EMPLOYMENT TRIBUNALS

Claimant: Mr A Hay

Respondent: ERM Certification & Verification Services Limited (trading as ERM CVS LTD)

Heard at: London Central (by CVP) **On:** 8 & 9 December 2020

Before: Employment Judge A Isaacson
Tribunal Member Mr T Robinson
Tribunal Member Ms P Keating

Representation
Claimant: In person
Respondent: Ms T Balding, HR representative

Covid -19 Statement
This was a remote hearing which was not objected to by the parties. The form of remote hearing was by Cloud Video Platform (CVP). A face- to -face hearing was not held because of the Coronavirus pandemic.

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1) The respondent breached their duty as a hirer under regulation 13 of the Agency Workers Regulations 2010 to inform the claimant, an agency worker, during his assignment of any relevant vacant posts with the hirer, to give that agency worker the same opportunity as a comparable worker to find permanent employment with the hirer. The respondent is ordered to pay to the claimant £1120 compensation for that breach. This is calculated based on a 35 hours week at £16 per hour.

2) The claimant suffered a detriment when the respondent ended his assignment because he raised an allegation that the respondent had breached the Agency Workers Regulations 2010. The respondent is ordered to pay to the claimant £1680 compensation for the detriment suffered, subject to any injury to feelings award.

3) The total amount of compensation the respondent is ordered to pay to the claimant, subject to any injury to feelings award is £2800.

4) The Tribunal will determine whether an injury to feelings award should also be awarded as part of the compensation for the detriment suffered under regulation 17 after further representations from the parties. A separate case management order has been made.

REASONS

Evidence before the Tribunal

1. The Tribunal was presented with a joint bundle of documents. Further documents were requested during the hearing and added to the bundle.

2. The Tribunal heard evidence from the claimant and from four respondent witnesses: Mr Oliver Clark (OC), the claimant's line manager, Mr Dan Orpin (DO), finance and operations director, Mr Barry Scanlan (BS), HR director of the groups' functions and global business, and Ms Beth Monroe (BM), a recruitment coordinator. BM did not attend the hearing and therefore could not be questioned by the claimant or the Tribunal. Little weight is given to her evidence where it is not corroborated by other witnesses and documentation.

3. Both parties had an opportunity to question witnesses and give oral submissions (a summary of their case). A draft list of issues was carefully considered and agreed.

Claims and issues

4.1 It is accepted by the respondent that the claimant was an agency worker and the respondent was his hirer as defined within the Agency Workers Regulations 2010 (AWR). The claimant accepts he was not an employee of the respondent.

4.2 The respondent accepts that the claimant, as an agency worker, had the right to be informed by the respondent during his assignment of any relevant vacant post within the respondent, to give the claimant the same opportunity as a comparable worker to find permanent employment within the respondent.

4.3 The respondent alleges that they complied with that right by a general announcement in a suitable place in the hirer's establishment by posting any new vacancies on the respondent's intranet Minerva, on their website ERM.com and on LinkedIn.

4.4 Did the respondent comply with regulation 13(4) AWR? Did the claimant know where and how to access this information?

4.5 As the claimant is not an employee of the respondent, he is not entitled to claim ordinary or automatically unfair dismissal.

4.6 Has the claimant suffered a detriment? The claimant asserts he has suffered a detriment when:

a) the respondent failed to inform him of the vacant post of the Accounts Receivable role (AR), and

b) his assignment with the respondent was ended.

4.7 Did the respondent end the claimant's assignment because the claimant had alleged that the respondent had breached the AWR? The respondent asserts that the assignment was brought to a close because the working relationship had broken down.

4.8 If so, what remedy is the claimant entitled to? The Tribunal can make a declaration, award compensation, including expenses, and make recommendations. The Tribunal can award compensation which it considers to be just and equitable.

4.9 The claimant argued that compensation awarded should include an injury to feelings award. The Tribunal's initial view was that it did not have the authority to make an injury to feelings award under the AWR. After the hearing, having had time for further consideration, the Tribunal seeks further representations from the parties on an injury to feelings award in relation to the detriment under regulation 17. The Tribunal has set out the established law on injury to feelings awards below to assist the parties as both parties are unrepresented. Regulation 18(15) specifically excludes from any compensation an injury to feelings award under regulations 5,12 or 13. Regulation 17 does not exclude an injury to feelings award.

Submissions

5. In brief, and not including all that was said, the respondent argued that the claimant had not suffered a detriment under the AWR because he had had the same access to relevant vacant posts as an employee because the claimant had access to their website and intranet where the vacant posts were advertised and should have made attempts to find the adverts. In any event the claimant did apply for the AR role. It was due to an unfortunate administrative error that the claimant's application was not received by the respondent. The claimant was not suitable for the role as it was a more senior role. The claimant's assignment was ended because the respondent felt there was an irretrievable breakdown in the working relationship after the telephone meetings on the 17 March 2020 and the claimant's refusal to attend a meeting on 18 March 2020.

6. If the claimant had suffered a detriment, he should only be awarded four weeks' net pay as there was a recruitment freeze from 17 March 2020 so no one was appointed to the AR role and his temporary appointment would have been terminated by mid - April, just after the end of the financial year.

7. The claimant's submissions are taken from his claim form, witness statement, the questions he asked in cross examination and his summary of the case. In brief, and not including all that was said, the claimant argued

that he had suffered a detriment because he was not made aware that he had access to the internal vacancies which knocked his confidence. He was never given an induction and did not know about the respondent's intranet or that job vacancies were advertised on it. He felt very anxious and depressed when he discovered his colleague, from the same agency, had been approached about the AR and Accounts Payable (AP) roles but neither his manager or DO notified him about the AR vacancy and instead, he saw people being interviewed for the very role he was doing.

8. His assignment was ended because he raised a complaint that the respondent had breached the AWR and asked for more time to seek legal advice. His complaint warranted an independent investigation. He argued the AR role was not more senior than his role. It was the same role he had been recruited to do via the agency and both the AR and AP roles were advertised internally and externally as "Associate level" as they were both on the same level. His application for the AR role was deliberately ignored.

The law

9. In order to be protected by the AWR you must be an "agency worker". This is an individual who has either a contract of employment with the agency or, more usually, a contract with the agency to perform work and services personally for the hirer (the end user), under the hirer's supervision. A temporary work agency supplies workers to hirers for temporary work. This is not the same as an agency that places people in permanent positions, whether directly or through an intermediary.

10. The regulations take a wide interpretation as to who is an agency worker. Someone who is genuinely self - employed will not be covered by these regulations.

11. The regulations provide for various rights to be automatically conferred on all agency workers from the first day they start work with the hirer. Regulation 13 provides that an agency worker must be given the same opportunity to be informed about job vacancies with the hirer as is given to the hirer's permanent employees. Paragraph 13(1) states:

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

12. Paragraph 13(4) states:

    "*For the purposes of paragraph (1) the hirer may inform the agency worker by a general announcement in a suitable place in the hirer's establishment".*

13. The BIS guidance on Agency Workers Regs (May11) provides that:

    "Hirers can choose how to publicise vacancies, whether it is via the internet/intranet or on a notice board in a communal area. But the agency worker should know where and how to access this information."

14. Case law has established that the right to be informed by the hirer of vacancies does not mean that the agency worker has a right to be entitled to apply for, and be considered for, internal vacancies on the same terms as directly – recruited employees. The right in regulation 13 is a right to be notified of the vacancies on the same basis as directly-recruited employees, and a right to be given the same level of information about the vacancies as the directly – recruited employees. Although regulation 13 refers to agency workers being given the same "opportunity" as comparable direct recruits to find permanent employment, they are given that opportunity by being given the same information about permanent vacancies as direct employees- Angard Staffing Solutions and anor v Kocur and anor EAT(2020)

15. Regulation 17(2) & 17(3)(a) (v) provide:

"(2) *An agency worker has the right not to be subjected to any detriment, or as a result of, any act, or any deliberate failure to act, of a temporary work agency or the hirer, done on a ground specified in paragraph (3).*

(3) The reasons or, as the case may be, grounds are-
(a) that the agency worker
(v) alleged that a temporary work agency or hirer has breached these Regulations".

16. Paragraph 17(4) states that regulation 17(3) does not apply if the allegation made by the agency worker is false and not made in good faith.

17. Paragraph 18 sets out how to make a complaint and paragraphs 18(8) to (18) state what remedy can be awarded if the claimant is successful:

" *(8) Where an employment tribunal finds that a complaint presented to it under this regulation is well founded, it shall take such of the following steps as it considers just and equitable—*

(a)making a declaration as to the rights of the complainant in relation to the matters to which the complaint relates;

(b)ordering the respondent to pay compensation to the complainant;

(c)recommending that the respondent take, within a specified period, action appearing to the tribunal to be reasonable, in all the circumstances of the case, for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the complaint relates.

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

(10) Subject to paragraphs (12) and (13), where a tribunal orders compensation under paragraph (8)(b), the amount of the compensation awarded shall be such

as the tribunal considers just and equitable in all the circumstances having regard to—

(a)the infringement or breach to which the complaint relates; and

(b)any loss which is attributable to the infringement.

(11) The loss shall be taken to include—

(a)any expenses reasonably incurred by the complainant in consequence of the infringement or breach; and

(b)loss of any benefit which the complainant might reasonably be expected to have had but for the infringement or breach.

(12) Subject to paragraph (13), where a tribunal orders compensation under paragraph (8)(b), any compensation which relates to an infringement or breach of the rights—

(a)conferred by regulation 5 or 10; or

(b)conferred by regulation 17(2) to the extent that the infringement or breach relates to regulation 5 or 10,

shall not be less than two weeks' pay, calculated in accordance with regulation 19.

(13) Paragraph (12) does not apply where the tribunal considers that in all the circumstances of the case, taking into account the conduct of the claimant and respondent, two weeks' pay is not a just and equitable amount of compensation, and the amount shall be reduced as the tribunal consider appropriate.

(14) Where a tribunal finds that regulation 9(4) applies and orders compensation under paragraph (8)(b), the tribunal may make an additional award of compensation under paragraph 8(b), which shall not be more than £5,000, and where there is more than one respondent the proportion of any additional compensation awarded that is payable by each of them shall be such as the tribunal considers just and equitable having regard to the extent to which it considers each to have been responsible for the fact that regulation 9(4)(a) applies.

(15) Compensation in respect of treating an agency worker in a manner which infringes the right conferred by regulation 5, 12 or 13 or breaches regulation 10(1)(b), (c) or (d), or breaches a term of the contract described in regulation 10(1)(a), shall not include compensation for injury to feelings.

(16) In ascertaining the loss the tribunal shall apply the same rule concerning the duty of a person to mitigate loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) the law of Scotland.

(17) Where the tribunal finds that the act, or failure to act, to which the complaint relates was to any extent caused or contributed to by action of the complainant, it

shall reduce the amount of the compensation by such proportion as it considers just and equitable having regard to that finding.

(18) If a temporary work agency or the hirer fails, without reasonable justification, to comply with a recommendation made by an employment tribunal under paragraph (8)(c) the tribunal may, if it thinks it just and equitable to do so—

(a)increase the amount of compensation required to be paid to the complainant in respect of the complaint, where an order was made under paragraph (8)(b); or

(b)make an order under paragraph (8)(b).”

18. The correct approach to compensation was considered by the Court of Appeal in London Underground Ltd v Amissah and Others [2019] EWCA Civ 125:

    1) The Tribunal must identify the infringement – this is not simply a right to the same terms and conditions, but a right to actually receive the benefits in question.

    2) The Tribunal must then identify the loss attributable to the infringement – this is ordinarily the amount necessary ‘to compensate the claimant for the pecuniary loss suffered as a result of the infringement’. The reference to compensation being ‘just and equitable’ is said to mean that Tribunals have a degree of flexibility in the approach to proof of loss.

    3) Where more than one respondent has been found liable, the Tribunal must decide the question of apportionment as a percentage, based on the extent of the parties’ relative responsibility for the breach. This consists of two elements: (i) Causation: the extent to which each wrongdoer contributed to the occurrence of the breach; and (ii) Culpability: their degree of relative fault.

    4) Although it is open to Tribunals to award less than the amount of the claimant’s loss, or for a respondent to be ordered to pay the claimant less than the amount for which it is “responsible”, such occasions are described respectively as ‘extremely uncommon’ and ‘exceptional’. The Court of Appeal suggested their possible application in cases of fraud or ‘serious misconduct’ by the claimant. In assessing the loss, the Tribunal should ask itself what would have happened but for the infringement for which the relevant party was responsible.

19. The compensation is calculated according to a week’s pay, which is a gross figure. A week’s pay is defined as the higher of: i) the average weekly pay received by the agency worker in the previous 4 weeks in relation to the assignment to which the claim relates; and ii) the average weekly pay that the agency worker should have received in the previous 4 weeks in relation to the assignment to which the claim relates.

20. The minimum compensation is 2 week’s pay, unless 2 week’s pay is not a just and equitable amount of compensation, in which case the Tribunal can reduce the amount as it considers appropriate; There is no maximum. The

award can be reduced for contributory conduct (Reg 18(17)), and the Tribunal may reduce the amount if it considers that the claimant has failed to mitigate their loss (Reg 18(16)).

21. Injury to feelings is excluded for claims under Regulations 5, 12, 13, 10(1)(a) to (d) (see Reg 18(15)) but it does appear to apply to unfair dismissal claims and detriment claims under regulation 17.

22. The award of injury to feelings is intended to compensate the claimant for the anger, distress and upset caused by the unlawful treatment they have received. It is compensatory, not punitive. Tribunals have a broad discretion about what level of award to make.

23. The focus is on the actual injury suffered by the claimant and not the gravity of the acts of the respondent (Komeng v Creative Support Ltd UKEAT/0275/18/JOJ).

24. The general principles that apply to assessing an appropriate injury to feelings award have been set out by the EAT in Prison Service v Johnson [1997] IRLR 162, para 27:

● Injury to feelings awards are compensatory and should be just to both parties. They should compensate fully without punishing the discriminator. Feelings of indignation at the discriminator's conduct should not be allowed to inflate the award;

● Awards should not be too low, as that would diminish respect for the policy of the antidiscrimination legislation. Society has condemned discrimination and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could be seen as the way to untaxed riches;

● Awards should bear some broad general similarity to the range of awards in personal injury cases – not to any particular type of personal injury but to the whole range of such awards;

● Tribunals should take into account the value in everyday life of the sum they have in mind, by reference to purchasing power or by reference to earnings;

● Tribunals should bear in mind the need for public respect for the level of awards made.

25. The matters compensated for by an injury to feelings award encompass subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress and depression (Vento v Chief Constable of West Yorkshire Police (No2) [2003] IRLR 102) (Vento).

26. In Vento the Court of Appeal identified three broad bands of compensation for injury to feelings and gave the following guidance (however, see below for revised figures):

1) The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000;

2) The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band;

3) Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one - off occurrence. In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.

27. Within each band there is considerable flexibility, allowing Tribunals to fix what is considered to be fair, reasonable and just compensation in the particular circumstances of the case.

28. The boundaries of the bands have been revised in several subsequent cases, culminating in the decision in De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879, which held that the 10% uplift in Simmons v Castle [2012] EWCA Civ 1288 should apply to awards for injury to feelings.

29. Following this, the Presidents of the Employment Tribunals in England & Wales and Scotland issued 'Presidential Guidance: Employment Tribunal Awards for Injury to Feelings and Psychiatric Injury Following De Souza v Vinci Construction (UK) Ltd'. This Guidance, the third addendum of which was released on 27 March 2020 taking into account changes in the RPI, updated the bands as follows:

● Upper Band: £27,000 to £45,000 (the most serious cases);

● Middle Band: £9,000 to £27,000 (cases that do not merit an award in the upper band); and

● Lower Band: £900 to £9,000 (less serious cases).

The 'most exceptional cases' are capable of exceeding the maximum of £45,000.

Findings of fact

30. DO, the respondent's finance and operations director joined the respondent on 11 November 2019, and one of his first decisions was to look for a temporary cover for the AR role with the view for a permanent to start in the role in the new fiscal year April 2020. If the temporary agency worker showed the skills and attitude they were looking for, then the intention was to consider that person as a candidate for the permanent position.

31. OC, a management accountant and the claimant's line manager, contacted the claimant's agency Michael Page, on 15 November 2019 and three candidates were put forward for interviews, including the claimant. The

claimant had a very good interview and was chosen by the respondent as the successful candidate. The agency asked for clarification regarding the respondent's offer, whether it was for a fixed term or temporary and OC confirmed they were looking for a temporary arrangement (p71).

32. The claimant commenced his assignment on 25 November 2019 in the AR role in the finance accounts team. The claimant was engaged on a week-by -week basis but OC told him that it was likely his assignment would last for around three months. As an agency worker the claimant was given very little induction other than some compulsory training on health and safety. Two of the respondent witnesses, DO and OC confirmed that as an agency worker the claimant would not have received the same induction as an employee.

33. The Tribunal accepts the evidence of the claimant that he was not told about the respondent's intranet, Minerva nor told that any job vacancies were posted on the intranet or their website. The claimant did not need to use the intranet's home page to access various sites on the internet as he had saved a number of favourite links for his work. Without any induction from the respondent the Tribunal finds that the claimant was unaware that the respondent advertised internal job vacancies on the intranet, their website or on LinkedIn.

34. The Tribunal finds that by failing to notify the claimant where and how he could access their intranet was a breach in their duty to inform the claimant, during his assignment, of any relevant vacant posts within the respondent, to give the claimant the same opportunity as a comparable worker to find permanent employment within the hirer.

35. The claimant was told by DO, shortly after he started, that he had liked the way he answered questions in the interview and felt he presented well in the team environment and got off to a good start.

36. Around the same time as the claimant commenced his assignment at the respondent another agency worker RA, from the same agency as the claimant, started an assignment with the respondent in an accounts payable (AP) role.

37. The claimant was paid £14 per hour by the agency. He discovered that the agency was being paid by the respondent £22 per hour and around January 2020 approached the agency for a pay rise. He specifically told the agency not to contact the respondent but Charlie Stubbings (CS) from the agency did speak to DO who confirmed the claimant's pay was not their concern. The agency did increase the claimant's hourly rate to £16 per hour.

38. The Tribunal was not provided with copies of the claimant's pay slips from the agency. The respondent provided a counter schedule which calculated the claimant's weekly net pay as £458.51. This figure was not disputed by the claimant and appears to be accurate when working out a net weekly salary from a gross figure of £16 per hour times seven hours times five days per week of £560.

39. Around the same time the claimant had a conversation with OC about taking holiday and the claimant asked OC if his assignment was for a fixed term of three months. OC confirmed that it wasn't a fixed term but on a week by

week rolling basis and was likely to go on until the start of the new fiscal year.

40. The claimant believed that from the time he raised the issue of his pay the respondent's attitude towards him changed. This is denied by the respondent.

41. In January 2020 DO decided to recruit for the AR and AP roles on a permanent basis. The Tribunal accepts the evidence of DO and OC that they discussed the claimant and decided he was not a strong candidate for the permanent AR position. Although the claimant had had a good start at the respondent both OC and DO felt that the claimant was having difficulty keeping up with his daily tasks. Once in the role the claimant demonstrated that he could fulfil basic tasks- such as billing clients and running Work in Progress (WIP) reports – but he was struggling to do them in a timely manner which resulted in a backlog. They felt the claimant couldn't take on the responsibility of chasing debt and other credit control activities. OC regularly had feedback conversations and meetings with the claimant about his performance and his time issues.

42. The claimant's lack of motivation became apparent to OC and the claimant mentioned it during his assignment that he was struggling to stay motivated in his capacity of a temporary worker.

43. The respondent expected the claimant's temporary assignment to continue for a number of weeks until the successful candidate for the permanent AR role was ready to start, with a short overlap. The Tribunal finds that the claimant's temporary assignment would have ceased around mid- April as the permanent AR role was meant to start at the beginning of the financial year (6 April).

44. The respondent advertised the permanent AR and AP roles by using a recruitment coordinator Ms Monroe (BM). The roles were first posted on the respondent's intranet Minerva, the respondent's website, ERM.com and on LinkedIn. BM didn't get a sufficient response from those avenues so advertised the AR role on an external website Indeed.com.

45. Indeed.com is one of the two websites the claimant used to search for roles. After he had discussed with his agency about a pay rise, he chose to start looking for new roles in the hope to get a permanent position on a higher hourly rate/ annual salary. He saw an advert for the respondent's AR role on Indeed.com and felt very upset that the respondent was advertising his own role without letting him know.

46. Around the same time the claimant saw his colleague from the agency RA being approached by DO and was told by RA he was encouraged to apply for both the AP and AR permanent roles.

47. The claimant thought that his manager OC would contact him about the permanent role on his return from holiday but was very disappointed when neither DO or OC told him about the AR role being advertised.

48. On 29 January 2020 the claimant applied for the AR role via the website Indeed.com. He didn't hear anything further about the role from the respondent or Indeed.com, not even an acknowledgment. This really knocked his confidence and made it difficult for him to concentrate and

perform his daily work duties as he felt demotivated when he knew his own job was being advertised, yet he was not being considered for the role.

49. Unbeknown to the claimant or the respondent at the time, the claimant's application was never considered or acknowledged because BM, the recruitment coordinator only considered applications submitted up to 28 February 2020. The last batch she sent to DO was on the 28 February 2020. By 28 February 2020 DO had several candidates in process and therefore BM stopped checking for new applications around this time.

50. The claimant argued the date BM gives as the cut- off date, just one day before he made his application, is too much of a coincidence to be true. Although BM was not present to be questioned by the Tribunal, the Tribunal accepts that what she stated in her witness statement was what she had told DO. What is clear is that the claimant's application was not considered by the respondent because they were unaware that he had made the application.

51. The Tribunal is critical of an application process where every application is not acknowledged and when a cut-off date has been decided this should be apparent to further potential applicants. The fact the claimant's application was not acknowledged caused him stress and anxiety.

52. The claimant then saw two external candidates being interviewed for the AR role. He was becoming increasingly anxious as he thought his role may come to an end on 25 February as OC had mentioned that the rolling term may be for 3 months. He thought the two external candidates must have applied through Indeed.com yet his application had been totally ignored.

53. The respondent witnesses told the Tribunal that the AR role advertised was a more senior role to the one the claimant was performing, and a higher salary budget had been approved for the role compared to the AP role. This was due to the role requiring more advanced credit control skills and the requirement to appoint a credible holder who could deal effectively with external stakeholders.

54. However, the respondent witnesses were inconsistent in their evidence regarding why the AR and AP roles were both referred to as "associate level". In any event it is not necessary for the Tribunal to decide whether or not the permanent role was the same as the role being done by the claimant as a permanent role was never in fact appointed due to a recruitment freeze (see below). What is clear to the Tribunal is that the claimant believed that the advertised AR role was the same as the role he was currently performing.

55. On 24 February 2020, in response to OC asking for a catch up, the claimant messaged OC "*I have seen ERM have advertised my role online, my contract with the agency is due to end tomorrow the 25th, could you please let me know where I stand and what I need to do?"*

56. At their meeting the claimant told OC that he was disappointed that he had not been made aware of the role and he was aware RA was directly informed of the permanent AP and AR vacancy. OC told the Tribunal that at that meeting he told the claimant that the expectations of the permanent AR role went beyond the range of skills and level of performance he had

demonstrated to date, but he was free to apply for the role and they would consider it accordingly.

57. The claimant told the Tribunal that OC merely told him that the AR applications were being dealt with by DO.

58. The claimant continued to come in to work but felt undervalued and demoralised. He decided to make a formal complaint via email to someone senior within the organisation as he did not know how to contact HR. The fact that the claimant did not know how to contact HR is another example of how the respondent failed to give the claimant adequate training on their internal website and intranet.

59. On 13 March 2020 the claimant emailed a complaint to the chief operations officer and a senior member of HR. He told the Tribunal he found their contact details in the Outlook address book. His email (p77) was forwarded on to Mr Scanlan (BS) the respondent's HR director of group functions and global business.

60. In his complaint he described finding out about his role being advertised as a permanent role and feeling shocked, undervalued and ignored. He said his motivation for work had dropped as could be probably backed by feedback from his managers. He referred to his rights as a temporary agency worker to be treated equally to employees under the AWR and the fact that his colleague was approached about the role, but he was ignored.

61. He also alleged that by being asked why he was late into work by a female colleague was sex discrimination. He concluded the email by saying: "*What I ask from you is to please investigate this further as I really would like to know why I am being treated so unfairly and hope you can come to a suitable conclusion using your HR knowledge and experience."*

62. BS acknowledged the claimant's complaint the same day and said he would be in touch the next week. BS was unaware of the claimant before and arranged a three- way call with Mr Jenkins (MJ) a managing partner and DO. They agreed that BS should follow up with a three- way call with the claimant.

63. BS told the Tribunal that he was satisfied, after speaking to MJ and DO, that the complaint did not warrant an investigation and they could respond comprehensively to his points based on what they already knew. He hoped the upshot of the call would be the claimant understanding matters better, appreciating their transparent approach to addressing the points he raised and being prepared to continue in his temporary role. BS sent the claimant an invite to a Teams meeting with himself and DO on 16 March. By this date England was in lockdown and everyone working for the respondent was working remotely.

64. The claimant responded by saying he was uncomfortable having DO in the meeting as his complaint involved issues in which DO was involved. He said he felt quite scared to raise the issues with him and asked if he could investigate it. The claimant emphasised to the Tribunal that he was very concerned about his complaint being dealt with by someone he was complaining about and although he had little knowledge of fair procedure, he did know that an investigation should be carried out by someone

independent and more senior than the person complained of. The claimant told the Tribunal that he felt that DO had taken a disliking to him.

65. BS asserted that DO was the most appropriate person to respond to his complaint but would have a separate one to one meeting with the claimant first. The Tribunal are critical of the respondent for not complying with the claimant's request that his complaint be investigated independently of DO. It is good practice for a person who is the subject of a grievance not to be hearing the grievance but to be questioned as part of the investigation.

66. On 16 March 2020 BS contacted Charlie Stubbings (CS) from the claimant's agency. CS then contacted the claimant, and the Tribunal accepts the claimant's evidence that CS told him that BS wanted to know if he was going to take matters further legally and if he did then the respondent would be investigating it robustly. The claimant viewed this as a threat to him even though the respondent may not have meant it as a threat.

67. BS and the claimant had a one- to- one call at 2pm on 17 March 2020. BS explained that the purpose of the meeting with DO was to allow the claimant to set out his complaint and to hear what he was looking to happen in response.

68. BS told the Tribunal that DO and him were approaching the meeting in a constructive, professional manner with a view to seeking a solution but that he felt the claimant seemed committed to the idea that the business was infringing his legal rights.

69. There are no notes of the one -to -one meeting or of the three - way meeting later that day. The Tribunal is critical of the respondent for failing to take notes of meetings regarding a complaint, especially when a senior HR manager is holding the meeting. It is often the case that two parties can come away from a meeting with different views and recall of what happened at a meeting, which is why minutes of a meeting are so important.

70. The claimant's recall of the meeting is very different. He said BS started the meeting by saying there was no breach of the AWR. The claimant then quoted the regulations to him and set out his understanding of how they had breached the regulations.

71. BS then told him to think carefully about what he wanted to do, as they had trust in him, but he needed to tread carefully if he didn't want to break the working relationship. If they had fallen foul of the regulations, then the most he could expect to get was an apology.

72. The Tribunal prefers the evidence of the claimant and finds that the claimant felt intimidated by the way a senior HR professional had conducted himself. It was clear to the Tribunal, from hearing BS's evidence that, he was not happy that the claimant had raised an allegation that the respondent had breached the AWR and expected the claimant to be satisfied by BS asking DO for an explanation and then to drop his allegation. It was also clear to the Tribunal that BS was irritated by the fact that the claimant had emailed senior members of the respondent with his complaint.

73. At 3.30pm the claimant then had a three - way call with BS and DO. There are no minutes of the meeting, but the respondent did send an email later

that evening on 17 March 2020 (p78) setting out their formal responses to the issues he raised in his complaint.

74. The Tribunal accepts the evidence of DO that he hoped to address all the claimant's concerns and get him back in the mind set for continuing in his temporary role. However, DO told the Tribunal that he found the call with the claimant difficult because the claimant took a litigious position from the off set, repeatedly citing his rights as an agency worker while being unable to articulate what had occurred to his detriment or what he would like to happen in response. Both BS and DO were frustrated that they had failed to appease the claimant.

75. BS told the Tribunal that the claimant's other complaints had no merit, and they were disappointed that the claimant felt justified in bringing these non-issues up in the context of a formal complaint.

76. The impression the Tribunal got from both BS and DO's witness statements and their answers to questions was that both men had prejudged that the claimant's complaint had no merit and were angry that he continued to raise the issue of a breach of AWR rather than just accepting the respondent's position. The claimant came across as litigious and said he needed time to take legal advice before meeting them again. This annoyed the respondent, and the Tribunal accepts the claimant's evidence that BS told the claimant that he needed to think carefully about what he wanted to do if he wished to work with them: "*You need to give us a decision, you either work with us or we give you notice"*.

77. The Tribunal finds that the claimant felt intimidated and bullied. He didn't want to be rushed and wanted time to take legal advice and didn't want to have another meeting the next day but preferred to communicate with the respondent in writing. The claimant asked for a written response to his complaint.

78. The respondent then sent their formal response to the claimant's complaint at 9pm (p78). The email goes through each of the claimant's complaints in detail. The last paragraph of the email stated:

"The unhelpful attitude you displayed on our call today has raised questions about your approach and commitment to continuing to work in the ERM CVS Finance team. I will invite you to another three-way Skype call with Dan and I for tomorrow afternoon. Dan and I will review how that meeting goes and then make a decision on whether it is in the business's interests to have you continue in your current capacity. I ask that you give careful consideration to the content of this email in advance of that meeting."

79. The claimant viewed the email as a direct threat that if he didn't drop the allegation of the breach of AWR his assignment would be terminated. The respondent denies that this was their intention.

80. The next day, the 18 March 2020, the claimant logged on and saw that BS had invited him to a follow up meeting at 1pm. The claimant was working that morning and wanted to take legal advice before any further meeting with the respondent so sent an email to the respondent saying he would respond in due course after getting legal advice. He declined the invite.

81. Around this time the respondent asked the recruitment coordinator if the claimant had applied for the AR role. BM confirmed that the claimant had not. As set out above this was an error as BM failed to check the applications via Indeed.com. They also asked the agency to warn the claimant to attend the meeting. DO told the Tribunal that CS from the agency told him that despite repeated attempts to contact him the claimant did not return his calls. The claimant told the Tribunal that the agency did not call him prior to 1pm, although they did make contact later in the afternoon regarding return of a laptop.

82. At 1pm DO messaged the claimant and asked him to join the meeting. He apologised and said he needed more time. DO told the claimant that he took that as a refusal to take part in the meeting. Thirty minutes later the claimant was disconnected from the respondent's system. At 4.30pm the claimant received an email from BS (p83) confirming that the claimant's agency had been notified of the respondent's decision to end his current temporary assignment. The email stated:

"It became apparent to us over the past week that your attitude to working in the ERM CVS Finance team had become concerning and that our concerted efforts yesterday to reach out and address your concerns had not been well received by you. Your refusal to attend the call today confirmed for us that this working relationship was untenable."

83. The claimant was paid until 25 March 2020 without having to attend work and was asked to return his laptop.

84. DO told the Tribunal he was uncomfortable in continuing to work with the claimant because he felt by then that the claimant had decided to engage in legalistic conflict with them, despite not suffering any tangible detriment and despite them engaging with the claimant, to work through his concerns. It was especially concerning that the claimant had been out of touch with the agency and declined their meeting. BS and DO took the view that their trust in him had broken down and as the claimant was working from home and had access to sensitive financial data, it would be irresponsible to allow him to continue his temporary assignment.

85. DO told the Tribunal that his decision to end the claimant's assignment was based on a breakdown of the working relationship as they could no longer trust him and that his complaint under the AWR had no influence on their decision.

86. BS confirmed DO's evidence and stated:

"He showed little interest in discussing matters constructively or looking to resolve them. By the time the claimant was refusing to engage with his agency or with us and he had taken up a litigious position, Dan and I felt we had little option but end our working arrangement with him."

87. The Tribunal finds that the claimant's assignment was ended, and the claimant suffered a detriment, because he alleged that the respondent had breached the AWR. The respondent witnesses tried to separate their decision to end the assignment from the claimant's complaint by narrowing it down to a breakdown in trust and confidence. However, the respondent witnesses own evidence confirmed that it was the claimant's litigious approach and the way he did not just accept their view that they had not

breached the AWR that caused the breakdown in the relationship. They were not happy that the claimant had made a complaint in which a breach of the AWR was at the very heart of it and believed they had complied with the regulations. They expected him to accept their view- point and were annoyed when he insisted on having time to take legal advice.

88. The Tribunal accepts the claimant's evidence that they warned the claimant that he should drop the allegation of the breach of the AWR or they would end his working relationship with them. The last paragraph in the respondent's email dated 17 March 2020 is clearly a threat to the claimant that continuing his assignment is contingent on the way he conducts himself at the meeting the next day.

89. If the claimant had not raised a complaint of the breach of the AWR his assignment would not have ended. The respondent cannot divorce the breakdown in their relationship with the claimant from his complaint. The claimant's litigious attitude and refusal to attend the third meeting because he wanted time to get legal advice had an influence on the respondent's decision to end the assignment.

90. On 17 March 2020, as evidenced by a cost management plan dated 17 March 2020, all permanent recruitment was frozen. The Tribunal accepts the evidence of the respondent witnesses that the respondent did not recruit a permanent AR and that the claimant's duties were absorbed by other workers.

91. The Tribunal finds that even if the claimant's application had been received by the respondent his application would not have been successful as OC and DO did not think the claimant was capable of doing the role and in any event the role was never implemented. Had the claimant not raised a complaint that the respondent had breached the AWR he would have remained in his temporary assignment until 15 April 2020, to cover the end of the financial year.

92. On 6 May 2020, following discussion with ACAS during early conciliation, the respondent made further enquiries with BM regarding whether the claimant had in fact applied for the permanent AR role. BM confirmed he had applied on 29 February 2020 but that she never forwarded on his application to DO.

93. The Tribunal accepts the claimant's evidence that he suffers from anxiety and depression, as evidenced by a letter from the claimant's GP dated 19 November 2020 (p48). The main trigger for his depression and anxiety was his job loss. The claimant found it difficult to go out of his house to find new work but fortunately was able to apply for roles via two agencies and commenced work of an equivalent salary to his assignment with the respondent from 2 November 2020.

94. The Tribunal finds that the claimant's allegations of detriment under the AWR were true and made in good faith.

Conclusion

95. In conclusion the Tribunal declares, as set out in paragraph 22 above, that the respondent breached their duty under regulation 13 of the AWR to inform the claimant of any relevant vacant posts within the respondent, in

order to give the claimant the same opportunity as a comparable worker to find permanent employment.

96. The claimant should have been informed about the respondent's intranet and where internal vacancies were posted. However, the claimant did apply for the role and it was due to an unfortunate administrative error that the claimant's application was ignored. Had the respondent received the application the claimant may have been interviewed for the role, but he would not have been appointed to the role as the respondent did not think he was capable of performing the role, and, in any event, the role was never in fact appointed due to a recruitment freeze.

97. The Tribunal finds that taking account of all the above circumstances it is just and equitable to award the claimant two weeks' gross pay, £1120 (£16 x 7 x 5 = £560 x 2) for the respondent's breach of regulation 13.

98. The Tribunal declares, as set out in paragraphs 74 to 76 above, that the claimant's assignment was ended by the respondent because he had alleged that the respondent had breached the AWR. The ending of the assignment amounts to a detriment that the claimant suffered.

99. The Tribunal finds that the claimant's temporary assignment with the respondent would have ended, in any event, by 15 April 2020. The claimant's role would then have been absorbed by other workers.

100. The claimant was given one week's notice and therefore finds that the claimant's loss was three weeks' gross pay (from 25 March 2020 to 15 April 2020). The Tribunal finds that it is just and equitable to award the claimant compensation, for the detriment he suffered, equivalent to three weeks gross pay which amounts to £1680, but this may increase if an injury to feelings award is also made after further representations.

101. The total amount of compensation (subject to any injury to feelings award) awarded to the claimant, to be paid by the respondent is £2800.

102. A case management order has been made to allow both parties to make representations regarding an injury to feelings award.

EJ A Isaacson

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Employment Judge **A Isaacson**

18th December 2020

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Date

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

15/01/21

FOR EMPLOYMENT TRIBUNALS

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