THE NEW NORMAL? SPOTLIGHT ON ATYPICAL ARRANGEMENTS
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(1) INTRODUCTION

What is an "atypical worker"?

1. "Atypical worker" is not a term of art: there is no definition to be found in any statute or in the case law. Rather, it has come generally to be used to describe any worker whose relationship with the party for whom he or she carries out work, does not conform to what has traditionally been regarded as the "typical" form of arrangement, namely full-time employment under a permanent contract of employment.

2. The term "atypical worker" might therefore refer to virtually any other kind of arrangement beyond that "norm", including any form of part-time working; casual or "zero hours" work; home working; piece work; fixed-term employment; temporary agency work; apprenticeships; office holders; flexible working and even perhaps volunteers and interns.

3. While part-time working is of course a very significant form of working, the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (and their parent Directive) apply to all kinds of worker, not only permanent employees. As such, part-time work might equally be said not to constitute a category of atypical working arrangement in itself, but rather a reference to the proportion of full-time hours worked by any manner of atypical worker (so long as the definition of "worker" is satisfied) or indeed permanent employee. In any event, the absence of significant recent developments in the context of part-time working has led to the exclusion of that subject from the present consideration. Recent significant developments have tended to be concentrated in certain other areas however, and given the need to keep within manageable boundaries for the purposes of this seminar, the focus will be on three key areas: (1) "Zero hours" contracts/casual workers; (2) fixed-term employment; and (3) temporary agency workers.

The rise of the atypical worker

4. As has been well publicised in the media, recent years have seen an increase at the very least in the perception or awareness of the use of atypical working arrangements by employers, particularly in the three areas under consideration here.

5. This perception or awareness is not misplaced either, being supported by independent data. On 2 September 2015, the Office for National Statistics published its latest analysis of *"Employee Contracts that do not Guarantee a Minimum Number of Hours".* The ONS drew on work by the Labour Force Survey, and while the ONS urged caution in the extrapolation of meaningful trends from the data produce in the report, the best LFS estimate was that as at April-June 2015, 744,000 people had a zero hours contract as their main employment (2.4% of people in employment), compared with 624,000 (2.0% of people in employment) for the same period in 2014. That represents an increase of over 19% in one year, but the ONS was careful to point out that this may have been due to an increase in the recognition by survey respondents of the term "zero hours contract", rather than necessarily an increase in the number of them. There had been a similar level of increase in the previous year on LFS data, however, from 586,000.

6. The ONS's own estimate of the number of zero hours contracts in existence *and where work was carried out*, was 1.5 million during the fortnight beginning 19 January 2015 (around 4% of all contracts). The figure for the fortnight beginning 20 January 2014 had been 1.4 million. Added to that 1.5 million figure, were a further 1.9 million contracts *where no work was carried out.* Larger employers (with 250 or more employees) tend to use zero hours contracts to a greater extent (almost 50%) than smaller employers with fewer than 20 employees (10%). By far the most prolific use was in the "accommodation and food" sector, followed by the education sector (ONS data).

7. As regards temporary work, ONS-sourced data cited in a paper entitled "*Flex Appeal"* by the Recruitment and Employment Confederation (2014) indicate a significant increase in the number of temporary workers between 2008 and 2014. According to those data, in July–September 2008, the number of full-time employees stood at 18.958 million. In February–April 2014 this number was 19.022 million, which represents a 0.3% growth rate in employment. By contrast, the number of temporary workers increased from 1.384 million to 1.673 million in these two time periods, representing a 20% growth in temporary workers. It is not absolutely clear who the REC was referring to as a "temporary worker" in that paper, although the term appears to have encompassed temporary agency workers, fixed-term employees, and freelancers contracted for specific periods.

8. That trend is further reflected by LFS data covering a slightly earlier period, cited in a TUC article published in August 2013 (*"Involuntary temporary jobs driving rising employment"*). That data showed that between 2005 and 2012, there had been a steady increase in the number of temporary workers (including agency work, seasonal work, casual work, fixed-term employment and "some other" method) from just under 1.49 million to just over 1.65 million: an increase of 10.7%. By contrast, the number of "permanent" employees had fluctuated but remained fairly constant, at 23.52 million in both 2005 and 2012.

9. Whatever holes may be picked in the statistical evidence that is available and whatever the true figures are (which will never be known), a relatively clear picture emerges of a trend towards increasing use of zero hours/casual workers and temporary workers (whether engaged directly on fixed-term contracts or via agencies). Self-evidently therefore, employers need to be increasingly aware of the issues that may arise in respect of such workers. Equally those who generally advise claimants will increasingly need to be aware of the extent of such atypical workers' rights. This paper considers recent developments and some of the more difficult issues that may arise in each of the three areas under consideration.

(2) "ZERO HOURS" CONTRACTS/CASUAL WORKERS

<u>New legislation</u>

10. No doubt in response to the level of media attention being paid to the subject over recent years, the Coalition government set in train certain measures intended to address the problem.

11. In March 2015, the Department for Business Innovations and Skills ("BIS") published its response to the consultation on zero hours employment contracts it had undertaken, entitled "*Banning Exclusivity Clauses: Tackling Avoidance".* That consultation response set out the statutory amendments that would be proposed, prohibiting so called "exclusivity clauses", and appended to the consultation response document was a set of draft regulations.

12. Subsequently, sections 27A and 27B ERA 1996 were introduced with effect from 26 May 2015, via the **Small Business, Enterprise and Employment Act 2015**. Essentially those sections lay the foundations for the later Regulations which will provide workers with a remedy mechanism for enforcing the new rights that have been introduced.

13. Section 27A(1) defines a "zero hours contract" as:

> "*a contract of employment or other worker's contract under which –*
>
> *(a) the undertaking to do or perform work or services is an undertaking to do so conditionally on the employer making work or services available to the worker, and*
> *(b) there is no certainty that any such work or services will be made available to the worker".*

14. Section 27A(3) goes on to specify the right, which is that any clause in a zero hours contract which prohibits the worker from doing work or performing services for another employer under

another contract or under any other arrangement, or doing so without the employer's consent, will be unenforceable.

15. Section 27B goes on to create the statutory power for the Secretary of State to make what are called – in their draft form – the **Zero Hours Workers (Exclusivity Terms) Regulations 2015.**

16. The draft Regulations indicate that there will be a right for zero hours workers not to suffer detriment on the grounds that the zero hours worker has performed work or services for another employer under another contract or arrangement. That right will be enforceable in the Employment Tribunal in the usual way, and Employment Tribunals will be empowered to award compensation on a "just and equitable" basis (draft reg.5). Some form of separate penalty for infringing employers, separate from compensation for the worker, may also be created.

17. Moreover, the Regulations will extend the prohibition on exclusivity clauses and the right not to be subjected to detriment, to all contracts of employment or worker's contracts under which the individual is not guaranteed a certain level of weekly income ("prescribed contracts"). The level of weekly income above which a "prescribed contract" will cease to be such, has yet to be determined. There will be a financial threshold above which the rights will not apply in respect of prescribed contracts however, namely where the applicable hourly rate is £20 or higher.

18. The effect of these rights is potentially quite far reaching, and to an extent misleading in that the extension of the rights to "prescribed contracts" means that they could apply to contracts or arrangements that are not "zero hours" arrangements at all. The contract/arrangement might guarantee a particular weekly income (and number of hours), which simply falls below the proposed statutory threshold. On the other hand, the rights themselves might be said to be quite limited, in that there is no ban on zero hours contracts that some would like to see, or even any attempt to restrict their use.

19. What employers will not be able to do, is to subject workers to detriments for working elsewhere to boost their income. The most common complaint by workers of course is that if work is refused, they will not be offered it again for some time or at all, due to not being available when the employer wanted. Interesting questions are likely to arise in such situations, as to whether withholding work will be capable of amounting to a "detriment" (if it can be shown to have occurred on the evidence), and if so whether that detriment can be said to have been meted out "on the grounds that" the worker was doing work for someone else, or was rather simply "on the grounds that" the worker was not available at the relevant time (the reason for not being available not actually being important to the employer).

<u>Case law developments</u>

20. Of course, "exclusivity clauses" are by no means the only issue that "zero hours" or "nil hours" casual workers face. There may be discrimination on grounds of any of the protected characteristics covered by the Equality Act 2010, or even potentially issues of unfair dismissal.

21. In this latter regard, the little known case of ***Pulse Healthcare Ltd v Carewatch Care Services and ors (06.08.12, UKEAT/0123/12)*** may provide some hope for workers on "zero hours" contracts, and a cautionary tale for employers who make use of them.

22. The employer (Carewatch Care Ltd) took on care staff, and there was a high need for continuous care organised on prepared work patterns. Effectively the work was constant, but the contracts that the workers were engaged under, purported to be "nil hours" contracts. Carewatch Care lost its contract with the local PCT to Pulse Healthcare, and Pulse Healthcare (as transferee) resisted any obligation towards to the claimants, with Carewatch Care also denying any liability.

23. The tribunal concluded both that the terms of the contracts bore no relation to reality, and that the claimants had been employed by Carewatch Care under overarching "umbrella" contracts of employment (as opposed to individual contracts for each assignment worked, with no ongoing mutuality of obligations in between assignments). The EAT upheld those conclusions. While the tribunal had given judgment shortly before the Supreme Court in ***Autoclenz v Belcher [2011] ICR 1157***¸ the EAT considered that the tribunal's approach had been entirely consistent with it.

24. There were in reality contracts of employment, under which the claimants were offered a certain number of hours' work per week, which they undertook to work. The legal debate about the difference between "umbrella" contracts and individual assignments was something of a side-show, in the light of the evidence that had been heard.

25. Plainly, the lesson for employers is that in cases involving express terms which purport to constitute "zero hours" contracts, it will be important not to assume that such express terms will prevail: careful consideration of the evidence as to how the relationship has operated will be required to assess vulnerability to ***Autoclenz*** arguments. There were only five claimants in ***Pulse Healthcare,*** but it is not difficult to imagine TUPE-transfer scenarios (for example) involving significant numbers of putative employees (ostensibly engaged on zero hours contracts) where liabilities could be substantial.

26. More recently however, in ***Saha v Viewpoint Field Services Ltd (20.02.14, UKEAT/0116/13)*** the EAT upheld a tribunal judgment denying the claimant and her contemporaries "employee" status, in a judgment which emphasises just how fact sensitive the question can be.

27. The claimant was engaged as a telephone interviewer. Viewpoint told her what shifts they had and she told them which ones she might be able to work. Her work pattern varied, between 7 and 43 hours per week. Following an HMRC "employment audit", Viewpoint decided that its interviewers were not "employees" and terminated their arrangements, re-engaging them as self-employed contractors.

28. The claimant claimed unfair dismissal, but lost in the tribunal on the basis that she never was an employee. Central to this conclusion was a finding of fact that there had never been any mutuality of obligations: there was never any promise to supply any particular number of shifts, and she had never been required to work any that were offered. Indeed she had declined some. The EAT reluctantly upheld that decision: the absence of mutuality was a finding of fact that the tribunal had been entitled to make.

29. The EAT did go on to refer however, to a judgment of Elias J (as he then was) in ***St Ives Plymouth Ltd v Haggerty (UKEAT/0107/08)***, cautioning tribunals to bear it in mind, and to consider in such cases whether an arrangement which *originally* lacked mutuality, may have developed into a relationship of mutual obligations over time on the facts: such a conclusion will be open to tribunals. In effect, this is indeed a further species of the ***Autoclenz*** approach. Essentially the casual/zero hours worker needs to be looking to argue that the real relationship either never was, or has ceased over time to be a truly casual/zero hours relationship lacking in mutuality.

30. "Employee" status is of course only required for certain rights such as unfair dismissal, but not for other significant rights against discrimination on protected grounds, whistleblowing detriment, part-time working, and working time for example. In a judgment of considerable importance, the EAT in ***Windle and anor v Secretary of State for Justice [2014] IRLR 914*** emphasised that in respect of "worker" rights, mutuality of obligations will not in fact be an issue at all.

31. The claimants were interpreters working for the MoJ, who wanted to bring race discrimination claims. They worked intermittently, but fairly regularly, but also worked elsewhere. They argued that they contracted personally to do work, for the purposes of s.83(2) of the Equality Act 2010.

32. The tribunal concluded that they could not satisfy any part of s.83(2), because of the absence of mutuality of obligation in between occasions of providing services or assignments. However, the EAT took the view that that amounted to an error of law. There is no requirement in s.83(2) for mutuality to exist between assignments at all: as long as it can be established that when services are provided, they are provided pursuant to a contract personally to do work, the test will be satisfied. The appeal was allowed and remitted for reconsideration.

33. Upon reconsideration, the EAT pointed out that the tribunal would still have to make findings about whether the claimants did contract personally to do work in a subordinate capacity during assignments or whether they were in fact sufficiently independent as to have been self-employed contractors for whom the MoJ was a commercial or professional client. But that position is of course a very significant improvement for casual workers over not being able to get out of the starting blocks, and has the potential to open up a world of possible claims that might otherwise have remained closed.

34. Indeed, the ***Windle*** position has been further cemented by the Court of Appeal even more recently, albeit without making reference to the EAT's judgment, in ***Halawi v WDFG UK Ltd (t/a World Duty Free) [2015] IRLR 50.*** The central point made by the Court was that, where s.83(2) EqA 2010 "employee" status (equivalent to "worker" status in s.230(3)(b) ERA 1996) is under consideration, fairly self-evidently a right of the worker under the contract to provide a substitute will enable a tribunal legitimately to find that the contract was not to provide work "personally" and therefore that the desired status is not achieved.

35. In the process of making that point however, the Court underlined that the tests for employment status for the purposes of the ERA 1996, do not apply when considering s.83(2) EqA 2010. The essential criteria for the latter are simply that the putative employee should agree personally to do the work, and should be in a subordinate position to the putative employer.

(3) FIXED-TERM EMPLOYEES

Overview of relevant rights

36. As is well known, the position of fixed-term employees is governed by the Fixed-Term Employment (Prevention of Less Favourable Treatment) Regulations 2002 (SI 2002/2034) (the "FTER") and their parent Directive: the Fixed-Term Work Directive 99/77/EC (the "FTWD").

37. In essence, the FTER provide employees engaged on a fixed-term contract, with a general right to be treated no less favourably than a comparable permanent employee, subject to a defence of objective justification (reg.3 FTER). An actual comparator is required by the domestic FTER (reg.2), although it is debatable whether such an actual comparator is compatible with the terms of the FTWD.

38. There is of course a specific right for employees engaged on a succession of fixed-term contracts, which converts the contract by law into a permanent contract after four years, unless a good objective reason can be demonstrated for continuing to use fixed-term contracts (reg.8).

39. There is also a right for fixed-term employees to be provided with information about permanent vacancies. This is an auxiliary, standalone right domestically, provided by reg.3(6). It supports the domestic right not to be treated less favourably than a comparable permanent employee, in the "*opportunity to secure any permanent position in the establishment*" (reg.3(2)(c)). The right to be provided with information about vacancies is explicitly to ensure that employees are able to exercise the right under reg.3(2)(c).

40. It is noteworthy that in implementing the FTWD in this way, the FTER have blended together separate clauses of the Framework Agreement which provides the substantive terms of the FTWD (the FTWD adopts and incorporates the Framework Agreement as its text). Clause 4 of the Framework Agreement, creates the principle of equal treatment, *"in respect of employment conditions".* It is clause 6 which deals with the right to information and employment opportunities, specifying at 6(1):

> *"Employers shall inform fixed-term workers about vacancies which become available in the undertaking or establishment to ensure that they have the same opportunity to secure permanent positions as other workers."*

41. Under the FTWD, the principle of equal treatment is separate from the right to information about vacancies to ensure the same opportunity to secure permanent employment. The latter "clause 6" right has evidently been interpreted by the UK Government however, as giving rise to a right not to be treated less favourably in the opportunity to secure permanent employment: that right in the domestic FTER is derived from clause 6 of the Framework Agreement, not the principle of equal treatment at clause 4. This is a significant point in respect of the arguments over a specific development to be returned to later in this paper, involving a comparison with the position of temporary agency workers on the same issue.

Recent developments: collective redundancies

42. The FTER are now 13 years old, but it is in the last few of those years that there has been a spate of noteworthy judgments dealing with various points.

43. As recently as July this year, the IRLR reported the ECJ's judgment in ***Rabal Cañas v Nexea Gestión Documental [2015] IRLR 577*** (considered by the ECJ alongside the "Woolworths" case). One of the issues raised in ***Rabal Cañas***, was the extent to which (if at all), fixed-term employees who are dismissed upon the expiry of their fixed term, are to be counted for the purposes of collective redundancy thresholds triggering consultation obligations under the Collective Redundancies Directive 98/59/EC.

44. Art.1(2)(a) of the Directive provides that it does not apply to "*collective redundancies effected under contracts of employment concluded for limited periods of time or for specific tasks except where such redundancies take place prior to the date of expiry of the completion of such contracts*". Essentially the ECJ confirmed that art.1(2)(a) does what it says on the tin: if "redundancies" of fixed-term employees occur upon the date of expiry of their contracts or the completion of the task they were contracted to perform, those individual "dismissals" are outside the scope of the Directive and will not count towards triggering any collective consultation threshold. Such dismissals are not to be regarded as "redundancies" for the purposes of the Directive at all, because the reason for the termination is simply the expiry of the contract or the completion of the task: the terminations are not "on the initiative of the employer" but are pursuant to the relevant clauses of the contract.

45. That is not to say that dismissals of fixed-term employees can never count towards collective redundancy consultation thresholds however. As art.1(2)(a) makes clear, if dismissals are effected *during the fixed-term*, such dismissals will count: there is a distinction to be drawn between fixed-term contracts that simply run their course and those that are terminated early.

46. That position has been reflected domestically in s.282 of TULRCA 1992 (introduced by the TULRCA 1992 (Amendment) Order 2013), since 6 April 2013. Interestingly however, the Supreme Court recently decided in a long-running case concerning the law prior to that 2013 amendment, that dismissals of fixed-term employees *could* count for the purposes of collective redundancy consultation: dismissals upon the expiry of fixed terms could be dismissals for a reason "not related to the individual concerned" (which is what constitutes a redundancy for these purposes in accordance with art.1(1)(a) of the Directive) depending on

the employer's reasons for non-renewal. See ***University and College Union v University of Stirling [2015] IRLR 573.*** The effect of that judgment is of course now somewhat academic in light of the 2013 statutory amendments.

Recent developments: successive fixed-term contracts

47. As noted above, reg.8 of the FTER imposes a statutory restriction on the use of successive fixed term contracts, which implements the restriction imposed on Member States by clause 5 of the Framework Agreement. Rules differ across Member States as to how many years fixed-term contracts can be renewed for, for example. But whatever limit is imposed (four years in the UK), Member States are able to implement a defence in national law where there are "*objective reasons justifying the renewal of such contracts or relationships*" (clause 5).

48. Under reg.8, that defence will be available where a collective agreement or workforce agreement specifies "*objective grounds justifying the renewal of fixed-term contracts…*".

49. But what will constitute "objective reasons" or "objective grounds" justifying the renewal of fixed-term contracts?

50. A recent example is provided by the judgment of the ECJ in ***Marquez Samohano v Universitat Pompeu Fabra C-190/13 [2014] IRLR 459.*** That case concerned particular posts as associate lecturers at a Spanish university. As is common in the sector, fixed-term contracts were used, and on a continuing basis.

51. In the ECJ's view, there were permissible objective reasons for continuing to employee lecturers in the specific situation in question, on fixed-term contracts with unlimited renewals. Their unusual position was as professionals who worked elsewhere most of the time, but who were seconded to the university for limited periods and with an expectation of returning to their usual professional position and of being replaced in their secondment position. In reaching this conclusion, the ECJ applied ***Adelener Ellinikos Organismos Galaktos C-212/04 [2006] IRLR 716***, where the ECJ had said that in respect of the nature of objective reasons that will be required, the requirement is to show *"specific factors relating in particular to the activity in question and the conditions under which it is carried out".*

52. Generalised arguments and situations where in reality permanent needs are being covered, will not be acceptable: the needs must be genuinely temporary, such as in relation to a particular period of funding from an external source which is finite. In ***Samohano***, a key feature of the arrangements was that although the existence of associate lecturer posts was a permanent aspect of the university's staffing, for each individual engaged in that way it was truly a temporary position because of the expectation of returning to the "day job" and being replaced by someone else.

53. Claimants should not expect to be successful in circumstances where the challenge in truth amounts to a challenge to a limit on the maximum length of employment operated by the employer, rather than the fact of repeated fixed-term contracts: the Supreme Court made very clear in ***Duncombe v Secretary of State for Children, Schools and Families [2011] IRLR 840*** that what has to be justified is the individual fixed-term contract in question, not the length of time that the claimant has been employed on fixed-term contracts.

54. The factual context was the employment of teachers in European Schools, outside Great Britain (the territorial jurisdiction aspects of the case are outside the scope of this paper). EU rules limited the total length of employment to 9 years, which was made up of various fixed-term contracts for 2, 3 and 4 years. Leaving aside the territorial jurisdiction question, the claimants successfully argued in the tribunal, EAT and Court of Appeal, that the 9 year rule could not be justified.

55. However, in the Supreme Court Baroness Hale considered that all the judgments below had missed the point. The question was whether the most recent fixed-term contract taking the succession of contracts beyond four years could be justified, not the 9 year rule. Rather, the existence of the 9 year rule was in fact itself the justification for the most recent fixed-term contract, and thus provided the defence against the claim for deemed permanent employment under reg.8. The claimants' complaint was really about the fact of there being an overarching limit on the length of employment, which was not prohibited by the FTER. The government could have included such a limit in the FTER, but had chosen not to do so, and further if the employer had engaged the teachers on one 9-year fixed-term contract, no question of becoming permanent could have arisen because there would have been no renewal of a fixed-term contract at all so as to engage reg.8 in the first place. Finally, and contrary to the claimants' case, there is no overall rule that a fixed-term contract can only be used if the work itself is only needed for a definite period (so that indefinite work must always be under an indefinite contract). This latter view can be seen to be entirely consistent with the ECJ's more recent stance in ***Samohano***, above.

56. In terms of establishing when there will be the necessary "succession" of fixed term contracts so as to engage reg.8, the Court of Appeal made clear in ***Hudson v Department for Work and Pensions [2013] IRLR 22 (CA),*** that time spent working on fixed-term *training* contracts that are excluded from the scope of the FTER altogether by virtue of reg.18, will not count towards the four year period of successive contracts required in order to establish a *prima facie* case for becoming a permanent employee. The claimant's claim was founded upon including within the necessary four years, periods of time spent working on excluded training contracts, and while the tribunal and EAT initially overturned the tribunal's rejection of the claim, the tribunal's position was firmly restored by the Court of Appeal: excluded contracts are excluded for all purposes under the FTER.

57. What about the very common situation where employees are engaged on fixed-term contracts in order to provide maternity cover, or employees who are absent on some other similar kind of leave? The ECJ addressed this situation in ***Kücük v Land Nordrhein Westfalen C-586/10 [2012] IRLR 697 (ECJ).***

58. There, the claimant had been employed on 13 successive fixed-term contracts over 11 years. Each time, the purpose of the fixed-term contract had been to replace other permanent employees who had been on maternity or some other special form of leave. German law provided specifically that the use of a fixed-term contract would always be justified if the purpose of the fixed-term contract was to provide replacement cover for another employee. The size of the employer was such that there was a permanent need for such cover: there would always be some permanent employees absent on such types of leave that would need to be temporarily replaced.

59. The central question for the ECJ was whether clause 5 of the Framework Agreement, prohibited provisions in national law that provide that successive fixed-term contracts will be objectively justified if they are in order to provide replacement cover, in circumstances where there is effectively a permanent need for temporary replacement cover within the organisation.

60. The ECJ's view, was that that a temporary need for replacement staff, provided for by national legislation such as that at issue in the main proceedings, may, in principle, constitute an objective reason justifying successive fixed term contracts under clause 5 of the Framework Agreement. The mere fact that there may have been a permanent need for temporary replacements within the organisation, and that it would be possible to provide the necessary cover by hiring permanent employees, did not prohibit the employer from electing to use fixed-term contracts instead: it does not follow that a permanent need for temporary cover makes the use of fixed-term contracts an abuse.

61. Clause 5 did not prohibit such provisions in national law, especially since the provision of German law in question could be said to be in furtherance of other social policy objectives, such as the protection of mothers absent on maternity leave. But it would be for the national court to determine whether the use of successive fixed-term contracts could be objectively justified in the circumstances of the case, taking into account the number and cumulative duration of the fixed-term contracts that had been used.

62. The domestic law in the UK is of course different: the UK included the "four-year rule" in the FTER. However, establishing a chain of successive fixed-term contracts lasting longer than four years is only the first hurdle: use of more fixed-term contracts over a longer duration may be possible, if of course that can be justified. The ECJ's judgment certainly supports the notion that where the specific fixed-term contract in question is entered into in order to provide temporary replacement cover, that may very well be justified under UK law depending on the circumstances. The domestic tribunal would have to consider whether 13 successive fixed term contracts over 11 years could be justified. Perhaps that would be regarded as just the sort of situation the FTER were intended to guard against, but that outcome is by no means guaranteed.

63. Finally, if an employee who has been engaged on successive fixed-term contracts eventually does become a permanent employee, are there restrictions on the *terms* that can be used in the eventual permanent contract? Do they have to remain the same as they were in the preceding fixed-term contract? The ECJ dealt with this question in ***Huet v Université de Bretagne Occidentale [2012] IRLR 703***.

64. There, the claimant had been employed on fixed-term contracts as a university researcher. French law provided a similar limit on the period over which fixed-term contracts can be renewed as exists in UK law, except that the restriction in France was six years rather than four. At the end of six years, Mr Huet was engaged on a permanent contract, but as a "research officer", on inferior terms and conditions. He contended essentially that this was not permitted by the Directive.

65. The ECJ disagreed. In its view, the purpose of the Directive is to promote stable employment for fixed-term workers, but clause 5 of the Framework Agreement does not require that any permanent contract that may be offered following a succession of fixed-term contracts must be on identical terms. Rather, the Member State must ensure that:

> *"the conversion of fixed-term employment contracts into an employment contract of indefinite duration is not accompanied by material amendments to the clauses of the previous contract in a way that is, overall, unfavourable to the person concerned when the subject-matter of that person's tasks and the nature of his functions remains unchanged."*

66. It is for the national court to apply this test. What the test permits therefore, is some degree of change in the terms and conditions. And that is only in situations where the tasks and nature of the functions "remains unchanged", raising therefore the possibility that if the employee is simply given an entirely new job on a permanent basis, all bets are off as to the terms of any such permanent contract.

67. Whether that possibility is open to employers in the UK remains to be seen however, because of the wording of the FTER. It has been argued that the method by which reg.8 of the FTER prohibits unjustified renewals of fixed-term contracts beyond a period of four years, is to render the specific term of the contract restricting its duration, null and void. Thus, all other terms of the contract remain the same.

68. While that would certainly appear to be correct in cases where a further fixed-term contract is effectively being "struck down" in favour of deemed permanent employment, it is much less

clear that there is any domestic restriction on possible terms (beyond that set out by the ECJ in ***Huet***) in cases where the employer dutifully engages the employee on fixed-term contracts for no more that the four year period specified in the FTER, and then voluntarily offers the employee a permanent contract.

(4) TEMPORARY AGENCY WORKERS

Overview of relevant rights

69. The Agency Workers Regulations 2010 (SI 2010/93) ("AWR") were introduced to implement in domestic law, the requirements of the Temporary Agency Workers Directive (2008/14/EC) ("AWD"). There have only been two significant domestic judgments on their interpretation, which are both considered below.

70. The core rights available to qualifying temporary agency workers are:

    (1) Rights to the same basic working and employment conditions (defined as matters relating to working time, rest, leave and pay by reg.6) as a comparable permanent employee (reg.5). An actual comparator is required by reg.5(4), and rights under reg.5 are subject to a qualifying period under reg.7, of working in the same role with the same hirer for 12 continuous weeks. They are also subject to reg.10, which applies different rules where the worker is employed by the agency and is paid by the agency in between assignments.

    (2) Rights to be treated no less favourably than a comparable worker in relation to the collective facilities and amenities provided by the hirer (reg.12). The amenities referred to include canteen, child care and transport services. These rights are subject to a defence of objective justification (reg.12(2)).

    (3) Rights in relation to "access to employment" (reg.13). Following recent case law (discussed below), the right is limited to a right to be provided with information about any vacant posts with the hirer, in the same way as a comparable worker. Again, an actual comparator is required.

71. Regulation 13(1) in particular provides:

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

72. Regulations 5 and 13 are intended to implement art.5 and 6 of the AWD respectively.

73. Art.5(1) ("The principle of equal treatment") provides:

> *"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."*

74. Art.6(1) ("Access to employment, collective facilities and vocational training") provides:

> *"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. Such information may be provided by a general announcement in a suitable place in the undertaking for which, and under whose supervision, temporary agency workers are engaged."*
>
> [arts.6(4) and 6(5) deal with access to collective facilities and vocational training respectively]

Recent developments: scope of AWR

75. A very significant limitation on the effectiveness of the AWR was articulated last year by the EAT in ***Moran and ors v Ideal Cleaning Services Ltd and anor [2014] IRLR 172.***

76. In that case, the claimants worked as cleaners at Celanese Acetate Ltd, for varying periods of time, ranging from six to 25 years. They were employed by Ideal Cleaning Services as agency workers under contracts of indefinite duration, Celanese Acetate being the end user. The claimants brought claims under the Agency Workers Regulations, claiming the right to the same basic working and employment conditions as other workers at Celanese Acetate under reg.5. At first instance, the tribunal relied upon a dictionary definition of the word "temporary" and decided that because the claimants had been placed at Celanese on an indefinite basis, they were not agency workers because they were not supplied to work "temporarily" for the purposes of reg.3.

77. In the EAT, Singh J held that the tribunal was entitled to find that the arrangements under which the claimants in this case worked were indefinite in duration "and therefore permanent". Since "*the concept of 'temporary' in the Regulations and the Directive means not permanent*" the claimants in this case could not be "temporary" agency workers. Singh J further rejected a more fundamental submission that in order to give effect to the purpose of the AWD, the AWR had to be interpreted in such a way as to bring all agency workers who meet the 12-week qualifying period within the scope of the AWR. But that, says Singh J, would "*give no meaning or effect to the word 'temporary' at all.*"

78. The effect of the EAT's judgment is stark, but fairly straightforward: as the law stands following ***Moran***, to have any hope of actually benefitting from the protection of the AWR, agency workers will have to be able to show that when they were engaged on a particular assignment, it was for a specified finite duration. There must be a stipulated *end* to the assignment, otherwise the worker will not be a *temporary* agency worker: the fact of being engaged via a third party agency will not of itself be enough to bring the worker within the scope of the AWR.

79. This opens up a fairly obvious mechanism for abuse. All any agency or end-user has to do in order to avoid relevant workers coming within the scope of the AWR's protection, is to offer assignments on an open-ended basis. They can then be terminated without any notice when they have served their purpose.

80. Such practices are likely to be the subject of challenge on the evidence in some cases of course: it may be for instance, that in any given case evidence is available which indicates that while the worker was told that the assignment was open-ended, the end-user or agency always intended for it to last a finite amount of time. Cases of this nature where the agency worker is in possession of such evidence are of course likely to be rare.

81. What is really needed however, is for the issue to be revisited at appellate level or even via legislative amendment, and for the meaning of "temporary" to be reconsidered. Arguably, the EAT's approach in ***Moran*** has simply replaced difficulty in defining "temporary" with difficulty in defining "not permanent". There ought to be room for some assignments to be regarded as "temporary" even if there is no formal end date given, by reference to the surrounding circumstances.

Recent developments: access to permanent vacancies

82. While some temporary agency workers are agency workers by choice, for the most part what they really want is a permanent job. Following a judgment of the EAT earlier this summer however, the AWR (and by implication the AWD) do very little (if anything) to assist in that regard.

83. As regards the right under reg.13 *"to be informed by the hirer of any relevant vacant posts with the hirer, to give that agency worker the same opportunity as a comparable worker to find permanent employment with the hirer"*, there is no right to the "same opportunity" at all, but

rather merely a right to information. The wording of reg.13 is said simply to be stating an assumption that giving the information, will lead to the agency worker having that same opportunity as a comparable worker. That is the effect of the judgment in ***Coles v Ministry of Defence (31.07.15, UKEAT/0403/14/RN).***

84. Mr Coles worked in a particular post as an agency worker for approximately 8 ½ years. The MOD conceded, perhaps surprisingly, that he was a temporary agency worker, so that his status was not in issue.

85. Upon a reorganisation by the respondent, the post occupied by the claimant in this way was to be removed. In its place, would be a permanent "in house" post for a civil service employee. That post was advertised in such a way as to enable agency workers to see the vacancy, and to submit an application. But any such application would have been entirely futile and not considered on its merits because it was a pre-condition for eligibility that applicants had to be an existing civil service employee (at least until the final stage of the recruitment process – if that ever were to arise – pursuant to which external advertisement of the vacancy would be resorted to). Further, priority was to be given to existing civil service employees who were in the "redeployment pool".

86. There was a factual dispute in the tribunal, as to whether the claimant had received a particular email inviting him to "validate" his "Civil Service Jobs" account. Such validation would have enabled the claimant to see and respond to the vacancy for what had essentially been his agency position. The tribunal found that he did receive the email, and that for whatever reason he failed to appreciate the need to take further steps.

87. That finding did not matter however, because the tribunal also found that eventually there was a telephone conversation between the claimant and HR prior to the closing date, wherein the claimant was told that he could not be considered for the vacancy due to being an agency worker (unless or until the vacancy were to be advertised externally). It was also found that validation of a Civil Service Jobs account would enable the individual to access a 30 minute online test as to competency for a Band D post, the passing of which was a further obligatory hurdle for a non-civil service candidate like the claimant, or indeed an internal candidate seeking a promotion.

88. After being told that he was not eligible even to be considered, there was no point in the claimant validating his account, submitting an application and taking the Band D test. There was still time to have done so before the closing date. If he had succeeded, such matters would have been questions of a *Polkey* nature to be determined at a remedy hearing.

89. An existing civil service employee who was in the surplus/redeployment pool (Ms Gingell) was subsequently appointed to the post in question without competition. The claimant's agency position therefore was terminated and he left.

90. Mr Coles' case in the tribunal was:

(1) The right in reg.13 and art.6 was more than a right to information: it was a right to have the "same opportunity" as other workers to find permanent employment.

(2) At the very least, it was by no means certain which of those two possible interpretations of art.6 was correct, necessitating a reference to the ECJ bearing in mind the test in the relevant case law for when a reference should be made.

(3) If the right was to more than mere information, the provisions in reg.13 requiring comparison with a "comparable worker" were not compatible with art.6 (again, requiring a reference for determination of that question).

(4) If the "comparable worker" provisions were compatible with art.6, then Ms Gingell was indeed a comparable worker and Mr Coles had not had the "same opportunity" as her on the MoD's own case.

Tribunal judgment

91. The tribunal agreed that the right was implicitly more than a right merely to information: reg.13/art.6 contained a right to be able to apply for relevant vacancies as well. The tribunal went as far as to find that it would be "strange" if the position were otherwise.

92. However, that right to apply, did not entail a right for the temporary agency worker to have an application actually considered. The MoD was free to reject any such application out of hand, on the basis of an eligibility criterion requiring applicants to be permanent civil service employees and not agency workers. In this way, the MoD was entitled to give priority to an in house permanent employee who was in the redeployment pool (ie Ms Gingell).

93. In any event the "comparable worker" provisions in the AWR were not incompatible with the AWD, and Ms Gingell was not a comparable worker. Consequently his claim would have to fail, even if the right was more extensive in nature than the tribunal had found. This was on the basis that (1) Mr Coles was an agency worker; (2) Ms Gingell had already taken the Band D test whereas Mr Coles had not and (3) she was in the redeployment pool.

94. Finally, the tribunal agreed that the post in question was a "vacant post" (art.6(1) AWD) and a "relevant vacant post" (reg.13). However, because of the tribunal's other conclusions this did not have a bearing on the outcome.

EAT arguments

95. On appeal to the EAT, Mr Coles ran essentially the same arguments that had been made to the tribunal. The central contention was that there was less than complete certainty as to the correct interpretation of art.6, so that it was not possible to be sure as to what was required when interpreting reg.13 of the domestic regulations. Following ***R v International Stock Exchange [1993] QB 534 (CA),*** It is well established that a reference will not be required where the conclusion as to the correct interpretation of the provision of EU law in question is "*inevitable*" (550A), or in other words where the domestic court can have "*complete confidence*" (551C), per Sir Thomas Bingham MR. Those phrases could not apply here and thus, an ECJ reference was required on both the issue of the nature of the right, and whether the domestic implementation of an actual comparator, was compatible with art.6.

96. Alternatively if it was possible to be sufficiently confident, the interpretation advanced was that there was a right to the "same opportunity" to find permanent employment as other workers in the undertaking. That meant that being given information about a vacancy that agency workers were specifically prevented from applying for could not be sufficient to meet art.6 requirements.

97. The "same opportunity" meant, being able at least to compete with Ms Gingell for the post. It was not contended by Mr Coles that there was any right to a guaranteed interview, nor that there was a right to any "preferential treatment" for Mr Coles over Ms Gingell, nor that the employer should not be allowed to form a redeployment pool of existing employees in the first place.

98. Indeed, it was common ground that any permanent employee in Mr Coles' position (ie having his or her post deleted) would automatically have entered the redeployment pool, and the argument was simply that he should have been treated as if a member of that pool, so as to enter a competitive selection exercise with Ms Gingell. He might well still have been unsuccessful, but the chances of success were a question for the remedy stage.

EAT judgment

99. Dealing with the shorter points first, the EAT gave short shrift to a cross-appeal by the MoD against the tribunal's conclusion that the post in question was "vacant post" and/or a "relevant vacant post". It was plainly both.

100. Further, the EAT concluded that the issue of whether the actual comparator requirement in reg.13(2) was compatible with art.6, "*might have merited a reference*" to the ECJ (para.55), but because this issue did not arise unless the right could be said to be a right to more than simply information – and because the EAT ultimately concluded that the right was no more than that – the issue of the permissibility of the domestic actual comparator provisions could not affect the outcome of the case.

101. Moreover, the EAT agreed that the tribunal had erred in finding that Ms Gingell was not a "comparable worker" for the purposes of reg.13(2). The issue, following ***Matthews v Kent & Medway Fire Authority [2006] ICR 365 (HL)*** (concerning very similar provisions in the Part-Time Workers (Prevention of Less Favourable Treatment) Regulation 2000), was whether Mr Coles and Ms Gingell had been engaged in "broadly similar work", not whether they had the same or broadly similar qualifications and skills. The MoD had not challenged Mr Coles' evidence in the tribunal as to the nature of his work compared with that which it was said Ms Gingell had been doing, and none of the grounds relied upon by the tribunal had been relevant to the exercise it had to carry out. Mr Coles and Ms Gingell were comparable workers, but again because of the EAT's primary conclusion this did not affect the outcome.

102. The primary and fatal conclusion to Mr Coles' claim however was that the right in art.6 that Member States are required to implement, is simply a right for agency workers to be given information about vacancies. Because Mr Coles had been given the necessary information about the vacancy in question, that was the end of the claim and the other issues in the case became academic.

103. The EAT's reasoning was primarily that the words "*to give them the same opportunity as other workers in that undertaking to find permanent employment*", are there to spell out what the purpose of giving the information is: they build in an assumption that providing the information will in fact give the agency worker the same opportunity to find permanent employment as other workers in the undertaking.

104. The principle of equal treatment is set out in art.5 of the AWD, and is restricted to "basic working and employment conditions" which are defined by art.3 as relating to working time and pay only. Because the principle of equal treatment had been set out in that limited way separately, it had to follow that the words "the same opportunity…" in art.6 did not connote any right in respect of access to permanent employment separately or in addition to rights of equal treatment in respect of basic working and employment conditions.

105. Further, support for this view was to be gained by comparing the position with the operation of the FTER and Framework Agreement constituting the parent Directive of the FTER. First, it was noted that art.6 AWD refers to the same opportunity to *"find"* permanent employment, whereas clause 6 of the Framework Agreement refers to the opportunity to *"secure"* permanent employment. That difference was said to be significant.

106. Moreover, in the Framework Agreement at clause 4, the principle of equal treatment is broader in that it concerns simply "employment conditions". This was a sufficiently wide phrase as to encompass requiring fixed-term employees to have the "same opportunity to secure any permanent position in the establishment", as provided for in reg.3(2)(c) FTER. The fact that the domestic FTER provide a separate right to information about vacancies at reg.3(6), supports the proposition that the correct interpretation of clause 6 of the Framework Agreement (which sets out a right to information about vacancies in virtually identical terms to those used in art.6 of the AWD) is that it is limited to a right to information. Interpreting art.6 of the AWD consistently with the very similar clause 6 of the Framework Agreement, ought then to produce the same result.

107. The point made on behalf of Mr Coles to the effect that interpreting art.6 in this way means that agency workers will often have a pointless right to be provided with information about vacancies that they are ineligible for, could be answered by regarding the point as unrealistic. Because it did not seem likely that employers would in fact reject applicants on grounds only of their agency worker status, that was a further reason for interpreting art.6 as giving rise only to a right of information.

108. Finally, it is evident at various points in the judgment that the EAT regarded the idea of a right to the "same opportunity" to be considered for permanent vacancies as other workers as difficult to implement, leading to the EAT positing propositions for itself as to guaranteed interviews, and preference for the agency worker, and an "unspecific right to make an application" (para.55) which it then knocked down. Evidently, considerations as to the workability of the right proposed by Mr Coles weighed on the EAT's mind in rejecting the appeal.

Comment

109. Sadly, for various reasons unconnected with the legal arguments, there is not going to be an appeal to the Court of Appeal in Coles. That is perhaps a shame as there are a number of difficulties with the EAT's reasoning which would arguably merit further attention, ultimately by the ECJ. If that is ever to happen however, it will be in another case.

110. The fundamental point at issue, is whether it is possible to be *certain* as to the true meaning of art.6, given the complete absence of ECJ authority on the point, without obtaining the true meaning from the ECJ itself. Of course lucid and reasoned conclusions can be reached either way without the benefit of an ECJ judgment, but the question is whether there is any doubt about what the ECJ's view would be. It may be that Langstaff J's interpretation would turn out to be correct of course, but given the perhaps controversial aspects of the judgment it is contended that it was not in fact possible to be as sure as the EAT suggests.

111. Moreover, the absence of any further appeal by Mr Coles means that the compatibility of the actual comparator requirement in the FTER with the terms of art.6 AWD will not be ventilated before the ECJ either, unless another case challenges that point.

112. The problems with the EAT's reasoning, it is suggested, are as follows.

(1) A restrictive reading of art.6, to the effect that it merely points out helpfully what the benefit is in being provided with information, contains a perverse assumption that such a benefit does actually exist. Self-evidently however it cannot exist in many cases, including ***Coles*** itself: information about vacancies that agency workers will not be considered for, is of no assistance to agency workers in finding "permanent employment" at all. Would the EU Parliament and Council really have intended such an assumption to be made?

(2) The idea that the words "to give them the same opportunity…" simply helpfully explain what the purpose of the right to information is, represents an odd drafting technique. If the right is only to be given information, why does the article need to say any more than that there is a right to information?

(3) Equally, if the right is merely to information such that the "same opportunity…" does not connote a right to equal treatment, and given that the second sentence of art.6(1) explains how the right to information may be complied with (by providing a "general announcement in a suitable place" etc), it is difficult to see why it is necessary for the domestic AWR to contain elaborate comparator provisions at all. Could it not be that the second sentence of art.6(1) explains how the simple right to information may be complied with, while the "same opportunity …" signifies something more?

(4) Indeed, where fixed-term employment is concerned, the Government appears to have taken that view, by creating *both* a right to the same "opportunity to secure any permanent position…" as an aspect of the right to equal treatment (reg.3(2)(c)), *and* a separate right to information under reg.3(6). The latter right is explicitly created in order to ensure the effectiveness of the former, which makes perfect sense. Is it not possible that the EU Parliament and Council independently had the same thing in mind when drafting art.6 of the AWD in very similar terms to those used in the Framework Agreement? It might very well be that the Government implemented the parent Directive on fixed-term work properly in the FTER in this respect, and that the

Parliament and Council did not intend anything different when creating the AWD in strikingly similar terms.

(5) The EAT's reasoning in comparing and contrasting rights under the Fixed-Term Workers Directive (Framework Agreement), and under the Agency Workers Directive (AWD) is problematic in this regard. Firstly, the EAT relies on the fact that the domestic FTER include an additional separate right only to information at reg.3(6), as a basis for concluding that the EU Parliament and Council could not have intended there to be any more extensive a right than that, in art.6 of the AWD (para.28). It clearly cannot provide any such guidance at all.

(6) Further, the Framework Agreement and the AWD both provide separate rights to equal treatment in clause 4/art.5 and to information about vacancies to provide the "same opportunity…" in clause 6/art.6. The "employment conditions" in clause 4 of the Framework Agreement that are the subject of equal treatment, arguably refers to terms of employment. The range of terms deserving of parity is wider than under art.5 of the AWD (limited to working time and pay), and the EAT relied on this idea in apparently concluding that this explains why the Government created the right to equal treatment in the "opportunity to secure any permanent position" in reg.3(2)(c) FTER, whereas it did not in the AWR.

(7) But terms of employment or employment conditions conceptually do not obviously include a right to be considered equally for permanent vacancies. The use of the broader definition of "employment conditions" in clause 4 of the Framework Agreement (equal treatment), does not therefore explain why domestically the words "opportunity to secure any permanent position…" were used to create a substantive right of equal treatment in the FTER. Those words were plainly derived from clause 6 rather than clause 4 of the Framework Agreement, contrary to the EAT's own view the words the "same opportunity…" contained in clause 6/art.6 do not form any part of the principle of equal treatment at all.

(8) Clearly there is therefore some basis for believing that art.6 AWD might have created a substantive right of equal treatment in relation to access to vacancies, separately from issues of working time and pay: the Government's view that in one context the "same opportunity…" gives rise to a right of parity of treatment, but that in another context seemingly it does not, itself indicates at least two different possibilities as to which is the correct position under the parent Directives, which ought to have been resolved by the ECJ.

(9) In any event, even without comparing the rights of fixed-term employees, it is difficult to see why the fact that the principle of equal treatment in the AWD is concerned with working time and pay, should preclude there being a separate right to the "same opportunity" to be considered for permanent vacancies in another provision. The rights of equal access to collective facilities and vocational training are not grouped within art.5 on the principle of equal treatment either.

(10) The EAT also placed emphasis on the word "*find*" in the AWD, contrasting it with the alternative of "*secure*" in the Framework Agreement. But the emphasis should arguably have been on the words "*permanent employment*": a right merely to be provided with information, only enables the agency worker to "find" information about vacancies. It does not enable him to find permanent employment, particularly if he is not allowed to apply for the vacancy he is informed about. It is by no means clear that there is any particular significance to be attached to the difference between these two words. The ideal party to address that issue, it is contended, would be the ECJ.

(11) The "lack of reality" that the EAT said lay behind the foregoing submission can clearly be challenged beyond the obvious point that it is in fact what happened in this case: the assumption that in practice employers would have no reason to breach such a right is not a basis for concluding that the right does not exist. There is no rational

basis for any conventional form of discrimination, but that is not a reason not to prohibit it.

(12) The EAT's apparent view of the unworkability of the right to the same opportunity, somewhat overlooks the fact that the very same right has in fact been introduced for fixed-term employees in the FTER at reg.3(2)(c) (subject to the defence of objective justification). Indeed, if Mr Coles had been engaged in exactly the same way, for exactly the same reasons, but directly rather than through an intermediary, he would have had exactly the *prima facie* right contended for, under the FTER.

(13) In any event, the fact that the existence of the right contended for would necessitate adaptation of existing practices in relation to redeployment pools and the like, is not a reason for deciding that the right cannot possibly exist. If the EU has indeed created such a right, it is the existing practices that have to bend to accommodate it, not the other way around. In terms of redundancies and finding suitable alternative employment and the fairness of such dismissals, it would clearly be within the range of reasonable responses not to give a vacancy to an at risk employee without competition, if the law requires the employer to give a relevant agency worker a chance to compete for that vacancy as well.

113. There is a world of difference between a permissible interpretation, and the only possible interpretation. The EAT's view as to the scope of the right under art.6 AWD is plainly a permissible interpretation, and might even be said by the ECJ ultimately to be the correct interpretation. But it is contended that without the ECJ's clarification, it cannot truly be said that it is the only possible or unquestionably correct interpretation. As matters stand however, it is the EAT's interpretation that counts and the right to anything more than information does not exist. Whether that position will be altered in future, only time will tell.

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September 2015