assessment of the compensation due to the Claimants from LUL, save in the case of Mr Parekh whose claim had failed on other grounds. This is LUL's appeal against that decision.

7. LUL has been represented before us by Ms Lydia Seymour of counsel, who represented it also in the ET and the EAT. The Claimants have been represented by Mr Thomas Linden QC, leading Mr David Mitchell. Mr Mitchell also appeared in the EAT and the ET.

THE REGULATIONS

8. Part 1 of the Regulations contains the definitions of the key concepts of "hirer", "agency worker" and "temporary work agency", but nothing turns on them in this case since it is common ground that TP was a temporary work agency which supplied LUL with the services of the Claimants as agency workers and that LUL was accordingly the hirer. But I need to refer in detail to some of the provisions of Part 2 ("Rights") and Part 3 ("Liability, Protection and Remedies").

PART 2

9. Part 2, which is headed "Rights", provides for three kinds of rights, under regulations 5, 12 and 13. We are concerned on this appeal only with regulation 5, which is headed "Rights of agency workers in relation to the basic working and employment conditions"; but I should note that regulation 12 also confers rights to access to "collective facilities and amenities" and that regulation 13 confers rights to access to permanent employment opportunities with the hirer.

10. Regulation 5 (1) reads:

> "(1) Subject to regulation 7, an agency worker (A) shall be entitled to the same basic working and employment conditions as A would be entitled to for doing the same job had A been recruited by the hirer —
>
> (a) other than by using the services of a temporary work agency; and
>
> (b) at the time the qualifying period commenced."

Paragraph (2) defines "basic working and employment conditions", in the case where A would have been recruited as an employee, as "the relevant terms and conditions that are ordinarily included in the contracts of the employee". "Relevant terms and conditions" is defined in regulation 6 (1) as "terms and conditions relating to: (a) pay; (b) the duration of working time; (c) night work; (d) rest periods; (e) rest breaks; and (f) annual leave".

11. Regulation 7 provides that regulation 5 does not apply unless an agency worker has completed a qualifying period by working in the same role for the same hirer for twelve weeks. The effect of that is that although the Regulations came into force on 1 October 2012 the earliest that any worker could enjoy any rights under them was 24 December 2012.

12. Regulation 10, which is headed "Permanent contracts providing for pay between assignments", contains the Swedish derogation, which qualifies the right conferred by regulation 5 (1). Again, I need not explain the details, and I refer to it only because of the part which TP's original reliance on it played in the events which give rise to the issue before us.

PART 3

13. Part 3 is headed "Liability, Protection and Remedies" and as that title suggests it contains a rather disparate group of provisions. I need to refer to regulations 14, 17 and 18.

14. Regulation 14 is headed "Liability of temporary work agency and hirer". Its purpose is to allocate liability, as between the agency and the hirer, for any breach of a worker's rights under Part 2. Paragraphs (1) and (2) read:

> "(1) A temporary work agency shall be liable for any breach of regulation 5, to the extent that it is responsible for that breach.
>
> (2) Subject to paragraph (3), the hirer shall be liable for any breach of regulation 5, to the extent that it is responsible for that breach."

Paragraph (3), to which paragraph (2) is expressed to be subject, provides that the agency will not be liable in circumstances where, very broadly, it has done its best to obtain from the hirer the information necessary for the comparison required under regulation 5 and has acted reasonably in the light of that information. The provisions are very elaborate and I need not set them out. The paragraph concludes:

> "… and to the extent that the temporary work agency is not liable under this provision, the hirer shall be liable."

Paragraph (6) provides that the hirer alone will be liable for any breach of regulations 12 and 13. Paragraph (7) allocates liability for acts of victimisation contrary to regulation 17 (as to which see below): in short, the agency and the hirer are each liable for their own acts.

15. Regulation 17 provides for protection of an agency workers against being dismissed or subjected to a detriment on various grounds which can be loosely described as victimisation.

16. Paragraph 18 is headed "Complaints to employment tribunals etc". It deals with a number of different matters. I take the relevant parts in turn.

17. Paragraph (2) confers the basic right on an agency worker to bring a complaint in the ET of an infringement of the rights identified above. It reads (so far as material):

> "… [A]n agency worker may present a complaint to an employment tribunal that a temporary work agency or the hirer has infringed a right conferred on the agency worker by regulation 5, 12, 13 or 17 (2)."

18. Paragraph (8) specifies the remedies available to the ET when it finds a complaint to be well-founded. It reads:

> "Where an employment tribunal finds that a complaint presented to it under this regulation is well founded, it shall take such of the following steps as it considers just and equitable —
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> (a) making a declaration as to the rights of the complainant in relation to the matters to which the complaint relates;
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> (b) ordering the respondent to pay compensation to the complainant;
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> (c) recommending that the respondent take, within a specified period, action appearing to the tribunal to be reasonable, in all the circumstances of the case, for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the complaint relates."

"Respondent" is defined by paragraph (1) as including "the hirer and any temporary work agency".

19. Paragraphs (10) and (11) contain further provisions about the assessment of compensation under paragraph (8) (b). Paragraph (10) reads:

> "Subject to paragraphs (12) and (13), where a tribunal orders compensation under paragraph (8) (b), the amount of the compensation awarded shall be such as the tribunal considers just and equitable in all the circumstances having regard to —
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> (a) the infringement or breach to which the complaint relates; and
>
> (b) any loss which is attributable to the infringement."

(The provisions of paragraphs (12) and (13), referred to in paragraph (10), are immaterial for our purposes.) Paragraph (11) glosses the reference to "loss" in paragraph (10) (b) and reads:

> "The loss shall be taken to include —
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> (a) any expenses reasonably incurred by the complainant in consequence of the infringement or breach; and
>
> (b) loss of any benefit which the complainant might reasonably be expected to have had but for the infringement or breach."

20. I return, out of sequence, to paragraph (9). It reads:

> "Where a tribunal orders compensation under paragraph (8)(b), and there is more than one respondent, the amount of compensation payable by each or any respondent shall be such as may be found by the tribunal to be just and equitable having regard to the extent of each respondent's responsibility for the infringement to which the complaint relates."

I discuss the effect of this provision at para. 31 below, but I observe at this stage that its interposition between paragraphs (8) and (10)-(13) is odd: since it is concerned with who has to pay what part of the compensation one might expect it to follow the provisions governing how the amount of that compensation is to be arrived at. But it was not suggested that this is anything more than a drafting anomaly or that it has any bearing on the issues which we have to decide.

21. I should mention a point about terminology. The jurisdiction conferred by regulation 18 (2) covers complaints that the rights identified, including those under regulation 5 (1), have been "infringed". However, regulations 14 (1) and (2) refer to "breach" of regulation 5 (1), and for present purposes I think it is acceptable to use the terms interchangeably.[1]

THE EFFECT OF THE REGULATIONS

22. The effect of those regulations and how they fit together is not straightforward and was not agreed before us. The correct analysis is in my view as follows.

23. The starting-point is the primary rights conferred by the Regulations. For our purposes the relevant right is that conferred by regulation 5, though, as noted, other rights are conferred by regulations 12 and 13. The right is to "be entitled to" the same terms and conditions as permanent workers.

24. It was the Claimants' case before the ET that regulation 5 (1) created an obligation on the agency actually to pay wages at the equalised rates. The Employment Judge rejected that argument. At paras. 19-32 of his liability Reasons he conducted a painstaking analysis of the structure of the Regulations and concluded (para. 19) that

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1 An additional complication is that the compensation provisions in paragraphs (9)-(12) at some points refer to "infringement or breach". I am inclined to think, however, that the references to "breach" in that context apply only to certain contractual rights or duties relating to the Swedish derogation: these are referred to in regulation 10 (3), but I need not set them out.

> "the [Regulations] are designed … to ensure equality of *terms* but they say nothing about compliance (or non-compliance) with the terms so *equalised*."

As will appear, Mitting J in the EAT took essentially the same view, and before us it was maintained by Ms Seymour. She submitted that regulation 5 (1) was concerned with *ascertaining* rights and not with their enforcement. She submitted that its role was analogous to that of Part I of the Employment Rights Act 1996 and that the remedy for a worker who was not accorded his or her rights under regulation 5 (1) was to bring (at least in the case of pay) proceedings for unlawful deduction of wages under Part II of that Act.

25. Mr Linden submitted that the Employment Judge's analysis was wrong. The point is fundamental to the issues in this case, and I should deal with it at this stage. In my view the Judge's analysis was indeed mistaken, and I do not accept Ms Seymour's submissions. I regard it as clear that the language of regulation 5 (1) has the effect of creating a substantive right to the equalised benefits. To say that a worker is "entitled to" the same terms and conditions as the comparator enjoys under his or her contract naturally connotes a right actually to receive the benefits in question. Thus, in the case of pay, which is what we are concerned with here, an agency worker is given the right to be paid, on each pay-day, what the comparator would be paid. That right is enforceable under the provisions as to remedy in the Regulations themselves. Mr Linden pointed out that, even if Ms Seymour were right that complaints of non-payment of equalised pay could be enforced in the tribunal under Part II of the 1996 Act, the same would not be true as regards most of the other heads identified in regulation 6; and it is hardly likely that the draftsman intended complainants to have to bring proceedings in the County Court.

26. However, the right created by regulation 5 is of an unusual character because the regulation itself does not identify any person who is under a correlative duty to accord the worker the benefit of equalised terms. Instead, regulation 14 provides for who is to be "liable" where there is a breach of the right. That approach of providing separately for the right and the liability was evidently taken in order to be able to make special provision reflecting the tripartite nature of the relevant relationships, and it is perfectly workable: whenever the right created by regulation 5 is infringed – in the case of pay, by non-receipt of pay at the equalised rate – the worker has a cause of action against whoever is "responsible for" the infringement applying the criteria under regulation 14.

27. I turn to regulation 14 itself. The way that it deals with liability is to provide that the agency and/or the hirer will be liable for a breach "to the extent that" it is responsible for it. It was common ground both below and before us – and seems to me correct – that that language envisages situations in which both parties are partly responsible and that what it requires in such a case is an apportionment of liability on a percentage basis. The basis of the apportionment is the extent of the parties' relative "responsibility" for the breach. That term is not defined[2]. Essentially the same

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[2] I should say, for completeness, that there is no equivalent to regulation 14 in the Directive, and the language must accordingly be construed without reference to any autonomous EU sense.

language is used in section 2 (1) of the Civil Liability (Contribution) Act 1978, where it is well-established that "responsibility" refers both to the degree to which each wrongdoer contributed to the occurrence of the breach and to the degree of their relative fault – for short, causation and culpability. The present context is not the same[3], but it is analogous; and it seems to me that the language naturally has the same meaning in regulation 14 (and, to anticipate, regulation 18 – as to this, see para. 63 below).

28. Regulations 5 and 14 thus provide between them for who is to be *liable*, and to what extent, for any breach. *Remedy* is a distinct question and is the subject of regulation 18.

29. As to remedy, it might be natural to assume that, at least in the case of pay, the Regulations created a statutory right to claim for payment at the equalised rates as a liquidated sum. But that is not the way that the Regulations are framed: instead of a claim in debt, the only pecuniary remedy is by way of compensation under paragraph (8) (b). That is no doubt a further consequence of the separate provision made by the draftsman for the creation of the right and for liability for its infringement. It means among other things that, contrary to Ms Seymour's submission, no claim can be brought under Part II of the 1996 Act.[4]

30. Paragraphs (10) and (11) of regulation 18, which provide for the approach to be taken to compensation, are closely based on, though they are not wholly identical to, the language of the provisions governing compensation for unlawful detriments in employment and unfair dismissal in the Employment Rights Act 1996: see sections 49 and 123. In particular, the 1996 Act, like paragraph (10), identifies the criterion as what "the tribunal considers just and equitable in all the circumstances having regard to" the loss attributable to the dismissal or detriment complained of. The principles arising from those provisions are well-understood and do not need to be recapitulated here. However, there is one point that I should make because it is relevant to a later stage in the argument. Notwithstanding the reference in the statutory language to justice and equity, the touchstone in all ordinary cases is what amount is necessary to compensate the claimant for the (pecuniary) loss suffered as a result of the wrongful act. The primary effect of the reference to justice and equity is to give the tribunals a degree of flexibility in the approach to the proof of loss. This was first established by the judgment of Lord Donaldson in the National Industrial Relations Court in *Norton Tool Ltd v Tewson* [1972] ICR 501 (see at p. 504 G-H); but it was confirmed by the House of Lords in *Dunnachie v Kingston-upon-Hull City Council* [2004] UKHL 36, [2005] 1 AC 226 (see in particular paras. 24-26 in the speech of Lord Steyn (pp. 250-1)). There are also, as Lord Steyn acknowledged by reference to the speech of Lord Dilhorne in *W. Devis & Sons Ltd. v Atkins* [1977] AC 931, circumstances in which it may be just and equitable to award a claimant less than the amount of his or her loss, but such cases are extremely uncommon: Lord Dilhorne was considering a case where

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3 As to this, see further n. 5 below.

4 Another consequence is that the terms "arrears" and "back pay" which appear in the decisions of both the ET and the EAT in this case, are not, on a very strict analysis, accurate. But they are difficult to avoid, and I will myself also use them subject to that caveat.

an employee who had been guilty of fraud was nonetheless unfairly dismissed because he had successfully concealed his fraud from the employer at the time of dismissal.

31. That leaves regulation 18 (9). This applies where "there is more than one respondent". Given the context, that can only refer to a case where liability has been found on the part of both the agency and the hirer, under regulation 14. What paragraph (9) requires in such a case is that the tribunal shall provide for the amount of compensation "payable by each", on the basis of what is "just and equitable having regard to the extent of … the responsibility [of each] for the infringement" – in other words, though the term is not used, for an apportionment. But that gives rise to a conundrum. Regulation 14 already provides for an apportionment, on what appear to be essentially the same principles. On the face of it the two provisions largely, if not wholly, duplicate one another; but I return to this at paras. 63-64 below.[5]

THE DECISIONS OF THE ET

THE LIABILITY DECISION

32. Although we are primarily concerned with the remedy decision I need to summarise the key findings from the liability decision.

33. The Employment Judge identified the issues at paras. 1-4 of the Reasons. The only claim with which we are now concerned is a claim to equalisation of pay under regulation 5; but there were also claims in relation to equalisation of annual leave entitlements (also under regulation 5) and travel benefits (under regulation 12) and a claim of unlawful detriment contrary to regulation 17.

34. At paras. 19-32 of the Reasons the Employment Judge analysed the structure of the Regulations. I have already indicated that I respectfully disagree with his conclusion on one important aspect, and this to some extent impacts on other points that he makes; but I would wish to pay tribute to the thought and care that he put into the exercise.

35. The Judge's findings of primary fact are at paras. 40-83. Those that are relevant I summarise in my account below of his reasoning on the issues with which we are concerned. At paras. 84-111 he deals with a number of issues which are not material to this appeal.

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5 It occurred to me in the course of writing this judgment that one solution to the conundrum might be that regulation 18 (9) was intended to govern the liability of the agency and the hirer *inter se* – in other words, to create a right of contribution; and at first sight that seems plausible because the formula for assessing the amounts payable by each closely tracks that of section 2 (1) of the Civil Liability (Contribution) Act 1978. But neither party advanced such a construction, and on closer examination it is problematic. In the first place the language "payable by each" most naturally connotes "payable to the person being compensated". And, more substantially, contribution provisions are only required in circumstances where the claimant is entitled to recover in full against one of two (or more) joint wrongdoers; but that is not the case here, since regulation 14 already restricts each respondent's initial liability to the extent of their responsibility.

36. At paras. 112-118 the Employment Judge addresses the issue of whether the Claimants could "establish any actionable breach of regs 5 (1) and/or 12 (1) and/or 17 (2)". At para. 112 he says that his earlier conclusions necessarily mean that "TP was in breach of reg 5 (1) in relation to hourly rates until about 15 October 2012"[6]. There is no challenge to that finding in this appeal. The following paragraphs are concerned with the claims under regulations 12 and 17 and are not relevant for our purposes.

37. Having thus established that the Claimants were under-paid in breach of regulation 5 (1) the Judge next addresses the question whether LUL was "responsible" for that breach to any extent so as to be liable for it under regulation 14 (2). As to that, the relevant facts, as found earlier in the Reasons but incorporating also some further findings in paras. 119-121, can be summarised as follows:

    (1) As noted above, when the Regulations first came into force TP took the position that the Swedish derogation applied to the employees whom it supplied for the Wembley group stations, and accordingly that it did not have to equalise the Claimants' pay under regulation 5 (1). The Judge described its position as "either dishonest or, at the very least, badly misguided" (para. 119).

    (2) LUL did not initially question TP's position, and the Judge found that it was not at fault in not doing so: the original under-payments were thus entirely the responsibility of TP (again, para. 119).

    (3) At the very end of 2011 or in early 2012 LUL on its own initiative re-visited the question whether the Regulations applied, it decided that they did and that the rates paid by TP to the relevant employees should be increased accordingly (which in practice meant that it would have to increase its payments to TP). TP could not, however, pay the equalised rates until LUL provided it with information about the rates for comparators. As a result of various errors and confusions it was not until the end of August 2012 that it supplied TP with the correct figures; and not until after mid-October 2012 that the correct payments began to be made. The Judge was critical of LUL's delay in that period and held that if it had acted with appropriate expedition the correct figures could have been supplied within a month or so and payment at the correct rates would have started within a month or two thereafter (see para. 121).

    (4) That still left the question of arrears. The Judge had earlier found that the process of calculating the sums in question, which could only be done by TP (because it had the figures for what hours the Claimants had worked), began in late September (para. 62); and that between December 2012 and May 2013 LUL, presumably on the basis of figures provided by TP, made payments to it to fund the payment of the amounts due (para. 66). It is common ground that despite being put in funds to do so TP never made any payment of arrears to the Claimants (or any of the other employees to whom they were owed). The Judge made no finding as to why that was (though see para. 44 below), but he found at para. 83 that LUL repeatedly urged TP, up to May 2013, to pay the arrears.

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6 There may be some uncertainty as to exactly when equalised amounts started to be paid. LUL told us that the last date at which the Claimants were under-paid was 15 October 2012, but for the purpose of this appeal nothing turns on the precise date.

38. At para. 122 of the Reasons the Judge noted that Ms Seymour relied "in mitigation" (that is not here a reference to mitigation in the compensation context) on LUL's attempts to get TP "to pay the Claimants what was owing to them"; but he held that those attempts were irrelevant to the issue of its liability under regulation 14. He continued, at para. 133:

> "I remind myself of the broad terms of reg 14 (1) and (2). They call on me to perform a rough and ready assessment. I hold TP entirely responsible for the fact that the process of engaging with the requirements of [the Regulations] did not begin until much too late. I hold LUL very largely responsible for the inordinate delay in remedying the breach. Had they given the matter the attention and urgency it merited, I consider that the breach would have been remedied in about half the time it actually occupied. Doing the best I can, I apportion liability for the breach in respect of pay evenly between the parties."

That is the decision that translates into paragraph (3) of the formal judgment which I set out at para. 4 above.

39. At paras. 130-132 of the Reasons the Employment Judge summarised the effect of his decision and discussed what issues remained to be decided. He directed a further hearing (if the parties were unable to reach a compromise). One of the issues at that hearing would be when each of the Claimants first qualified for the right under regulation 5 (1). The other would be "remedy". As to the latter, he said, at para. 131:

> "The claimants have secured a finding against TP on the annual leave claim and against both respondents on pay. In this long and bitter litigation, they are entitled to regard that as a partial vindication of their position. But compensation is another matter. … [I]njuries to feelings are not compensable. By reg 18 (10), any award must be in such a sum as is 'just and equitable in all the circumstances having regard to … the infringement or breach ... and … any loss which is attributable to the infringement'. The substantial loss suffered by the Claimants results, as a matter of practical reality, from the liquidation of TP in November 2013, over a year after the breach relating to the pay was remedied. That was the moment at which their contractual right to recover the back pay owing to them becomes illusory. It will be for them to show (a) that the substantial losses claimed are attributable to the breach of reg 5 (1) and (b) that an award of compensation against LUL for those losses or any part of them would be just and equitable. I have not heard the matter argued and have formed no view, but to state that the Claimants face formidable challenges is, it seems to me, to state the obvious."

It is convenient to say at this stage that I regard the analysis in that passage, focusing as it does not on the original underpayments but on the failure to recover from TP before its insolvency, as wrong; and it is carried over into the remedy decision. I return to this later.

40. LUL did not appeal against the liability decision. Accordingly the finding of 50% liability against LUL stands.

THE REMEDY DECISION

41. In the first part of the remedy decision the Employment Judge dealt with the qualifying period issue and with a limitation point that had been raised in the case of one of the two lead Claimants.

42. Paras. 26-38 are headed "Remedies". At para. 30 the Judge recorded that the Claimants were seeking compensation under regulation 18 (8) (b), so that paragraphs (9) and (10) applied. At para. 31 he accepted a submission from Ms Seymour that

> "… regs 18 (9) and (10) are correctly applied by asking three questions. First, what is the relevant infringement? Secondly, what loss, if any, is attributable to the infringement? Thirdly, where there are two or more respondents, what proportion of the compensation award above is it just and equitable for each to pay having regard to its responsibility for the infringement?"

He proceeded to address those questions in turn.

43. As to the first, at para. 32 he identified the infringement, on the basis of his liability decision, as "the failure by TP, [up to …] 15 October 2012, to accord or extend to the Claimants terms as to pay equal to those of their comparators". Read in isolation, that seems unexceptionable, but it is clear from his analysis in the liability decision (see para. 39 above) that the phrase "accord or extend terms as to pay" does not mean "failure to pay".

44. As to the second question, his reasoning is to be found in paras. 33-34. He started by considering the meaning of "attributable to": plainly that is a term importing causation, but he refers to authority to the effect that formal analysis in terms of foreseeability and remoteness may in this context be inappropriate. At para. 34 he said:

> "In my judgment it cannot sensibly be said that the loss of the back pay (or any associated expenditure[7]) is 'attributable' to the failure (by TP, contributed to by LUL) timeously to equalise pay terms. I am satisfied that the loss for which Mr Mitchell sought compensation is entirely attributable to the facts that (a) in circumstances suggestive (as I held in my initial reasons …) of fraud, TP did not pay the Claimants what, by October 2012, they admittedly owed them (despite receiving, by May 2013 (not that their liability to pay the Claimants depended upon it), a greater sum from LUL); and (b) the Claimants did not (despite having the benefit of professional legal advice) enforce their rights to recover the sums due; and (c) ultimately,

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7 It seems that a claim for some such expenditure was made, or at least adumbrated, by the Claimants, but we were not given any details. The issues before us were wholly concerned with pay.

> through the liquidation of TP some 13 months after the debt crystallised, they lost the chance of doing so. In reaching this view I do not resort to common law reasoning. The concepts of remoteness and foreseeability forged and refined over centuries are not applicable. Nor is a 'but for' test appropriate. My task is simply to interpret and apply the straightforward language of reg 18 (10) in a manner which accords with practical reality and common sense."

In short, he held that the Claimants could not recover for the under-payments prior to 15 October 2012 because they were not attributable to the breaches of regulation 5 but to the three subsequently-occurring factors which he identifies as (a)-(c). I note in particular his finding that TP's failure to pass on to the Claimants the payments that it had received from LUL appeared to be deliberate and dishonest.

45. That conclusion meant that the third question did not arise, but the Judge went on at para. 35 to deal with it in case he was wrong. He said:

> "In my first judgment I held that, having regard to their responsibility for the breach of reg 5 in relation to pay rates, LUL were equally liable with TP under reg 14 (2). It might be thought that the inevitable consequence would be that compensation under reg 18 must be shared in the same proportions, but reg 18 (9) does not say that. Plainly, in any but the most exceptional case, the apportionment under reg 18 (9) will correspond with that under reg 14 (2). The two provisions are framed in very similar language. It seems to me, however, that the requirements for the award against any respondent to be 'just and equitable' dictates a discretionary assessment which takes account of all relevant circumstances. The circumstances of the instant case are, in my view, exceptional and justice and equity require them all (not just the responsibility of the individual respondents for the infringement) to be taken into account. The additional points of particular importance have already been referred to. They are: (a) the fact that LUL paid to TP more than they owed to the Claimants; and (b) the fact that the Claimants failed (despite having the benefit of legal advice) to enforce their right to back pay against TP; and (c) owing to TP's insolvency, the fact that they lost that right. The logic of the Claimant's case is that LUL must pay twice in respect of the back pay. I do not accept that a proper application of [the Regulations] dictates that bizarre outcome."

In other words, even if the under-payments prior to 15 October 2012 were attributable to the infringement found, for which LUL had been held 50% liable, it would not be just and equitable to require LUL to compensate the Claimants for them.

THE DECISION OF THE EMPLOYMENT APPEAL TRIBUNAL

46. The Claimants appealed to the EAT. I need not set out their grounds of appeal. I can pick up the judgment of Mitting J at para. 8, where he sets out what he says is the correct approach to the assessment of compensation for a breach of the Regulations:

> "The approach that the Tribunal is required to take in assessing compensation is in principle straightforward:
>
> (1) It must identify the infringement. In this case, the infringement was of Regulation 5(1) and (2)(a).
>
> (2) It must identify the responsibility of the hirer and the temporary work agency for the infringement. Under Regulation 14(1) and (2):
>
> '(1) … a temporary work agency shall be liable for any breach of regulation 5, to the extent that it is responsible for that breach.
>
> (2) … The hirer shall be liable for any breach of regulation 5, to the extent that it is responsible for that breach.'
>
> (3) It must decide whether to order either the temporary work agency or the hirer to pay compensation (see Regulation 18(8)(b)).
>
> (4) When it does, it must determine what amount of compensation it would be just and equitable to award. It must have regard to (a) the infringement and (b) the loss attributable to the infringement. That loss should be taken to include the loss of any benefit that the Claimant might reasonably be expected to have had but for the infringement (see Regulation 18(10) and (11)(b))."

47. That is a helpful overall framework for the analysis, though it is not designed itself to address the difficulties raised by some of those questions. Mitting J continues, at para. 9:

> "Applying those principles to the facts, the infringement here as found by the Employment Tribunal was the failure of TP to include in the Claimant's terms and conditions of employment the basic working and employment conditions enjoyed by LUL's directly employed comparable staff. The loss attributable to that infringement includes the benefit of the payment of wages at the higher level enjoyed by LUL's directly employed comparable staff. The Employment Tribunal would then have to ask what compensation it would be just and equitable to require LUL to pay to the Claimants having regard to that loss. It is only at that point once the amount of compensation that LUL should pay to the Claimants is known that they would have a directly enforceable right to payment of any sum against LUL. Until that time their right was to the payment of wages by their employer. The claim for compensation against LUL is not therefore in principle a claim for wages or for unlawful deduction from wages but a claim for statutory compensation."

I agree with the last sentence in that passage – see para. 29 above; and I note that the Claimants' pleaded claim was, correctly, for "compensation" and was not advanced

under Part II of the 1996 Act. However, for the reasons given at para. 25 I cannot accept Mitting J's characterisation of the infringement in the first sentence.

48. Mitting J then goes on at para. 10 of his judgment to summarise the circumstances that resulted in the Claimants never being paid the arrears due for the period prior to 15 October 2012. He says, at para. 11:

> "On those unusual facts, the starting point for the calculation of the loss for which LUL are liable must be the traditional one, namely to ask what would have happened but for the infringement for which LUL was responsible. What would have happened but for that infringement is that TP should have, and may well have, issued compliant terms and conditions of employment to the Claimants on or very soon after 24 December 2011."

He proceeds at para. 12 to identify a number of particular factual questions about what might have happened if TP had indeed issued compliant terms and which the ET had not addressed. I need not set them out, but they essentially concern whether TP, established to be an unscrupulous employer, would in fact have paid up in accordance with those terms; and, if not, whether the Claimants would have brought proceedings to enforce payment in time to recover from TP itself before it went into liquidation (or against the Secretary of State under Part XII of the 1996 Act). At para. 13 he rejects a submission by Ms Seymour that if such an enquiry had been carried out the result would necessarily be the same because on any view the loss was caused entirely by TP's (apparently fraudulent) failure to pay the arrears even when they were in funds to do so. At paras. 14-15 he criticises the Employment Judge for starting the assessment of loss "at the end" rather than going back to the moment of breach and asking what would have happened if it had not occurred.

49. It followed from that analysis that, the Employment Judge having failed to address the essential question, the issue would have to be remitted for re-hearing, subject to the Judge's alternative finding under regulation 18 (9). As to that, Mitting J accepts (at para. 17) that "[t]he fact that LUL have paid TP at [*sic*] the amount that is owing to the Claimants by TP is plainly an important factor" in determining the amount of compensation that it was just and equitable that LUL should pay; but he goes on (see paras. 17-19) on to identify four "counter-balancing factors", namely:

(a) that it was LUL's choice to use agency workers in the first place because of the savings that that entailed (para. 17);

(b) that LUL was, as the Judge had found in his decision on liability under regulation 14, partly responsible for the original under-payment (para. 18); and

(c) that it was unfair to take into account, as the Employment Judge apparently did, the fact the Claimants had not brought proceedings against TP prior to its liquidation (para. 19) ;

(d) that the Claimants were in a weaker "bargaining position" than either TP or LUL (para. 20).

He continued:

> "Balancing all of those factors together, it seems to me that Judge Snelson's conclusion that it would not be just and equitable to require LUL to pay significant compensation to them is at best open to question. If it had stood alone and had not been founded as it was, on an erroneous approach to the calculation of the loss in the first place, it might have been possible to sustain it on appeal, but, taken together with the undoubted error of approach in relation to the basic loss, it cannot stand."

It followed that the apportionment issue should be remitted too.

50. I have to say that I am not sure that the way that Mitting J expresses his reasoning on this issue justifies the course that he took. I do not see how the error in the Employment Judge's conclusion about compensation was relevant to his conclusion about how, if (contrary to his view) the Claimants did in fact fall to be compensated, payment of that compensation should be apportioned. The only basis on which his decision could properly be set aside was if the conclusion that he reached was not reasonably open to him on the facts.

THE ISSUES ON THE APPEAL

51. The pleaded grounds of appeal focus on the reasoning of the EAT, which is not always helpful in a case of this kind, and they do not fully reflect the underlying issues. It is also the case that some of the arguments advanced by Mr Linden ought to have been the subject of a Respondent's Notice. But this was a complicated case about legislation which has not previously been the subject of judicial consideration, and I do not think it would be right to take a narrow approach to the issues, which were fully explored in the oral submissions.

52. In broad terms the issues are (a) whether the Employment Judge was right to find that the Claimants were not entitled to compensation for the reasons given in para. 34 of the Reasons; and (b) whether, if not, he was entitled to find nevertheless that it was not just and equitable that any part of that compensation should be payable by LUL for the reasons given at para. 35. The particular arguments are best identified in the course of my consideration of those issues.

DISCUSSION AND CONCLUSION

COMPENSATION: REGULATION 18 (10)

53. As already trailed, I believe that the approaches of both the ET and the EAT to the assessment of compensation were wrong. The correct analysis is in my view as follows.

54. The starting-point is that on each pay day between 24 December 2011 and 15 October 2012 the Claimants were entitled to be paid at equalised rates: see paras. 25-26 above. It follows that on each occasion when they were paid at less than those rates a breach, or infringement, occurred in respect of which they were entitled to compensation. As already discussed, that was not the approach of the Employment Judge, and Mitting J likewise treated the infringement as being a failure to "issue compliant terms and conditions of employment" (see para. 48 above). For the reasons I have already

given, that is a mischaracterisation: the Claimants' entitlement was not to be "issued with" terms, in the sense of being given some formal written acknowledgment of their equalised entitlements, but to be paid the correct amounts.

55. The parties liable for that infringement – or, more accurately, those infringements – were established by the ET's liability decision. LUL is liable as to 50%.

56. The next step is to identify the loss attributable to that breach/infringement (paragraph (10) (b)). On ordinary common law principles the loss would be the difference between the payment actually received and that which would have been received but for the breach, namely payment at the equalised rate, and compensation should be assessed in the amount of that difference. But the same result is achieved by applying the language of paragraph (11) (b): indeed the Claimants might not only have "reasonably … expected" to have the benefit of payment at the equalised rates, they were positively entitled to it. In short, compensation should be assessed as, pound-for-pound, the amount of the underpayments.

57. So far so good. But both the Employment Judge and Mitting J believed that it was necessary to take into account what happened, or did not happen, subsequent to the initial underpayment(s). I accept that in assessing compensation it will not always be right to draw a line as at the date of the breach: if, for example, the Claimants had been paid the arrears in full a week after they occurred they would not have suffered any loss requiring compensation. The real question is whether the particular subsequent matters to which the ET and the EAT had regard were material. I take the two decisions in turn.

58. As for the ET, the Judge found that it could not sensibly be said that "the loss of the back pay was 'attributable' to the failure … timeously to equalise pay terms" but rather that it was attributable to a combination of TP's dishonest failure to pass on the amounts paid to it by LUL and the Claimants' failure to pursue TP until too late: see para. 44 above. In my view that conclusion is unsustainable. The Judge treats the Claimants' loss as occurring, in effect, only at the moment when TP went into liquidation: indeed he says so in terms at para. 131 of the Reasons for the liability decision (see para. 39 above), which foreshadows the reasoning in the remedy decision. That ignores the fact that the breach first occurred at the moment of each underpayment, and it is not right to treat it as occurring only when it became definitively irrecoverable from TP: that is what Mitting J meant by saying that the Judge had "started at the end". The fact that TP failed to pay even when put in funds to do so and eventually became insolvent does not break any connection with the original breach: it simply meant that it continued. The same goes for the fact that the Claimants did not pursue TP timeously.

59. As for the EAT, Mitting J's belief that it was necessary to conduct an enquiry into what would have happened if TP had "issued compliant terms" is based on what I have already said is a mischaracterisation of the infringement. The actual infringement was the failure to pay the equalised payments, and the fact that the Claimants may have been slow in pursuing TP for them cannot affect their right to be compensated for that non-payment.

60. In the tribunals below there was considerable debate about the correct approach to "attributability", and in her grounds of appeal Ms Seymour submitted that the EAT

had wrongly applied a "but for" test rather than the more flexible approach taken by the ET. In that context we were referred to the recent decision of this Court in *Roberts v Wilsons Solicitors LLP* [2018] EWCA Civ 52, [2018] ICR 1092. But on the analysis which I adopt above no such issue arises. If the infringement consisted in the failure to pay the equalised rates the loss of the enhanced pay was obviously attributable to that infringement: they are two sides of the same coin. Potential causation issues only arise if the loss is regarded – wrongly, as I would hold – as occurring only when TP became insolvent.

61. I accordingly believe that the compensation payable under regulation 18 (10) is the full amount of the underpayments prior to 15 October 2012, and that the only issue that needs to be determined on remittal to the ET is the calculation of the amounts in question.

62. That leaves the question of how much of that compensation LUL has to pay. The finding under regulation 14 (1) that liability for the breach of regulation 5 (1) "is apportioned as to 50% to [LUL]" means that it is it is not liable to pay more than half; but the question is whether regulation 18 (9) justifies some greater discount.

APPORTIONMENT: REGULATION 18 (9)

63. As I have already noted, there appears to be at least a substantial overlap between the exercises required by regulation 14 and by regulation 18 (9) in the case of a breach/infringement[8] of regulation 5. The language is not identical, but both provisions require the tribunal to assess "the extent" to which the agency and the hirer are "responsible" for the breach, and it is inconceivable that the exercise of assessing relative responsibility can be different as between the two regulations. It is true that the purpose of the exercise under regulation 14 is to decide the extent of "liability", whereas under regulation 18 (9) it is to guide the assessment of what part of the compensation it is just and equitable should be payable by each party. But that would appear to be a distinction without a difference. I do not see what the purpose of apportioning "liability" under regulation 14 could be except to apportion the amount of compensation that each of the two responsible parties has to pay.

64. If the overlap were total it would follow that the ET's (unappealed) apportionment of 50% liability to LUL under regulation 14 would necessarily apply equally to the exercise under regulation 18 (9), with the result that it was not open to it to hold, as it did, that no compensation was payable by LUL. But both the ET and the EAT proceeded on the basis that the reference in paragraph (9) to "justice and equity" (which does not appear in regulation 14) allowed the tribunal, in an appropriate case, to have regard to matters going beyond the relative responsibility of the parties. Mr Linden submitted that they were wrong to do so and that that language did no more than indicate that a broad and flexible approach could be taken in applying the criterion of relative "responsibility": he referred us to Sir John Donaldson's observations in *Norton Tool v Tewson* about the substantially similar wording of the provisions relating to compensation for unfair dismissal (see para. 30 above).

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8 In the case of regulation 5 these terms appear to be interchangeable: see para. 21 above.

65. I agree with Mr Linden that we should approach the use of the "just and equitable having regard to" formula in regulation 18 (9) in the same way as in the provisions governing the assessment of compensation. I do not agree that that excludes in principle the possibility of a finding that it would be just and equitable to require a respondent to pay a claimant less than the amount of compensation for which it is "responsible", since, as noted at para. 30 above, such an outcome is recognised as possible in cases of the *Devis v Atkins* type. But I certainly accept that such cases will be exceptional and it is hard to conceive of them arising except in the context of some serious misconduct by the claimant.

66. On that basis the question is whether it was open to the Employment Judge, in all the circumstances found by him, to hold that justice and equity required that LUL should not pay the Claimants any compensation in respect of the arrears notwithstanding that it was 50% responsible for them not being paid at equalised rates up to mid-October 2012. I do not believe that it was. The finding that LUL was 50% responsible reflected findings by the Judge that it culpably contributed to the fact that the Claimants' pay was not equalised many months sooner than it was. It is true that it did the right thing thereafter by funding TP to pay the arrears, and I can understand why the Judge baulked at the idea that it should have to "pay twice". But I cannot accept that that circumstance, regrettable though it is, renders it just and equitable to deprive the Claimants of the compensation otherwise due. There is no question of any misconduct on their part. They have been underpaid wages for reasons which have nothing whatever to do with them and were (partly) LUL's fault: LUL chose to deal with TP and it should in my view be it, and not the Claimants, who should bear the burden of TP's dishonesty. That basic inequity is elaborated by Mitting J in the four "counter-balancing factors" which he identifies in his judgment (see para. 49 above), and I differ from him only in believing that they render the ET's decision not only "open to question" but positively wrong. (I should mention one point made in Ms Seymour's skeleton argument, though not developed by her orally. She pointed out that LUL did not initially choose to contract with TP but inherited the contract from Silverlink. That overlooks the fact that a new contract was entered into between LUL and TP in January 2011 (see para. 1 above); but the point is not in any event central to the inequity which I regard as decisive.)

67. The only criticism of the Claimants advanced by the Employment Judge is that they did not bring proceedings as soon as they could have and so lost (perhaps) the chance to recover against TP. I do not see how that is a material criticism. As a result of the finding on apportionment under regulation 14 they could only have recovered 50% of the arrears from TP in any event: this claim is for LUL's half. But in any case it does not seem to me the kind of criticism that would justify relieving LUL of any part of what would otherwise be its obligation to pay compensation.

68. I accordingly see no need for the case to be remitted on this issue and would hold straightforwardly that the amount of compensation payable by LUL under regulation 18 (9) is 50% of the compensation to which the Claimants will, following assessment by the ET on remittal, be entitled under regulation 18 (10).

69. I would add by way of coda that I am far from sure that the draftsman really thought through the relationship of regulations 14 and 18 (9) or, therefore, that their near-total overlap was deliberate. I note that regulation 18 (9) applies to compensation for infringement of the rights under regulations 12, 13 and 17, to which the

apportionment provisions of regulation 14 do not apply, and it is possible that the overlap in the case of rights under regulation 5 was simply overlooked. But although it is clumsy to have formally to consider both provisions in a regulation 5 case it should not cause any real problems.

DISPOSAL

70. I would dismiss the appeal, save that the remittal to the ET should be for the purpose only of assessing compensation under regulation 18 (10), 50% of which will be payable to the Claimants by LUL. Given the much more limited purpose of the remittal, my strong provisional view is that it would be better if the case were remitted to Employment Judge Snelson, if available. He has a very good grasp of the background, and I have already paid tribute to the thoroughness of his previous decisions: it would be wasteful to require a different judge to start again from scratch. The nature of the errors which I believe he made are not such as to give any ground for suspicion of his ability to determine the remaining issues fairly.

71. It may in fact be that, now that the issues of principle have been decided, the parties can reach agreement as to the sums payable, and that would obviously be highly desirable if it can be achieved. I appreciate that there may be some issues which go beyond mere arithmetic, but I would urge the parties to try to reach compromise on any such issues rather than expend further costs.

Lord Sales:

72. I agree.

Lord Justice Moylan:

73. I also agree.