

ENGLAND AND WALES / JUDGMENT

Jason Lutz v Ryanair DAC & Anor

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Neutral Citation Number: [2025] EWCA Civ 849 IN THE COURT OF APPEAL (CIVIL DIVISION) ON APPEAL FROM EMPLOYMENT APPEAL TRIBUNAL MRS JUSTICE HEATHER WILLIAMS, MR NICK AZIZ AND MR ANDREW MORRIS

[2023] EAT 146 Case No: CA-2023-002537 CA-2023-002546 Royal Courts of Justice Strand, London, WC2A 2LL Date: 08/07/2025 Before : LORD JUSTICE UNDERHILL (Vice-President of the Court of Appeal (Civil Division)) LORD JUSTICE MALES and LADY JUSTICE ELISABETH LAING

- ----- Between : JASON LUTZ

- and - Claimant/ Respondent

(1) RYANAIR DAC

(2) STORM GLOBAL LTD Respondent/ Appellants

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- ----- John Bowers KC and Matthew Sheridan (instructed by Eversheds Sutherland LLP) for the First Appellant Edward Brown KC and Tim Welch (instructed by Constantine Law) for the Second Appellant Michael Ford KC and Stuart Brittenden KC (instructed by Farrer & Co) for the Respondent Hearing dates: 1 & 2 April 2025

- ----- Approved Judgment This judgment was handed down remotely at 10.30am on 8 July 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives. Judgment Approved by the court for handing down. Lutz v Ryanair & Another Lord Justice Underhill :

INTRODUCTION

1. 2. 3. 4. 5. Ryanair DAC (“Ryanair”), formerly Ryanair Ltd, which is the Second Appellant in this appeal, operates the international airline of that name. At the time material to these proceedings the pilots flying its aircraft fell into two groups: (a) pilots directly employed by it (so-called “employed pilots”) and (b) so-called “contracted pilots”, whose services were supplied under an arrangement between it and the First Appellant, a company then known as MCG Aviation Ltd but now called Storm Global Ltd (“MCG”). The Claimant, Mr Jason Lutz, who is the Respondent before us, was from July 2018 to January 2020 a Ryanair contracted pilot based at Stansted and flying Boeing 737s. As between himself and MCG, his services

were nominally supplied by an Irish limited company supposedly owned and controlled by him called Dishford Port Ltd (“Dishford”). It is now accepted that the interposition of Dishford had no effect in law and that the true parties to the relationship were MCG and himself; but I shall have sometimes to refer to it since it features in the formal paperwork. On 13 January 2020, following an incident between the Claimant and Ryanair management, the Claimant was sent a letter by MCG terminating its contract with Dishford – that is, with him. On 28 May 2020 the Claimant, with the support of the British Airline Pilots Association (“BALPA”), commenced proceedings in the Employment Tribunal (“the ET”) against Ryanair and MCG1. He brought two distinct claims, which can be summarised as follows: (A) (B) The Annual Leave Claim. This is brought against MCG alone, for payment in respect of annual leave accrued at the date of his termination. It is brought primarily pursuant to regulation 4 of the Civil Aviation (Working Time) Regulations 2004 (“the CAWTR”), read so far as necessary with the parent EU Directive, 2000/79/EC (“the CAW Directive”); but in the alternative the Claimant relies on what he says is the direct effect of articles 31 and 47 of the EU Charter of Fundamental Rights (“the Charter”). The Equal Terms Claim. This is brought against both MCG and Ryanair, for compensation for not being afforded the same working and employment conditions as he would have enjoyed if he had been an employed pilot, particularly as regards pay and/or annual leave. It is brought pursuant to regulation 5 of the Agency Workers Regulations 2010 (“the AWR”), read so far as necessary with the parent EU Directive, 2008/104/EC, on Temporary Agency Work – the so-called “Agency Workers Directive” (“the AWD”). A preliminary hearing was held by Employment Judge Housego between 29 March and 1 April 2022 in order to determine whether the Claimant had the required employment status to claim (in respect of the annual leave claim) under the CAWTR or the Charter and (in respect of the equal terms claim) under the AWR. He heard Initially he also joined a second Ryanair company, but the claim against it was not proceeded with. Judgment Approved by the court for handing down. Lutz v Ryanair & Another evidence from the Claimant and a BALPA officer and from senior management witnesses for both Ryanair and MCG. By a judgment with written Reasons promulgated on 5 April 2022 he determined those issues in the Claimant’s favour. Specifically: (A) in relation to the annual leave claim, he held that the Claimant was a “crew member ... employed by [MCG]” within the meaning of the CAWTR and a “worker” within the meaning of the Charter; and (B) in relation to the equal terms claim, he held that the Claimant was an “agency worker” within the meaning of the AWR. Both Ryanair and MCG appealed to the Employment Appeal Tribunal (“the EAT”). The appeals were heard on 23 and 24 October 2023 before Heather Williams J, Mr Nick Aziz and Mr Andrew Morris. By a judgment handed down on 30 November both appeals were dismissed. This is an appeal against the decision of the EAT, with the permission of Elisabeth Laing LJ. Ryanair was represented by Mr John Bowers KC, leading Mr Matthew Sheridan; MCG (now Storm Global) by Mr Edward Brown KC, leading Mr Tim Welch; and the Claimant by Mr Michael Ford KC, leading Mr Stuart Brittenden KC. All counsel appeared in both the ET and the EAT. The oral submissions on the two claims were advanced by different counsel for each side. As regards the annual leave claim we were addressed by Mr Brown for MCG and Mr Ford for the Claimant. As regards

the equal terms claim we were addressed mainly by Mr Bowers and Mr Sheridan, but Mr Brown, in addition to adopting their submissions, advanced a distinct argument on behalf of MCG; Mr Brittenden addressed us for the Claimant. We understand that the issues raised by the appeals are of wider relevance to Ryanair's contracted pilot workforce. We were told that 27 claims against it by contracted pilots are stayed pending the outcome of this appeal. 6. 7. 8. THE FACTS 9. The EAT gives a clear and helpful chronological narrative, taken from the ET's rather more diffuse findings, at paras. 15-36 of its judgment. For our purposes, however, it is unnecessary to set out the facts in the same degree of detail since the issues are substantially narrower than they were below. Those interested in a fuller account of the underlying events can find it in the EAT's judgment. I focus on the two contracts governing the relationships between Ryanair, MCG and the Claimant, but I need also to summarise the ET's findings about how those relationships operated in practice. THE CONTRACT BETWEEN RYANAIR AND MCG 10. The relationship between Ryanair and MCG was governed by a written agreement dated 20 December 2011 ("the MCG Agreement"). Clauses 1-5 read as follows: "1. Ryanair agrees to engage the Supplier and the Supplier agrees to provide the Services specified to Ryanair and on the basis of the [sic] Judgment Approved by the court for handing down. Lutz v Ryanair & Another Ryanair's Terms of Business for the supply of Services to Ryanair which are contained with this signed contract for services.

2. The commencement date shall be 20 December 2011. The contract for services is for a period of five years ending on 20 December 2016.
3. The Supplier hereby agrees to arrange for the services of Service Companies to be provided to Ryanair during the term of this Agreement on the terms and conditions hereinafter set forth.
4. Ryanair primarily operates scheduled airline services. To ensure efficient planning and scheduling of crew rest, approximately four crews per aircraft are required to cover the basic roster. The Ryanair flying programme is subject to significant seasonal and regional variations in intensity. To cover these requirements, the Supplier will maintain a pool of pilots to support the contraction and expansion of the Ryanair operation at short notice.
5. The Supplier accepts the appointment to make the services of Service Companies available to Ryanair from time to time to crew Boeing 737-800 aircraft for up to 900 hours per annum² from 1 April to 31 March annually in accordance with the terms and conditions of this agreement." "The Supplier" is MCG (then known as Storm McGinley Support Services). The terms "Service Companies", "Company Representative" and "Services" are defined as follows: "Service Companies" means the Companies engaged as an independent consultant by the supplier to provide the services of the Company Representative for the 'services' required to the [sic] Ryanair. 'Company Representative' means the pilot engaged by the Service Company to fulfil the terms of the contract for services with the Supplier. 'Services' means the following:- A. B. The Supplier has undertaken to procure for Ryanair the services of Service Companies (hereinafter called 'SERVICE COMPANIES'). Supplier has agreed to engage the Service Companies for the sole purpose of having them make their Company

Representatives available to operate as pilots on Ryanair aircraft at any location or base that Ryanair nominates and subject to Ryanair's operation manuals and Safety Management System." The significance of the figure of 900 is that this is the maximum number of hours which a pilot is permitted to fly in a year: see para. 34 below. Judgment Approved by the court for handing down. Lutz v Ryanair & Another 11. It will be seen that the expressed purpose of the MCG Agreement was to provide Ryanair with flexibility by having access to a pool of pilots during its busier periods without it having to give them work, and so pay them, when it is less busy: see in particular clause 4. However, at para. 27 of its Reasons the ET found that throughout the time that the Claimant worked for Ryanair contracted and employed pilots were rostered "on the same basis". Although that is a little opaque, it was accepted before us that it meant that contracted pilots were in fact rostered to fly as many hours as employed pilots: Mr Bowers said that that reflected the fact that Ryanair had throughout that period been expanding its operations. 12. I need not refer to most of the remainder of the terms of the MCG Agreement. However, I should set out clauses 25-27, which are headed "Status of Company Representatives", and clauses 30-31, which are under the heading "Miscellaneous": "25. It is not intended that the Company Representatives shall at any point be employed by Ryanair.

26. During the term of this agreement, the Service Companies and Company Representatives shall be contracted through the Supplier to provide contract services to Ryanair only. The Company Representatives shall report to, and be supervised by, Ryanair personnel. It is agreed that the Company Representatives will not at any time be deemed to be employees of Ryanair.
27. It is understood and agreed that the Supplier is an independent company and is not an agent of Ryanair or of any entity affiliated with Ryanair. Supplier has no power or authority to act for, represent or bind Ryanair in any manner. ...
30. The supplier will appoint a Standards Captain who will act as the technical administrative contact for all the Suppliers [sic] Service Companies and Company Representatives operating on Ryanair aircraft.
31. The relationship governed by this Agreement is neither that of agent-principal, nor that of employer-employee; no person providing services will be the employee of the Client. No person providing services is expected or required to integrate into the Client's business organisation or employed workforce." (The term "Client" in clause 31 is not defined, but it appears to refer to Ryanair.) These clauses taken together are evidently intended so far as possible to preclude any risk of an employment contract or relationship being found to exist between contracted pilots and Ryanair. It should also be noted that the effect of the first sentence of clause 26 appears to be that contracted pilots will not work for any other airline. 13. There is a Schedule to the MCG Agreement, section 2 of which is headed "Rostering Guidelines". We were not taken through its provisions, which are not entirely clear to Judgment Approved by the court for handing down. Lutz v Ryanair & Another the uninitiated, but it imposes various restrictions on rostering of flight time in the interests of

rest and by reference to “EU Ops limits”, which is no doubt a reference to the provisions of the CAW Directive of which I give details below. There is no finding about the rostering cycle, but we were told by Mr Bowers, without objection, that Ryanair’s rosters were on a four-weekly basis but were published twelve months in advance (though they must presumably have been subject to adjustment to meet unexpected contingencies). 14. Although the MCG Agreement was expressed to be for a term of five years, the ET found that the parties continued to operate under it at all material times thereafter. 15. The ET found that MCG supplied pilots primarily, but not exclusively, to Ryanair. THE CONTRACT BETWEEN THE CLAIMANT AND MCG The Claimant’s Recruitment 16. On 10 August 2017 the Claimant applied to Ryanair in response to an advertisement for pilots. He passed a preliminary assessment, conducted by Ryanair, in September 2017, following which he was informed by MCG that he had passed and that he was to be offered a place as a contracted pilot: up to that point he had had no contact with MCG. MCG told him that the necessary contractual arrangements would be made not with him directly but with a company through which his services would be provided: that was of course required by its own agreement with Ryanair. Dishford was incorporated accordingly, though the Claimant had very little to do with the process, which was managed for him by a firm of accountants in Ireland from a panel suggested by MCG. Details of the distinctly unsatisfactory nature of the process are given at paras. 17-21 of the judgment of the EAT, but I need not summarise them here since they are not material to any issue which is live before us. 17. Before starting work the Claimant was required to attend, at his own expense, a training course, specified by Ryanair, on flying Boeing 737s. There is no finding about exactly when he started to work for Ryanair, but it appears to have been some time in July 2018. The Services Agreement 18. On 26 April 2018 the Claimant signed an agreement between himself (designated “the Company Representative”), MCG (“the Contractor”) and Dishford (“the Service Company”): I will refer to this as “the Services Agreement”. It consists of six clauses of a fairly general nature, and a “Schedule 1”, headed “Terms”, which contains various more specific provisions. It is formally dated 1 April 2018, although the commencement date is specified in Schedule 1 as 27 November 2017. Its terms can be summarised as follows. 19. It starts with a recital that “[T]he Service Company is engaged as an independent consultant by the Contractor to provide the services of the Company Representative on the terms and conditions set out below.” Judgment Approved by the court for handing down. Lutz v Ryanair & Another It then proceeds to a number of definitions. I need only note that “the Hirer” is Ryanair; that “Services” is defined as “carrying out the duties of a pilot of a 737-800 aircraft”; and that “Work” is given the meaning defined in Schedule 1. 20. Clause 1 is headed “Basic Terms and Conditions” and comprises sub-clauses (a)-(t). I note the following points:

- (1) Clause 1 (b) gave the Claimant the right to provide the services through a substitute, subject to certain conditions. I need say no more about this since the EAT, approving the decision of the ET (though not its specific reasoning), held that the contract remained one under which the Claimant was obliged to provide personal services: see paras. 164-191 of its judgment. There is no appeal against that aspect of its reasoning.

- (2) Clause 1 (c) provides that MCG is not acting as an agent for Ryanair.
- (3) Clause 1 (d) provides that neither Dishford nor (more pertinently) the Claimant “shall be deemed to be an officer, agent, employee or servant” of either MCG or Ryanair. There is a substantially identical provision at clause 1 (o).
- (4) Clause 1 (j) contains the substantive obligation on Dishford to make the Claimant available “to perform the Work on behalf of the Contractor for the Hirer”: in reality, this is to be construed as an undertaking by the Claimant himself.
- (5) Clause 1 (l) commits Dishford to ensure that the Claimant is available – again, in practice this is an undertaking by the Claimant – to perform “the Work” from March to October and in three of the other four months of the year. Contractually, therefore, the Claimant is obliged to be available for eleven months of the year. MCG would “consider requests for” up to a further three months’ unavailability between November and February and up to ten further “ad hoc” days free of duties.
- (6) Clause 1 (n) requires the Claimant to “operate in accordance with the Hirer’s Operations Manuals and guidelines”. Clause 2 is headed “Fees”. We need not be concerned with the details. The important point is that MCG undertook to pay Dishford for the Claimant’s services as a pilot – in fact, to pay him – at the rates specified in Schedule 1. Clause 3 is headed “Scheduling and Positioning Transport”. Again, the details do not matter, but it should be noted that it provides for scheduling to be in accordance with Ryanair’s Operations Manual and that Ryanair will also designate the Claimant’s operating bases. Clause 4 is immaterial for our purposes. Clause 5 is headed “Termination”. It provides for a wide range of circumstances in which MCG can terminate the Services Agreement summarily. Clause 6, headed “Notice”, gives both MCG and Dishford the right to terminate it unilaterally on three months’ notice. 21. 22. 23. Schedule 1 begins by defining the parties and allocating a “Contract for Services” number. It then defines the term of the contract as being for five years (though it is Judgment Approved by the court for handing down. Lutz v Ryanair & Another common ground before us that this was subject to the provision for termination on three months’ notice in clause 6). It is important, however, to note, because it is the foundation for a submission on the part of the Appellants, that at para. 115 of its Reasons the ET found that at the expiry of the five-year term “any contracted pilot who remained, was, without exception, issued with a new five-year contract”. No further details are given, and it is unclear on how many occasions this had actually occurred, given that the MCG Agreement had only been in place since the end of 2011 and that there was also evidence that most contracted pilots either left or became employed pilots before the end of the term. However, it was common ground before us that the Claimant was unaware of any such practice and that he expected his position as a contracted pilot to come to an end at the end of five years if he had not become an employed pilot in the meantime. 24. The Schedule proceeds to define the Claimant’s “position” as “Co-Pilot on Boeing 737-800”, and the “Work” as follows: “The Company Representative shall perform the duties as pilot as required by the Hirer in accordance with Hirers Manuals and Safety Management System, as may be

amended at the Hirer's sole discretion from time to time." 25. There then follow three sections dealing with, respectively, rates of pay and other financial entitlements, rostering guidelines, and "Minimum Hours Commitment". Only the third is relevant for our purposes. It reads: "A. Where the Company Representative has been providing services under this agreement for at least 12 months, and is available to work, then the Contractor will provide a minimum of 450 flying hours per annum during the period from 1st April to 31st March, or a pro-rata of same to allow for periods of unavailability over the course of the flight year. B. This annual minimum hours guarantee will not apply to any Company Representative who has given notice of intent to terminate this contract or who has received notice of termination." The importance of the figure of 450 hours is that it gives the pilot the opportunity to achieve a minimum level of earnings in the year, and no doubt also to maintain his skills and competence. It is presumably chosen simply as being half of the maximum permitted flying hours. The Practical Operation of the Services Agreement 26. The ET's findings about the practical operation of the Services Agreement appear at a number of different points in its Reasons (although there is a useful summary at para. 104). However, there is no dispute about them, and I need only give an unreferenced summary. Once he had completed his training the Claimant started working for Ryanair as, in effect, a fully-integrated part of its pilot workforce. He wore a Ryanair uniform and had a Ryanair ID card. He had to pass Ryanair competency assessments. The base from which he worked was set by Ryanair. Ryanair set the rosters which were, as we have seen, "on the same basis" for employed and contracted pilots. He Judgment Approved by the court for handing down. Lutz v Ryanair & Another booked his annual leave and time off with Ryanair. He swapped shifts through Ryanair's "Crew Dock" process. The disciplinary process which led to his termination was conducted by Ryanair. In truth none of this is at all surprising: the arrangement would not have been workable if Ryanair had not had complete control of the operational aspects of the Claimant's rostering and work. 27. That does not mean that MCG had no role at all in the Claimant's working life. Importantly, of course, he was paid by it, and it sent him (or, formally, Dishford) monthly statements of earnings. There were also some occasions when it was involved in operational matters. On one occasion the Claimant missed a shift for which he was rostered, and it was MCG who wrote to reprimand him. On another occasion his request for a "pattern share", under which he shared late shifts with another pilot, was responded to by MCG. And, as already noted, his dismissal took the form of a letter from MCG. In all those instances no doubt the underlying decision will have been taken by Ryanair; but the contractual position that his services were supplied by MCG was respected. 28. The ET found that during the period that he worked for Ryanair the Claimant repeatedly asked to become an employed pilot but his request was not accepted. (A) THE ANNUAL LEAVE CLAIM

INTRODUCTION

29. In very broad outline, the issue on this part of the appeal is whether under the arrangements which I have set out above the Claimant is to be treated for the purposes of the CAWTR as being employed by MCG or Ryanair. As noted above, he has an alternative claim under the EU Charter, but I defer consideration of that at this stage. THE LEGISLATION The CAW Directive 30. 31. 32. Formally, the claim is brought under the CAWTR, but since it relates to a period prior to the end of the transition period under the European Union (Withdrawal) Act 2018 (as amended by the European Union (Withdrawal Agreement) Act 2020) (“the EU Withdrawal Act”) the relevant provisions must, so far as possible, be interpreted so as to conform to the requirements of the CAW Directive whose terms it is intended to implement. I will accordingly start with the latter. The purpose of the CAW Directive is to give effect to the terms of the “Agreement on the Organisation of Working Time of Mobile Workers in Civil Aviation” concluded between organisations representing management and labour in the civil aviation sector in the EU (“the Agreement”). The terms of the Agreement are set out as an Annex to the Directive. The provisions which are material for our purposes can be summarised as follows. Clause 2 defines “mobile workers in civil aviation” (being the beneficiaries of the Agreement) as “crew members on board a civil aircraft, employed by an undertaking established in a Member State”. It also contains a definition of “working time” as (so far as material) “any period during which the worker is working, at the employer’s Judgment Approved by the court for handing down. Lutz v Ryanair & Another disposal and carrying out his activity or duties”. It is thus clear that a crew member must be a “worker” employed by an “employer”. It is also clear that for the purpose of the Agreement there can only be a single employer. 33. Clauses 3-5 provide for three specific entitlements of crew members – respectively, to paid annual leave, to free health assessments, and to “safety and health protection appropriate to their work”. I need only set out clause 3, which reads: “1. Mobile staff in civil aviation are entitled to paid annual leave of at least four weeks, in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.
2. The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.” 34. Clauses 6, 8 and 9 are less central for our purposes, but, in brief:
- Clause 6 imposes an obligation on the employer when setting working patterns to “[take] account of the general principle of adapting work to the worker”.
 - Clause 8 sets a maximum annual working time of 2,000 hours and a maximum flying time of 900 hours.
 - Clause 9 provides for minimum numbers of work-free days. The CAWTR 35. The principal provisions of the CAWTR substantially reproduce the terms of the Agreement annexed to the Directive, but the beneficiaries are referred to as “crew members”. “Crew member” is defined in regulation 3 as “a person employed to act as a member of the cabin crew or flight

crew on board a civil aircraft by an undertaking established in the United Kingdom”. 36. 37. “Employment” is defined as “in relation to a crew member, ... employment under his contract”, and the definition provides that “employed” shall be construed accordingly. Regulations 4-6 confer, respectively, the substantive rights required by clauses 3-5 of the Agreement. Thus, as already noted, the annual leave claim in these proceedings is based on regulation 4: regulation 18 provides for such claims to be brought by way of complaint to an employment tribunal. The equivalents of clauses 6, 8 and 9 are regulations 7, 9 and 10. Regulation 12 provides that any person who fails to comply with any of “the relevant requirements” will be guilty of an offence: the requirements in question do not include those under regulation 4. 38. It was common ground before us that, given its origins in the CAW Directive, the term “employed” in regulation 3 of the CAWTR, and cognate expressions elsewhere, Judgment Approved by the court for handing down. *Lutz v Ryanair & Another* are to be understood as corresponding to the autonomous meaning of “worker” and “employer” in the EU jurisprudence. As to that, there is no CJEU authority on the meaning of the term in the CAW Directive itself, but at para. 27 of its judgment in *Fenoll v Centre d’aide par le travail “La Jovenue”* (C-316/13) [2016] IRLR 67, which was concerned with the closely analogous Working Time Directive, the Court said: “The essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.” The same formulation is found in very many other decisions of the CJEU concerned with the employment relationship in a wide variety of contexts, (including *Allonby* and *Ruhrlandklinik* to which I refer below). Although it is in very broad terms, the CJEU case-law establishes that it does not cover genuine “independent economic operators” (see *FNV Kunsten Informatie en Media v Staat der Nederlanden* (C- 413/13) [2015] 4 CMLR 1, at para. 27); and that the right to have the work done by a substitute may be a pointer against worker status (*B v Yodel Delivery Network Ltd* (C- 692/19) [2020] IRLR 550). 39. The EU concept of “worker” is in at least one respect wider than the definition in regulation 3 (1) of the CAWTR since it does not require that the relevant relationship be contractual in character. That gives rise to no direct issue in the present case since, if the Dishford complication is ignored, the Claimant clearly had a contractual relationship with MCG, but I mention it because it features tangentially in the arguments before us. Describing the worker as “employed” by the other party to the relationship, referred to as “the employer”, is potentially confusing because the same language is used in the context of the relationship created by a contract of employment in the narrower domestic-law sense of a contract of service; but there should be no real confusion in the circumstances of this case. THE ISSUE 40. As regards the claim under the CAWTR, the preliminary issue which the ET was required to determine was whether the Claimant satisfied the definition of “crew member” in regulation 3 of the CAWTR. As to that, the area of dispute is now very limited. Specifically:

- (1) The interposition of Dishford is now accepted to be irrelevant: the ET found that the service company arrangement was fictitious, and in his oral submissions before the EAT Mr Brown accepted that he could not go behind that finding (see para. 136 of its judgment).

- (2) There is no dispute that the Claimant was “a member of ... flight crew on board a civil aircraft”. (3) It is accepted that the Claimant satisfied the definition of a “worker” within the meaning of the Directive. More particularly, it is not suggested that he was an “independent economic operator” nor, as noted at para. 20 (1) above, is any reliance now placed on the substitution clause in the Service Agreement. Judgment Approved by the court for handing down. *Lutz v Ryanair & Another* 41. It follows that the Claimant was in an employment relationship with someone. The only remaining issue is with whom – or, to put it more simply, who was his employer. Mr Brown’s fundamental submission is that it was not MCG. He was reluctant to advance a positive case that the true employer was Ryanair: all that mattered was that the employer was not his client. That is formally correct, but the necessary implication of MCG’s case is nevertheless that he was employed by Ryanair. That appears to be tacitly recognised in MCG’s skeleton argument, which adverts to the Claimant’s “presumably tactical” decision not to bring the annual leave claim against Ryanair. THE PARTIES’ CASES 42. 43. The Claimant’s case that MCG was his employer is straightforward. Once the fiction of the use of a service company is put to one side, the Service Agreement constitutes an express written agreement between him and MCG under which he undertook to provide his services as a pilot and in return MCG agreed to pay him on the basis there set out. By contrast, there is no agreement of any kind between him and Ryanair. It is true that the services in question were provided to Ryanair, and he worked under its direction and supervision, but the law is very familiar with so-called “tripartite arrangements” under which A (the worker) is employed by B (typically referred to as an “agent” or “supplier”) to provide services to, and under the direction of, C (the “principal” or “end-user”). The contract between the Claimant and MCG is entirely explicit that that was the arrangement here: see para. 20 (3) above, reflecting similar provisions in the MCG Agreement. Thus the fact that the Claimant’s services were provided to, and under the supervision and direction of, Ryanair affords no basis for finding an employment relationship between them as opposed to between him and MCG. In support of the submissions that such tripartite arrangements under which the agency remains the employer are well recognised in law, Mr Ford relied on a number of both domestic and CJEU authorities, which I will review in turn. As regards domestic law, Mr Ford referred us to the leading case of *James v London Borough of Greenwich* [2008] EWCA Civ 35, [2008] ICR 545. In that case the claimant was a housing support worker whose services were supplied by an agency (in fact, two successive agencies) to the respondent local authority on a full-time and continuous basis for over three years. Her activities were wholly under the control of the authority, and she worked as an integral part of its social services team. However, she had no express agreement with the authority: rather, she signed what was described as a “temporary worker agreement” with the agency and was paid by it. When the authority dispensed with her services she brought a claim against it for unfair dismissal. The employment tribunal dismissed her claim on the basis that she was not employed by the authority. The EAT, in a judgment given by Elias J ([2007] ICR 577), held that that was a decision which it was entitled to reach on the facts; and its judgment was upheld by this Court. Its essential ratio was that the question whether the claimant was employed by the authority fell to be determined by ordinary contractual

principles, and that since her provision of services to the authority was fully explicable by reference to the contractual arrangements between her and the agency there was no basis for implying any contractual relationship between her and it. As Mummery LJ put it at paras. 41-42 of his judgment (with which Thomas and Lloyd LJ agreed): Judgment Approved by the court for handing down. *Lutz v Ryanair & Another* “41. On the implied contract of service approach to the facts found by the ET it was, in my judgment, entitled to conclude that Ms James was not an employee of the Council because there was no express or implied contractual relationship between her and the Council. Her only express contractual relationship was with the employment agency, as she recognised when she changed agencies rather than employers in order to obtain a higher wage. The Council’s only express contractual relationship was also with the agency. There were no grounds for treating the express contracts as other than genuine contracts.

42. The ET was not perverse in holding that it was unnecessary to imply a third contract between Ms James and the Council. What Ms James did and what the Council did were fully explained in this case by the express contracts into which she and the Council had entered with the employment agency. The Council provided work to Ms James for several years, but the ET found that it was not under any implied obligation to do so. The mere passage of time did not generate a legal obligation on the part of the Council to provide her with work any more than it generated a legal obligation on her to do the work. The provision of work by the Council, its payments to the employment agency and the performance of work by Ms James were all explained in this case by their respective express contracts with the employment agency, so that it was not necessary to imply the existence of another contract in order to give business reality to the relationship between the parties.” 44. 45. It was not necessary for any decision to be reached about the nature of the contract between the claimant and the agency: what mattered was that that, however it was to be characterised, was the contract under which the claimant worked. James therefore clearly establishes that as a matter of domestic law the mere fact that an agency worker may work for the principal as an integral part of its organisation, full-time and for a period of years, is an insufficient basis for concluding that there was any employment contract between them.
46. Mr Brown submitted that James had no bearing on the present case because unfair dismissal protection is only extended to persons employed under a contract of service, whereas in the present case the issue is whether the Claimant was employed by MCG as a worker, which is a broader concept, and indeed one which does not require the existence of a contract at all: see para. 39 above. I cannot see that that is a relevant distinction. The reasoning in *James* is equally applicable to the question whether there is a contract, or employment relationship, of any character between the worker and the principal: if the provision by A of his or her services to C can be properly accounted for by their express contract, or relationship, with B there is no basis for implying the existence of a contract, or relationship, between them and C. 47. , Mr Ford referred us first to *Allonby v Accrington & Rossendale As* regards EU law *College (C-256/01)* [2004] ICR 1328. In that case the applicant was one of a predominantly female group of part-time lecturers whose services were

supplied to a Judgment Approved by the court for handing down. Lutz v Ryanair & Another college by an agency called ELS:³ their contractual arrangements were with ELS and they were paid by it. The applicant brought various claims against both ELS and the college, but I need only refer to her claim against ELS for equal pay with full-time lecturers (predominantly male) employed by the college. Various questions relating to that claim were referred to the CJEU. We need not be concerned with the Court's decision on the primary issues. What is important for our purposes is that its analysis of one of those issues, namely whether the applicant was a worker, proceeded on the basis that her employer was ELS, notwithstanding that it was the college to whom, and under whose control and supervision, her services were provided: the relevant part of the judgment is at paras. 61-71, but I need not quote it here. Mr Brown pointed out that the Court appears to have assumed rather than decided that that was the correct position. Mr Ford acknowledged that, but he submitted that what mattered was that it evidently had no difficulty with the concept of such a relationship.

48. Mr Ford also referred us to two decisions of the CJEU under the AWD. I shall have to refer to the AWD in more detail in the context of the equal terms claim. Here I only note that its purpose is, broadly, to require equal treatment between agency workers and directly-employed workers. Article 1 defines the scope of the Directive as applying to “workers with a contract of employment or employment relationship with a temporary-work agency who are assigned to user undertakings to work temporarily under their supervision and direction”. The recognition that the Directive makes provision for such relationships might in itself be enough to make the point that they are recognised in EU law, but Mr Ford submits that it is reinforced by the decisions in question. 49. 50. The first of those two decisions is *Betriebsrat der Ruhrlandklinik GmbH v Ruhrlandklinik GmbH* (C-216/15) [2017] IRLR 194 (“Ruhrlandklinik”). In this case a not-for-profit association of nurses under the aegis of the German Red Cross supplied their services to healthcare institutions by way of what was described (as translated) as “secondment” – in the case in question, a clinic in the Ruhrland. As a matter of German law the nurses were members of the association rather than employed by it. Nurses who were so seconded were, as the Advocate General put it at para. 10 of his Opinion, subject to “the ... functional and organisational instructions” of the clinic; but they were paid by the association. The question referred to the CJEU was whether, for the purpose of the AWD, seconded nurses were workers notwithstanding the absence of an employment contract with the association. The Court held that it was sufficient that they were in an employment relationship with it; but the point on which Mr Ford relies is that the relationship in question was with the association and not with the clinic. Mr Brown said that the case was of no relevance to the issue before us because it concerned secondment, but I do not accept that. Quite apart from the fact that we do not know the significance of whatever (German) term was translated as “secondment”, it does not seem to me that the label matters: the point is that this was a case where, as in the present appeal, A was employed by B to provide services (full-time) to C and under C's direction and supervision. The second decision was *LM v Omnitel Comunicaciones SL* (C-441/23) [2025] ICR

688. In this case the claimant worked as a sales and marketing consultant for the Spanish arm of Microsoft (by whom she had been trained); but she was employed to They had in fact previously been employed directly by the college, but that is immaterial for our purposes. Judgment Approved by the court for handing down. Lutz v Ryanair & Another do so by a series of independent companies who supplied her services to it. Various questions relevant to her claim under the AWD were referred to the CJEU, but for our purposes it is necessary only to quote paras. 55-57 of the judgment of the Court, which read: “55. The concept of ‘worker’ is defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship is that, for a certain period of time, a person performs services for and under the direction of another person, in return for which he or she receives remuneration (see, inter Bosworth and Hurley, C- alia, judgment of 11 April 2019, 603/17, EU:C:2019:310, paragraph 25 and the case-law cited).
56. However, the assignment of temporary agency workers is a complex situation which is specific to labour law, involving a twofold employment relationship between, on the one hand, the temporary- work agency and the temporary agency worker and, on the other, the temporary agency worker and the user undertaking, as well as a relationship of assignment between the temporary-work agency and the user undertaking (judgment of 11 April 2013, Della Rocca, C- 290/12, EU:C:2013:235, paragraph 40).
57. The particularity of that employment relationship lies in the fact that, when a temporary agency worker is assigned, the temporary- work agency retains an employment relationship with that worker, but transfers the responsibility for supervision and direction which generally lies with all employers to the user undertaking [my emphasis], thereby establishing a new relationship of subordination between the temporary agency worker and the user undertaking, whereby that worker provides a service contractually owed by the temporary-work agency to that undertaking and is placed, for that purpose, under the latter’s supervision and direction.” Mr Ford relied on the words which I have italicised in para. 57 for the clear acknowledgment that there is an employment relationship between the worker and the agency notwithstanding that the principal has the responsibility for supervising and directing the employer’s work. 51. It is convenient to say at this point that, although I think that Mr Ford is entitled to rely on the two CJEU authorities for the purpose that he does, the Court was not primarily focused on the issues before us, and the reference in para. 56 of the judgment in Omnitel to the worker enjoying separate “employment relationships” with both the agency and the principal has to be understood in the context of the provisions of the AWD. Mr Brown did not contend that in the context of the CAWTR it was possible for a crew member to have two employers. 52. Despite his particular submissions noted above, Mr Brown did not dispute Mr Ford’s basic proposition that both domestic and EU law recognise that an agency worker may be employed by the agency and not by the principal. Rather, his case was that Judgment Approved by the court for handing down. Lutz v Ryanair & Another the authorities relied on by Mr Ford did not show that there was any general rule. What was necessary in each case was an analysis of the particular

facts in order to establish whether the agency or the principal was the employer, and for that purpose the essential question was which of them in truth had direction and control of the worker's working life. 53. In support of that submission Mr Brown relied on paras. 72-75 of the judgment of Lord Leggatt in *Uber BV v Aslam* [2021] UKSC 5, [2021] ICR 657. Those paragraphs form part of a passage in which Lord Leggatt is considering the protective purpose of employment legislation. In paras. 72-74 he refers to the definition of worker in the CJEU case-law to which I have already referred, noting that in *Allonby* reference had also been made (at para. 68 of the Court's judgment) to "a relationship of subordination". At para. 75 he continues: "The correlative of the subordination and/or dependency of employees and workers in a similar position to employees is control exercised by the employer over their working conditions and remuneration. As the Supreme Court of Canada observed in *McCormick v Fasken Martineau DuMoulin LLP* 2014 SCC 39; [2014] 2 SCR 108, para 23: 'Deciding who is in an employment relationship ... means, in essence, examining how two synergetic aspects function in an employment relationship: control exercised by an employer over working conditions and remuneration, and corresponding dependency on the part of a worker. ... The more the work life of individuals is controlled, the greater their dependency and, social and psychological their economic, consequently, vulnerability in the workplace ...' ... It is these features of work relations which give rise to a situation in which such relations cannot safely be left to contractual regulation and are considered to require statutory regulation." Basing himself on that passage, Mr Brown submitted that the essential elements in an employment relationship were that the worker worked under the direction and control of the putative employer and in a relationship of subordination to it. He submitted also that what mattered was not the terms of any contractual arrangements but the nature of the practical working relationship. 54. Adopting that approach, Mr Brown relied on the ET's findings about the circumstances of the Claimant's recruitment, in which MCG had no involvement, and the extent to which he was integrated into Ryanair's workforce and worked pursuant to its direction and control: see paras. 16 and 26 above. He attached particular significance to the ET's characterisation of those findings as showing that the Claimant was "employed as a resource by Ryanair". He contrasted that relationship with the extremely limited extent of the Claimant's dealings with MCG as regards operational matters (as to which see para. 27 above). At one point in his submissions he went so far as to describe MCG's role as being in essence no more than a payroll administrator. He submitted that it was impossible to conclude from those facts that the Claimant's relationship with MCG showed "the necessary level of subordination and control envisaged by Uber". Consistently with the approach noted at para. 41 Judgment Approved by the court for handing down. *Lutz v Ryanair & Another* above, he did not positively submit that the Claimant's employer was Ryanair, but that was the inevitable implication of his submissions.

55. Mr Brown also drew our attention to regulation 36 of the Working Time Regulations 1998 ("the WTR"), which govern working time for the generality of workers. It is headed "Agency workers not otherwise 'workers'" and reads: "(1) This regulation applies in any case where

an individual ('the agency worker') — (a) (b) (c) is supplied by a person ('the agent') to do work for another ('the principal') under a contract or other arrangements made between the agent and the principal; but is not, as respects that work, a worker, because of the absence of a worker's contract between the individual and the agent or the principal; and is not a party to a contract under which he undertakes to do the work for another party to the contract whose status is, by virtue of the contract, that of a client or customer of any profession or business undertaking carried on by the individual.

- (2) In a case where this regulation applies, the other provisions of these Regulations shall have effect as if there were a worker's contract for the doing of the work by the agency worker made between the agency worker and —
- (a) whichever of the agent and the principal is responsible for paying the agency worker in respect of the work; or (b) if neither the agent nor the principal is so responsible, whichever of them pays the agency worker in respect of the work, and as if that person were the agency worker's employer." There is no equivalent provision in the CAWTR. Mr Brown submitted that the inclusion in the WTR of special provision for the case of agency workers showed that in the absence of such provision they would not be regarded as workers employed by the agency in any relevant sense; and that the absence of such provision meant that that was the case under the CAWTR. He acknowledged that that might be regarded as a lacuna, but it was one which could only be filled by legislation. 56. I should mention that, since Ryanair would potentially be affected by our decision on this issue even though it was not a party to the claim, we asked Mr Bowers whether he wished to make any submissions about it. His position was that we should not make any finding about the Claimant's relationship with Ryanair for the purposes of the CAWTR since no claim had been made against it, and he declined to make any substantive submissions on the issue. Judgment Approved by the court for handing down. *Lutz v Ryanair & Another* THE DECISIONS OF THE ET AND THE EAT 57. At para. 1 of its formal Judgment the ET found that "The claimant was a 'crew member' employed by [MCG] within the meaning of regulation 3 of [the CAWTR]." However, its reasoning in support of that conclusion is very brief. Para. 91 of the Reasons reads simply: "As Ryanair and MCG set up the situation, and as MCG paid Mr Lutz via a service company they set up, he was a worker for them. ... No one says he was a worker for Ryanair – that is not the claim." Mr Brown submitted that that reasoning is obviously flawed. If the final sentence means that the fact that no claim had been brought against Ryanair was relevant to the question whether the Claimant was employed by it or by MCG, that is obviously a non sequitur. The only other factor mentioned is that he was paid by MCG; but, he submits, that could not by itself be a sufficient reason for finding an employment relationship. 58. The EAT upheld the finding of the ET, but it addressed Mr Brown's case much more fully. Its essential reasoning appears at paras. 143-156 of its judgment. Its analysis is complicated both by the need to address some difficulties in the details of the ET's reasoning and by the fact that it was dealing also with the question of whether the Claimant was a worker at all, irrespective of who his employer was, which is not in issue before us. That being so, without intending any disrespect, I will not attempt to summarise it here. Ultimately, the issue of

whether, on the basis of the ET's findings of fact, the Claimant was employed by MCG is one of law, and it is more straightforward if we address it directly rather than through the lens of the EAT's reasoning. DECISION 59. The relevant ground of appeal (ground 1) reads: "The ET and the EAT were wrong to conclude that C was a crew member 'employed by' MCG for the purpose of the CAWTR." 60. I would reject that ground. I see no reason not to apply the approach in James. The contractual arrangements under which the Claimant worked for Ryanair were made, quite explicitly, between himself and MCG, and indeed included express provisions that he was not employed by Ryanair: see para. 20 (3) above. That fully accounts for his providing the services that he did. There is no basis for implying the existence of any employment contract, or relationship, with Ryanair. The (unsurprising) fact that he provided those services under Ryanair's exclusive direction and control makes no difference: that is typically the case in any tripartite arrangement of the kind with which we are here concerned, as illustrated by the authorities cited by Mr Ford.

61. With all respect to Mr Brown, his reliance on Uber is a red herring. The passage to which he refers is concerned, at a high level of generality, with the question of who is a worker and accordingly entitled to the protection of the legislation. The questions Judgment Approved by the court for handing down. Lutz v Ryanair & Another 62. 63. of subordination and dependency are raised in that context. But there are no protection issues in this case. There is no dispute that the Claimant was a worker: he was obviously working in a position of subordination and subject to (Ryanair's) direction and control. Rather, the issue is, as I have already said, who his employment relationship was with. That was not the question being addressed by Lord Leggatt in the passage relied on, which is not concerned with the kind of tripartite agency relationship which arises in this case. The effect of the authorities relied on by Mr Ford is that in such cases the necessary element of "direction and control" may be exercised by the principal rather than the employer. For the same reason, there is no justification for not taking the written contract at face value: Mr Brown did not suggest that it was a sham. In terms of protecting the more vulnerable party, the boot is in truth on the other foot. Other things being equal, it is in the worker's interest to be able to take the straightforward course of bringing his or her claim against the party which has explicitly identified itself as their employer. Nor am I persuaded by Mr Brown's argument based on regulation 36 of the WTR. That regulation provides for protection where an individual is supplied by an agency but does not have "a worker's contract" with either the agent or the principal (see paragraph (1) (b)). I am bound to say that I do not find the purpose of the regulation very easy to identify, and counsel were not able to refer us to any relevant external materials. I am inclined to think that the clue may be in the reference to a "contract". The definition of "worker" in regulation 2 of the WTR requires that the relevant services be provided under a contract with the employer: that creates a mismatch with EU law – which, as noted at para. 39 above, requires only a "relationship" – which the drafter may have been intending to address. I note in this regard that regulation 36 appears in Part V of the WTR ("Special Classes of Person"), alongside provisions addressing various other kinds of non-contractual relationships such as those of members of the armed forces and

the police. On this basis, the Secretary of State should indeed for consistency have included a similar provision in the CAWTR, though the omission to do so creates no difficulty in the present case because the Claimant on any view has a contract with MCG4. But whether that is the thinking behind regulation 36 or not, it is clearly directed at an exceptional case of some kind. I cannot regard it as justifying the conclusion that the Secretary of State believed that an agency worker would not typically be employed by either the principal or the agent; and in any event we should construe the CAWTR in accordance with the general analysis of this kind of tripartite relationship adopted in the domestic and EU case-law. 64. It was not Mr Brown's case that a situation where the duties imposed by the CAWTR – as to which, see paras. 34 and 37 above – were owed by MCG rather than Ryanair would create practical difficulties in their implementation. However, the Court did raise that question with Mr Ford. At first blush, it might be thought that, since the duties in question concern the organisation of working time for flight crew, which is inevitably something that can only be managed by the airline itself, it does not make sense for them to be owed by a third party which has no management involvement at In fact even the absence of a contract would probably not create a difficulty, given the need to construe the Regulations conformably with the Directive: cf. such cases as *Gilham v Ministry of Justice* [2019] UKSC 44, [2019] ICR 1655. Judgment Approved by the court for handing down. *Lutz v Ryanair & Another* all. Mr Ford pointed out that the claim in the present case under regulation 4 (the equivalent of clause 3 of the Agreement) is simply to be paid a sum of money in respect of annual leave taken, and that accordingly no difficulty of that kind arises; but I think it is necessary to have regard to the totality of the obligations under the CAWTR, which are primarily about the limitation of actual working time and not about any pecuniary right. However, on reflection I do not believe that there is any such difficulty. If the employer of a particular crew member is not itself the operator of the airline, the effect of the CAWTR is that it will have to secure that the operator respects the relevant limits. I see no reason why that should not be workable. An obligation on the airline to roster the crew member in a way which conforms to their rights under the CAWTR could readily be included in the agreement between it and the agency, and could hardly be objected to.5 Indeed where – as here, and indeed as I suspect is typical – agency-supplied crew members are working on the same basis as the airline's own employees the airline will anyway be rostering the entire crew in a manner which is CAWTR-compliant. 65. Finally, I would note that, although the issue arises in the present case in the context of a conventional agency agreement, that is not the only situation in which A may be employed by B to work for C. It is not at all uncommon for employees of one company in a group to be deployed to work, whether ad hoc or pursuant to a regular arrangement, for another company in the same group, and that model may indeed often be employed by airlines.6 If Mr Brown's submission were correct, the issue of who was the employer would in all such cases be determined not by the explicit contractual arrangements, which involve no inherent disadvantage to the worker, but by reference to the degree of direction and control exercised by C. That would not be a sensible outcome. THE CLAIM UNDER THE CHARTER 66. Ground 2 of the grounds of appeal contends that the ET and the EAT were wrong to hold that if they had not upheld his claim under the CAWTR he

would nevertheless have been entitled to succeed on the basis of article 31 of the Charter. In view of my conclusion above I need not consider that question, and I see no advantage in doing so. If the Claimant were indeed entitled to claim under article 31 the substantive content of such a claim would necessarily have been identical to a claim under the CAW Directive and thus the CAWTR. CONCLUSION ON THE ANNUAL LEAVE CLAIM ISSUE 67. I would dismiss MCG's appeal and hold that the Claimant is entitled to bring a claim against it under the CAWTR for payment in respect of annual leave. 6 It appears that the MCG Agreement is intended to do so: see the reference in cl. 5 to the maximum annual limit of 900 hours, and the provisions of section 2 of the Schedule referred to at para. 10 above. Indeed, there is at least one example in a well-known authority. In *Crofts v Veta Ltd*, being one of the group of cases about the territorial jurisdiction of the ET considered by the House of Lords and reported as *Lawson v Serco Ltd* [2006] UKHL 3, [2006] ICR 250, a group of pilots flying for Cathay Pacific were, for reasons which benefited both parties, employed by a wholly-owned subsidiary with no operational role. Judgment Approved by the court for handing down. *Lutz v Ryanair & Another (B) THE EQUAL TERMS CLAIM*

INTRODUCTION

68. The overall issue on this part of the appeal is whether the Claimant comes within the definition of “agency worker” in the AWR, but that turns entirely on the question whether under the arrangements set out above he is to be regarded as being supplied by MCG “to work temporarily for ... Ryanair”. I begin by setting out the relevant legislative provisions. THE AGENCY WORKERS DIRECTIVE 69. 70. Although the Claimant's claim is under the AWR, it makes sense, for the same reason as noted at para. 30 above, to start with the terms of the underlying Directive. The official title of the AWD identifies its subject as “Temporary Agency Work”. I should set out four of the recitals: “(5) In the introduction to the framework agreement on fixed-term work concluded on 18 March 1999, the signatories indicated their intention to consider the need for a similar agreement on temporary agency work and decided not to include temporary agency workers in the Directive on fixed-term work. ...
- (9) In accordance with the Communication from the Commission on the Social Agenda covering the period up to 2010, which was welcomed by the March 2005 European Council as a contribution towards achieving the Lisbon Strategy objectives by reinforcing the European social model, the European Council considered that new forms of work organisation and a greater diversity of contractual arrangements for workers and businesses, better combining flexibility with security, would contribute to adaptability. Furthermore, the December 2007 European Council endorsed the agreed common principles of flexicurity⁷, which strike a balance between flexibility and security in the labour market and help both workers and employers to seize the opportunities offered by globalisation. ...

- (13) Council Directive 91/383/EEC of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship establishes the safety and health provisions applicable to temporary agency workers. ...
- (15) Employment contracts of an indefinite duration are the general form of employment relationship. In the case of workers who have a permanent contract with their temporary-work agency, and in view of This is a peculiarly ugly neologism which I am glad to say does not seem to have caught on generally, but its broad meaning is sufficiently clear. Judgment Approved by the court for handing down. Lutz v Ryanair & Another the special protection such a contract offers, provision should be made to permit exemptions from the rules applicable in the user undertaking.” I explain the reference in recital (5) to the agreement relating to fixed-term work at para. 74 below. Recital (13) is significant only because of the dichotomy which it applies between a “fixed-duration employment relationship” and a “temporary employment relationship”. 71. The term “temporary agency workers” is defined in article 3.1 (c). This, with the definitions of the various terms used in it, reads: “For the purposes of this Directive:
- (a) ... ; (b) (c) (d) (e) ‘temporary-work agency’ means any natural or legal person who, in compliance with national law, concludes contracts of employment or employment relationships with temporary agency workers in order to assign them to user undertakings to work there temporarily under their supervision and direction; ‘temporary agency worker’ means a worker with a contract of employment or an employment relationship with a temporary- work agency with a view to being assigned to a user undertaking to work temporarily under its supervision and direction; ‘user undertaking’ means any natural or legal person for whom and under the supervision and direction of whom a temporary agency worker works temporarily; ‘assignment’ means the period during which the temporary agency worker is placed at the user undertaking to work temporarily under its supervision and direction ...” 72. The primary operative provision of the AWD is article 5.1, which is headed “The Principle of Equal Treatment” and reads: “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.” It is necessary also, because it features in the authorities to which I will have to refer, to note the terms of article 5.5, which reads (so far as relevant): “Member States shall take appropriate measures, in accordance with national law and/or practice, with a view to preventing misuse in the application of this Article and, in particular, to preventing successive assignments designed to circumvent the provisions of this Directive.” 73. I should note two other provisions of the AWD which are not directly material but which are referred to in the authorities. Article 4.1 reads: Judgment Approved by the court for handing down. Lutz v Ryanair & Another “Prohibitions or restrictions on the use of temporary agency work shall be justified only on grounds of general interest relating in particular to the protection of temporary agency workers, the requirements of health and safety at work or the need to ensure that the labour market

functions properly and abuses are prevented.” Article 6.1 reads: “Temporary agency workers shall be informed of any vacant posts in the user undertaking to give them the same opportunity as other workers in that undertaking to find permanent employment.” 74. The reference in recital (5) to “the framework agreement on fixed-term work” is to an agreement between EU-wide bodies representing employers and workers (“the social partners”) given effect by EU Council Directive 1999/70/EC (“the Fixed-Term Work Directive” – “FTWD” for short), to which it is annexed. That agreement is one of a suite of agreements relating to “non-standard” employment of various kinds, the first being the agreement which resulted in EU Council Directive 97/81/EC (“the Part-time Work Directive”). Its broad purpose appears from the Preamble, the relevant parts of which read as follows: “The parties to this agreement recognise that contracts of an indefinite duration are, and will continue to be, the general form of employment relationship between employers and workers. They also recognise that fixed-term employment contracts respond, in certain circumstances, to the needs of both employers and workers. This agreement sets out the general principles and minimum requirements relating to fixed-term work, recognising that their detailed application needs to take account of the realities of specific national, sectoral and seasonal situations. It illustrates the willingness of the Social Partners to establish a general framework for ensuring equal treatment for fixed-term workers by protecting them against discrimination and for using fixed-term employment contracts on a basis acceptable to employers and workers.” The point made in the first paragraph is re-stated in paragraph 6 of a section headed “General Considerations” – in effect, the recitals – which reads: “Whereas employment contracts of an indefinite duration are the general form of employment relationships and contribute to the quality of life of the workers concerned and improve performance ...” The details of the Agreement are not relevant for our purpose. I need only note that clause 4 states a “principle of non-discrimination” between fixed-term workers and “comparable permanent workers”; and that clause 5 requires member states to introduce one or more measures to prevent abuse, including the maximum duration of successive fixed-term contracts⁸. In accordance with the latter requirement the UK has introduced, by regulation 8 of the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002, a provision which (in summary) has the effect that an employee who has been employed for Judgment Approved by the court for handing down. *Lutz v Ryanair & Another* 75. As recital (5) to the AWD says, the social partners expressly stated that they decided not to make any provision in the framework agreement as regards temporary agency workers. Recital (13) to the FTWD reads: “Management and labour wished to give particular attention to fixed-term work, while at the same time indicating that it was their intention to consider the need for a similar agreement relating to temporary agency work ...” The same point is made in the preamble to the agreement. The significance of all this is that the legislators (which for these purposes means the social partners) recognised that temporary agency work was potentially problematic in the same way as fixed-term work, because it prevented workers from having the security of “employment contracts of an indefinite duration”. 76. It is important to appreciate from the start that the essential distinction in the AWD, as in the FTWD to which it refers, is between “relationships which

continue indefinitely” (described as “permanent”), which are regarded as the norm, and relationships which are finite (described as “temporary”). To anticipate a point to which I shall have to return, the labels “permanent” and “temporary” are linguistically capable of having other meanings; but that is what they mean here. THE AGENCY WORKERS REGULATIONS 77. The primary operative provision of the AWR is regulation 5, which is headed “Rights of agency workers in relation to the basic working and employment conditions” and gives effect to the principle of equal treatment prescribed by article 5.1 of the AWD. I need only quote paragraph (1), which reads (so far as material): “... [A]n agency worker (A) shall be entitled to the same basic working and employment conditions as A would be entitled to for doing the same job had A been recruited by the hirer — (a) other than by using the services of a temporary work agency; and (b)” 78. The term “agency worker” is defined in regulation 3 (1) as follows: “In these Regulations ‘agency worker’ means an individual who — (a) is supplied by a temporary work agency to work temporarily for and under the supervision and direction of a hirer; and (b) has a contract with the temporary work agency which is — (i) a contract of employment with the agency, or (ii) any other contract with the agency to perform work or services personally.” I should for completeness also quote the definition of “temporary work agency”, which reads: more than four years automatically becomes a “permanent employee”. Judgment Approved by the court for handing down. Lutz v Ryanair & Another “In these Regulations ‘temporary work agency’ means a person engaged in the economic activity, public or private, whether or not operating for profit, and whether or not carrying on such activity in conjunction with others, of — (a) (b) supplying individuals to work temporarily for and under the supervision and direction of hirers; or paying for, or receiving or forwarding payment for, the services of individuals who are supplied to work temporarily for and under the supervision and direction of hirers.” 79. 80. It is clear from that definition that, although the AWR refers to “agency workers” rather than, as in the AWD, “temporary agency workers”, the requirement that the supply be temporary is equally central. The Claimant’s claim is for breach of regulation 5. By regulation 14 of the AWR, liability for such a breach may rest with either the agency or the hirer, or both, depending on the extent of their respective responsibility for it (see London Underground Ltd v Amissah [2019] EWCA Civ 125, [2019] ICR 1155). That is why the equal terms claim is brought against both MCG and Ryanair. THE DECISIONS OF THE ET AND THE EAT The ET 81. The ET’s conclusion on the “temporarily” issue is summarised at para. 17 of the Reasons as follows: “To be an agency worker, the work has to be temporary. I conclude that the circumstances meet that definition ... In essence it was a fixed term of five years. Mr Lutz pressed for employment. That would be permanent: he was temporary. As Mr. Ford pointed out, a five-year posting is, in EU law, temporary. I reject the argument that temporary means, only, short term, such as cover for another. The word temporary stems, of course, from the Latin for time. This was a time limited appointment. That in some cases it was replaced by another time limited appointment (as occurred⁹) does not make it cease to be a time limited appointment.” 82. The reasoning in that paragraph is more fully developed at paras. 102-120, with reference to three EAT authorities – Moran v Ideal Cleaning Services Ltd [2013] UKEAT 0274/13/1312, [2014] ICR 442 (Singh J); Brooknight

Guarding Ltd v Matei

- [2018] UKEAT 0309/17/2604 (HH Judge Eady QC); and Angard Staffing Solutions Ltd v Kocur UKEAT/50/20, [2020] ICR 1541 (HH Judge Auerbach). I shall consider those authorities below, and it is unnecessary for me to reproduce the ET's review of them. I should, however, record that the Judge repeatedly returns to the fact that the Service Agreement specifies a five-year fixed term, including at paras. 102 and 115. This a reference to the Judge's finding, noted at para. 23 above, that in practice a new contract would be issued if a contracted pilot reached the end of the five-year term under the Service Agreement. Judgment Approved by the court for handing down. Lutz v Ryanair & Another The EAT 83. The EAT addresses the "temporarily" issue in two stages. At paras. 112-120 it carefully analysed the three EAT authorities identified above. Its conclusion, at para. 120, was that the correct approach in law was as follows: "(i) The question is whether the individual was supplied by the agency to work 'temporarily' under the supervision and direction of the hirer: regulation 3(1)(a); (ii) A temporary supply is one that is terminable upon some other condition being satisfied, for example, the expiry of a fixed period or the completion of a particular event. It does not mean short term. The contrast is with an indefinite supply, which is to say one that is open-ended in duration: Moran paragraph 41; Brooknight paragraphs 25 and 28; and Angard paragraph 46; (iii) Accordingly, the distinction between a temporary supply and an indefinite one is binary; there is no intermediate form of supply for these purposes; (iv) The focus is on the purpose and nature of the work for which the worker was supplied; to determine whether it is temporary or permanent: Brooknight paragraph 25;
- (v) In this regard, the focus is upon the basis on which the individual was supplied to the hirer, rather than on the overarching arrangement between the agency and the hirer: Angard paragraphs 46, 50 and 51; (vi) A finding of fact will need to be made about the basis on which the worker is supplied to work for the hirer and then a decision made as to whether that basis amounts to a supply to work temporarily: Angard paragraphs 44-45; (vii) The terms of the contract between the individual and the agency will not necessarily be determinative of this question, but may parties provide intended: Brooknight paragraph 25, Angard paragraphs 48 and 50; evidence what the as to (viii) In some cases the documentation created when the relationship between the individual and the agency was formed will contain all the particulars of the supply which are contemplated, including sufficient terms to enable the tribunal to identify the basis of the supply from the documentation alone. Whereas in other cases, the documents may simply provide the framework for the supply or may not reflect what was done in practice. The question is what was in fact the basis in practice on which the supply was made: Brooknight, paragraphs 25-26 and Angard 52-54; and Judgment Approved by the court for handing down. Lutz v Ryanair & Another (ix) If the individual is supplied to the hirer on successive occasions, then the question is the basis upon which s/he was supplied on each such occasion. There can be a number of temporary supplies of a worker to the same hirer: Angard paragraphs 46, 64 and 66." It is convenient to record here that Mr Bowers said that he did not challenge any of those propositions except

(ii). 84. At paras. 192-212 of its judgment the EAT applied that approach to the facts as found by the ET in the light of the criticisms of the ET's reasoning advanced by the Appellants. It is sufficient to say that, although it identified some errors and confusions in the Judge's reasoning, it concluded that he had correctly found that the Claimant had been supplied to Ryanair to work for a fixed term of five years and that he was accordingly a "temporary" worker within the meaning of regulation 3 (1). I shall return to the key passage in its reasoning later. THE GROUNDS OF APPEAL 85. Ryanair's grounds of appeal against the decision of the EAT were threefold. Grounds 1 and 2, which were argued by Mr Bowers, go to the substance of the EAT's decision. Its primary case (ground 1) is that on its true construction "temporarily" means "short term". In the alternative (ground 2) it contends that, even if "temporarily" does indeed mean "for a limited period", that question has to be answered not primarily by reference to the contractual position but, as the EAT had put it in its point (iv), by reference to "the purpose and nature of the work for which the worker was supplied"; and the EAT had not, despite its self-direction, approached the case on that basis. Ground 3, which was argued by Mr Sheridan, arises only if we accept one or other of those grounds, and contends that, as regards both, the only possible answer on the facts found is that the Claimant's employment was permanent.

86. MCG's grounds 4 and 5 raise this issue in more general terms. They are developed in its skeleton argument in ways which generally correspond to the arguments advanced by Ryanair, and, as I have said, Mr Brown only made oral submissions on one point, which I consider at paras. 126-127 below.

(1) THE MEANING OF "TEMPORARILY" 87. I start by considering the authorities in which this question is addressed. The first is the decision of the EAT in Moran to which I have referred above, and the remaining three are decisions of the CJEU. I should note that only the first of the CJEU decisions was promulgated prior to 31 December 2020 and so is binding on the Court: but by virtue of section 6 (1) and (2) of the EU Withdrawal Act the latter two may be taken into account to the extent that we regard them as relevant (see *Lipton v BA Cityflyer Ltd* [2024] UKSC 24, [2025] AC 154). Moran 88. In this case a group of cleaners had for many years been supplied by an agency to provide cleaning services at the premises of a single end-user: the number of years that they had worked there ranged from six to twenty-five. They brought proceedings against both the agency and the end-user for breach of regulation 5 of the AWR. Judgment Approved by the court for handing down. *Lutz v Ryanair & Another* Their claims were dismissed by the ET because they were held not to have been supplied to work temporarily. The appeal was dismissed. 89. The claimants' primary case in the EAT was that the ET had mistakenly proceeded on the basis that "temporary" meant short-term, whereas in the context of the AWR it was used to connote employment that was not permanent. Singh J held that the ET had not fallen into that error, but what matters for our purposes is that he accepted the claimants' submission about the meaning of "temporary". At para. 41 of his judgment, having set out the relevant provisions not only of the AWR but also of the AWD (including recitals (13) and (15)), he said: "The word 'temporary' can mean something that is not permanent or it can mean something that is short term, fleeting etc.

The two are not necessarily the same: for example a contract of employment may be of a fixed duration of many months or perhaps even years. It can properly be regarded as temporary because it is not permanent but it would not ordinarily be regarded as short term. I should add that by permanent I do not mean a contract that lasts forever, since every contract of employment is terminable upon proper notice being given. What is meant is that it is indefinite, in other words open-ended in duration, whereas a temporary contract will be terminable upon some other condition being satisfied, for example the expiry of a fixed period or the completion of a specific project.” 90. KG 91. That passage plainly supports the Claimant’s construction, and it was followed and applied by the ET and the EAT in the present case. It has been followed in the two other decisions of the EAT to which I have already referred, Brooknight and Angard; but they do not add to Singh J’s analysis. Mr Bowers contends that that analysis is wrong. The issue in JH v KG (C-681/18) is succinctly stated in para. 1 of the Opinion of Advocate General Sharpston as follows: “[T]he Court is required to clarify whether, in circumstances in which a worker is hired by a temporary work agency and assigned as a temporary agency worker to the same user undertaking by eight successive contracts for the temporary supply of work and 17 extensions, there have been ‘successive assignments designed to circumvent the provisions of [the AWD]’.” The reference to “circumventing” the AWD is to article 5.5, quoted at para. 72 above. The reference was from a court in Italy. The worker in that case had been assigned by an agency to the same end-user on eight successive and uninterrupted assignments over a period of two-and-a-half years and sought a declaration that there was in fact a permanent employment relationship between him and the end-user. 92. The decision of the Court on the question referred, broadly following the Advocate General’s recommendation, was (in short) that national legislation must include measures to prevent successive assignments being used to circumvent the Judgment Approved by the court for handing down. Lutz v Ryanair & Another requirements of the AWD, but that such measures need not include a limit on the number of assignments to the same end-user. However its relevance to the present issue lies in certain wider observations of the Advocate General and the Court. 93. The Advocate General began her consideration of the referred question with a general discussion of the purpose of the AWD and a summary of its provisions. Mr Brittenden referred us in particular to para. 40 of her Opinion, where she said: “Whilst those provisions bring temporary agency work closer to ‘usual’ employment relationships, it is clear that the starting point of Directive 2008/104 is that the general form of employment relationship is (and, I add, should be) employment contracts of indefinite duration.” She refers in a footnote to recital (15), which I have set out at para. 70 above. Mr Brittenden submitted that that is a clear acknowledgment, in line with Singh J’s conclusion in Moran, that the essential feature of “temporary” agency work is that it is of finite duration. Still more explicit is para. 51, which reads: “The very title of Directive 2008/104 makes clear that the employment relationships it covers are (and are by definition supposed to be) temporary. That term is used, inter alia, in the provisions defining the scope of the Directive (Article 1), its purpose (Article 2) as well as in the definitions of its key terms in Article 3(1)(b), (c), (d) and (e). The word temporary means ‘lasting for only a limited period of time’; ‘not permanent’.”¹⁰ The

Directive states, moreover, that ‘employment contracts of an indefinite duration’ (thus, permanent employment relationships) are the general form of employment relationships and that temporary agency workers must be informed of vacant posts in the user undertaking so that they have the same chances as other workers to find permanent employment (see recital 15 and Article 6(1) and (2)).” 94. In a later part of her Opinion the Advocate General considers the kinds of specific legislation that a member state might adopt to discourage circumvention. In that context, she refers at para. 56 to article 4.1 (see para. 71 above), which permits legislation to prevent labour market abuses and says: “If successive assignments of the same temporary agency worker to the same user undertaking result in a period of service with that undertaking that is (significantly) longer than what can reasonably be regarded as ‘temporary’, that constitutes, in my view, precisely such an abuse.” Mr Bowers submitted that that passage showed that, notwithstanding the earlier passages relied on by Mr Brittenden, the Advocate General recognised that considerations of duration were relevant to whether an assignment could be regarded as temporary. A footnote at this point refers to the Oxford English Dictionary and also to the equivalent words in the French and Italian versions – *intérimaire* and *interinale*. Judgment Approved by the court for handing down. Lutz v Ryanair & Another

95. We were also referred to para. 62 of the Judgment of the Court, but for present purposes this does no more than identify the distinction between “employment relationships which are temporary, transitional or limited in time” and “employment contracts of an indefinite duration, that is to say permanent employment relationships [which] are the general form of employment relationship”. Daimler 96. 97. NP v Daimler AG (C-232/20) was another case in which it was claimed that successive assignments were being abused: the claimant had been doing the same job for the end-user, Daimler AG, on a series of successive assignments, for over 55 months, and claimed a declaration that he was in a permanent employment relationship with it. The detailed issues are not straightforward, but for present purposes it is enough to say that German legislation had prescribed a period (eighteen months) after which successive assignments could no longer be regarded as “temporary”. Mr Bowers referred us to para. 57 of the judgment of the Court. Having referred to the requirement on member states to take appropriate measures against the use of such assignments to circumvent the provisions of the AWD, it said: “It is open to the Member States, in that regard, to set, in national law, a specific period beyond which an assignment can no longer, including where successive renewals of the assignment of the same temporary agency worker to the same user undertaking go on for some time, be regarded as temporary. That said, such a period must necessarily, in accordance with Article 1(1) of Directive 2008/104, be temporary in nature, namely, according to the meaning of that term in everyday language, be limited in time.” Mr Bowers submitted that the first sentence necessarily recognised, in line with Advocate General Sharpston’s statement in KG quoted at para. 94 above, that the duration of an assignment is relevant to whether it can be regarded as “temporary”. I note, however, that the second sentence treats the meaning of “temporary” as “in everyday language ... limited in time”.

98. Mr Brittenden in response emphasised that the context of the Court's observation was the abuse of successive assignments and in that connection asked us to note the terms of its formal answer to the referred question, which reads: "In the light of all the foregoing considerations, the answer to the second question is that Article 1(1) and Article 5(5) of Directive 2008/104 must be interpreted as meaning that the renewal of successive assignments in respect of the same job at a user undertaking for a period of 55 months constitutes misuse of the allocation of successive assignments to a temporary agency worker, where successive assignments of the same temporary agency worker to the same user undertaking result in a period of service with that undertaking that is longer than what can reasonably be regarded as 'temporary', in view of all the relevant circumstances, including, in particular, the specific characteristics of the sector, and in the context Judgment Approved by the court for handing down. *Lutz v Ryanair & Another* 99. ALB 100. of the national legislative framework, and no objective explanation is given for the decision of the user undertaking concerned to have recourse to a series of successive temporary agency contracts, which is a matter for the referring court to determine." I should note for completeness that although the Opinion of Advocate General Tanchev contains a section headed, promisingly, "Meaning of 'temporarily'" (paras. 37-44), it contains nothing that develops the points already made in *KG. In LD v ALB FILS Kliniken GmbH (C-427/21)* the claimant's employment had been transferred to another company under German legislation implementing the Acquired Rights Directive (i.e. what in the UK would be the Transfer of Undertakings (Protection of Employment) Regulations) but he continued to provide services to his previous employer. He contended that that had the effect of rendering him a temporary agency worker and entitled to be considered for permanent employment with his previous employer under article 6 of the AWD. The Court rejected that argument. One of its reasons is stated at paras. 50-51 of its judgment as follows: "50. Although Directive 2008/104 states, in recital 15 and Article 6(1) and (2), that 'employment contracts of an indefinite duration', that is to say permanent employment relationships, are the general form of employment relationship and that temporary agency workers are to be informed of any vacant posts in the user undertaking to give them the same opportunity as other workers in that undertaking to find permanent employment, it is clear from the case-law of the Court that that directive refers exclusively to employment relationships which are temporary, transitional or limited in time, and not permanent employment relationships (see, to that effect, [KG], paragraph 62).
51. That finding is not called into question by the fact that the Court has also held, first, that Directive 2008/104 seeks to have Member States ensure that temporary agency work at the same user undertaking does not become a permanent situation for a temporary agency worker and, second, that the first sentence of Article 5(5) of that directive precludes Member States not taking any measures to preserve the temporary nature of temporary agency work as well as national legislation which does not provide for any measures to prevent successive assignments of the same temporary agency worker to the same user undertaking with the aim of circumventing the provisions of that directive as a whole (see, to that effect, [KG])

paragraphs 60 and 72). The reference in para. 51 to taking measures to “preserve the temporary nature of temporary agency work”, sc. by limiting the length of periods for which it may be supplied, might suggest that considerations of duration are relevant. However, it is to be noted that that phrase is used in the context of a paragraph whose whole point is that the jurisprudence of the Court is not to be treated as qualifying the clear restriction of the scope of the AWD to “relationships which are temporary, transitional or limited in time, and not permanent employment relationships”. Judgment Approved by the court for handing down. Lutz v Ryanair & Another Discussion and Decision 101. 102. 103. In my view the definition of “temporarily” adopted by Singh J in Moran was correct, and the ET and the EAT were right to follow it. It is clear from the recitals to the AWD, and also from the other legislation to which they refer, that the cardinal distinction in this field is between employment which is permanent, in the sense of indefinite, and employment which is finite (typically because fixed-term), and that the term “temporary” is used to connote cases of the latter kind: I say “cardinal” because the EU legislators explicitly state that permanent employment is the norm, and that the purpose of the AWD, as also of the FTWD, is to regulate employment relationships which do not follow that norm. That interpretation is confirmed by the passages from the Opinion of Advocate General Sharpston and the judgment of the Court in KG relied on by Mr Brittenden. There is no warrant for smudging or qualifying that straightforward and principled distinction by introducing a reference to the length of the period. If the Appellants’ construction were correct, there would be a gap in the protection afforded to agency workers who were employed neither permanently nor “short-term”. That would defeat what seems to me to be the clear purpose of the AWD. It would also create unacceptable uncertainty in the absence of any definition of how short is “short”. I do not believe that the references to the length of the period for which the worker is supplied in para. 56 of the Opinion of Advocate General Sharpston in KG and in the judgments of the Court in Daimler and ALB which I have quoted affect that conclusion. As Singh J says in Moran, the word “temporary” can refer to duration, and in the passages in question it is indeed being used in that sense. The choice of words is not perhaps ideal, precisely because of the potential for ambiguity, but in context it is perfectly clear what is being said. The reasoning proceeds on the premise that supplies which are very long (and thus not temporary in the sense of short-term) will nevertheless be temporary within the meaning of the AWD, as the Court emphasises in ALB: that is why limits on duration may need to be imposed by national legislation in order to prevent abuse. As Males LJ pointed out to Mr Bowers, he was in fact relying on the observations in question in support of a contention that the Claimant should not be accorded the right to equal treatment with the end-user’s permanent employees: that was the opposite of the outcome in support of which the Court was deploying them, namely that if a worker was employed on a temporary basis for too long national legislation should treat him as working permanently. 104. Finally, Mr Bowers pointed out that in the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002, which implement the FTWD in domestic law, regulation 1 (2) defines “fixed-term contract” as “a contract of employment that, under its provisions determining how it will terminate in the normal course, will terminate — (a) on the expiry

of a specific term, (b) on the completion of a particular task, or Judgment Approved by the court for handing down. Lutz v Ryanair & Another (c) on the occurrence or non-occurrence of any other specific event other than the attainment by the employee of any normal and bona fide retiring age in the establishment for an employee holding the position held by him.” He submitted that if the Secretary of State had intended “temporary” to mean for a fixed period the same definition, or something like it, could have been used in the AWR. But that does not advance the argument. It is impossible to know why no such definition was included, but its omission cannot justify a conclusion that the word means something different from the meaning which clearly appears from the AWD and the case-law.

(2) “PURPOSE AND NATURE”

105. Mr Bowers’ proposition that the issue of whether the Claimant was supplied to Ryanair to work temporarily should be determined by reference not primarily to the contractual position but to “the purpose and nature of the work for which the worker was supplied” is based on the judgments of Judge Eady in Brooknight and of Judge Auerbach in Angard to which I have already referred in connection with ground 1. I should start by considering the relevant passages. Brooknight 106. In this case the claimant was employed by an agency, Brooknight, as what his contract described as a “cover security guard”. He was employed on a zero-hours contract and the contract made it clear that he could be deployed to work on any site for which Brooknight had a contract to supply security staff. In practice he had for just under two years been supplied almost (but not wholly) exclusively to Mitie Security Ltd at a particular site. He brought a claim under the AWR against Brooknight claiming to be entitled to equal terms with Mitie’s employees at that site.
107. Brooknight denied that the Claimant was an agency worker on the basis that he had been assigned to Mitie not temporarily but on a permanent, i.e. indefinite, basis. The ET rejected that argument, relying on the terms of the Claimant’s contract.
108. On the appeal to the EAT Brooknight submitted that the test of whether a supply was temporary should be determined by reference to “the way in which the work is performed in fact, rather than ... the provisions of the contract”. As to that, Judge Eady said, at para. 25 of her judgment: “On the whole, I agree with [Brooknight] that the terms of the contract will not necessarily be determinative of agency worker status. The focus under Regulation 3(1) (a) is on the purpose and nature of the work for which the work is supplied: is it temporary or permanent? The underlying contract – as will necessarily have been found to exist for the purposes of Regulation 3(1)(b) – may state that there is no obligation to provide or undertake work, and may allow that the worker can be moved from site to site but if, in fact, that individual is supplied to carry out work on an indefinite basis (the continuing cleaning jobs in issue in Moran, for example), it would not be temporary in nature.” Judgment Approved by the court for handing down. Lutz v Ryanair & Another Having referred to a submission about the kind of factual enquiry necessary in some arguably analogous cases, she continued: “I agree that the same kind of factual analysis is required for present purposes. That said, the terms of the contract may not be irrelevant: the contract provides evidence as

to what the parties understood and intended in terms of the work that the worker might carry out, and the ET is entitled to test the evidence given as to what occurred in practice against the relevant documentary evidence, which would include the contract.” However she held at para. 27 that, even applying that approach, the ET had been right to conclude that the claimant’s supply to Mitie had been temporary because it had found “that the Claimant was being supplied to work to provide specific cover for Mitie, as and when required, and would thus be temporarily working for the fixed duration of the absence being covered”.

109. As regards any matter of principle, Judge Eady goes no further than the point at the beginning of para. 25 that the terms of the contract between the worker and the agency “will not necessarily be determinative” of agency worker status. I respectfully agree with that. Her later observation that they “may not be irrelevant”, which suggests a more marginal role for the contract, must be read in the context of the argument which she was there addressing. Angard
110. Angard was a company wholly-owned by Royal Mail which employed a large number of workers on zero-hours contracts to be available to supplement the work of directly-employed staff at Royal Mail sorting offices on an “as required” basis. A group of its employees brought claims against both Royal Mail and Angard for breach of regulation 5. The respondents disputed that the claimants were agency workers, on the basis that they were not supplied to Royal Mail to work temporarily. The issue was determined by reference to the facts of a lead case, in which the claimant had worked for Royal Mail for a period of over four years, working an average of two shifts per week. The ET held that he was an agency worker, on the basis, applying Moran, that he was supplied on a time-limited basis, each engagement being for a finite period defined by reference to the start and end dates of the work to be done. 111. 112. The EAT upheld that decision. At paras. 43-68 Judge Auerbach gives a helpful exposition of the correct approach, following Moran and Brooknight, to the application of the phrase “supplied ... to work temporarily ... for a hirer”. Although it repays reading in full, it can be sufficiently summarised for present purposes as follows. Judge Auerbach starts, at para. 44, by characterising the issue of whether a worker has been supplied to work temporarily or permanently as one of fact. I agree with that as far as it goes, but it does not of course follow that the inquiry will necessarily involve complex questions of factual evaluation: in many cases the answer is likely to be straightforward. Judgment Approved by the court for handing down. Lutz v Ryanair & Another 113. At paras. 45-46 he identifies the essential inquiry required by regulation 3 (1) (a) as follows: “45. The natural meaning of the words of Regulation 3(1)(a) is that it directs attention to the basis on which the worker is actually placed, designated, directed or sent to go and do work for a hirer, on one or more specific occasions. In common parlance, it refers to the basis on which the worker is to work pursuant to a particular assignment or engagement, on a particular occasion. That is the natural meaning of ‘supplied’, and particularly of being ‘supplied ... to work temporarily’ (my italics) for and under the supervision of the hirer.

46. The focus of the Tribunal's enquiry should therefore be on the basis on which the worker is supplied to work, on each such occasion. In particular, it should ascertain, applying the guidance in *Moran*, whether that supply is made on the basis that, having embarked on the assignment, the worker will continue to work for the hirer indefinitely (whether full or part-time), or on the basis that the work will cease at the end of a fixed period, on the completion of a particular task, or on the occurrence of some other event. If it is the latter, it may be followed by another supply to work for the same hirer temporarily, and then another, and another."
114. At paras. 47-54 he addresses the question of how the terms of the contract between the agency and the worker fit into that inquiry. His conclusion, agreeing with Judge Eady in *Brooknight*, is that it is relevant but not necessarily determinative. Having identified in paras. 49-50 why (unsurprisingly) the terms of the contract are relevant, at paras 51-53 he explains why they are not necessarily determinative. He acknowledges at para. 52 that: "In some cases the documentation created when the relationship is first formed will contain all the particulars of the supply or supplies which are contemplated, including sufficient terms to enable the Tribunal to identify, from that documentation alone, whether that supply or supplies will, if carried out accordingly, be to work temporarily or not." His point, however, is that that will not always be the case and that the contract may do no more than provide an overarching framework which is not determinative of whether individual supplies pursuant to it are temporary or permanent. He also points out that even in the former case the parties may later agree to do something different.
115. At paras. 57-59 he addresses a submission on behalf of the claimants that it was important that workers knew from the start of their relationship with an agency what their status would be. Having said that he suspected that in most cases the contract, or other initial documentation, would make the position clear, he continued, at para. 58: "Further, I suspect that, in most cases, the parties will start as they mean to go on. There will either be a single supply, whether to work temporarily or not, or a number of supplies, all to work temporarily. Further, at the risk of stating a tautology, variations or fluctuations in, Judgment Approved by the court for handing down. *Lutz v Ryanair & Another* for example, the nature, frequency or duration of individual supplies or assignments, or in other details of individual assignments, will not make any difference for Regulation 3 purposes if they do not in fact bespeak a change from supplying someone to work temporarily to supplying them to work permanently (or vice versa), in the *Moran* sense."
116. At paras. 60-61 he applied those principles in deciding the case before him. He found that the contract between the claimants and the agency appeared to provide for multiple temporary assignments. But he noted that the ET had also, properly, considered whether that corresponded to the actual practice and had found that it did. As he put it at para. 61: "Overall, in summary, the Tribunal made findings about the wider context, about the relationship between Royal Mail and Angard about [the claimant's] contract, about what actually happened, both generally at Leeds, and in [the claimant's] own case; and it found

that what happened in practice was just what the contract envisaged would happen. As it commented...: ‘In this case, in all material ways, the practice reflected the written agreement from first to last.’ These were unchallenged, unassailable, findings of fact.” 117. I respectfully agree with Judge Auerbach’s approach as summarised above. As regards the particular issue before us, it is clear that he recognises that there will be cases where the nature of the supply can be properly answered by reference to the terms of the contract, subject to any issue about whether the nature of the supply in question could be shown to differ from what was there provided for. Decision 118. I have no problem with the general proposition that in deciding whether a worker has been supplied on a temporary or permanent basis it is necessary to consider the purpose and nature of the supply. However, for the reasons given in my consideration of the two EAT decisions above, I do not accept that it follows that in a particular case the purpose and nature of the supply cannot be sufficiently established by reference to terms of the contract between the worker and the agency. I respectfully agree with what the EAT said in para. 120 of its judgment in the present case: “[T]he EAT authorities do not suggest, still less require, that where the written terms of the arrangement are clear and are reflected in what occurred in practice, that they should be disregarded. As we have observed earlier, Brooknight was a case where the written agreement between the individual and the agency was open-ended and the tribunal had to address a contention that nevertheless the worker had been assigned permanently to work for the hirer In Angard, HHJ Auerbach expressly envisaged that there would be cases where the Judgment Approved by the court for handing down. Lutz v Ryanair & Another documentation created when the relationship was first formed would contain the relevant details of the supply”

119. Although this is expressed as a ground of appeal, Ryanair in fact acknowledges that the EAT at least directed itself in accordance with what they say is the correct position, and its real case is that it did not apply its own self-direction.
- (3) APPLICATION TO THE PRESENT CASE 120. 121. 122. 123. I start by noting that the parties approached the “temporarily” issue on the basis that we are concerned in this case with a single supply of the Claimant’s services to Ryanair starting at the moment in July 2018 when he first started actually to work for it and continuing thereafter. The Court raised with counsel the possibility of an alternative analysis under which there were a series of distinct supplies for each period that he was rostered. However, Mr Bowers pointed out that even if such an analysis might be possible it had not been suggested at any stage below, and that, if it had been, it might well have been necessary to make further findings of fact. I accept that. I accordingly proceed on the “single supply” basis, and in the absence of submissions I express no views about the alternative analysis. But it should be noted that on that basis this case is very different on its facts from either Brooknight or Angard, where the workers were found to have been supplied to the end-user on a series of specific time-limited assignments. The question then is whether that supply was for a fixed period. So far as the contract is concerned, it plainly was: it is an express term that the Claimant would work for Ryanair for a five-year period, and it would thus follow from my conclusion on ground 1 that he would

be working “temporarily” within the meaning of regulation 3 (1). Mr Sheridan, who made his submissions clearly and succinctly, advanced two answers to that conclusion. , he relied on the ET’s finding, noted at para. 23 above, that it was the invariable First practice at the expiry of a five-year term for contracted pilots to be issued with a new five-year contract. He submitted that that meant that, notwithstanding the formal contractual position, the nature and purpose of the arrangement was that the Claimant was being supplied to Ryanair work on a permanent basis. I do not accept that submission. In the present case the contract expressly provided for the Claimant to work for Ryanair for a single fixed term. The complications which may arise where the contract between the agent and the worker contemplates multiple supplies, as considered by Judge Auerbach in *Angard*, are not present. The contract should be taken as correctly reflecting the nature of the supply unless the Claimant was aware that in practice it would continue indefinitely. It was, however, accepted that the Claimant was unaware of any such practice: see para. 23. At para. 204 of its judgment the EAT made the further point that the replacement of one fixed term by another would in any event not render the supply indefinite, and there is obvious force in that point too. 124. Second , Mr Sheridan relied on the finding that, contrary to the expressed purpose of the MCG Agreement, the Claimant was in practice working for Ryanair from the start on a fully-rostered basis and not simply to fill in during the busier periods: see para. 11 above. I cannot, however, see how this is relevant. We are, as I have said, Judgment Approved by the court for handing down. *Lutz v Ryanair & Another* 125. 126. 127. proceeding on the basis that MCG made a single supply of the Claimant’s services. The only question is whether that supply was for a fixed term. If it was, it does not matter how often during that term his services would be called on. (I believe that this is the same point as is made by Judge Auerbach at para. 58 of his judgment in *Angard*.) Even if, contrary to that view, the question whether the Claimant would be fully- rostered were relevant, I would not accept Mr Sheridan’s submission. The nature of the supply has to be judged at the point that it is made. The Service Agreement only committed MCG to providing the Claimant with 450 hours flying time. It may well be that he was nevertheless aware that Ryanair was sufficiently busy to roster him fully throughout the year, but he could not be confident that that would remain the case throughout the term of the Agreement. If there were a downturn (as in fact must have been the case shortly after his dismissal, in consequence of the pandemic) Ryanair would inevitably roster the employed pilots in preference to the contracted pilots. I turn to consider the distinct point raised by Mr Brown on behalf of MCG. He emphasised that the essential issue concerned regulation 3 (1) (a) – that is, the nature of the “supply” of the worker’s services by the agency to the hirer: he endorsed the approach taken by Judge Auerbach at para. 45 of his judgment in *Angard*. It followed that the nature of the worker’s contract with the agency, which is the subject of regulation 3 (1) (b), is not the focus of the enquiry: he accepted that it might be relevant as part of “the evidential mosaic”, but the main focus should be on the contract, or other arrangements, between the agency and the hirer, as the supplier and recipient respectively of the services in question. That was not the approach taken by the ET, which, he submitted, had treated the five-year fixed term in the Services Agreement as decisive against permanent status. If the Judge had focused on the

correct question, his finding at para. 27 of the Reasons that by the time that the Claimant was recruited contracted pilots were being rostered on the same basis as employed pilots (see para. 11 above) would have required him to conclude that the Claimant was being supplied to work on a permanent basis; and even if that was not so the ET had evidently approached the issue on the wrong basis, and the claim should be remitted for a factual evaluation on the right basis to be carried out. I do not accept that submission, for reasons which are largely covered by what I have already said. I agree that the correct analytical focus is on the basis on which the worker's services are supplied by the agency to the hirer. But there is no reason why that may not be identified by looking at the terms of the contract between the agency and the worker, and that is indeed what the EAT did in both *Brooknight* and *Angard*. I can accept that there may be cases in which the contract, or other arrangements, between the agency and the hirer will show, or help to show, whether the supply is temporary or permanent, particularly where the contract with the worker is silent about it. But this is not such a case. As Mr Brown was constrained to accept, the MCG Agreement says nothing explicit about whether workers are to be supplied. Rather, as I have said, his argument was based on the ET's finding about how the Claimant was rostered in practice. I do not believe that that finding assists him any more than it does Mr Sheridan: a finding that at the time that the Claimant was first supplied he was in fact fully rostered is not an indication about whether he was being supplied on a temporary or a permanent basis. I therefore see no error in the Judge's Judgment Approved by the court for handing down. *Lutz v Ryanair & Another* focus on the five-year term in the Service Agreement. (For what it is worth, however, I do not think that it is right to say that that is the only factor which he took into account. He also refers in para. 17 of the Reasons to the fact that the Claimant repeatedly pressed to be engaged as a contracted pilot and was refused: that is a relevant indication that the basis of his supply was understood by Ryanair as well as by him to be temporary.) CONCLUSION ON THE EQUAL TERMS CLAIM ISSUE

128. Both the ET and the EAT reached their conclusion that the Claimant was supplied to work temporarily for Ryanair on the basis that the contract between him and MCG was subject to a fixed term. In my view they were right to do so. DISPOSAL 129. For those reasons I would dismiss both MCG's and Ryanair's appeals. Males LJ: 130. I agree. Elisabeth Laing LJ: 131. I also agree. 40

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