Appeal No. UKEAT/0229/16/DA
UKEAT/0058/17/DA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 23-25 May and
25 & 27 July 2017

Before

THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)

(SITTING ALONE)

---

(1) INTERNATIONAL PETROLEUM LIMITED — APPELLANTS
(2) MR F TIMIS
(3) MR A SAGE

(1) MR A OSIPOV
(2) DR S LAKE
(3) MR S MATVEEV — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEAL AND CROSS-APPEAL

APPEARANCES

For the Appellants and Second and Third Respondents	MR SIMON FORSHAW (of Counsel) Instructed by: Clyde & Co LLP The St Botolph Building 138 Houndsditch London EC3A 7AR
For the First Respondent	MR BRUCE CARR QC (One of Her Majesty's Counsel) Instructed by: Brahams Dutt Badrick French LLP 24 Monument Street London EC3R 8AJ

SUMMARY

PRACTICE AND PROCEDURE

There was no error of law by the Employment Tribunal in proceeding with the grossing up exercise for tax purposes, on the basis of the schedules provided by both parties, which set out the position under UK tax law only. The Respondents had only themselves to blame for failing to produce the necessary material that would have enabled the Employment Tribunal to determine the questions raised under the **Double Tax Convention** with the USA, and whether they made a difference to the calculation of the tax due.

There is a strong public interest in the finality of litigation, and this principle applies even in a case decided on a basis of law that may prove to be wrong.

THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)

Introduction

1. This is an addendum to my Judgment handed down on Wednesday 19 July, dealing with all but the tax aspects of the appeals and cross-appeal in this case. This addendum should be read with that Judgment, which sets out the background and context for what follows, and is not repeated here.

2. By its First Judgment, the Employment Tribunal made a provisional compensation award of £843,372.56 in favour of the Claimant. The Tribunal made the award on a provisional basis because it did not have the necessary information to gross up the award for tax purposes, as it explained at paragraph 157. The Tribunal expressed the hope that the parties would agree the tax position. In the absence of the hoped-for agreement, a further hearing took place, and by the Second Judgment the Tribunal adopted the approach to grossing up advanced by the Claimant with the result that a final grossed-up award of £1,744,575.56 was made. I shall return to the detail and circumstances leading to the Tribunal's Second Judgment below.

3. The Respondents contend that the Tribunal erred in the Second Judgment in the approach to grossing-up the Claimant's award. In short, the Respondents contend:

(i) that the Tribunal grossed up according to UK law, when the proper law was US law pursuant to articles 14 and 22 of the **UK/US Double Tax Convention** ("the Double Tax Convention"); alternatively,

(ii) if the UK tax regime was the appropriate regime in principle, then the Claimant was entitled to foreign service relief in respect of the compensatory

awards, which would otherwise fall to be taxed under Part 6 of the **Income Tax Earnings and Pensions Act 2003** ("ITEPA 2003").

4. A third ground of appeal contending that, in any event, the Tribunal was wrong to gross up the award on the assumption that the Claimant was liable to pay tax in the UK on the portion of the award made to the Claimant to account for his liability to pay tax in New Jersey, was not pursued by the Respondents in light of my Judgment, as Mr Forshaw made clear.

5. The appeal is resisted by the Claimant. First, Mr Carr QC submits, that it is not open to the Respondents to pursue these arguments at all. They are either to be regarded as new arguments not pursued below, or, to the extent that they were pursued, they were pursued too late and without a basis that enabled any calculation of the tax due to be made. The appeal should accordingly be dismissed, irrespective of its legal merit or otherwise. Alternatively, if the legal arguments are entertained, Mr Carr submits that the proper law for tax purposes is UK law, as the Employment Tribunal held. So far as foreign service relief is concerned, he submits, that the issues raised require evidence and a factual determination that has not been made, and that the Employment Appeal Tribunal cannot therefore adjudicate this issue.

6. It seems to me, to be appropriate to deal first with Mr Carr's fundamental objection to the appeal. In doing so, it is necessary to set out in a little more detail the chronology of events between the First and Second Judgments.

The Relevant Chronology

7. The Claimant was dismissed in October 2014. His claims were heard in December 2015. The First Judgment was promulgated on 6 April 2016, and the Claimant was awarded the

provisional sum referred to above. In the First Judgment, the Employment Tribunal said at paragraph 157 the following:

> **"157. During the course of the hearing the Employment Judge raised with the parties the matter of how remedy should be dealt with if Mr Osipov was successful. All parties agreed that the Tribunal should determine remedy but requested a provisional determination without grossing up. Mr Osipov's loss is the net amount that he would have received, but he will have an obligation to pay US and/or UK taxes on any award made, as a result of which any net award will have to be grossed up to take into account that tax liability which, at present, Mr Osipov is unable to quantify. The award made by the Tribunal is therefore a provisional award based on the figures provided in the schedule of loss and the written submissions of Mr Carr. It is for the parties to attempt to agree the tax position, with liberty to apply for a short additional hearing in the event that they are unable to do this and provided that they have the necessary information in order for the Tribunal to undertake the grossing up exercise."**

8. The Second Judgment sets out the attempts by the Claimant to resolve the tax issues in accordance with that direction. At paragraphs 28 to 37, that chronology is set out, and it is clear that the Tribunal concluded that the Respondents did not cooperate in that process. The Tribunal held as follows:

> **"28. The Tribunal notes that the Claimant's solicitors, Brahams Dutt Badrick and French ("BDBF") wrote to Clyde and Co, the Respondents' solicitors, on 26 April 2016 (481) stating amongst other things:**
>
> > **"We consider that if the parties take a co-operative approach there should be no need for a further hearing to deal with the tax position. Accordingly, in order to avoid unnecessary costs, on Monday 18 April 2016 our Gareth Brahams proposed to your Chris Duffy that the parties instruct a US accountant on a joint basis to determine the issue.**
> >
> > **Mr Duffy confirmed he would take your clients' instructions on our proposal and would revert to us but we have heard nothing further since that time."**
>
> **29. By a letter dated 27 April 2016 (485) Clyde and Co wrote to BDBF requesting full details of all income, earnings and other awards Mr Osipov had received directly or indirectly in an individual capacity and through any service companies for the period from 6 April 2012 to that date in USA, Russia, the UK and any other jurisdiction in which he had performed work.**
>
> **30. On 4 May 2016 (493) BDBF responded again suggesting the appointment of a joint expert and also stating:**
>
> > **"As we have explained, our client is resident in the United States for tax purposes. As we understand it, personal income in the US is taxed in the year it is received. As such, it is only the current tax year that is relevant for the computation of tax. Therefore, there is no basis for your clients to ask to be provided with information and tax documents of our client in relation to prior tax years.**
> >
> > **We confirm that in the current tax year for federal and state taxes being the calendar year 2016 our client has earned no income at all. …"**
>
> **31. On 9 May 2016 (506) Clyde and Co wrote to BDBF stating:**
>
> > **"The damages awarded by the Tribunal cover a long period including historical payments and therefore International Petroleum Limited needs to understand your client's tax position as per our letter dated 27 April 2016. As you are aware any**

shortfall or wrong computation of tax may result in the tax authorities in the UK, US and Russia pursuing International Petroleum Limited. …"

32. On 17 May 2016 BDBF wrote to the Tribunal (517) as follows:

"As we understand it, whether it is the US or UK tax rules that apply to the provisional net award or both, it is the tax position of the Claimant in the tax year of his receipt of the grossed up award that determines the amount of tax payable. Consequently, there is no basis whatsoever for the Respondents to say that any information and documentation relating to prior tax years is needed for the grossing up calculations to be performed.

Furthermore, as we have stated to the Respondents our client has earned no income in the current UK or US tax years.

Thus, there is no reason to delay a hearing on the issue of grossing up on the basis that the Respondents contend or [at] all. …"

33. By a letter dated 27 May 2016 from Clyde and Co to BDBF (523) it was stated:

"You have confirmed that your client is a US tax resident. As you may be aware the tax year for federal income tax for individuals in the US is a calendar year, with the income tax return due on 15 April of the year following the end of the calendar year.

…

In light of the above we believe it is necessary for your client to provide details of his taxable income in the US (on his worldwide earnings) for the calendar years 2012-2015. …"

34. On 10 June 2016 BDBF wrote to Clyde and Co (545) stating:

"… As US tax is accrued on cash basis the years the entitlements fell due (2012-2015) are irrelevant. It is only the year in which the payments would have been made (2016) that count.

Accordingly, it is only the current tax year that is relevant for the purposes of grossing up of the Tribunal's award. Your clients do not therefore require information about the income earned by our client in the tax years 2012-2015 or our client's US income tax returns in respect of those years."

35. There then followed a period of inactivity. On 26 October 2016 BDBF notified Clyde and Co that it was likely that the Claimant would submit an expert opinion on the tax position and was informed that the Respondents had not made their decision on the matter at that stage. This was confirmed by Mr Wilcox of BDBF in an email to Clyde and Co of 31 October (602).

36. On 10 November 2016 BDBF sent Clyde and Co a draft index for this hearing, including a reference to expert evidence, to which Mr Duffy responded:

"Reviewing the position and will revert shortly." (604)

Mr Duffy confirmed on 11 November (605) that he would advise the following week if Clyde and Co would be producing an expert letter on tax.

37. On 22 November 2016, two days before this hearing, Mr Duffy emailed Mr Wilcox (608):

"We understand that skeleton arguments will be exchanged at 10am tomorrow.

We would hope to be in a position to exchange our costs schedule with tax reports at the same time and will contact you to do so at 10.00am." "

A

9. Thus, although the Respondents sought wide-ranging disclosure of the Claimant's tax affairs extending over a number of years from 6 April 2012 and across a number of jurisdictions, which was refused by Brahams Dutt Badrick French ("BDBF", the Claimant's solicitors), no applications for specific disclosure orders were made at any stage, and after the letter of 10 June 2016, from BDBF to Clyde & Co (solicitors for the Respondents), Clyde & Co remained silent. Moreover, during this period the Respondents refused to make a net, or any, payment to the Claimant: see, in particular, the letter dated 27 May 2016 from Clyde & Co.

B

C

10. In the absence of agreement as to resolution of the tax issues, BDBF wrote to the Employment Tribunal by letter dated 22 June 2016, inviting a further hearing to be listed as soon as possible. The hearing was fixed for 24 November 2016. I assume, in accordance with normal practice, that adequate notice of that hearing date was given, although I have not been able to identify when that date was fixed.

D

E

11. At the eleventh hour, by letter dated 22 November, the Respondents notified BDBF that they would be relying on expert evidence in relation to the tax position. Clyde & Co said in that letter that they hoped to be in a position to exchange expert tax reports at 10am the following day.

F

12. The expert tax evidence, provided to the Claimant accordingly on 23 November, comprised a letter with a report prepared by a partner of Clyde & Co, Mr Ray Smith, and a report from BDO, who are accountants, prepared by Mark Walters, dated 22 November. Mr Smith attached to his letter a schedule showing:

G

> **"… the calculations of the tax payable on the award made by the Employment Tribunal to Alexander Osipov if Alexander Osipov was subject to UK tax. …"**

H

A It continued:

> **"… However we do not have enough information at this time to determine whether US tax law or UK tax law applies save in relation to the award of unpaid salary as mentioned in the attached schedule."**

B 13. Insofar as that element of the award was concerned, the schedule explained:

> **"2.1. The amount of unpaid salary (£169,702.58) is likely to be taxed as if it were regular "earnings" from the employment (ITEPA 2003 s62). …"**

C In other words, this sum would be taxed under UK tax law.

14. At paragraph 2.1, the report stated:

D

> **"2.1. … We do not have sufficient information concerning the tax status of AO [Alexander Osipov] during his period in the UK to comment definitively on his UK tax treatment. However, we understand that AO performed employment duties in the UK during the period between 1 June 2012 to 27 September 2014 and that the Unpaid Salary part of the Award is in respect of such duties. In any case, on any basis (even if AO was not a UK tax resident) the Unpaid Salary part of the Award would still be subject to UK income tax as UK based earnings under ITEPA 2003, s27."**

E 15. As to the balance of the award, at paragraph 2.2, the letter stated:

> **"2.2. The remainder of the Award is likely to be taxable under the special provisions relating to the taxation of termination payments (ITEPA 2003 s401), but only to the extent that it exceeds the £30,000 threshold (ITEPA 2003 s403). …"**

F 16. At paragraphs 4 and 5, the letter provided the tax calculations for the unpaid salary component of the award (paragraph 4) and for the balance (paragraph 5). As to the latter, the letter said:

G

> **"5.1. Depending on double taxation (see point 6 below) the remainder of the Award may fall to be taxed in the UK in this tax year."**

17. The letter concluded at paragraph 6, in the following terms:

H

> **"6. *The UK/US Double Taxation Convention (the Treaty)***
>
> **6.1. Even if AO is now US resident, Article 14 (Income from employment) of the Treaty would still seem to allow the UK to tax the unpaid salary element of the Award. Article 14 provides**

that "salaries, wages and other similar remuneration" earnt in one state can be taxed in that state.

6.2. However, it seems quite likely that the remainder of the Award should be exempt from UK tax since it should fall within Article 22 (Other income) of the Treaty. This Article only allows the state in which the individual is resident to tax the income. We note though (save in relation to the award of unpaid salary referred to above) that at this stage we do not have enough information to determine whether US tax law or UK tax [law] applies."

18. Mr Mark Walters explained in his BDO report that he had:

"… examined the component elements of the award made at Tribunal and the exchanges between parties subsequently to find a basis on which to evaluate the grossed up component."

19. Under the heading "US", he stated the following:

"If, in the year of payment, Mr Osipov is resident for State tax purposes in New Jersey or other of the states of [the] United States he will be subject to the laws of that state. Almost all US states impose an income tax on residents and very few states provide any relief for taxes paid to foreign countries. As a result the likelihood is that the payment will be subject to state taxes in full, subject to confirmation of Mr Osipov's state of residence, and a US state tax gross up is likely to be required (on top of the UK tax gross up)."

20. Under the heading "UK", he wrote:

"The UK will consider earnings relating from an employment delivered in the UK to income taxes when determined … irrespective of whether the individual is resident or non-resident at the point of receipt. …

The constituent parts of the award fall to be assessed under different sections of the UK tax legislation applying to employment related awards. The components that are compensatory in nature rather than contractual payments may qualify for a significant element of relief from UK tax for foreign service with the group. Relief may also be available under the US-UK tax treaty, under the 'Other Income' article (article 21)."

21. He then stated, with regard to potential relief, that:

"In order to determine the extent of this relief we have to examine the total period of employment by Mr Osipov with IPL and other group companies. We then need to determine the years when Mr Osipov was resident counting as years of UK service and, either non resident years or resident but not ordinarily resident years counting as overseas years in determining the ratio of foreign service relief that may be due."

22. Under the heading "Specific Points to Resolution", he said the following:

"Hopefully this analysis of how taxation matters work between the UK and the US is helpful but, no conclusions can be drawn with [the] information supplied.

> **In order to satisfactorily consider the Federal (State and local taxation if applicable) in the United States and the UK taxation treatments in terms of the gross up of payments correctly and accurately we would need to have the following:**
>
> **1. A copy of the Federal tax return for the 2015 calendar year (Form 1040) including Forms 1116 reflecting the carry over foreign tax credit position and a supporting statement of any carry forwards for the 10 year period.**
>
> **2. Clarification of State of residency for tax purposes, the 2015 State return(s) as filed will be helpful and any change of circumstances in 2016 where a main residence or property is maintained and a physical presence in different states if changed from 2015.**
>
> **3. Clarification of Mr Osipov's UK residence and Ordinary Residence status for all years he was employed by IPL or related entities, so that a determination of Foreign Service Relief (FSR) can be made."**

23. The result is that having made wide, perhaps unnecessarily wide, requests for disclosure of what was inevitably sensitive personal information between May and June 2016, the Respondents and their solicitors did nothing whatever to progress these issues in the months that followed. As late as 11 November, having been chased by BDBF to explain their position, they were still undecided as to whether expert tax advice evidence would be relied on by them. They finally disclosed that tax evidence on 23 November, but even then, so far as the points now advanced by reference to the **Double Tax Convention** and foreign service relief, the Respondents' expert tax evidence was equivocal and incapable of any certain conclusions as to the correct tax position and, significantly, provided no basis for calculating the grossed up figure required.

24. At the hearing on 24 November, the Respondents by their skeleton argument criticised the Claimant for this situation, asserting that there had been a simple refusal by him to provide disclosure of relevant documents to the Respondents. That submission was not accepted by the Tribunal. At paragraphs 33 to 38, the skeleton argument continued:

> **"33. The Respondents cannot be required to calculate tax liabilities, potentially arising over several years, in a vacuum. Proper disclosure should have been provided.**
>
> **34. It follows that the appropriate way for the Tribunal to dispose of this aspect of the case, is to require the Claimant to provide proper disclosure to the Respondent. Only once that has happened, can the Tribunal consider the appropriate approach to 'grossing up'.**

Calculation of Tax

35. If notwithstanding the Respondents' submissions, set out above, the Tribunal is minded to make an assessment of the Claimant's liability to pay tax, the best that the First Respondents can do is as follows.

…

37. As to the wages element of the award (and doing the best the Respondents can):

(a) since these wages were earned in the UK, they ought to be taxed in the UK;

(b) assuming that the wages are split equally as between the 2012/13 and 2013/13 [sic] tax years, the Respondents assess the tax at £80,608.75.

38. It is assumed that the remaining aspects of the award will be taxed under US law, although in the light of the foregoing, it is very difficult for the Respondents to know what the true position is."

25. In other words, the Respondents attempted to raise the two issues (the issue by reference to the **Double Tax Convention** and the foreign service relief issue) but only on the basis that they might make a difference to the grossing up calculation. However, their position at the hearing was that the calculation could not be undertaken without an adjournment and the provision of further information or documents, albeit that there was no focussed application for particular or specific documents or information.

26. Nonetheless, and despite the absence of any calculation at all to support his submissions, I accept that Mr Forshaw made submissions to the effect that, as a result of article 22 of the **Double Tax Convention**, US law applied to the grossing up exercise and, in the alternative, that foreign service relief was available if UK tax law applied.

27. It is common ground, as between Mr Forshaw and Mr Carr, that although the Employment Tribunal did not expressly state that it refused the adjournment sought, the clear implication from the way the hearing proceeded indicates that was its conclusion. That is unsurprising, in light of the chronology and, in particular, the direction that had been made by the Tribunal at paragraph 157 of the First Judgment. It is also unsurprising, in light of the early

attempts by the Claimant to cooperate in instructing a joint tax expert, who could then identify what documents were necessary for the purposes of this exercise, but which was rejected by the Respondents, who instead waited until the day before the hearing before disclosing equivocal expert evidence unsupported by any calculations, still less the very grossing up calculations, that the Tribunal required.

28. Furthermore, the Claimant had been kept out of his money for some significant time, and the Respondents had not, as I have indicated, been prepared to make any payment on an interim basis. As Mr Carr submitted then and submits now, without contradiction by Mr Forshaw, the published accounts of the First Respondent immediately before the Claimant's dismissal, in October 2014 showed a bank balance of approximately $7.9m odd. By the date of the Tribunal's First Judgment, that had fallen to a little over $1m. Since then, it has reduced further. Although the accounts referred to the Employment Tribunal's award to the Claimant, no provision is made for the award in those accounts. Any delay caused by an adjournment was and remains likely to lead to further depletion of those assets, out of which any compensation might be paid.

29. The decision to proceed with the grossing up exercise listed for 24 November, and by implication to refuse an adjournment, was a case management decision that fell well within the range of decisions open to the Employment Tribunal. It has not been challenged on this appeal, and nor in my judgment could it have been successfully challenged.

30. It is significant to my mind, that at the end of the day on 24 November the Employment Tribunal, having concluded that it had insufficient information to determine the grossing up exercise and the award that should result, made an order for each side to provide the Tribunal

with their calculations of the grossing up by 2pm on 25 November. Further to that order (as the Tribunal record at paragraph 41) and in compliance with it, it received a letter from BDBF (dated 25 November 2016 timed at 2pm) setting out in detail the way in which the calculations had been undertaken by the tax expert relied on by the Claimant (GTN) together with appended calculations, and further calculating the position if national insurance was taken out of the calculations. The Tribunal also received at 2.01pm on 25 November, from the Respondents:

> **"(b) A spreadsheet prepared by BDO, on behalf of the Respondents, *merely* calculating the tax payable by Mr Osipov in the UK and taking the New Jersey taxes figure from the GTN calculations. The Respondents make no attempt to undertake the grossing up process." (My emphasis).**

Accordingly, the Tribunal had available to it two calculations, both prepared on the basis that the sums were taxable in the UK, neither referring to any foreign service relief.

31. It is right to observe that the Respondents' calculation was sent under cover of an e-mail stating that it was:

> **"… without prejudice to the Respondents' principal argument that this approach is incorrect by reason of Articles 14 and 22 of the UK/US Tax Treaty. You heard the Respondents' submissions in relation to this point yesterday."**

However, I find it difficult to understand this statement. To what was the schedule "without prejudice"? The Respondents had been refused an adjournment. They were ordered to provide grossing up calculations. It was open to them to provide a calculation based on the application of article 22 of the **Double Tax Treaty** to the whole award or to some part of that award, but they failed altogether to do so. Instead, they produced a calculation based on UK law, without reference to the foreign service relief, while maintaining that such a schedule was incorrect.

32. At paragraph 42, the Tribunal held as follows:

> **"42. The Tribunal prefers the approach taken by the Claimant. It adopts that approach, taking national insurance out of the calculations. Mr Osipov would not have been entitled to a personal allowance as he earned more than £122,000. Accordingly, the UK tax calculations of GTN are correct and are as follows:**
>
> | | |
> |---|---|
> | **£43,000 at 20% equals** | **£8,600** |
> | **£43,000 - £150,000 at 40% equals** | **£42,800** |
> | **£150,000 to £813,372.56 at 45% equals** | **£298,517.65** |
> | **Total tax** | **£349,917.65** |
>
> **The Tribunal does not add national insurance because this is an award of compensation. It does however add the New Jersey tax figure given by GTN which is £64,606.09 which when added to £349,917.65 amounts to a total tax figure to be grossed up of £414,823.74."**

The Appeal

33. Against that background, the first question that must be addressed is whether the Employment Tribunal erred in law by failing to determine what the proper law for taxation purposes was. Mr Forshaw submits that, faced with the Respondents' submissions that US law applied, the starting point was for the Employment Tribunal to identify the proper law and whether the Respondents were correct. It was not open to the Tribunal simply to ignore the argument and avoid altogether dealing with that first. Mr Forshaw submits it was incumbent on the Tribunal to do so, even if thereafter the Tribunal would have had to grapple with what to do, including possibly, considering the grant of an adjournment that would necessarily be required to achieve the calculations for grossing up purposes.

34. Persuasively as these submissions were advanced, I do not accept them. From the outset, the Employment Tribunal made clear that what it lacked at the First Judgment stage was the necessary information to undertake a grossing up exercise. The Respondents refused to cooperate in the instruction of a joint expert and, having failed to do so, failed to take any steps in preparation for a contested hearing until the eleventh hour.

35. Finally, at the hearing on 24 November, having refused an adjournment, the Tribunal expressly ordered the parties to provide it with calculations of the grossing up relied upon by 2pm the following day. The only calculation provided by the Respondents in response to this clear order was a calculation based on UK tax law applying. That this was provided on a "without prejudice" basis is neither here nor there in these circumstances. Whatever the merit of the legal arguments advanced by the Respondents on 24 November, their position was that no calculation could be carried out then, and their ability to do so was necessarily dependent on an adjournment for further or specific disclosure to be obtained which had already been refused.

36. In these circumstances, I can see no error of law in the Employment Tribunal proceeding as it did, in the exercise of its discretion, to continue with the grossing up exercise rather than adjourning. Further, there was no error of law in deciding the issue at stake on the basis of the material provided by the parties. The Tribunal recognised that the only calculation provided by the Respondents was a calculation merely setting out the UK tax position. It chose between the only two calculations it had been provided with in response to its order.

37. It was neither necessary nor appropriate in those circumstances, for the Tribunal to determine the questions of law in principle raised under the **Double Tax Convention**, or by reference to foreign service relief, in the absence of a calculation that would enable the Tribunal to apply such a conclusion to the facts and to produce a grossed up award. To decide the legal question, without it being capable of any application in fact by virtue of the absence of adequate evidence and/or information, would have been an academic exercise the Employment Tribunal was not required to embark upon. The whole purpose of that part of the further hearing was to achieve a final grossed up award that could be paid to the Claimant. But the only factual basis advanced by the Respondents (in the schedule from BDO created at 13.53pm on 25 November

A and produced in compliance with the Tribunal's order) that would enable the Tribunal to do this, was a factual basis premised on UK law without even any reference to foreign service relief.

B

38. Moreover, having exercised its discretion to refuse an adjournment, the Claimant was entitled to finality in this litigation, with an adjudication in November 2016 based on the calculations provided by the parties, both by reference to UK tax law. The Respondents had

C only themselves to blame for that situation. They could, and should if they wished to do so, have obtained the evidence and information they considered necessary to produce the calculations required by the Tribunal, based on the proper law they contended for, and that

D would have enabled the Tribunal to determine whether, and to what extent, their arguments made a difference to the calculation of tax likely to be exigible on the award, and to calculate the award in final form.

E

39. Even now, the Respondents have not, so far as I am aware, produced any grossed up calculations by reference to US tax law, which is said to apply, or by reference even to UK law with foreign service relief in the alternative. Were I to entertain these grounds of appeal and, if

F successful, so far as foreign service relief at least is concerned, it would be necessary for the case to be remitted to the Tribunal to consider further evidence about the nature of the Claimant's employment when in Russia between 22 February 2011 and Spring 2012 and

G whether it is properly to be regarded as continuous employment with the same employer or group, or as two separate and different employments, and to consider his residence status. There is a strong public interest in the finality of litigation, and it is well established that this

H principle applies, even in a case decided on a basis of law that may prove to be wrong.

40. In light of this conclusion, it seems to me that it is neither necessary nor appropriate to adjudicate on the interesting substantive issues raised by this part of the Respondents' appeal.

Conclusion

41. For all these reasons the appeal is dismissed, and the grossing up exercise conducted by the Tribunal, cannot be faulted for having been carried out on the basis of UK law without reference to foreign service relief.

42. The tax calculation will have to be carried out afresh in light of my Judgment. The parties should apply the same approach and method as that applied by the Employment Tribunal since that has not been challenged in any way on this appeal. This should be a straight forward exercise and I will give directions aimed at producing an agreed grossed up award calculation.

43. I sincerely hope that the failure to cooperate exhibited earlier in these proceedings by the Respondents will not be repeated. I make it clear that if unnecessary resort to expert evidence or other unreasonable behaviour occurs (by either side), cost sanctions may be applied. I hope that will not be necessary.

44. Finally, I am grateful to counsel and those instructing them for the able assistance they have provided in dealing with this matter.