THE INDUSTRIAL TRIBUNALS

CASE REF: 16346/19IT

CLAIMANT: **Joan Corrigan**

RESPONDENTS: **1. First Choice Recruitment**
2. Western Health and Social Care Trust

JUDGMENT ON CASE MANAGEMENT PRELIMINARY HEARING

The decision of the tribunal is:-

(i) That the claimant be permitted to amend her claim against the respondents to include a claim in respect of an alleged breach of regulation 5(1) of The Agency Worker Regulations (Northern Ireland) 2011.

(ii) The particulars of the claim permitted by the amendment are:

(a) It is alleged that, between April 2018 and April 2019 the claimant worked 55 weekday night shifts for which she did not receive the same basic working and employment conditions as she would have been entitled to for doing the same job had the claimant been recruited by the second respondent.

(b) It is alleged that in respect of her pay for these night shifts, the claimant received a lesser hourly rate for hours worked between 6am-8am than any equivalent staff member who had been directly recruited by the second respondent.

(c) The claimant alleges that the shortfall was £3.81 per hour which equates to £7.62 per night shift. Over 55 night shifts at £7.62 per shift, the total deficit alleged is £419.10.

(iii) This case shall be listed for a further case management preliminary hearing in respect of all claims now made in these proceedings.

(iv) The parties are referred to the following paragraphs of the judgment where action or particular consideration is required prior to the next hearing: Paragraphs 92, 121, 179, 181, 188, 196, 198-200, 203, 209.

Constitution of Tribunal:

Employment Judge: **Employment Judge Travers**

APPEARANCES:

The claimant appeared in person by video link and was not legally represented.

The first respondent was represented by Ms Richards (Elas).

The second respondent was represented by Ms McClarnon, Barrister-at-Law, instructed by the Directorate of Legal Services, Western Health and Social Care Trust.

REASONS

Issue

1. By notice of hearing dated 2nd September 2021, the case was listed for the determination of a single issue:

> *'Whether the Claimant's application to amend her claim to add a claim under the Agency Workers' Regulation (NI) 2011 should be granted'.*

Sources of evidence and information

2. The tribunal heard oral evidence from the claimant in support of her application to amend the claim. The claimant was subjected to a thorough and entirely proper cross-examination by counsel for the second respondent. No other witnesses were called by any party.

3. The contents of a bundle headed '*Joint Bundle for Amendment Application Hearing on 30th July 2021*' were referred to extensively during the hearing. The bundle did not include all the documentation which was referred to during the hearing. It was necessary to locate some documents within the tribunal case file.

Facts

4. The tribunal heard evidence from the claimant. No other witnesses were called by any party. The findings of fact set out below have been reached on the balance of probabilities. The findings have been informed by: the claimant's oral evidence, the documents to which the tribunal was referred, and by the parties' oral and written submissions.

Proposed Amendment

5. At the material times the claimant worked as a care assistant/nursing auxiliary at Altnagelvin Hospital.

6. She secured the work at Altnagelvin via the first respondent which carries on business as a temporary work agency.

7. The second respondent used the services of the first respondent to secure agency workers to meet staffing requirements at Altnagelvin as necessary.

8. The claimant alleges that in certain respects she was paid less well than staff directly recruited by the second respondent.

   The claimant now seeks to amend her existing tribunal claim to add a claim under regulation 5(1) of *The Agency Workers Regulations (Northern Ireland) 2011* ['*the Regulations*'] in respect of this alleged shortfall.

9. The claimant at times worked night shifts. She alleges that for the last two hours of her night shift (6am-8am), she was paid £3.81 per hour less than her colleagues who were directly recruited by the second respondent. The total deficit is said to amount to £7.62 per night shift (£3.81 x 2).

10. The claimant alleges that between April 2018 and April 2019, she was underpaid in respect of 55 night shifts. The underpayment was £7.62 per shift. The total value of the claim which she wishes to introduce by amendment is £419.10 (55 shifts x £7.62).

The Proceedings

11. By a claim form received by the tribunal office on 25th June 2019, the claimant commenced proceedings in respect of three claims (albeit that two of them related to wages). The claims were:

    - Under the Public Disclosure (Northern Ireland) Order 1998 in respect of alleged detriment as a result of whistle-blowing.

    - In respect of £450 of holiday pay.

    - In respect of £1,075 arrears of pay.

12. The claims were initially made against two respondents:

    - Paul Crean, described on the claim form as the area manager of First Choice Recruitment, Northern Ireland

    - First Choice Recruitment

13. By email dated 5th March 2020 addressed to the tribunal, the claimant stated that she had been advised to withdraw proceedings against Paul Crean and that she wanted to proceed against the Western Health and Social Care Trust.

14. In a document dated 6th March 2020, headed 'Information Required by Judge Orla Murray By 6 March', the claimant confirmed that she was, *'… seeking to drop Paul Crean as a second respondent and to add as second respondent the Western Trust*'.

15. Following the claimant's request dated 5th March 2020, the proceedings against Paul Crean were dismissed on 30th July 2020.

16. The issue of the claimant's application for the Western Health and Social Care Trust to be joined as second respondent was considered by the tribunal at a

preliminary hearing on 25th August 2020 when it was adjourned to be considered further at a preliminary hearing on 1st October 2020.

17. At the preliminary hearing on 1st October 2020, when Employment Judge Tiffney told the claimant that she was minded to add the Western Health and Social Care Trust as a second respondent, the claimant informed Employment Judge Tiffney that she no longer wished to proceed with that application. The detail of these exchanges between the claimant and the judge is set out in the Record of Proceedings for that hearing.

18. Following the hearing on 1st October 2020, the claimant subsequently changed her mind about applying to add the Trust as second respondent and she emailed the tribunal to that effect on 5th October 2020.

19. The Trust was subsequently joined to the proceedings and is now the second respondent. The second respondent has filed an ET3 dated 11th January 2021.

Application to amend

20. On 26th April 2019 the second respondent made its last payment to the claimant. As is set out in the analysis of the law below, under the Regulations the time limit for presenting a claim to an Industrial Tribunal is 3 months. Consequently **time for the claimant to present a claim under the Regulations expired on 26th July 2019**.

21. It was not until **13th January 2020** that the claimant first notified the tribunal by email that she sought to amend her claim to include a claim under the Regulations. Her **application to amend was made five months and 18 days after the statutory deadline for presenting a claim under the Regulations had expired**.

22. In respect of her application to amend, the claimant's email dated 13th January 2020 said the following:

> *'… I would also like to request to amend the amount of money I believe is owed to me. I would now like to include the extra sum of £419. This is because I have discovered that First Choice have, I believe, paid me less than any western trust permanent staff counterparts for the hours between 6-8am, Monday to Thursday. Contrary to the agency workers regulations. For 55 shifts.* ***I discovered this for sure on 31 Dec 2019****…' [emphasis added]*

23. In all the circumstances, the tribunal treats the claimant's application to amend as being made on 13th January 2020.

Why, prior to 13th January 2020, was there neither a claim made under the Regulations, nor an application to amend to allow a claim under the Regulations?

24. The claimant presented her claim form in respect of other matters arising from her employment on 25th June 2019.

25. Had the claimant included a claim under the Regulations in that claim form it would have been in time. In fact, such a claim would have been in time right up until 26th July 2021.

26. An email written by the claimant to the tribunal office on 3rd February 2020 includes the following [all emphasis added]:

> *'2) In the month of **August 2019** I became aware of the fact that Western Trust staff in Altnagelvin hospital are receiving a different rate of pay than agency workers between the hours of 6-8am on Monday to Thursday. This is where I worked my shifts while working for First Choice. **This pay discrepancy was confirmed in a letter** from Western Trust Freedom of Information team **on 31 December 2019**. Because **this confirmation information comes some time after the et1 form was written (5 months)** I would be very grateful if this claim could be amended...'.*

27. In cross-examination, Ms McClarnon challenged the claimant about the suggestion in her February 2020 email that it was only in August 2019 that the claimant became aware that directly recruited employees were potentially being paid more than agency workers for the hours between 6-8am on a nightshift.

28. The challenge was well made. It was readily conceded. The claimant told the tribunal that the reference to August 2019 was not correct. The claimant said it was in fact June 2019 that she first became aware of the issue of differential payment for the hours between 6-8am on a nightshift.

29. The tribunal was referred to an email dated 28th June 2019. It was from a Mr Duddy to the claimant. Mr Duddy works for a rival agency to the second respondent. It is clear that the email was written in response to an inquiry by the claimant. The substance of the response strongly suggests that prior to 28/06/19, the claimant had been alerted to the possibility that she may have been paid less for the hours between 6-8am on a night shift than comparable directly recruited workers were paid for the same hours on a night shift.

30. Mr Duddy's email includes the following [emphasis added]:

> *'We work of [sic] a framework that was sent to us from the trust. They send us an updated copy every April. The start rates of pay for a band 2 are:*
>
> *Mon – **Fri 6.00am to 8.00pm £8.66***
>
> *Band 2 **– Unsocial Hrs: M-F 8.00pm 6.00 am** & Sat (24hr) **£12.47***
>
> *Band 2 – Unsocial Hrs: Sun & Pub Hol (24hrs) £16.28'*

Once a person has completed 12 weeks they are entitled to the same as a permanent WHSCT trust staff member.

The following was taken from page 29 of the NHS Employee handbook relating to Northern Ireland and Scotland. I have attached a copy.

> *'2.11 **Where a continuous night shift or evening shift on a weekday** (other than a public holiday) **includes hours outside the period of 8pm to 6 am**, **the enhancements** in column 2 **should be applied to***

the whole shift if more than half the time falls between 8pm and 6am*. 2.12 Staff will only receive one rate of unsocial hours payment for each hour worked.*

If you need any more information please let me know, Thanks, Dan'

31. The matters highlighted in bold in Mr Duddy's email demonstrate that by 28th June 2019, the claimant either knew or ought to have known that she was being paid less than directly recruited workers for the hours between 6am-8am on a weekday nightshift.

32. On the claimant's evidence, on a weekday nightshift she was being paid £12.47 per hour for the hours worked before 6am, then at the day rate of £8.66 for any hours worked after 6am.

33. Mr Duddy's email indicates that directly recruited employees were also paid at the day rate for hours worked after 6am. There was however one important caveat.

34. Mr Duddy provided information which should have caused the claimant to either know or strongly suspect that, unlike herself, directly recruited employees were paid at the enhanced unsocial hour rate (£12.47 per hour) when they worked between 6am and 8am at the end of a night shift.

35. The extract from the NHS employee handbook which was provided to the claimant is clear:

> '*Where a continuous night shift…on a weekday…includes hours outside the period of 8pm to 6am, the enhancements…should be applied to the whole shift if more than half the time falls between 8pm and 6am.'*

36. In other words, providing that more than half of a directly recruited worker's night shift was worked between 8pm and 6am, they would be paid at the '*unsocial hour*' rate of £12.47 per hour for the entire shift. This would include any hours worked after 6am which would otherwise have been paid at the day rate of £8.66.

37. In June 2019 when the claimant read this extract from the NHS employee handbook, she will have known that, unlike directly recruited workers, she was paid the day rate of £8.66 for the hours between 6am and 8am at the end of a night shift. She will have known or ought to have known that if the information she had been given was reliable, then she was being paid less than the directly recruited workers for the same work.

38. On an objective view, the information given to the claimant by Mr Duddy should have seemed to her to be likely to be reliable. Mr Duddy worked in the recruitment business. The information which he imparted was in response to the claimant's own request and had the appearance of informed, objectively ascertainable fact. On the face of it, there does not appear to have been any objective reason for the claimant to doubt the veracity of the information given to her by Mr Duddy.

39. Nonetheless, the claimant did not act on Mr Duddy's information. Had she done so promptly, any claim or amendment application could have been made within the statutory time limit for presenting a claim.

40. Having listened carefully to the claimant's evidence and read the documentary information in this case, it isn't entirely clear to the tribunal why the claimant did not proceed with a claim or amendment application after she received Mr Duddy's email.

41. Under fair and entirely proper cross-examination, the claimant sought to explain her inaction.

42. The claimant acknowledged that: '[*Mr Duddy] informed me about the difference in pay between agency workers and trust employees'*. The claimant went on to explain why she did not then take action:

> '*I have made clear many times I didn't have evidence to back up the claim. I had Mr Duddy's email…What I read from Mr Duddy I thought was basic…All I wanted to know was does the trust pay the agency worker the same? Without having any source from the Trust I didn't believe that is reliable information*'.

43. The tribunal finds it surprising that the claimant did not consider the information from Mr Duddy to be reliable. It was information which had been sent in response to her own request. It was information sent by an apparently informed and experienced recruitment agency.

44. It is clear from the emails included in the hearing bundle that by July 2019 the claimant was battling on a number of fronts. She had recently commenced her tribunal claim, and she was also pursuing a complaint to the Employment Agency Inspectorate ['EAI'] concerning the first respondent. It appears from the disclosed emails that she commenced her complaint to the EAI on 24th June 2019.

45. The tenor of the claimant's email correspondence with the EAI was at times forceful. At times it demonstrated a frustration on the claimant's part that she felt that her complaint was not being dealt with properly.

46. In an email dated 3rd July 2019 to the EAI she wrote:

> *'I've asked some specific questions today. I do not have faith at present they will be answered thoroughly or promptly. This case is important to me, so I want it treated with professionalism & competence. That is what I deserve from a public body. Agency workers are very vulnerable to poor treatment by their employers with little recourse.*
>
> *For this reason, can you please copy your line manager into all communication with me from now on. This will, I hope, ensure prompt & accurate & thorough correspondence from yourself, if it is yourself who is responsible for answering me'.*

47. The tribunal is not in a position to comment on whether the claimant's criticism of the EAI was fair, and in any event it would not be relevant to do so. The tribunal was however struck by the capacity of the claimant to complain forcefully at this period of time when she felt that she had a legitimate grievance.

48. The totality of the claimant's correspondence included in the bundle presents a picture of the claimant as a person who, when she believes that her rights have not been respected, will pursue the issue in correspondence with vigour.

49. This has caused the tribunal to consider further why the claimant, following receipt of Mr Duddy's email, did not immediately go ahead and issue a claim or amendment application. Her failure to do so is at odds with the content and tenor of the litigation correspondence which the tribunal has been referred to.

50. The tribunal is clear that, objectively, the information provided by Mr Duddy in June 2019 should have been regarded as sufficient to support the claimant issuing a claim or amendment application.

51. The tribunal is strengthened in this conclusion by the contents of an email dated 10th June 2021. This email was sent to the tribunal office by the claimant. In that email the claimant sets out succinctly the basis of her claim under the Regulations and how she calculates the value of her claim at £419.10. It is significant that in support of her claim, the claimant quotes the extract from the NHS Employee handbook which had originally been sent to her in Mr Duddy's email in June 2019. It is also significant that the day rate (£8.66) and night rate (£12.47) cited in support of her calculation of loss are identical to those identified in Mr Duddy's email.

52. The tribunal has come to the conclusion that the claimant held a genuine belief that she required more information in June 2019 before proceeding with a claim under the Regulations. A genuine belief is not necessarily an objectively reasonable one. It was a misjudgement on the claimant's part.

53. On 13th September 2021, the claimant sent to the tribunal office by email a document headed, '*Claimant, Witness Statement, for Hearing Dated 17 Sept 2021*'. It is a mixture of factual information and argument of the claimant's case. At paragraph 2 of the document, the claimant writes:

> *'What Mr Duddy told me was new information, but I felt that seeking the older backpay was going to be task in itself (and it was). And so as the bundles show, I went about seeking that, and that in itself was enough because engaging with these gov bodies such as the DFE, BSO (Business sevices organisation) and Western Trust is not easy for me, and takes its toll on me and my Mental Health. It is complex, time and energy consuming, and mentally debilitating process to engage with Trusts and other Gov bodies. In doing so I am doing it alone without any authority or support.'*

54. It is clear from the correspondence contained within the bundle that by June 2019 the relationship between the first respondent's Mr Crean and the claimant had completely broken down. The tribunal has little doubt that if the claimant had believed that she had a further claim which she could make successfully against the first respondent and/or Mr Crean (who was still a party to the proceedings at that time), that she would have done so.

55. In email correspondence which the claimant pursued during August 2019 with the Western Health and Social Care Trust's Audrey Proctor, the claimant's focus was on the recovery of the arrears of pay which formed one part of her tribunal claim.

The claimant complained that the Trust had paid money for the arrears to the first respondent but that the first respondent had not passed the money for the arrears on to her.

56. In fact, the Trust had paid money in respect of arrears of pay to all of the agencies it worked with in order to compensate for an earlier miscalculation in the agency workers' rate of pay, It was in that context that the claimant commented to Ms Proctor that, '*All agency workers after 12 weeks are by law entitled to equal pay to trust staff*.' No reference was made to the differential in night shift pay between agency workers and directly recruited employees.

57. Similarly, in the claimant's correspondence dated 17th September 2019 with the EAI, the focus of her complaint was on back pay. It did not refer to the differential in night shift pay between agency workers and directly recruited workers.

58. Dissatisfaction concerning arrears of pay was a theme of the email correspondence which the claimant conducted with various people (often multiple recipients) during August and September.

59. If the claimant had in fact believed at that time that she had sufficient information to support a claim under the Regulations in respect of a differential in night shift pay, the tribunal has little doubt that this issue would also have featured prominently in her email correspondence during August and September 2019.

60. On 4th October 2019 the claimant emailed the Trust and broached the issue of differentials in pay on the night shift. Her email quoted the extract of the NHS Employee Handbook which had been sent to her by Mr Duddy. The claimant's email posed two questions:

> *'1) Are WHSCT Health Care Assistants paid a consistent 'one rate only' rate between the hours of 20.00 and 08.00? (And if so, why are agency staff paid differently ie less?)*
>
> *2) Why is the variant hours of pay which currently exists (and has long existed) in payment of an agency worker's night shift at odds with what is stated in the NHS Employee Handbook?'*

61. There followed over the next two months a series of emails between the claimant and various employees of the Trust. The claimant was dissatisfied with some of the responses she received and continued to drill down on the issue.

62. On 31st December 2019 this sequence of correspondence came to an end when the claimant received a detailed response from the Trust's chief executive to a Freedom of Information request which the claimant had raised earlier in December.

63. It was at that point that the claimant decided that she had sufficient information to support an application for amendment to include a claim under the Regulations. The claimant took advice in early January and notified the tribunal on 13th January 2020 of her wish to make an amendment application.

64. The claimant told the tribunal that any delay between receiving the advice and emailing the tribunal on 13th January 2020 was due to her being in Switzerland at the time and not having a job or house.

Law

Power to amend

65. The source of the tribunal's power to amend a claim is Rule 25(1) of The Industrial Tribunals and Fair Employment Tribunal (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2020 which provides that:

> *'The tribunal may at any stage of the proceedings, on its own initiative or on application, make a case management order'.*

66. It should be noted that this rule does not set out any restriction on the timing of a case management order. The tribunal may exercise its power to amend a claim, *'…at any stage of the proceedings'*.

67. It is clear however from the authorities detailed in this judgment, that the power to amend is not unrestricted. It may only be exercised where relevant factors identified in those authorities have been properly considered by the tribunal.

68. The second respondent helpfully provided the tribunal with a bundle containing six authorities on amendment. The tribunal has read the authorities and refers to them below as appropriate.

69. The tribunal has also considered the cases of:

- ***Abertawe Bro Morgannwg University v Morgan [2018] EWCA Civ 640, [2018] ICR 1194*** concerning the meaning of 'just and equitable
- ***Grace Bryant v Nestle UK Limited [2021] NICA 34*** concerning amendment
- ***Kocur v Angard Staffing Solutions Ltd and another UKEAT/0181/17/BA, [2018] IRLR 388*** in respect of the working of The Agency Workers Regulations (Northern Ireland) 2011.

All three cases are referred to below.

The proposed claim – The Agency Workers Regulations (Northern Ireland) 2011 ['the Regulations']

70. Regulation 5 (1) provides that

> *'…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 through a temporary work agency…'*

The right under regulation 5(1) is subject to certain qualifications which it is unnecessary to detail for the purposes of this decision.

71. Regulation 6(1) sets out some of the 'relevant terms and conditions' to which the right under regulation 5 applies. These include terms and conditions relating to '*pay*' (reg 6(1)(a).

Respective liability of temporary work agency and the hirer for a breach of regulation 5

72. The effect of regulations 14(1) and 14(2) is that each of the temporary work agency and the hirer can be liable for a breach of regulation 5:

> *'…to the extent that it is responsible for the breach'.*

73. Where there is a breach of regulation 5, the Regulations contemplate the possibility of a dispute between the agency and the hirer as to which of the two is actually responsible for the breach.

74. To that end regulation 14(3) provides a framework for allocation of liability as between the agency and the hirer. An agency can avoid liability for a breach of regulation 5 to the extent that it has:

> *'14(3)(a)…obtained, or taken reasonable steps to obtain, relevant information from the hirer…'*
>
> *And*
>
> *'14(3)(b) where it has received such information, has acted reasonably in determining what the agency worker's basic working and employment conditions should be…'*
>
> *And*
>
> *'…to the extent that the temporary work agency is not liable under this provision [reg 14(3)] the hirer shall be liable.'.*

Agency worker's right to receive information from temporary work and hirer

75. Where an agency worker considers that they may have been treated in a manner which breaches regulation 5, regulation 16 entitles the worker to receive relevant information about the treatment (subject to the procedure in regulation 16 for making such a request being followed).

76. Any information received under regulation 16 is admissible as evidence in any proceedings under the Regulations.

77. The failure of either the temporary work agency or the hirer to comply with a properly constituted request under regulation 16 may result in the tribunal which hears a claim under the Regulations drawing such inferences as it seems just and equitable to draw. These can include an inference that the temporary work agency or hirer has breached the regulation complained of.

78. Regulation 16 provides that [all emphasis added]:

'16.—*(1) An agency worker who considers that the hirer or a temporary work agency may have treated that agency worker in a manner which infringes a right conferred by regulation 5,* ***may make a written request to the temporary work agency for a written statement containing information relating to the treatment in question****.*

(2) A temporary work agency that receives such a request from an agency worker ***shall, within 28 days*** *of receiving it, provide the agency worker with a written statement setting out—*

(a) relevant information relating to the ***basic working and employment conditions of the workers of the hirer****,*

(b) the ***factors the temporary work agency considered when determining the basic working and employment conditions which applied to the agency worker*** *at the time when the breach of regulation 5 is alleged to have taken place, and*

(c) where the temporary work agency seeks to rely on regulation 5(3), relevant information which—

(i) explains the basis on which it is considered that an individual is a comparable employee, and

(ii) describes the relevant terms and conditions, which apply to that employee.

(3) If an agency worker has made a request under paragraph (1) and ***has not been provided with such a statement within 30 days of making that request****, the agency worker* ***may make a written request to the hirer*** *for a written statement containing information relating to the relevant basic working and employment conditions of the workers of the hirer.*

(4) A hirer that receives a request made in accordance with paragraph (3) shall, within 28 days of receiving it, provide the agency worker with such a statement …

…

(7) Paragraphs (1) and (3) apply only to an agency worker who at the time that worker makes such a request is entitled to the right conferred by regulation 5.

(8) ***Information provided under this regulation****, whether in the form of a written statement or otherwise,* ***is admissible as evidence in any proceedings under these Regulations****.*

(9) If it appears to the tribunal in any proceedings under these Regulations—

> *(a) that a **temporary work agency or the hirer (as the case may be) deliberately, and without reasonable excuse, failed to provide information**, whether in the form of a written statement or otherwise, or*
>
> *(b) that any written statement supplied is **evasive or equivocal,***
>
> *it may draw **any inference which it considers it just and equitable to draw**, **including an inference that that temporary work agency or hirer** (as the case may be) **has infringed the right in question**.'*

Does it matter if an agency worker gets paid less than a directly recruited employee in certain respects if their pay overall is said to be comparable and/or better than the employee?

79. The Regulations at regulation 5(1) entitle an agency worker to, *'…the same basic working and employment conditions…*' as if they had been recruited by the hirer.

80. Regulation 5(3) provides that regulation 5(1) shall be, *'…deemed to have been complied with where (a) an agency worker is working under the same relevant terms and conditions as an employee who is a **comparable employee**…*'.

81. The second respondent's skeleton argument at the first bullet point states:

> *'The Claimant alleges that she was paid a lesser rate by the First Respondent than that paid to employees of the Second Respondent. This **claim relates to the final two hours of the Claimant's night shift**. The Second Respondent understands that the Claimant indicates that **she received a sum in excess of that paid to the Second Respondent's employees for all other hours worked** and therefore this period is not in dispute.'* [Emphasis added].

82. During the course of the hearing there was a discussion between the tribunal and Ms McLarnon (counsel for the second respondent) about this issue.

83. It was suggested on behalf of the second respondent that, even if it were established that the claimant's hourly pay rate for two hours of her shift was at a lesser rate than that of employees recruited by the hirer, there would be no breach of regulation 5(1) if the claimant's overall pay was at least as much as that of the directly recruited employees working the same number of hours as those worked by the claimant.

84. The tribunal refers the parties to the judgment of Choudhury J in ***Kocur v Angard Staffing Solutions Ltd and another UKEAT/0181/17/BA, [2018] IRLR 388***.

85. In ***Kocur***, Choudhury J noted that the English equivalent of the Regulations was intended to implement the EU Temporary Agency Workers Directive (No. 2008/104).

Article 5 of the directive states that:

> *'The basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, **at least** those that would apply if they had been recruited directly by that undertaking to occupy the same job.'* [emphasis added]

86. Choudhury J referenced the language of regulation 5(1) which entitles an agency worker, *'…**to the same** basic working and employment conditions…*' as directly recruited employees.

He went on to observe at paragraph 17 of his judgment:

> '*It could be said that the use of the word 'same' has an enhancing effect in that any rights which are the same as those of direct recruits will always be 'at least' those of such recruits. However, a literal interpretation of the phrase 'the same' could result in an agency worker being prevented from earning a higher rate of pay than direct recruits. **In our view, it cannot have been the intention of Parliament to create a situation whereby agency workers were precluded from doing better in some respects (eg hourly rates of pay) than employees.** Far from protecting agency workers, an insistence that terms and conditions are literally the same as employees could render agency work less attractive for some workers, given that the higher rates of pay could be said to compensate to some extent for the unstable and irregular nature of such work.'*

87. Under regulation 5, ***Kocur*** suggests that where any particular working condition of an agency worker is less favourable than that of a recruited employee, it is impermissible for a temporary work agency or hirer to set off the negative effect of the less favourable term on the agency worker, against the positive impact of any term where the agency worker's working conditions are more favourable than those of a recruited employee.

88. At paragraph 27 of ***Kocur***, the Employment Appeal Tribunal held that:

> *'We agree with both counsel that **a term-by-term approach is required by the AWR**. The structure of the AWR, whereby only a few stipulated terms and conditions are required to be the same for the agency worker and the employee, and where **there is nothing to suggest that the employer or agency can offset the shortfall in respect of one of those terms (eg annual leave) by conferring a greater entitlement in respect of another (eg rest periods)**, drive one to that conclusion.'*

89. On the face of it, ***Kocur*** appears to undermine the suggested argument that it would be permissible to pay the claimant less than her directly recruited colleagues for the last two hours of her night shift, on the basis that the claimant's overall pay is at least as good as, if not better than, her directly recruited colleagues' package.

90. For the avoidance of doubt, the tribunal is not purporting to determine this issue. It has not heard detailed argument on the point. The tribunal has yet to be addressed on ***Kocur***. No party should cite the content of this judgment on the ***Kocur*** point

before any differently constituted tribunal to suggest or imply that this tribunal has made a determination on the issue. It hasn't.

91. The tribunal raises ***Kocur*** now only for the purposes of assisting the parties to clarify the issues on which the tribunal will have to adjudicate in due course.

92. **Prior to the next hearing, the respondents are requested to consider what is the relevance and impact, if any, of *Kocur* on the issues to be determined in this case**.

Time limit for making a claim under the Regulations

93. Under regulation 18(2):

> *'…an agency worker may present a complaint to an industrial tribunal that a temporary work agency or the hirer has infringed a right conferred on the agency worker by regulation 5…'.*

94. Under regulation 18(4):

> *'…an industrial tribunal shall not consider a complaint under this regulation unless it is presented* ***before the end of the period of three months beginning—***
>
> *(a) in the case of an alleged infringement of a right conferred by regulation 5…with the date of the infringement, detriment or breach to which the complaint relates or,* ***where an act or failure to act is part of a series of similar acts or failures comprising the infringement, detriment or breach, the last of them;****'*

95. The effect of regulation 18(4) is that where, as in this case, it is alleged that there has been a series of underpayments of pay, the three month time limit for making a claim under regulation 5 runs from the date of the last underpayment.

96. Under regulation 18(5), a claim which is outside the three month time limit imposed by regulation 18(4) may nonetheless be considered by a tribunal:

> *'…if, in all the circumstances of the case, it considers that it* ***is just and equitable*** *to do so.'*

Amendment of the claim

Balance of injustice and hardship test

97. The leading authority in respect of amendment is ***Selkent Bus Company Ltd v Moore [1996] IRLR 661***.

98. Selkent was most recently considered by the Court of Appeal in Northern Ireland when it was approved and applied in ***Grace Bryant v Nestle UK Limited [2021] NICA 34***.

99. The ultimate test to be applied in considering an amendment application was put succinctly by Mummery J in ***Selkent*** at para 21:

> *'(4) Whenever the discretion to grant an amendment is invoked, the tribunal should **take into account all the circumstances** and should **balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it**.'*

Relevant circumstances

100. At paras 22-24 of ***Selkent***, Mummery J offered guidance as to the relevant circumstances to be considered. It is important to note his express observation that this list is ***not*** exhaustive:

> ***'22***
> *(5) What are the relevant circumstances? It is **impossible and undesirable to attempt to list them exhaustively**, but the following are certainly relevant:*
>
> ***(a)*** **The nature of the amendment**
>
> *Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the additions of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. **The tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action**.*
>
> ***23***
>
> ***(b)*** **The applicability of time limits**
>
> *If a new complaint or cause of action is proposed to be added by way of amendment, it is **essential for the tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions**, eg, in the case of unfair dismissal, s.67 of the 1978 Act.*
>
> ***24***
>
> ***(c)*** **The timing and manner of the application**
> *An **application should not be refused solely because there has been a delay in making it.** There are no time limits laid down in the Rules for the making of amendments. The amendments may be made at any time – before, at, even after the hearing of the case. **Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made**: for example, the discovery of new facts or new*

> *information appearing from documents disclosed on discovery.* ***Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment****. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision.'*

101. The balance of injustice and hardship test is at the core of all the post-***Selkent*** authorities.

102. Appellate tribunals have also consistently reminded litigants that, when Mummery J at paragraph 22 of his judgment in ***Selkent*** identified potential relevant circumstances on an amendment application, he was not purporting to set out a compulsory check-list for completion in every case. Circumstances vary widely from case to case. The only constant is the balance of injustice and hardship test which the tribunal must apply.

103. In ***Abercrombie and others v AGA Rangemaster Ltd [2013] EWCA Civ 1148, [2013] IRLR 953*** at para 47 of his judgment put it thus:

> *'(It is perhaps worth emphasising that head (5) [the three relevant circumstances identified at para 22 of the judgment] of Mummery J's* ***guidance in Selkent was not intended as prescribing some kind of a tick-box exercise****. As he makes clear, it is* ***simply a discussion of the kinds of factors which are likely to be relevant in striking the balance which he identifies under head (4)*** *[the balance of injustice and hardship test].)'*

The nature of the amendment

104. The first of Mummery J's non-exhaustive list of relevant circumstances in ***Selkent*** (as set out above) was the nature of the amendment. He drew a distinction between a minor amendment and, '*a substantial alteration pleading a new cause of action'*.

105. The fact that a proposed amendment may add a new cause of action is highly relevant. In considering the significance of such an amendment application, there must be a focus on the practical consequences which would follow from the amendment.

106. In his judgment in ***Abercrombie***, Underhill LJ was clear that a formalistic approach to the question of permitting an amendment is not appropriate. The fact that an amended pleading introduces a new cause of action does not:

> *'[47]…of itself weigh heavily against the amendment…[48]…the approach of both the EAT and this court in considering applications to amend which arguably raise new causes of action has been to* ***focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of enquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted****. It is thus well recognised that in cases where the effect of a*

> *proposed amendment is simply to put a different legal label on facts which are already pleaded permission will normally be granted…'.*

107. Judge James Tayler at paragraph 21 of ***Vaughan v Modality Partnership UKEAT/0147/20/BA, [2021] IRLR 97***, referenced the decision in ***Abercrombie*** and commented:

> *'Underhill LJ focused on the **practical consequences of allowing an amendment**. Such a **practical approach should underlie the entire balancing exercise**. Representatives would be well advised to start by considering, possibly putting the Selkent factors to one side for a moment, **what will be the real practical consequences of allowing or refusing the amendment**. If the application to amend is refused how severe will the consequences be, in terms of the prospects of success of the claim or defence; if permitted what will be the practical problems in responding. This requires a **focus on reality rather than assumptions**. It requires representatives to take instructions, where possible, about matters such as whether witnesses remember the events and/or have records relevant to the matters raised in the proposed amendment. Representatives have a duty to advance arguments about prejudice on the basis instructions rather than supposition. They should not allege prejudice that does not really exist. It will often be appropriate to consent to an amendment that causes no real prejudice. This will save time and money and allow the parties and tribunal to get on with the job of determining the claim.'*

The applicability of time limits

108. Where a proposed amendment will introduce a claim which is outside the statutory time limit for presentation of such a claim, it is essential that this factor is weighed in the balance by the tribunal when it considers whether to permit the amendment.

109. It is important to bear in mind however, that the applicability of time limits is just one aspect of the overriding test involving the balance of injustice and hardship [see ***Ali v Office of National Statistics [2004] EWCA Civ 1363, [2005] IRLR 201*** per Waller LJ at para 3].

110. The decision whether or not to grant an amendment which will permit a fresh claim to proceed out of time is discretionary:

> *'Thus the reason why it is "essential" that a tribunal consider whether the fresh claim in question is in time is simply that that is a factor – albeit an important and potentially decisive one – in the exercise of the discretion'* [***Transport and General Workers Union v Safeway Stores Ltd, UKEAT/0092/07/LA, [2007] All ER (D) 14 (Jun)*** peer Underhill J at para 10].

Relationship between 'balance of injustice and hardship' and 'just and equitable' test

111. Where the appropriate statutory test for a claim would be whether it is '*just and equitable*' to permit presentation of the claim out of time, it has been held that there is little practical difference between that test and the '*balance of injustice and hardship*' test applied by tribunals when considering applications to amend.

112. In ***Ali v Office of National Statistics [2004] EWCA Civ 1363, [2005] IRLR 201*** at para 47 Chadwick LJ observed:

> *'For my part, I find it impossible to accept that, in the circumstances of this case, an employment tribunal, directing itself correctly to the question whether the amendment for which the applicant seeks leave should be allowed, could reach a conclusion on the basis of a 'just and equitable' test which differed from the conclusion it would reach on the basis of a 'balance of injustice and hardship' test. Indeed, I find it* ***difficult to conceive of any circumstances in which the conclusion would be different****.* ***I do not see how it would be possible to reach the conclusion that 'justice and equity' did not require a tribunal to take the course which, on balancing 'injustice and hardship', it thought to be the right course****…'*

'Just and Equitable'

113. In considering the meaning of '*just and equitable*' in the context of applications for extensions of time, the tribunal has been assisted by the judgment of Leggatt LJ (as he then was) in ***Abertawe Bro Morgannwg University v Morgan [2018] EWCA Civ 640, [2018] ICR 1194*** at paras 18-19 and para 25:

> *'[18] First, it is plain from the language used ("****such other period as the employment tribunal thinks just and equitable****") that Parliament has chosen to give the employment tribunal the* ***widest possible discretion****. Unlike section 33 of the Limitation Act 1980, section 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and* ***it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list****. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see British Coal Corporation v Keeble [1997] IRLR 336), the* ***Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account:*** *see Southwark London Borough Council v Afolabi [2003] EWCA Civ 15; [2003] ICR 800, para 33…*
>
> *[19] That said,* ***factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)…***
>
> *[25] …the discretion given by section 123(1) of the Equality Act to the employment tribunal to decide what it "thinks* ***just and equitable" is clearly intended to be broad and unfettered****. There is* ***no justification for reading into the statutory language any requirement that the tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation of the delay from the claimant.***

The most that can be said is that whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the tribunal ought to have regard.'

114. Section 33 of the Limitation Act 1980 requires the court to consider the prejudice which each party would suffer as the result of the decision to be made and also to have regard to all the circumstances of the case and in particular, inter alia, to –

(a) the length of and reasons for the delay;

(b) the extent to which the cogency of the evidence is likely to be affected by the delay;

(c) the extent to which the party sued had cooperated with any requests for information;

(d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action;

(e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.

Conclusion on amendment application

Precedent and Impact on Agency Workers Generally

115. In the documentation filed by the claimant, much energy has been expended by the claimant in seeking to persuade the tribunal that this case is, '*a strategic litigation priority*' which '*is of massive public interest'*. In the claimant's various documents there are references to this case being a potential test case or precedent. Many words have been written by the claimant as to what she would say is the impact of this case on agency workers generally. The claimant writes that, '*These are very exceptional circumstances. And I hope the Tribunal can see that and use their discretion*.' In her '*witness statement*' for this hearing the claimant expresses frustration at what she perceives to be an ongoing substantial disadvantage faced by many agency workers and she writes that, '*The only people who can reverse this at the moment…are myself and an employment judge'*.

116. As was foreshadowed by the tribunal's comments during the hearing, none of this is relevant to the decision which the tribunal has to make in respect of this application to amend. None of this has influenced the tribunal in making its decision.

117. The tribunal has determined this application on the ordinary principles relating to amendment.

118. The tribunal is concerned with just one case, that of the claimant. The tribunal is interested in the facts relating to just one case, that of the claimant. There is no overriding public interest to be considered by the tribunal in this case other than that the claim should be determined fairly in accordance with the applicable law and procedure.

119. In due course if a tribunal is required to determine the substantive application relating to the alleged breach of the Regulations, that tribunal's task will be to apply what it understands to be the settled law to the facts of this case as it finds them to be.

120. The evidence required in respect of the alleged breach of the Regulations is narrow and dry. It will be focussed on what documentary and witness evidence is available and necessary to demonstrate that this claimant did or did not suffer a breach of her entitlement under regulation 5(1).

121. Statements as to what the claimant believes to be the wider public interest in this case, will not assist any future tribunal in making a decision about the alleged breach of the Regulations. The claimant is requested to note this when preparing any further documents for submission to the tribunal in support of this aspect of her claim.

Nature of amendment

122. The tribunal is satisfied that the proposed amendment introduces a new claim.

123. The tribunal is not persuaded that this claim is of the same nature as the existing claims relating to holiday pay and arrears of wages. Superficially there is a similarity in that the claim under the Regulations also relates to wages. In reality however, the proposed new claim requires a different area of enquiry to the existing claims.

124. The claim in respect of arrears of wages exists because an error was made in not paying agency workers the same as their directly recruited counterparts. This error was admitted by the Trust and consequently the arrears claim does not require any detailed investigation of the claimant's entitlement under the Regulations.

125. Under the arrears claim the fact of the claimant's entitlement is admitted, the issue is the non-payment of a sum which is due and owing. The question is whether the first respondent has paid to the claimant the monies allocated by the second respondent for the payment of arrears to qualifying agency workers.

126. In contrast to the arrears claim, the proposed new claim will require the tribunal to consider in detail issues and argument as to the claimant's entitlement under Regulation 5(1) in respect of pay rates for night shifts.

127. The claim for holiday pay is of a different nature to a claim under the Regulations.

The applicability of time limits

128. The statutory three month time limit for making a claim under the Regulations expired on 26th July 2019. The application to amend was first made by email dated 13th January. It was 5 months and 18 days out of time.

129. The fact that this application for amendment was made long after the statutory time limit expired is a very important factor to be considered when the tribunal weighs the balance of injustice and hardship.

130. A new claim in respect of the alleged breach of regulation 5(1) would be time barred unless the tribunal determined that it was just and equitable to extend time to permit it to be heard.

In considering this issue, the tribunal is mindful of the dicta of Chadwick LJ in ***Ali v Office of National Statistics [2004] EWCA Civ 1363, [2005] IRLR 201*** when he compared the *'just and equitable*' test with the '*balance of injustice and hardship*' test:

> '***I find it difficult to conceive of any circumstances in which the conclusion would be different****. I do not see how it would be possible to reach the conclusion that 'justice and equity' did not require a tribunal to take the course which, on balancing 'injustice and hardship', it thought to be the right course…'.*

The timing and manner of the application

131. The application to amend was delayed considerably. It was first raised with the tribunal more than 5 months after the statutory deadline had expired.

132. The tribunal has found that, on an objective view, by 28th June 2019 Mr Duddy's email provided the claimant with all the information required to make a properly informed decision about whether or not to make an application to amend or to issue a claim in respect of the alleged breach of Regulation 5(1). The primary time limit for presenting a claim for breach of the regulation did not expire until almost one month later on 26th July 2019.

133. On her own account, the claimant did not feel confident in relying on the information provided by Mr Duddy. She felt that she needed more. Given that this was her view, it is regrettable that she delayed from 28th June 2019 until 4th October 2019 before writing the first of her series of very pointed and specific emails to the Trust about the potential night shift pay differential. This was a period in excess of 3 months.

134. On listening to the claimant's evidence and reading the contemporaneous correspondence the tribunal is left with the impression that the claimant sought an excessive degree of evidential certainty before launching her claim in respect of a breach of the Regulations.

135. The fundamental reason for the delay was the claimant's genuine but objectively unreasonable belief that she required information from a source other than Mr Duddy. This was exacerbated by the claimant's decision to apply her energy initially to trying to resolve the arrears issue first. This delayed the claimant in going on to explore in more detail the prospects of success in respect of the alleged breach of regulation 5(1). As the claimant put it in the document described as a witness statement which she provided for this hearing:

> *'…**I felt that seeking the older backpay was going to be task in itself** (and it was)…I went about seeking that, and **that in itself was enough because engaging with these gov bodies such as the DFE, BSO (Business sevices organisation) and Western Trust is not easy for me**, and takes its toll on me and my Mental Health. **It is complex, time and energy consuming, and mentally debilitating process to engage with***

> ***Trusts and other Gov bodies**. In doing so I am doing it alone without any authority or support.'*

136. On the claimant's account this is the background to the delay in making the application to amend. The tribunal is sympathetic to the claimant as a litigant in person. Running litigation and meeting deadlines often presents challenges even for experienced lawyers. It is right however to note that the statutory time limits for making claims apply with equal force to represented and unrepresented parties.

137. Ms McClarnon has rightly pressed upon the tribunal the fact of the claimant's delay in making her amendment application after she had received Mr Duddy's email in June 2019.

138. If the test which the tribunal is required to apply on an amendment application was that of '*reasonable practicability'*, the claimant's application to amend would fail on the grounds that from 28th June 2019 she was in fact in possession of all the information necessary to make an informed decision about whether to commence proceedings.

139. '*Reasonable practicability'* however is not the test which the tribunal must apply. The tribunal is required to weigh in the discretionary balance a broader range of factors to determine where the '*balance of injustice and hardship'* lies.

Balance of Injustice and Hardship

140. In ***Vaughan v Modality Partnership*** (as cited above), the Employment Appeal Tribunal reviewed earlier cases concerning the balance of injustice and hardship test, and concluded that a tribunal should be:

> *'…focused on the **practical consequences of allowing an amendment…a practical approach should underlie the entire balancing exercise**…**what will be the real practical consequences of allowing or refusing the amendment**. If the application to amend is refused how severe will the consequences be, in terms of the prospects of success of the claim or defence; **if permitted what will be the practical problems in responding**. This requires a **focus on reality rather than assumptions**. It requires representatives to take instructions, where possible, about matters such as whether witnesses remember the events and/or have records relevant to the matters raised in the proposed amendment…'*

Practical consequences for Claimant

141. If the amendment is not granted, the claimant will lose the opportunity to pursue her claim for breach of regulation 5(1). Apart from the burning sense of injustice which the claimant would no doubt suffer, the real world practical consequences for the claimant would be that she loses the opportunity of recovering £419.10.

142. A written skeleton argument was submitted on behalf of the second respondent in July. It states that, *'…the value of the claim is modest'*. The reference to £419.10 being a '*modest'* sum of money upset the claimant. In the claimant's financial position it does not appear to her to be a modest sum.

143. The tribunal notes that the Regulations do not prescribe any minimum value threshold for the triggering of an agency worker's entitlement under regulation 5(1). The claimant however missed the deadline for exercising her right to make a claim. It is now a matter for the tribunal's discretion as to whether she is permitted to present the claim. The tribunal accepts that in the exercise of that discretion, the value of the potential claim (particularly when set against the time and expense involved in responding to it), is a relevant consideration to be weighed in the balance and the tribunal has done so.

144. The claimant delayed making the application for amendment in part because of what the tribunal regards as an over-zealous desire that before making the application she should secure the best possible evidence of a breach of regulation 5(1). It is commendable that the claimant wanted to take care that a regulation 5(1) claim would be well-founded before she launched a tribunal claim but, as previously noted, her judgment as to the sufficiency of Mr Duddy's information was wrong. This is evidenced by the fact that her regulation 5(1) claim as formulated appears to be based on the same information that Mr Duddy had provided to her in June 2019. Nonetheless, the claimant's view of the Duddy information was a misjudgement based on a genuine belief.

145. The claimant harbours a deep personal sense that she has been wronged. This is clear from her correspondence and documentation. On the claimant's case there is a sum of money to which she has a clear legal entitlement by reason of a breach of regulation 5(1). If the claimant is not permitted to amend the claim, she will lose the opportunity to seek legal redress in respect of what she alleges to be a breach of a fundamental obligation which the law has placed on agencies and hirers. In this case the benefit of that statutory obligation would be owed to the claimant.

Practical consequences for the first and second respondents

146. The amendment application was made more than 5 months after the statutory time limit for making a claim under the regulations had expired. It is a new claim and not simply a re-labelling of facts which have already been pleaded. If the application is successful it will require the respondents to expend time and resources on responding to a claim which would otherwise be out of time.

147. By agreement with the first respondent's representative, at the conclusion of the hearing Ms McClarnon for the second respondent made her submissions first in time. Ms Richards for the first respondent followed.

148. Counsel for the second respondent made a number of well-argued submissions. The tribunal has noted them, re-read them, and has taken them fully on board when considering what decision to make on this application. It is not proposed to recite them in full in this judgment but for ease of reference the tribunal has categorised and summarised them under the following headings which appear in bold.

Delay

The second respondent argues strongly that the claimant's delay in this case was lengthy, unnecessary and unacceptable. Reliance is placed on Mr Duddy's email to demonstrate that, as early as 28th June 2019, the claimant was in possession of the information necessary to commence a claim. The tribunal is invited to consider

whether the claimant was in fact certain that she could make a claim immediately following her receipt of the Duddy email in June 2019. It is said that the claimant was aware of the Labour Relations Agency and that she should have approached them about the potential regulation 5(1) claim at that time. For three months between receiving the Duddy email on 28th June and writing to the Trust about it on 4th October, the claimant did nothing to enquire about her potential regulation 5(1) claim. At the very least, prior to December 2019, the claimant should have asked herself whether she was right to wait or whether she should make a claim. On receiving the 31st December 2019 Freedom of Information Act response, the claimant unreasonably delayed writing to the tribunal until 13th January 2020.

Significant expansion of area of enquiry

It is said that necessary interlocutory processes consequent on permitting the amendment would expand the scope of the proceedings considerably. The second respondent would need to take '*significant instructions'* from a person working in the finance department and someone else familiar with the Agencies Framework Contract to be in a position to draft necessary notices in respect of the regulation 5(1) claim. It will require an enquiry into how agency rates are set and as to whether the respondents adhered to the agenda for change. The first and second respondents would have to ask a significant number of questions. The first respondent would have to call at least two further witnesses to deal with the regulation 5(1) claim – someone from the finance department to deal with rates of pay and banding, and another person to deal with the Agencies Framework Contract. A regulation 5(1) claim would concern entirely separate issues to the whistleblowing case. It would require: additional witnesses; a longer hearing; and skeleton arguments and additional consideration of an entirely separate area of law.

149. On behalf of the first respondent Ms Richards supported the submissions made by Ms McClarnon in their entirety. Ms Richards emphasised the claimant's delay after she received Mr Duddy's email in June. Ms Richards asserted that no valid reason had been given by the claimant as to why it would be just and equitable to permit a regulation 5(1) claim to be made out of time. It was also said that the amendment would cost the first respondent additional expense and time. The first respondent would be required to call one witness in respect of the regulation 5(1) issue. The first respondent would also have to retrieve documents from archive storage. Ms Richards told the tribunal that Mr Crean said that he had paid the claimant in line with the contract between the Trust and the first respondent. The contract states that the rates paid to agency workers should mirror that paid by the Trust to staff members. Mr Crean was under the impression that his agency workers were being paid the same as the Trust's directly recruited workers.

Balance of Injustice and Hardship

150. The claimant delayed making her application for amendment. The tribunal has found that neither of the reasons offered for that delay are satisfactory.

- By 28th June 2019 the claimant had all the information she required to suggest that making a claim under regulation 5(1) would be viable.

- After 28th June, the claimant delayed obtaining further information about a potential Regulation 5(1) claim because she said she had enough to do

pursuing the arrears claim, *'…and because engaging with these gov bodies such as the DFE, BSO (Business services organisation) and Western Trust is not easy for me, and takes its toll on me and my Mental Health. It is complex, time and energy consuming, and mentally debilitating process…*'. The claimant did not adduce or rely on any medical evidence in support of what she says about her mental health at that time. By August 2019 the claimant was communicating confidently by email with the Trust and others to try to resolve the arrears issue. She could have raised the regulation 5(1) issue in her correspondence at that time. No explanation has been offered as to why she did not do so other than her focus on the arrears issue in the first instance.

151. As has already been noted, the claimant's failure to make the claim after 28th June was in part the result of a genuine but ill-judged assessment that Mr Duddy's information was not sufficiently reliable to support a claim in respect of regulation 5(1). Ironically, in an effort to ensure that she was doing the right thing by gathering enough evidential support before making the claim, the claimant ended up doing the wrong thing when she failed to present a claim or to apply to amend the existing claim.

152. The claimant's delay has led to the expiry of the primary time limit for making a claim under the Regulations. In weighing this fact in the balance, the tribunal has borne in mind the dicta of Leggatt LJ in the *Abertawe* case (noted above) where he considered the application of the '*just and equitable'* test for an extension of time:

> '*There is* ***no justification for reading into the statutory language any requirement that the tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation of the delay from the claimant****'.*

153. The claim is of enormous importance to the claimant, both in financial terms and in terms of her strong desire to have what she perceives to be her legal entitlement honoured.

154. The Regulations under which the proposed claim is made, came into operation as long ago as 5th December 2011 [see the Regulations at regulation (1)]. The operation of the Regulations must now be, or ought to be, very familiar to both the first and second respondents. Awareness of the practical implications of the Regulations should be coursing through their respective corporate veins. Under the terms of the Regulations, the first respondent is a temporary work agency. When using staff recruited through a temporary work agency, the second respondent is a '*hirer'* within the terms of the Regulations.

155. Regulation 5(1) grants a defined entitlement to the agency worker (the claimant). Under regulation 14 only two entities can be made liable for a breach of regulation 5(1), the temporary work agency (the first respondent) and /or the hirer (the second respondent).

156. The obligations which the Regulations impose in respect of agency workers' pay are not optional for temporary worker agencies or hirers. The **obligation to ensure compliance with the Regulations rests with the temporary work agency and**

hirer. It is those entities which possess the requisite information to ensure their mutual compliance with the Regulations.

157. The Regulations include a framework which is designed to encourage compliance by agencies and hirers with their obligations under the regulations.

158. As set out earlier in this judgment, regulation 16 provides a right for an agency worker to receive information from the temporary work agency (or hirer as applicable), in relation to the rights and duties conferred by regulation 5. If it is just and equitable to do so, adverse inferences may be drawn against an agency or hirer which fails to comply with its regulation 16 obligations.

159. It is plain from the entire scheme of the regulations that temporary work agencies and hirers are **required by law** to provide information to an agency worker about the basic working and employment conditions of workers of the hirer, providing that the prescribed procedure is followed. **The respondents' shared protestations about the time, complexity and expense in investigating/acquiring such information in the claimant's case if amendment is granted, must be considered against the background of their shared pre-existing legal obligations to provide such information to any agency worker where a properly formulated request is made under regulation 16**. Both respondent's must either have, or ought to have, a system in place to provide precisely the sort of information which will be required to enable themselves to advance their respective cases if the claimant is permitted to make a claim alleging a breach of regulation 5(1).

160. Ms McClarnon made her submissions on instructions, and the submissions were skilfully put. Nonetheless the tribunal is unconvinced that if the amendment is permitted that the second respondent will face such a difficult or complex a task as counsel's instructions imply.

161. The EAT in *Vaughan v Modality* [cited above] offered a reminder that it is not enough for a respondent to an amendment application to assert prejudice if the application were to be allowed. There must be a, *'…**focus on reality rather than assumptions**. It requires representatives to take instructions, where possible, about matters such as whether witnesses remember the events and or have records relevant to the matters raised in the proposed amendment'* [*Vaughan at para 21].*

162. The claimant has set out her claim and the basis on which she calculates what is alleged to be owed. She is very specific about the underlying facts which she alleges in support of her proposed claim. The claimant sets out what she says was her basic hourly rate and her enhanced night rate, and she also sets out the basis of her belief that directly recruited workers were paid at a higher rate than she was for the hours between 6am and 8am at the end of a weekday night shift. The claimant states that the underpayment applied to 55 shifts.

163. This is the case which the respondents will have to meet if the amendment is granted. It is clear and specific. It is focussed on the claimant's pay for the hours of 6am-8am during her weekday night shifts.

164. As noted above, since the advent of the Regulations, temporary worker agencies and their hirer clients have had to ensure that agency workers are paid at least as much as their directly recruited counterparts for the same work. Following a properly constituted request from an agency worker both the temporary work agency and the hirer can be required to provide: '*relevant information relating to the basic working and employment conditions of the workers of the hirer*.' [The Regulations at regulation 16(2)(a)].

165. Neither of the respondents provided the tribunal with sufficient information which might persuade the tribunal that the burden of obtaining information to respond to this claim is significantly in excess of what would have to be provided under a regulation 16 request for information made by an agency worker.

166. In any event, in an era of computerised payroll records the tribunal is not satisfied that the relevant information will be as difficult or time consuming to identify as is implied by the respondents' assertions in opposition to the amendment application.

167. On the basis of the information provided on behalf of the second respondent, the tribunal at present is also not satisfied that it will prove necessary for the second respondent to call two witnesses at trial to address this claim. The issue of what witnesses, if any, are ultimately required to be called to give evidence at the final hearing in respect of the alleged breach of regulation 5(1) will require review by all parties after documentary disclosure has been provided by the respondents. It will of course be a matter for the respondents, subject to the tribunal's permission, to determine from which person(s) they wish to file and serve witness statements. The makers of any witness statements will be required to give evidence only to the extent that their evidence is challenged.

168. One of the additional grounds of objection which the first respondent raises is that it would have to retrieve documents from archive storage if the amendment is granted. No further information has been offered about the expense or difficulty of doing so. While the tribunal readily accepts that it will be an inconvenience for the first respondent to identify and retrieve documents from archive storage, the tribunal is not satisfied on the information which it has been given that this reason of itself represents a substantial factor to be weighted in the balance of injustice and hardship.

169. The tribunal agrees with the respondents' submissions that a claim which alleges a breach of regulation 5(1) would concern entirely different issues to the whistleblowing claim. An amendment would permit the claimant to raise a new claim which is factually and legally distinct from the existing claims. It is a claim relating to wages but it is of a different nature to the claimant's existing claims in respect of pay. It will add something to the length of the hearing, submissions, and skeleton arguments but how much it will add is not clear at present. Much will depend on the content of the formal responses to this new claim.

170. While it is a new claim, it is a claim which falls within a narrow compass and where much of the most relevant evidence is likely to be documentary.

Conclusion

171. This is a finely balanced case.

172. The claimant's delay in making this claim was unsatisfactory. The tribunal's detailed findings in respect of the reasons and mitigations offered for that delay are outlined above. In all the circumstances of this case the tribunal does not regard the delay between 31st December 2019 and 13th January 2020 as being of critical importance.

173. The tribunal finds that the claimant will suffer significant hardship and injustice if this amendment is not permitted. She will lose the opportunity to litigate her claim for £410.10 which for the claimant in her current circumstances represents a substantial sum. The claimant has been much perturbed by what she strongly believes has been a breach of her absolute legal entitlement under the Regulations. If the amendment is not permitted, the claimant will lose the opportunity to seek vindication of what she believes to be her firm legal entitlement.

174. If the amendment is granted the respondents will suffer a degree of hardship and injustice by the admission of a claim against them which has been made well outside the statutory limits for doing so. The amendment would require the respondents to incur time and expense in preparing responses to a claim which, but for the amendment, the tribunal would have no jurisdiction to consider because it would be out of time.

175. The nature of the claim brought for breach of regulation 5(1) is one which will not turn on a subjective judgment of the claimant's conduct at work. Regulation 5(1) endows an agency worker with a legal entitlement which by virtue of the Regulations is an integral and compulsory part of the legal relationship between agency worker, temporary work agency, and hirer. It is not an optional extra.

176. If regulation 5(1) has been breached, it has been breached because of the failure of either one or both of the respondents to honour a mandatory statutory obligation owed to the claimant.

177. While this is a finely balanced case, the tribunal has concluded that ultimately the relative balance of injustice and hardship falls firmly in favour of permitting the claimant's proposed amendment. In reaching this conclusion the tribunal has weighed in the balance all the matters referred to the tribunal by each party.

Other matters

Parties

178. The first respondent is currently stated in the title of these proceedings to be '*First Choice Recruitmen*t'.

During the course of the hearing the tribunal asked Ms Richards whether the first respondent is a limited company. Ms Richards said that it wasn't.

If this is correct and '*First Choice Recruitment'* is effectively a trading name, it begs the question as to which person or corporate entity is the correct respondent trading as '*First Choice Recruitment'*.

179. **This matter requires urgent consideration and must be addressed by the first respondent at the next hearing.**

180. There were three payslips included in the bundle for this hearing. The quality of the copying is extremely poor and difficult to read. The bundle index indicates that the payslips are dated: April 2019; 27th April 2019; and 28th September 2019. The tribunal notes that in the bottom right hand corner of each payslip, there appears to be stated just above an address: '*First Choice Selection Services Ltd'*.

181. As to the quality of the copies of the payslips, while it is appreciated that sometimes originals themselves are not printed or written very boldly, the tribunal reminds all parties that if documents are to be submitted to the tribunal for consideration, it is important that any photocopied or printed copies should be as legible as possible.

Technology

182. This hearing was conducted remotely on video by Webex. At the outset of the hearing difficulties arose with the technology used by two of the participants.

183. After Ms Richards had logged in, it transpired that she was unable to sustain a video connection for more than a minute or two, if that. At the tribunal's suggestion Ms Richards switched to audio only and was able to remain in the hearing and represent the first respondent's interests thereafter without any further problems. All other participants could not see Ms Richards, this included the claimant when she was being cross-examined briefly by Ms Richards. This was not a satisfactory state of affairs but the best that could be done in the circumstances.

184. When the claimant joined the hearing, she initially appeared at a diagonal angle on the screens of all other participants. It was an awkward and uncomfortable angle for participants to view the claimant. The claimant succeeded in remedying this aspect of the problem fairly swiftly and throughout the rest of the hearing she appeared on the screens of other participants in an appropriately vertical position. Unfortunately, it was to become clear that she had achieved this remedy by herself adopting an awkward posture in order to appear vertical on the screens of the other participants in the hearing. The claimant explained that her laptop was broken and that the mobile phone which she was using had to be kept plugged in to the electricity supply. The claimant had to keep her mobile phone plugged in and apparently that prevented the claimant from being able to sit up straight in front of her camera.

185. The tribunal is sympathetic to the technology problems which can arise when hearings are conducted remotely. Over the last 18 months, there can be few regular participants in remote hearings who will not have at one time, or indeed more than once, experienced the tyranny of technology which does not work as it should.

186. The tribunal would remind all parties to be mindful of the difficulties which can arise with their own technology and to try to ensure that they have a stable and adequate internet connection, together with suitable hardware.

187. It is to be hoped that both Ms Richards and the claimant will be able to address the difficulties which arose at this hearing prior to the next. The conduct of a tribunal hearing is stressful enough for any litigant, without them having to cope with the additional stress of conducting the hearing in an uncomfortable posture.

188. The tribunal would like all participants in any future remote hearing to be able to focus on the issues arising during the hearing and to give the best account of themselves, without the anxiety of technology impairing their ability to participate in the hearing fully, or causing delay for others. It is understood that the vagaries of technology may well make this aspiration impossible to fulfil, but every participant is asked in advance of each hearing to do what they reasonably can to ensure that their internet connection and their hardware is likely to be up to the task.

Arrears of pay and holiday pay

189. In her claim form at paragraph 7.1, the claimant asserts that she is owed holiday pay of £450 and arrears of pay totalling £1,075.

190. In the first respondent's ET3 response, it is asserted that, '[the claimant] has been paid all and any holiday pay due to her to the point she went on her extended holiday'.

So far as the claim in respect of arrears of pay is concerned, the ET3 acknowledges that the, '*Western Trust awarded staff back pay in January 2019'*. It is said that the first respondent was then awaiting confirmation from the Western Trust of the exact amount that each staff member was due in back pay and that when this confirmation was received that the claimant would be paid what she was due.

191. Subsequently, the first respondent did pay the claimant a sum of money in respect of the arrears of pay which were due to her. The bundle for this hearing includes a pay slip dated 28th September 2019 in respect of backpay. The following words are typed in the top left hand corner of the A4 page on which the copy of the payslip appears: '*Payslip, backpay finally paid'*. The tribunal assumes that the words in typescript originated from the claimant. The payslip shows a gross payment of £1,028.85 before deductions for tax and national insurance. On the payslip the payment is described as, '*Back Dated Pay Trust'*.

192. At a preliminary hearing on 10th June 2021, Employment Judge Tiffney directed Mr Crean and the claimant to exchange correspondence to clarify the precise extent of any outstanding dispute as to the arrears of pay. EJ Tiffney's careful direction can be found at paragraph 1 of the record of proceedings dated 10th June. She specifically directed that the tribunal should not be copied into the correspondence.

193. In support of that direction the judge stated that: *'…**it is imperative that the claimant and the first-named respondent communicate with each other about the precise basis of any remaining claim for arrears of pay and that they do so in a timely fashion**…The precise extent of any remaining claim for arrears of pay is a matter which will be reviewed by the tribunal at the next Case Management Preliminary Hearing*'.

194. The tribunal remains unclear about the precise extent of the dispute in respect of arrears of pay and holiday pay. The claimant points out that EJ Tiffney's direction did not explicitly refer to holiday pay. Nonetheless holiday pay appears to be an issue which remains in dispute between the parties.

195. It is not necessary at this stage in proceedings for the tribunal to investigate what has gone on in the correspondence between the claimant and the first respondent

following EJ Tiffney's direction. The tribunal will address its attention instead on what needs to be done now.

196. At the next hearing, the tribunal will require the claimant and the first respondent to be in a position to provide it with the information detailed below. For this purpose the tribunal is unlikely to be assisted by any allegations and cross-allegations as to how one party or the other has dealt with communications between them following this judgment. The tribunal's focus will be on the information requested. It is expected that the information will be provided**.** The tribunal does not require any of the information to be filed in writing with the tribunal in advance of the hearing. The parties will be expected to be able to articulate the information to the tribunal at the hearing, when the tribunal will determine the extent to which any of the information so provided should be directed to be filed in writing in these proceedings.

197. The purpose of requesting the information is:

- To enable the tribunal to understand the nature and quantum of any outstanding dispute in respect of arrears of pay and holiday pay, so that the tribunal can decide what case management orders are necessary in respect of these claims.

- To enable the claimant and the first respondent to understand the extent and nature of the dispute between them in respect of arrears of pay and holiday pay.

198. **The following information is required**:

Arrears of pay

(a) On the ET1 the claim in respect of arrears of pay is stated to be £1,075. Does the claimant agree that she received a payment of £1,028.85 on 28th September 2019 in respect of arrears of pay?

(b) Does the claimant agree that the payment of £1,028.85 on 28th September 2019 has settled the issue of arrears of pay?

(c) If the answer to (b) is no, the claimant is requested to state: what sum remains outstanding, and what is the legal and factual basis for asserting that the claimant has an entitlement to that sum. For the avoidance of doubt, it will be insufficient for the claimant simply to assert that a sum remains outstanding to which she is entitled. The claimant's response must include a detailed schedule of arrears to demonstrate why it is said that there is an outstanding sum of arrears.

(d) The **information requested at (c) must be sent by the claimant to the first respondent within 7 days of her receipt of this judgment**.

(e) The first respondent must reply to the claimant stating whether the claimant's calculation of any outstanding sum of arrears is accepted. If the claimant's calculation is not accepted, the first respondent must respond in detail to the claimant's schedule of arrears to demonstrate why it says that no arrears are due. The **first respondent's response is to be**

sent to the claimant by no later than 24 hours before the date and time fixed for the next hearing or within 7 days of receipt of the claimant's schedule, whichever is earlier.

Holiday Pay

(a) On the ET1 the claimant claims a payment of £450 in respect of holiday pay. The claimant is directed to set out the basis on which she asserts that holiday pay is outstanding, this shall include a schedule detailing how it is said that the claim for outstanding holiday pay arises.

(b) The information at (a) is **to be sent by the claimant to the first respondent** within 7 days of her receipt of this judgment.

(c) The **first respondent must reply to the claimant** stating whether her calculation of outstanding holiday pay is accepted. In the event that it is not, the first respondent must reply in detail to explain why.

(d) The first respondent's reply at (c) is to be sent to the claimant by the date and time not less than 24 hours before the next hearing or within 7 days of the receipt of the claimant's schedule, whichever is earlier.

The tribunal is not to be copied in to any of the documentation or correspondence between the parties referred to in this paragraph (whether in respect of the arrears of pay claim or the holiday pay claim).

199. It is expected that both the claimant and the first respondent will do their very best to comply with the timetable for the mutual exchange of information as set out above. In the event that either party is unable to do so they must immediately inform the other and indicate when they anticipate being able to provide the information.

200. Neither party should write to the tribunal in advance of the next hearing either to seek an extension of time for complying with the direction as to provision of information or to complain that the other party has in any way failed to comply with their obligation to provide information under the direction. The tribunal will consider the reasons for any non-compliance at the next hearing.

The overriding objective and duty of parties to co-operate

201. During the course of the hearing, the tribunal referred the parties to the overriding objective which is set out at rule 2 of The Industrial Tribunals and Fair Employment Tribunal Rules of Procedure 2020. It includes the following:

> *'The overriding objective of these Rules is to enable tribunals to deal with cases fairly and justly…*
>
> *A tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules.* ***The parties*** *and their representatives shall assist the tribunal to further the overriding objective and* ***in particular shall co-operate generally with each other and with the tribunal****.'*

202. The **parties** are invited to note the duty imposed on them by the Tribunal Rules of Procedure that they, *'…in particular shall* ***co-operate generally with each other and with the tribunal***.'

203. The parties are **invited to reflect this procedural duty to co-operate in the tone and content of their litigation correspondence** whether between themselves or with the tribunal. One practical aspect of this duty is that insofar as it is necessary for the parties to correspond with each other in order to comply with any direction from the tribunal, the tribunal expects that they will each seek to comply with the direction proactively and without rancour in order to achieve what the tribunal has directed.

204. The claimant has been a litigant in person throughout and Mr Crean has until recently represented the first respondent at hearings without any legal representation. The tribunal recognises just how challenging self-representation can be, particularly in circumstances where at times feelings run high on all sides.

205. The purpose of drawing the duty to co-operate to the parties' attention is not to criticise anyone for what may have gone before, but to encourage the parties to consider the duty to co-operate when corresponding and in conducting these proceedings in the future.

Conclusion

206. An unwelcome aspect of litigation is the impact which it can have on the health and wellbeing of participants. The tribunal recognises that sometimes cases can be enormously stressful for the parties and indeed for any potential witnesses who may find their past decisions or conduct called into question.

207. The claimant has described in various documents the impact which she says these proceedings have had on her. The proceedings are clearly stressful for the claimant, as indeed they are likely to be for both Mr Crean and any witnesses called in respect of the whistleblowing claim.

208. At the end of the hearing, the respondents made their closing submissions first. When it came to the claimant's turn to make submissions she declined to do so to any real extent and told the tribunal, '*I am unrepresented, I feel extremely exhausted*'. The claimant made a comment about the huge amount of work she has done on the case and her belief that the Regulations have been broken. The claimant said that, '*I have been cheated by not one but two respondents today'*. Shortly after that the claimant expressed a wish to leave the hearing.

209. The tribunal was troubled by the claimant's weary demeanour at the end of the hearing day. It contrasted sharply with her engagement before closing submissions began. The tribunal is anxious that all parties, including the claimant, should be able to participate as fully as possible in the proceedings. To this end, the tribunal invites the claimant to consider what adjustments or arrangements the tribunal may be able to make to assist her participation in proceedings. This issue can be considered further at the next hearing if required.

210. As noted above, the claimant declared at the end of the hearing that, '*I have been cheated by not one but two respondents today*'. If this comment was intended to

refer to the conduct of either Ms Richards or Ms McClarnon, it is misplaced. Both representatives behaved entirely properly and they put their respective client's cases fairly to the claimant.

211. The tribunal recognises the strength of emotion which the claimant feels about this case. That strength of emotion may also be matched by Mr Crean and/or other witnesses who could be the subject of criticism in the whistleblowing case.

212. These proceedings will be determined at a hearing where a tribunal will apply the relevant law in respect of each claim to the facts as found by the tribunal. Those findings of fact will be determined on the basis of the evidence and information presented to the tribunal at a final hearing. It is important that all parties should note that, however sympathetic a tribunal may feel towards a party or witness who is suffering evident emotional distress and upset during a hearing, the decision of the tribunal will nonetheless be based purely on the application of the law to the evidence presented to the tribunal at the hearing. Ultimately what will assist the tribunal when it comes to making decisions in this case will be focussed submissions and arguments which are based on the relevant evidence and law relating to each individual head of claim.

Employment Judge: H. Travers

Date and place of hearing: 17th September 2021, Belfast.

Date decision recorded in register and issued to parties: