Appeal No. UKEAT/0173/17/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 23 January 2018

Before

THE HONOURABLE MR JUSTICE LANGSTAFF

(SITTING ALONE)

MR P WRIGHT — APPELLANT

AEGIS DEFENCE SERVICES (BVI) LIMITED & OTHERS — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR EDWARD KEMP (of Counsel) Instructed by: Slater & Gordon (UK) LLP 50-52 Chancery Lane London WC2A 1HL
For the Respondent	MR JAMIE ANDERSON (of Counsel) Instructed by: LHS Solicitors LLP Corinthian House 17 Lansdowne Road Croydon CR0 2BX

SUMMARY

JURISDICTIONAL POINTS - Working outside the jurisdiction

CONTRACT OF EMPLOYMENT - Whether established

The Claimant, who was Australian though had dual nationality as a UK citizen, worked in the Australian embassy in Kabul providing security services for the Australian Government having been contracted to do so by a company registered in the British Virgin Islands, under a contract which provided (amongst other matters) that he would obey all reasonable instructions given to him by the company for whom he worked, who were contractors to the end-user, and by the end-user. He was paid in AUD, and when he took leave was paid to return to Perth as his home port; and had deliberately sought to distance himself from connections with the UK and emphasise connections with Australia at the time of his accepting the contract under which he worked, but his contract also included a clause that said that English law would apply to his contract, and the English Courts have exclusive jurisdiction. He appealed against the dismissal of claims for detriment for making public interest disclosures, and for "automatic" as well as "ordinary" unfair dismissal, and in respect of breach of contract, which depended upon whether he had a contract of employment as opposed to a contract as a worker.

The ET was held in error in its approach to determining employment status, by reason of its approach to determining whether the relevant Respondent has sufficient control over the Claimant. It did not remind itself that the law was clear that the relevant question is not what practical manifestations there were of control being exercised, but whether under the contract the purported employer had the right to direct the Claimant in what he did: **Ready Mixed Concrete**, **White v Troutbeck**, **Zuijs v Wirth** (and cases referred to in that decision) relied on. An appeal against the ET decision that Parliament would not have intended the **Employment Rights Act** to apply to this employment abroad failed: the appropriate test had been applied,

and there was no error in addressing the factual inquiry (whether the Claimant had a sufficiently close connection with the UK and UK employment law), answering it to the effect he did not, and thereby answering the question of law arising under section 94 **Employment Rights Act**. Whether taking the approach that it was now to be regarded as a question of fact, or whether taking the approach that it was for the Court to determine as a matter of law whilst according respect to the views of the decision maker at first instance, the answer was to the same effect. This head of appeal failed.

The consequence was that the claim for breach of contract remained to be determined by the Employment Tribunal.

THE HONOURABLE MR JUSTICE LANGSTAFF

1. This is an appeal from an Employment Tribunal ("ET") sitting at London Central (Employment Judge Welch), which on 20 March 2017 decided to reject the Claimant's claims. The ET held that the Claimant was a worker and not an employee of the proper Respondent (which is identified as "the First Respondent"), and that in consequence his claims to have been unfairly dismissed, subject to unfair dismissal on the ground of whistleblowing and, therefore, automatic unfair dismissal and for whistleblowing detriment were dismissed as against the First Respondent. As to a breach of contract claim, which he also raised, the Judge determined that that too foundered. That left the possibility of a claim in respect of whistleblowing detriment, which a worker (as opposed to a "traditional" employee) might bring. As to that the Judge held that, in the particular circumstances of the case, the ET had no jurisdiction to consider that complaint since, on her view, the **Employment Rights Act 1996** ("ERA") had no extra-territorial application in the particular circumstances of this case.

The Facts

2. The Claimant worked providing security for the Australian Government at the Australian Embassy in Kabul from 2013 onward. In late 2015, the Fourth Respondent succeeded to the contract and the First Respondent engaged staff to service it. One of those was the Claimant. The claim therefore relates to service, extra-territorially, by the Claimant in Kabul at the Australian Embassy, technically part of Australian territory abroad, on behalf of the ultimate end-user, the Australian Government. However, the Claimant was a dual national. He held a British passport for some of the time that he was engaged. He had, found the ET, a house in Lincoln which he had purchased with the aid of a mortgage; but he was engaged by the

First Respondent, a company registered in the BVI, on a contract tendered for by the Australian Department of Foreign Affairs and Trade.

3. When he was considering being recruited, though he was a dual national, he gave his parents' address in Australia as his in the forms which it was necessary to fill in. He deliberately chose not to give his English address. Indeed, the ET found that he stated that he was not lawfully resident in the United Kingdom, and when required to give addresses at which he had lived for the four years prior to his application, gave addresses in Australia.

4. In the process of entering into a contract, the Claimant, along with others of the group who had previously provided security under arrangements made by the predecessor of the Fourth Respondent in the contract, was concerned about entering into Annex B in the form of contract before the ET. Annex B, headed "*Acceptance of Terms*" and which began with the words:

> **"I have read, understood and agreed to comply with this Contract.**
>
> **In particular, I understand, acknowledge and agree that:**
>
> **…"**

appeared to them to make them subject to laws other than those which were Australian.

5. When that was raised on their behalf, saying to the would-be employer "We are subject to Australian law", the ET found that the First Respondent "confirmed" that:

> **"30. … only 'applicable' relevant laws were covered, and not all UK laws. "For example, the UK has extra-territorial jurisdiction over the crimes of torture, hostage-taking and war crimes in international armed conflicts. Therefore, we would prefer to leave this in." "**

The provision was duly left in but with that assurance for what it was worth.

6. When supplying a personal security verification check - which required him to disclose his nationality and immigration status - he again confirmed that he, the Claimant, was Australian, though he had dual nationality with Britain, and that he was not lawfully resident in the UK. Payment under the contract was in Australian dollars.

7. The contract of engagement defined relevant laws as:

> **"… Host Nation laws [I interpose to say the host nation was Afghanistan, so far as work was conducted outside the Embassy], applicable laws, treaties or MOUs of the Commonwealth of Australia (including the Public Service Act 1999 (Cth), the Privacy Act 1998 (Cth) and the Work Health and Safety Act 2011 (Cth) [which I think stands for Commonwealth]) and any applicable UK or Afghan laws, and any regulations relating to those laws."**

8. The contractual documentation also made reference to the **Official Secrets Act 1911-1989** ("OSA") - which I understand to be a reference to the UK legislation - and to the **Data Protection Act 1998** ("DPA"). The ET found as to this that it was the intention on the part of the First Respondent, never put into effect by reason of a mistake, that the Claimant should also have signed an Australian declaration to similar effect: but the fact is that within the contractual documentation, and documents relating to it at the time of his first appointment, he had signed the **OSA** and an undertaking relating to both the **DPA**, both of which were English statutes.

9. The ET also noted, however, and importantly for this appeal, that the contract of engagement provided under the heading "*Governing Law*", as follows:

> **"9.1. This contract shall be governed by the laws of England. The parties agree to submit to the exclusive jurisdiction of the courts of England to settle any claim or matter arising under or in connection with this Contract providing that if the Consultant does not have substantial assets in the United Kingdom, [the First Respondent] may take legal action against the Consultant before the courts of any other country in which the Consultant does have such assets."**

10. The ET additionally found that some of the administration relating to the Claimant's contract and its performance occurred in England though the personnel file was held in Dubai;

A that the termination of his contract was decided upon and effected from Dubai though a number of individuals were involved, some of whom were not in Dubai but may have been in the UK; and that the home port for the purposes of flights home, to which he was entitled contractually, was Perth in Australia.

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The Argument Below

C 11. Before the ET, it was contended that the nature of the contractual documentation was such that the Claimant was not an employee. He had not thought that he was an employee at the time that he accepted the contracts; rather he considered he was a contractor independent of employee status. The Claimant argued that, notwithstanding the declarations in the contractual

D documentation to the effect that he was not an employee, the ET should have regard to the realities of his position. The submission was that there was mutuality of obligation, the Claimant provided his services personally and there was no express right to substitute. He bore no risk in respect of the contract and was provided with equipment, was fully integrated into the

E First Respondent and subject to disciplinary proceedings should the need arise. Therefore, it was submitted that the Claimant should be regarded as an employee notwithstanding the description which the parties had given to his status in the contract.

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12. As to the applicability extra-territorially of English jurisdiction, it was submitted that the appropriate test was that which was contained in **Lawson v Serco Ltd** [2006] ICR 250 in the

G House of Lords, **Ravat v Halliburton Manufacturing and Services Ltd** [2012] ICR 389 in the Supreme Court, and I have little doubt that **Duncombe v Secretary of State for Children Schools and Families (No 2)** [2011] ICR 1312 was further relied upon by the Claimant.

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The Decision

13. The ET first considered the question of whether the Claimant was employed under a contract of employment as such. The Judge said (at paragraph 102) that she was satisfied that there was mutuality of obligation in the Claimant agreeing to provide personal service to the First Respondent and the First Respondent providing work for him to do; and that there was (paragraph 104) a requirement for him to provide personal service. She had directed herself by reference to the case of **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance** [1968] 2 QB 497. She quoted the well-known classic passage from the judgment of MacKenna J. Insofar as she cited it, it reads:

> **"A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service.**
>
> **… Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be …" (Page 515C-F)**

What I note she did not cite were the passages which followed immediately after the passage above.

14. The Judge expanded upon what was to be said about categories (i) and (ii). I note that those are two positive requirements before a contract *may* be classified (I emphasise the word "may") as a contract of employment. The third criterion is, in essence, a negative one; that is, that the other provisions of the contract do not take a contract in which there is a mutual agreement to provide work for money which is to be under the control, to a sufficient degree, to make one a master and the other a servant, outside the definition of a contract *of employment*: there may be situations, of which **Ready Mixed Concrete** itself was an example, in which

notwithstanding the two conditions ((i) and (ii)) necessary for there to be a contract of employment the contract was not properly to be classified as such.

15. As to the second condition - that of control - what MacKenna J said was:

> **"… Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant. The right need not be unrestricted.**
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> > **"What matters is lawful authority to command so far as there is scope for it. And there must always be some room for it, if only in incidental or collateral matters" - *Zuijs v Wirth Brothers Proprietary Ltd* [[1955] 93 CLR 561, page 571]." (Page 515F-G)**

He went on to demonstrate that what he was talking about was not a manifestation of practical control by what was done or said during the performance of a contract, but a question of contractual entitlement to require a particular act to be done or not - if you like, a directory power - by the words which immediately followed, "*To find where <u>the right</u> resides …*" and then going on to say:

> **"… If the contract does not expressly provide which party shall have the right, the question must be answered in the ordinary way by implication." (Page 516A-B)**

I shall return to the point later, but it is plain to me that MacKenna J was talking about the right to exercise control or give direction as opposed to whether directions could be shown to have been given from time to time during the life of a contract.

16. Applying the law as she had set it out, incompletely, as it may appear from **<u>Ready Mixed</u>**, the Judge declared herself satisfied that there was mutuality, and there was a requirement of personal service. She then turned to control, identifying no feature that was inconsistent with the contract of employment so as to justify reference to it in her Decision. In passing she had referred to some matters which might have shown such inconsistency, such as

A the identification of the payment arrangements by which the Claimant was entitled to a "fee" and was contractually responsible for his own tax. She said at paragraph 106:

> **"106. There was a level of control exerted over the Claimant, however, not sufficient in my view to make the First Respondent "the master" in an employment relationship. I have taken into account the particular type of service being provided by the Claimant and that due to this, sufficient control would have to be applied in order to ensure that the services were carried out in accordance with health and safety and appropriate rules in place, particularly as weapons were to be used."**

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17. At paragraph 107 she said that the parties initially intended the relationship to be that of

C a self-employed contractor, which was understood to be the norm for the industry in which the Claimant worked. At paragraph 111 she said:

> **"111. The Claimant was not in business in his own right such that the First Respondent was his customer or client. He was instructed in the way in which to carry out his work, he had a team leader and whilst he had some autonomy in how he carried out his assignment, he was subjected to rules, received training and could have been 'disciplined' should he have**

D **breached any of the rules applicable to his engagement.**

> **112. Whilst I accept the training would have to be provided, and that there would have to be an element of control due to the type of work being undertaken, I am satisfied that this level of control did not cross the threshold in order to make the Claimant an employee.**
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> **113. This was reflected in the paperwork and the fact that throughout his engagement with Hart or the First Respondent, he had never requested or taken paid holiday."**

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She went on to hold, therefore, that he was a worker not an employee.

F 18. Turning to the question of territorial jurisdiction, she pointed out that the Claimant had never worked in the United Kingdom, was not interviewed here, nor did he provide any services at all in the UK. Though that would normally be conclusive, she accepted that there were exceptions to that general principle where the Claimant was able to show a sufficiently

G strong connection to the UK in order to bring his claim here. She described the Claimant's movements when he was on leave from Kabul and, in effect (see paragraphs 118 and 119) found that he spent some time in Australia, some time visiting his partner in the United States

H and some time in the UK.

19. She said, at paragraph 120:

> **"120. The contractual documentation refers to various laws in various countries. Whilst this includes the laws of the UK, it is not, in my view, conclusive."**

20. At paragraph 122, she said:

> **"122. In light of the above, I am not satisfied that the links to the UK are sufficiently strong to satisfy the test concerning jurisdiction set out above. The Claimant only ever worked in Afghanistan, for a Company not based in the UK, on the [Australian Embassy Kabul] contract entered into between the Fourth Respondent and the Australian Government. I do not consider that Parliament would ever have intended a claimant in these circumstances to be afforded the protection of the UK employment legislation.**
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> **123. In coming to my decision, I have taken into consideration that there was a clause in the contract stating that it was governed by English law (clause 9.1). However, even if this raised an expectation as to possible protection that might be enjoyed by the parties (as referred to in *Duncombe v Secretary of State for Schools*), I have considered this as a factor in my decision and do not find that this is sufficient in light of the facts of this case, to enable the Claimant to bring claims in the UK."**

21. Before me Mr Kemp, for the Claimant, attacked the conclusions on both the findings as to contract and as to extra-territorial jurisdiction. I shall deal with each in turn.

Contract

22. Mr Kemp's essential submission was that the test here was a contractual one. The Judge had fallen into the error, he submitted, with particular reference to paragraph 106. It was identified as an error in cases such as **White v Troutbeck SA** [2013] IRLR 949, where Sir John Mummery said, at paragraph 41:

> **"41. … the low level of actual day-to-day control by [the purported employer] over the activities of the claimants as precluding an employment relationship when, viewed in the round, the relationship between the parties recorded in the agreement in the setting of the surrounding circumstances presented the principal elements of employment: work by the claimants for reward in a workplace designated by [the purported employer] and for the continuing benefit of [that employer], plus paid annual holiday reflecting the statutory protection of employees, coupled with a sufficient degree of control over the claimants to preclude their independent status as contractors with their own organisation and working arrangement. The claimants were not operating as independent contractors carrying on a business or businesses of supplying caretaking/management and security services generally. As for labels chosen by the parties to describe their working relationship, they are not necessarily the correct conclusion on the legal nature of the relationship, but in this case both parties signed a document referring to it [as] 'this employment agreement' and that was an expression of their intentions confirming the objective analysis of the legal position."**

Rimer and Longmore LJJ agreed.

23. In effect, the submission made to me is that the ET Judge did not pay proper regard to the contractual arrangements. She did not regard the question of control as being a matter principally of contractual entitlement but rather of practical demonstration to be established by what did or did not occur. Thus, for instance, her reference to the fact that the Claimant had never requested or taken paid holiday is a reference to what had occurred, but it says nothing as to whether he was obliged to request or whether contractually he was entitled to take paid holiday.

24. There is no reference within what she said to aspects of the contractual documentation which I have been shown in full. The ET expressed itself satisfied that this was documentation agreed between the parties, with a sufficient parity of bargaining power, as not to require an enquiry such as that which occurred in **Autoclenz Ltd v Belcher** [2011] ICR 1157 as to the true nature of the agreement. It consisted of a number of documents. The contract of engagement said at paragraph 1.1:

> **"1.1. … The Consultant will ["Consultant" being how the Claimant was described throughout the documentation; he was referred to as a consultant and not as an employee] at all times, act in a professional and disciplined manner, with all due skill, care and diligence and follow all reasonable requests and instructions."**

If that was intended, it is difficult to see why that is not an undertaking on behalf of the Claimant as consultant to make himself subservient to the orders of or directions of the First Respondent.

25. It does not stand on its own. In paragraph 1.2, the third line reads:

> **"1.2. … the Consultant agrees to exercise such powers and perform such reasonable duties and services as may from time to time be necessary for the provision of the Services at all times. …"**

and goes on to say that he will perform the services in accordance with:

> **"… any policies notified by [the First Respondent] or the Client from time to time, as well as in accordance with the General Terms and Conditions."**

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26. It is not necessary here to decide who should determine what is necessary for the provision of the services given the reference, clearly, (in paragraphs 1.1 and 1.2) to the Claimant's undertaking to follow the reasonable requests, instructions and (in paragraph 1.2) policies. The leave entitlement at paragraph 3.1 is that leave is to be taken only by prior agreement. At paragraph 2.2, the consultant agrees to be assigned to other roles as deemed necessary at the discretion of the First Respondent.

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27. There is (at paragraph 5.4) a clause relating to termination, which refers to the personal acts and behaviour of the Claimant - very like a disciplinary clause, though it could be consistent with a contractor who is a single independent operative - but which includes, at paragraph 5.4(e) and (f), the following as something which gave a right to terminate the contract:

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> **"e) The Consultant has refused to carry out an instruction from any superior or relevant military/diplomatic officer [which I envisage postulates that there is somebody who is "superior", i.e. a person who is likely to give him some orders]; or**
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> **f) The Consultant demonstrates insubordinate behaviour [which I take to mean that he is putting himself in a position of subordination]; …"**

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28. The contract goes on in the "*Self-employed Consultant Undertakings*" at Annex A, to include a non-solicitation clause at paragraph 10. Mr Anderson makes the point that that might be applicable too to a contractor, but in Annex B the position as to the entitlement of the employer contractually to give directions to the Claimant as to the work he is to do and the general manner of his doing so is set out in these terms: "*I must conform to*", and this continues on these terms as an undertaking by the Claimant:

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> **"2. I must confirm to and comply with all orders and SOPs [that is Special Operating Procedures] issued by or on behalf of [the First Respondent] or any other member of the Aegis Group in relation to the Project, …"**

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A Mr Anderson points out that that could be construed as referring only to the question of safety and that may have a reflection in the way in which the Judge dealt with that matter at paragraph 106. It, however, gives me another reason for concern about the logic which the Judge applied in paragraph 106.

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29. Paragraph 106 shows that the Judge was looking at the level of control exerted, by which, in context, the Judge appears to mean actually exerted as opposed to that which could contractually be required of the Claimant. That was not sufficient to amount to control, but curiously she said that in assessing this she had taken into account that sufficient control would have to be applied. It is an odd finding that there is an absence of control where there has necessarily to be sufficient control. She may have meant that it was inevitable that there would have to be a degree of control, but it does not follow that that means that degree of control (as to which there would necessarily be an implied entitlement in the Respondent to exercise it) should be ignored in deciding whether the employee was subject to a right in the employer to control him in his work.

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30. Annex B is followed by contract of engagement "*General Terms and Conditions*". That sets out some requirements as to the appearance of the consultant but, more particularly, and for present purposes, at paragraph 3.8 reads:

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> **"3.8. By accepting the Contract the Consultant is reminded that he is working in a high risk environment and must comply at all times with all instructions, policies and SOPs laid down by or on behalf of [the First Respondent] in conjunction with the Relevant Authorities."**

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At paragraph 5:

> **"5. There are no fixed hours of work for the Consultant. The Consultant may be called upon to provide his Services throughout each and every day of the Period of Engagement. When not [I note the next two words] on duty, the Consultant will be informed whether he is off duty or on standby. …"**

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31. Against this, there is only this to be said: that within the contract, described as a contract of engagement, it is expressly agreed at paragraph 8 that the contract constitutes a contract for the provision of services:

> **"8.1. … Nothing in this Contract shall constitute or be construed as constituting or establishing a contract of employment or a partnership or a joint venture or an agency between the parties hereto for any purpose whatsoever …**
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> **8.2. This Contract … constitutes the entire agreement between the parties …"**

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32. I shall turn to the provisions of the contract which relate particularly to extra-territorial jurisdiction in due course.

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33. It is submitted by Mr Anderson that the contract was held by the ET to reflect the reality of the situation. Thus, in that light, paragraph 8.1 was describing the reality as the parties saw it. The Judge had looked at the reality of the situation and in paragraph 93 of her Judgment had reflected it in her conclusion that the reality was not any different from that set out in the contractual documentation. She had pointed out at paragraph 97:

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> **"97. Throughout the Claimant's assignment, the Fourth Respondent [that is irrelevant for present purposes] did not subject him to any control. …"**

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She went on at paragraph 100 to describe how she had applied the facts of the case to the law in this area.

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Discussion

34. The use of terms such as "employer" and "employee" are relevant in determining whether there is a contract of employment or not. It could not be otherwise in determining what parties understood they had entered into by agreeing it. However, if it is clear what they agreed was nonetheless something which was a contract of employment, properly so described, then it

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A is for the Court, objectively, to recognise it as such, notwithstanding any label which the parties may have applied to it. This is trite law.

B 35. As to control, there have been a very great number of cases relating to employment status which have come to the EAT in which it has been clear that the Employment Judge has looked to see whether control has actually been exercised as a matter of fact in practice. It seems that in some of those cases much of the discussion has related to whether the evidence C shows that orders have been given or not, and whether the Claimant has or has not availed himself of the rights that one might expect an employee to utilise or have. This approach concentrates upon practical manifestations of day to day control and not upon the contractual D entitlement to which MacKenna J drew particular attention in what he had to say, yet it is this which is critical. He was speaking about rights, by reference to **Zuijs v Wirth Brothers Proprietary Ltd**.

E 36. **Zuijs** is a case which was decided by the High Court of Australia, but it is of great use in this context to return to it knowing that the essential principle within it has recently had the endorsement of the Court of Appeal in **White v Troutbeck** as I have described. But there is a F considerable body of law, all to the same effect. The judgment of the High Court of Australia in **Zuijs** - Dixon CJ, Williams, Webb and Taylor JJ together giving the main judgment and McTiernan J agreeing - identifies a number of other cases, some from this jurisdiction and of G binding authority, and all expressing the same principle.

37. The case deals with the problem of seeing an employer having control in any meaningful sense over someone who has more skills relevant to the task in hand than does the H employer. The particular case of **Zuijs** involved a claim by an acrobat for compensation. The

A acrobat was injured when a fellow acrobat, whom he had played a hand in bringing to the notice of his employer, had lost hold of some trapeze equipment and had fallen, whilst the Appellant was holding on to him from below, upon the Appellant. It was plain that acrobats have particular skills that those who employ them may not possess. As to that, the leading judgment pointed out that there may be people who are engaged or employed in order to use personal skill in an individual act, and it may be that in such cases that there might be no contract of service, but the judgments reads:

> **"… a false criterion is involved in the view that if, because the work to be done involves the exercise of a particular art or special skill or individual judgment or action, the other party could not in fact control or interfere in its performance, that shows that it is not a contract of service but an independent contract. …" (Page 570)**

38. It would be an error, such as identified by MacKinnon LJ in **Wardell v Kent County Council** [1938] 2 KB 769 (a binding authority), to hold that there may be workers such as chefs, cabinet makers, compositors, professional football players and nurses whose skills and, therefore, the occasions in which they may be required to exercise them, often involve judgement, and as such are not susceptible to intimate direction by an employer.

39. A further example was that of a comic artist employed by a newspaper: **Associated Newspapers Ltd v Bancks** [1951] HCA 24, and another that of the Scottish case of **Stagecraft Ltd v Minister of National Insurance** [1952] SC 288, concerning two comedians giving acts together in a variety show. Clarke LJ said:

> **"Broadly speaking there can be no doubt that in some respects an artiste is beyond the control of the management. It is his own individuality and personality that makes or mars him as an artiste. However, much he may be instructed or directed it is the natural gift which counts but the fact that the performance of a task depends on an actual gift or on some laboriously acquired accomplishment does not necessarily mean that the performer cannot be a servant. It is only in the most mechanical of operations that anyone can dictate absolutely the mode of performance. The nature of the task is not conclusive; an artisan may be an independent contractor while the most highly skilled technician is a servant. A skilled craftsman may have highly individual gifts and yet be under a contract of service. His value as a servant lies in his individuality and he is frequently employed just because he can exercise a specialised skill which the employer does not possess. The employer of such a servant can direct the objective to which the servant's skill is to be addressed but he is powerless to control the manner in which the servant's skill is exercised."**

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40. Examples come to mind of the in-house solicitor who advises an employer on matters of law as to which the employer may be ignorant or much less well informed; or the chauffeur who when driving is subject to the directions of traffic constables and traffic signs and is exercising his skill which his employer may simply not have, or chooses not to perform, delegating the judgements to be exercised to the chauffeur from time to time. Both are plainly employees, and are engaged as such precisely because the employer does not have their particular skills and could not himself do their jobs. Thus, the question does not depend, as the cases make clear, upon the practical demonstration of control by drawing attention to particular instances when control has or has not been exercised, but rather to what is known of or maybe inferred as to the contract between the parties which is said to give rise to the right in the employer to direct in relevant respects.

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41. The old-fashioned phrase "master and servant" has some use here: as between "employer and employee", so described, the focus upon the relationship being one in which one has power to direct the other may, by use of the terminology, be obscured. "Master and servant" may be more indicative of the right in one to direct the other, even if he could not himself do his job. The decision for the Court is not, however, a case of applying a label: the law is clear that, as these cases demonstrate, without any obvious exception, what matters is the power to direct, as MacKenna J pointed out.

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42. In this case, it seems to me, that the contract is clear as to this power. It is inescapable as a term of contract that the employer here had the power to direct and the employee had bound himself to observe that direction. The fact that the parties described the contract as that which it objectively was not is beside the point. It was simply unarguable that this contract did not contain sufficient by way of control, and it was no answer, as suggested in paragraph 106,

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A that one could ignore control such as was exercised because it was obvious some would have to be. If it was obvious some would have to be and the Claimant was to be subject to it, then that is strong evidence of a right to control by the employer of the employee.

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43. It follows that I have no hesitation in concluding that the Judge was in error as to the first ground of her decision.

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Extra-Territorial Jurisdiction

44. The ground of appeal reads as follows:

> **"The ET erred in law in its application of the test of sufficiently strong connection to Great Britain and British employment law by failing to assign the requisite importance to a number of factors that were in the Claimant's favour. Had the ET assigned the requisite importance to those factors it would have been bound to hold that the requisite strength of connection had been established. The ET was therefore wrong in law to hold that the ERA did not apply to the circumstances of the Claimant's engagement with the Respondent."**

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45. Jurisdiction in this Tribunal arises on a point of law only. To assert that the point of law is not applying an inappropriate test nor failing to take into account some factors which it was obligatory to take into account nor taking into account factors which it was obligatory to leave out, but instead to say merely that the Judge did not apply sufficient weight to relevant factors is an unpromising beginning. In any situation in which due regard has to be paid, at the least, to the Judgment below it would require very strong argument to show that in the decision made the Judge had failed to apply a weight which was appropriate. Nonetheless, undaunted, Mr Kemp set out on this task.

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46. He submitted that the test, as established through **Lawson v Serco**, **Duncombe**, **Ravat**, and **Bates van Winkelhof v Clyde & Co LLP** [2012] IRLR 992 CA, was properly articulated by the Judge, as was common ground, but that she did not pay sufficient attention to the fact that some factors were more than equal to others. In **Duncombe v Secretary of State for**

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Schools, when considering the case of a teacher at a school in Germany, in one of a group of schools arranged by the Government throughout Europe for children of parents working in European institutions - in what were, effectively, international enclaves - the Court held a teachers such as the Claimant have a sufficiently close connection between the terms of their engagement and the UK and UK law.

47. There were four reasons given at paragraph 16 by Lady Hale in her speech for this. The first she described as a *sine qua non*:

> **"16. … their employer was based in Britain; and not just based here but the Government of the United Kingdom. …"**

observing that that was the "*closest connection with Great Britain that any employer can have, for it cannot be based anywhere else*". It is interesting to note the use of the words there "*sine qua non*". The employer here was not found to be based in Britain in the present case (although I would have some hesitation in saying that the employer was "based" in the British Virgin Islands which appears, plainly, to have been a convenient country of registration).

48. Secondly - this was the first of her two most significant points - they were employed under contracts governed by English law, the terms and conditions entirely those of English law or a combination of those of English law and the international institutions for which they worked. As to that, Lady Hale commented:

> **"16. … Although this factor is not mentioned in *Lawson v Serco Ltd*, it must be relevant to the expectation of each party as to the protection which the employees would enjoy. The law of unfair dismissal does not form part of the contractual terms and conditions of employment, but it was devised by Parliament in order to fill a well known gap in the protection offered by the common law to those whose contracts of employment were ended. …"**

49. She noted that, thirdly, the teachers concerned were employed in international enclaves, having no particular connection with the countries in which they happened to be situated and

governed by international agreements between the participating states. They did not pay local taxes; they were there because of commitments undertaken by the British Government.

50. Fourthly, she thought it would be anomalous if a teacher who happened to be employed by the British Government to work in the European school in England were to enjoy a different protection from that afforded to teachers who happened to be employed to work in the same sort of school in other countries.

51. She described these four together as a very special combination of factors - especially the second and the third - and drew a distinction between her contract and that of directly employed labour where the closer analogy was with a British or any other company operating a business in a foreign country and employing local people to work there. They would work under local labour laws and, she said:

> **"17. … They do not expect to enjoy the same protection as an employee working in Great Britain, although they do expect to enjoy the same protection as an employee working in the country where they work. They do, in fact, have somewhere else to go. …"**

52. Centrally founding himself on this, Mr Kemp pointed out that in the Judge's summary of her decision she had mentioned (paragraph 123) that she had taken into consideration that there was a clause in the contract stating that it was governed by English law but (a) had given that no particular prominence, and (b) had simply failed to mention at this stage that clause 9.1, to which she there referred, went to on to state that the English Courts would have exclusive jurisdiction.

53. The third complaint ("c") that he has is about the level of scrutiny which the Judge gave to the conditions. In the light of the judgments from the trilogy of the highest level cases, and the four factors identified for special mention by Baroness Hale the signing of an undertaking to

abide by the **OSA** and the **DPA**, which are English statutes, demonstrated a clear connection contractually with English law.

54. Returning, as I said I would, to the contract: I have already cited paragraph 9.1. In paragraph 3 of Annex B the contractor agrees to comply with the spirit of, and all restrictions contained in, "*the US Foreign and Corrupt Practices Act and UK Bribery Act*". The contractor agrees at paragraph 6 to "*comply with all existing and future Australian, UK, EU, Host Nation Laws and any other applicable laws*". These go well beyond English laws.

55. He submits that the Judge is in error of approach by not realising the significance, and demonstrating that she understood the significance, to be given in terms of weight to the three particular factors which I have just mentioned.

56. In response, Mr Anderson argues that there is no error of legal principle. The Judge had set out what was common ground as to the test to be applied. In applying it, it is not said that she took into account anything she should not have done. He argues that her conclusion should be treated as if a decision of fact. He draws attention to the view expressed in **Olsen v Gearbulk Services Ltd** [2015] IRLR 818, paragraph 36, and submits that on that basis, adopted as it has been since in the case of **Green v SIG Trading Ltd** [2017] UKEAT/0282/16, where, after more detailed argument, it was held that the **Olsen** approach is indeed correct, at least at this level, then as a matter of law that that should be the approach.

57. Mr Kemp's riposte is to draw attention to the way in which the matter is set out first in **Lawson v Serco**, in which in his seminal speech Lord Hoffmann, at paragraph 34, dealt with the question of whether a Tribunal's conclusion as to extra-territorial effect was one of fact or

A of law. He pointed out that no finding of any primary facts was required but an evaluation of those facts in the cases before him. He said:

> **"34. … I would be reluctant, at least at this stage in the development of a post-section 196 jurisprudence, altogether to exclude a right of appeal. In my opinion, therefore, the question of whether, on given facts, a case falls within the territorial scope of section 94(1) should be treated as a question of law. On the other hand, it is a question of degree on which the decision of the primary fact-finder is entitled to considerable respect. …"**

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58. Building on that, submits Mr Kemp, in **Ravat** Lord Hope of Craighead said at paragraph 29:

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> **"29. … The question whether, on given facts, a case falls within the scope of section 94(1) is a question of law, but it is also a question of degree. … The question of law is whether section 94(1) applies to this particular employment. The question of fact is whether the connection between the circumstances of the employment and Great Britain and with British employment law was sufficiently strong to enable it to be said that it would be appropriate for the employee to have a claim for unfair dismissal in Great Britain."**

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He returned to that theme at paragraph 35 where he described the question as "*ultimately one of degree*" in which "cons*iderable respect must be given to the decision of the employment tribunal as the primary fact-finder*", and added:

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> **"35. … The test which [the Judge] applied was whether there was a substantial connection with Great Britain … It would have been better if he had asked himself whether the connection was sufficiently strong to enable it to be said that Parliament would have regarded it as appropriate for the tribunal to deal with the claim …"**

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59. In **Jeffery v The British Council** [2016] IRLR 935, Judge David Richardson said that he noted what Lord Hope had said in paragraph 29, and commented:

> **"17. On one reading, this might mean that the assessment is one entirely of fact, so long as the correct legal test is applied. But I do not understand Lord Hope to have been laying down a different test to that which Lord Hoffmann stated; nothing else in his opinion suggests that he intended to do so, and the earlier passage in the same paragraph is entirely consistent with Lord Hoffmann's approach."**

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60. Of further relevance to the current argument is paragraph 12, in which he disagreed with the reliance in **Dhunna v Creditsights Ltd** [2014] IRLR 953 of a description by Rimer LJ as to the fact of employment under a contract expressly incorporating English law as "*not*

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compelling" and explained that that meant that that factor on its own could not compel the conclusion that territorial jurisdiction is established, but it will always be significant if a contract is governed by English law. It bears on the degree of connection with British employment law and it is "*relevant to the expectation of each party as to the protection which the [parties] would enjoy*" (**Duncombe**, Lady Hale, paragraph 16), so it may find an important place in a list of factors establishing an especially strong connection. Indeed, in **Duncombe** it is one of the two principle factors which led to the conclusion that territorial jurisdiction was established. I agree with what Judge Richardson said in paragraph 12.

61. As to whether this Tribunal is entitled to take a different view from the Judge below, I am content that in this case my conclusion would be the same whichever approach I were to adopt. I have already expressed my preference in **Olsen v Gearbulk Services** for the approach which Judge Eady took further in **Green v SIG**, but it seems to me that, in this particular case, whether I accord considerable respect for the decision-maker or whether I regard it as a question of fact to be determined (as to which, as I have said, it seems to me the time has now come, since the general principles and examples of those principles in operation are well established by higher authority) I would come to the conclusion here that there is no sufficient basis to show that there should be a departure from the starting point which is, as Mr Anderson submits, that identified in **Powell v OMV Exploration & Production Ltd** [2014] IRLR 80 at paragraph 51:

> **"51. The starting point which must not be forgotten in applying the substantial connection test is that the statute will have no application to work outside the United Kingdom. Parliament would not have intended that unless there were a sufficiently strong connection. 'Sufficiently' has to be understood as sufficient to displace that which would otherwise be the position."**

That starting point has subsequently been endorsed by the Court of Appeal.

62. Adopting that starting point, I have to ask first whether the Judge in omitting to mention the jurisdiction question in what she said in paragraph 123 had failed to take it into account. As to that, the position seems to me to be this. Standing back, the case was one in which a person who was claiming to be, probably, at least as Australian if not more so than he was British, was engaged by a company which was not registered in the UK to work abroad for the entirety of his time in Afghanistan, in a part of Afghanistan, the Australian Embassy, which was technically Australian territory, for the benefit of the Australian Government; with his leave arrangements to be made through Australia and his payment to be in Australian dollars. He was subject to a number of obligations deriving from international sources, principally the US, the UK and Australia and I would accept, on the facts as recited by the ET, more the UK than Australia and the United States as to general obligations. He had, however, along with others, sought to distance himself from the UK, specifically on employment. He had sought, along with others, to distance himself from the particular application of English law except in the respects as to which assurance was given by the First Respondent; that had to be balanced against the fact that there was an agreement that the English Courts would have jurisdiction and English law would apply. Those, it seems to me, are powerful considerations.

63. I have been concerned whether the Judge in not mentioning the question of jurisdiction had omitted it from her consideration, but given that the factors which I have recited and which derive from the findings of fact, all indicate, apart from the three references to the **OSA/DPA**, the contractual place of jurisdiction and the applicable law, and such inferences as may be drawn from the fact that one of the places which the Claimant could lay his head was in his house in Lincolnshire, an absence of connection with the UK. There is some connection with the United Kingdom, indeed, but it would seem to me that the Judge was entitled to come to the conclusion and, indeed, right on these facts to come to the conclusion, that the provisions of the

Employment Rights Act did not apply extra-territorially; that is, the parties would not in this situation have expected them to do so, and nor would Parliament. I note that the Judge made clear that paragraph 9.1 read as it did (see paragraph 40) and highlighted that as one of the relevant terms.

64. Given that and the fact that paragraph 123, taken in context, is a general summary of the matters which had influenced her to coming to the conclusion she did, I have come to the conclusion that she did not overlook the fact of jurisdiction. Without expressly saying that she had taken all the circumstances into account, she was alert to it. She simply was using a form of shorthand in paragraph 123 to describe its effect.

65. As to the **OSA**, again, it is a point which she noted, it is not a point which she missed. There was a number of statutory provisions to which the contractual documentation made reference; some of which were provisions of UK law but, as I have said, others which related to different jurisdictions.

66. In the event, I have come to the conclusion that the challenge fails - whether on the basis that I have reviewed the determination applying the test as it was applied by His Honour Judge Richardson in **Jeffery** or whether, as would inevitably follow, applying the test as I would have suggested following **Olsen v Gearbulk** - that there is, here, no basis for reversing the decision of the ET or holding that it was reached in error of law.

Conclusions

67. In conclusion, therefore, I have found that the ET's decision as to employment status was in error. It follows from what I have said and the nature of the contracts that there is no

A other decision to which an ET could come other than that there was sufficient control. If the right to control is taken together with the other factors the Judge below identified, and with an apparent absence of factors suggestive that the contract formed was not truly one of employment, the contract was and could only be held to be one of employment.

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68. I shall hear argument as to whether, in the circumstances of this case, there should be remission for the ET to consider further whether there are any features of the contract which should take it out of its categorisation as an employment contract into some other form of contract. Though I will approach that sceptically should it be submitted, I am none the less prepared to listen.

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69. As to the question of extra-territorial effect, the conclusion of the Judge stands.

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Contractual Jurisdiction

70. The parties appear to have assumed, when this case began, that if the Tribunal should find that there was a contract of employment, the ET would have jurisdiction to determine the contractual dispute under the **Extension of Jurisdiction Order**. At the conclusion of the argument, I invited the parties to confirm this position. The Respondent was not entirely happy at that stage with agreeing that there was such jurisdiction without further consideration. In the event, there has been no argument that there is no such jurisdiction.

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71. It seems to me that the route to jurisdiction is this, as has been indicated to me: that Article 3 of the **Order** permits for contractual jurisdiction. The **Order** was enabled under section 32 of the **Employment Tribunals Act 1996**; that provides that an ET has jurisdiction where a Court would have jurisdiction to hear and determine the issue. A Court would have

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jurisdiction if service could be effected within the terms of Part 6 of the **CPR**; in particular, Rules 6.5 to 6.7. It is submitted by Mr Kemp, without there being any contrary submission from Mr Anderson, that those Rules provide, in the circumstances of this case, that service would be effective. Accordingly, the ET or a Court would have jurisdiction. Accordingly, the **Jurisdiction Order** is to be read as, in this case, permitting the ET to have jurisdiction to determine the contractual dispute in this case.

Remission

72. I shall not remit. It seems to be that this is not a case to which **Jafri v Lincoln College** [2014] EWCA Civ 449 applies. This is a case in which, for the reasons I have given, it is clear that there was a power to direct in this contract which the Judge did not sufficiently recognise in her Judgment.

Permission to Appeal

73. I shall not give permission to appeal in this case. This is because, whichever test is applied as to the test on appeal, I have concluded that in this particular case on these particular facts it could not be made out that the Judge was in legal error. Therefore you will have to go to the Court of Appeal and ask the Court of Appeal.