Appeal No. UKEAT/0091/17/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 25 January 2018

Before

THE HONOURABLE MR JUSTICE LANGSTAFF

(SITTING ALONE)

DYNASYSTEMS FOR TRADE AND GENERAL CONSULTING LTD AND OTHERS — APPELLANTS

MR M MOSELEY — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEAL AND CROSS-APPEAL

APPEARANCES

For the Appellants	MR GUS BAKER (of Counsel) Instructed by: Oval Law Solicitors Winthorpe House 29 Church End Biddenham Bedford MK40 4AR
For the Respondent	MS TARA O'HALLORAN (of Counsel) Instructed by: Ashtons Solicitors Trafalgar House Meridan Way Norfolk Norwich NR7 0TA

SUMMARY

CONTRACT OF EMPLOYMENT

A contract of employment was entered into by the Claimant. When dismissed he claimed that the dismissal was both unfair and wrongful, and that the appropriate Respondent amongst a group of companies (whom he said was the Second Respondent to the claim) was in breach of the contract it had made with him. The First Respondent, another member of the group, argued that it was the true contracting entity, since a written contract had been entered into with it. A written contract was entered into with the First Respondent, but on the same day the Claimant was given a letter to the passport office from the Second Respondent as if it was his employer. The Employment Tribunal concluded that the parties would never have, and did not at the time of entering the contract, intend that the Claimant would work for the First Respondent (which had no place at which he could have worked); the First Respondent appealed. Each of four grounds was considered and rejected.

THE HONOURABLE MR JUSTICE LANGSTAFF

1. It may at first sight seem surprising that parties who enter into a contract may be unsure as to the identity of the other party to that contract. It might seem to be the most obvious primary matter to be sure of. However, in the world of work, as it has become in the 21st century, corporate structures are often labyrinthine. It is more frequently than previously the case that the same individuals may hold positions of responsibility in a number of companies, which are associated in fact though they may not be so in strict law, and may therefore be wearing one or other hat at the time that a contract of employment is made with an employee.

2. The question arises in this appeal from a Decision of the London (Central) Employment Tribunal (Employment Judge Grewal; the Reasons for whose decision were promulgated on 4 January 2017), as to how the law should approach the issue of establishing the true identity of a contracting party where that is put in issue. In particular, in this case the identity of a potential contracting party was identified in writing in what appeared to be a formal contract of employment and signed by the employee concerned. That contract purported to be with a Jordanian Company, Dynasystems for Trade and General Consulting Company. However at the same time as that contract was signed, on 22 August 2011, the employee, who was sent it for signature, was also given a letter from the party whom he might have understood was his employer for him to present to the passport office, so that he might obtain a second passport necessary for his work in the Middle East, if he worked there at all. The letter was signed by Mr Reuter who was the Head of Legal, not for Dynasystems For Trade and General Consulting Co, a Jordanian Company, but for Dynasystems Ltd, which was a United Kingdom company. (He was also Head of Legal for a further Company (which had offices in Bagley Lane, SW6)

known as TFL Management Services Ltd, but nothing turns on that relevant to today's discussion.)

3. In her Decision, the Judge upheld complaints made to her that the Claimant had been unfairly and wrongfully dismissed and upheld a complaint that the Respondent - in her view the proper Respondent being the Second Respondent, Dynasystems Ltd, the UK Company - was in breach of its contract with him. A number of issues were in dispute below.

4. What is in dispute on this appeal is not the correctness of a finding in general terms as to unfair or wrongful dismissal, or breach of contract, but purely as to the identity of the proper contracting party. One may wonder what the practical purpose of this appeal is since it was accepted at the outset by Mr Baker on behalf of the Appellant that whether the appeal should succeed or fail would be of no practical consequence, so far as the Claimant was concerned. Mr Baker had been instructed below on behalf of three Companies; the Jordanian Company, the UK Company Dynasystems, and a further Company, Explora Security Ltd, which features in the story, all of which made common cause. Whichever was the proper employer, he accepted was bound to pay such sums as were properly due; though he tells me those sums have yet formally to be established.

5. I am told that despite this seeming lack of practical importance, so far as the Appellant is concerned, in that within what might loosely be called the group or association of corporate entities - two of which are Dynasystems Ltd and Dynasystems for Trade and General Consulting Co, the latter of which I shall call the Jordanian Company - there is need for the integrity of their inter-corporate relationships to be maintained and properly understood.

6. With that introduction I turn to the particular facts of the case, the most startling of which perhaps I have already mentioned, the apparent inconsistency at the very outset between the identity of the party which those proposing the contractual documentation had given to the Claimant.

7. The Claimant was an electrician who had seen service in the Forces. He applied for a post as an electrician working in a firm, which in general terms was engaged in aspects of the security industry and might be required to provide its services in arenas of conflict, for instance to NATO troops serving in Afghanistan.

8. He was interviewed at Bagley Lane by Mr Marment (whom the Tribunal found was a Director of the Third Respondent) and accepted an offer, which purported to be from "Dynasystems", so called on an email. On 29 July 2011 he accepted that offer. Nothing was said in particular in that early exchange of communication to identify Dynasystems as being specifically the UK Company, but there was certainly nothing to identify it as the Jordanian one, and the Judge was later to observe in her Judgment that before her when the term "Dynasystems" was used she understood it to refer to the UK Company.

9. On 15 August 2011, the Claimant while sorting out his tax affairs was found to have asked by email of Mr Marment whether he would be paid from the UK Company or a Company abroad. Mr Marment responded that his employment was with a Jordanian registered Company and that he had asked Mr Reuter to send him the details. It was from Mr Reuter that he then on 22 August obtained the offer letter, statement of terms and conditions, and the letter to the passport office with which I have already dealt.

10. The Judge found that there was a dispute as to the proper identity of the party that should be treated as the employer. It was not in question that on the face of it the contract began with the words, "*This Statement of Terms and Conditions of Employment (the "Statement") forms part of your contract of employment with Dynasystems FZE*" - that was the Jordanian Company. I shall turn to other parts of the contractual documentation when I deal with the arguments before me.

11. The Judge, given that there was conflict as to the employer properly to be liable for any matters established by reference to **Autoclenz Ltd v Belcher** [2011] UKSC 41, and directing herself that she had to be concerned with whether the express term stating that employment was with Dynasystems FZE accurately reflected what had been agreed between the parties, said at paragraph 59:

> **"59. … In determining that issue, I had regard to the relative bargaining power of the parties and the conduct of the parties before and after they signed that written statement. The issue, in essence, was whether the Claimant was in fact employed by the First Respondent [that is the Jordanian Company] or that term in his contract was a sham, in that it was not an accurate reflection of the reality."**

12. I shall be selective in reciting the facts, merely to indicate the way in which the arguments before me arise. I cannot do justice in that summary to the careful way in which the Judge explored various aspects of the evidence. In summary, she identified a number of individuals who worked for one or other and many more than one of the Companies which formed the loose group or association of Companies of which the three Respondents were part.

13. The Jordanian Company, she noted, had no actual place of business though it had a registered address. The agreement purported to say that the Claimant would be based at that address but if "based" has any force as a word it did not, in the Tribunal Judge's view, correspond with what actually occurred. She said that:

> **"40. In the course of his four and a half years of employment the Claimant did not do any work for or on behalf of the First Respondent. He worked predominantly for the Second Respondent but was sometimes asked to act as a representative of the Third Respondent when things had to be signed off by the Third Respondent and there was no one available to do it. …"**

14. She described how neither the Claimant nor any of the other electricians were ever based at the office at which it said they were based and it could never have been intended that they should be so based because there was no functioning office there. She noted that he had been employed in London in the way that I have already described briefly.

15. Within his contractual arrangements he was said to be subject to the line management of Mr Gaston. Mr Gaston, she found, was somebody who was a Director of the Second Respondent; he did not hold any office with the First Respondent, the Jordanian Company. The instructions for the Claimant had come, from the very beginning and throughout, from the Second Respondent and not from the First Respondent, though the First Respondent did make formal payment of his salary. However, that was the salary agreed between him and Mr Gaston as to amount, as to increase and as to terms.

16. In paragraphs 60 and 61 the Judge focused in particular upon certain terms. She noted it was difficult to identify - "*very difficult*" indeed she said - somebody who was either an officer or senior employee of the Jordanian Company other than Philippe Le Carpentier who appeared to be a Director; that the First Respondent had not been involved in any way in the recruitment of the Claimant; and at the time when he was offered and accepted employment at first, that being reference to July, nothing had been said about the fact that he would be employed by a Jordanian Company. She noted that the decision as to which legal entity was formally to employ the Claimant lay with the Respondent - by that I think the Judge meant whichever of the Respondents was responsible - and one over which the Claimant had no

option to accept if he wanted to take up the employment. She referred to the fact that Mr Gaston decided where and when the Claimant would be deployed and that the Claimant was never held out to third parties as a representative of the First Respondent. By contrast she referred in parts of her Judgment to occasions when he had been held out by officers of one or other of the Respondents as working for the Second Respondent, the UK Company.

17. At paragraph 61 she noted the discussions about the level of the pay when the field team was not being deployed to theatres of operation in a hostile environment which took place with Paul Gaston and Francis Le Carpentier; he, she found, was a Director of the Third Respondent and worked in London. She noted an argument put to her that the Claimant working for the Second Respondent was entirely consistent with being employed by the First Respondent and being required to work for others as stipulated by his contract (the precise terms - which I shall deal with in more detail later - were at clause 3 of the revised terms of contract on 14 September 2012 (nothing turns upon the fact of the revision): "*... You may be required by the Company, to carry out your duties for and / or act as an employee of any other Associated Company. Your Line Manager at the date hereof is Paul Gaston. ...*"). She observed as to that:

> **"61. … The difficulty with that argument is that under those clauses the instructions to carry out his duties on behalf of a Group Company or an Associated Company had to come from the First Respondent. The instructions to the Claimant about which company he was representing on any contract did not come from the First Respondent. They came from the officers of the Second and Third Respondents based in the London office. …"**

18. As she thought that working exclusively for other Companies, not doing any work for the First Respondent, was inconsistent with those clauses, she concluded:

> **"62. Having considered all the above factors, I am satisfied that the express term in the Claimant's written statement of terms and conditions does not reflect the actual agreement between the parties, and that it was understood from the outset that in reality the Claimant would be employed by the Second Respondent. It was not a question of the Second Respondent carrying out some of the functions of an employer but a case where it carried out all the functions of the employer because it was in reality the employer."**

The Grounds of Appeal

19. Four grounds of appeal were raised. The first was that the Tribunal was in error because the Judge had failed to consider whether it was necessary to imply that the Second Respondent was the employer. The second was that the Judge in dealing with **Autoclenz v Belcher** had misapplied the principles stated in that authority. Third, that the finding as to the identities of the parties to the contract was perverse. And fourth, that in dealing with the clause to which I have just referred - "*You may be required by the Company, to carry out your duties for and / or act as an employee of any other Associated Company*" - the Judge had misinterpreted it to mean that an instruction to work for any other Associated Company would necessarily have to come from the contracting party, on the face of it that is the Jordanian Company, rather than from offices of Associated Companies to whom that task may have been delegated.

20. In response the Claimant sought to raise, what in procedural terms may be known as a cross-appeal but in reality were other reasons for supporting the ultimate conclusion to which the Judge had come by arguing that if for any reason the decision that the Second Respondent was the employer was in error, then the Judge should have found that the Third Respondent was the employer but not the First Respondent.

The First Ground

21. Mr Baker argued that the Judge had found that the First Respondent had the role of providing personnel and products to the Second Respondent to facilitate the fulfilment of contracts into which the Second Respondent had entered. I understand in this that its role was therefore said to be something akin to that of an employment agency; so understood, the Judge had simply failed to appreciate that in a consistent line of authorities - of which notable members are **James v Greenwich London Borough Council** [2008] ICR 545, and **Tilson v**

Alstom Transport [2011] IRLR 169, to which more recently might be added **Halawi v WDFG UK Ltd t/a World Duty Free & Anor** UKEAT/0166/13 - it had been decided that unless it was necessary to imply a contract between a person supplied by an agency to work for an end user and that end user, so that the end user was thereafter to be treated as the employer of the agency worker, there would be no contract let alone one of employment between the person and the end user.

22. Therefore, it is submitted that the Judge here should have analysised the situation by asking whether it was necessary to imply that the Second Respondent was the employer. The Second Respondent was not stated in any contractual documentation to be so, such that the argument must be that there was a sufficient implication arising from the facts to establish it. Mr Baker drew the attention of this Tribunal in particular to **James** and pointed out paragraph 6 in the judgment of Mummery LJ that:

> **"6. In the absence of an express contract of employment, which may be written or oral, the employment tribunal is faced with the question whether it is necessary to imply a contract of employment between the claimant and the respondent. It is not always possible to predict with certainty how this question will be answered by the tribunal."**

23. As is now notorious, the Court came to the conclusion that in many cases, if not most, where an agency worker is supplied, by an employment agency with whom the worker has a contract, to an end user with whom the agency also has a contract, the agency worker will not be an employee of the end user. There is no contract between the two. It is only if it is necessary that there should be a contract between the two that there will be one. At paragraph 51 Mummery LJ expressed the matter in these terms:

> **"51. … the question whether an "agency worker" is an employee of an end-user must be decided in accordance with common law principles of implied contract and, in some very extreme cases, by exposing sham arrangements. Just as it is wrong to regard all "agency workers" as self-employed temporary workers outside the protection of the 1996 Act, the recent authorities do not entitle all "agency workers" to argue successfully that they should all be treated as employees in disguise. As illustrated in the authorities there is a wide spectrum of factual situations. Labels are not a substitute for legal analysis of the evidence. In many cases agency workers will fall outside the scope of the protection of the 1996 Act because neither the workers nor the end-users were in any kind of express contractual relationship**

with each other and it is not necessary to imply one in order to explain the work undertaken by the worker for the end-user."

24. This ground and that which follows were initially rejected on the sift by Laing J but reinstated without any express enthusiasm by His Honour Judge Richardson on a Rule 3(10) Hearing subsequently. They have nonetheless been advanced with skill and detail by Mr Baker in his argument. He submits that the arrangement, if it is understood as being one in which the Jordanian Company effectively supplies employees contracted to it under a clause such as that in clause 3 of the 2012 contract to another of the Respondents and for that matter others of the group, makes it unnecessary for the Court to find that the Second Respondent, the Third Respondent or any other Company is the employer of the Claimant.

25. The response to that, given by Ms O'Halloran on behalf of the Claimant, is that it is entirely open to a Court where the matter is in dispute to look at the reality of the situation. She draws my attention to the case of **Clifford v Union of Democratic Mineworkers** [1991] IRLR 518. This case arose out of the somewhat federal relationship between the National Union of Mineworkers and the constituent associations which were part of that federation, one of which was in Nottingham, out of which formed the Union of Democratic Mineworkers for whom ultimately Mr Clifford, the Claimant, came to work. What matters, however, is not centrally the facts but the principle established within the case; that emerges from paragraph 7 in the judgment of Mann LJ:

"7. A question as to whether A is employed by B or by C is apparently a question of law for it is a question as to between whom there is the legal relationship of employer and employee. The resolution of that question is dependent upon the construction of the relevant documents and the finding and evaluation of the relevant facts. Where the only relevant material is documentary in nature then the question is not only apparently, but it is also actually, a question of law (compare *Davies v Presbyterian Church of Wales* [1986] IRLR 194). Where, however, the relevant material is an amalgam of documents and facts then the apparent question of law is often said to be a mixed question of law and fact (for a recent decision see *Lee v Chung* [1990] IRLR 236[)]. The present case is one where the relevant material is an amalgam of documents and facts and it can thus be described as a case of mixed law and fact. This description does not, however, in my judgment mask the reality that the answer to the question is determined by the determination and evaluation of the relevant material. This is the task of the Industrial Tribunal and is not for either the Appeal Tribunal or this Court.

> **Neither can interfere with the resolution of an issue of fact unless the resolution contains an explicit or implicit misdirection in law. I appreciate, as did Fox LJ in a somewhat similar context (see [1983] IRLR at p.380), that the inability to interfere means accepting that my question as to B or C can possibly be answered as to B or as to C. One body's evaluation may lead to B whilst another body's evaluation of the same material may lead to C. If neither body misdirects itself neither is 'wrong' although in theory what is apparently a question of law should admit to only one 'correct' answer. In the present case therefore the question is not whether the Industrial Tribunal were 'wrong' but whether their conclusion betrays a self-misdirection."**

He, therefore, treated the issue as one of fact, but fact to be determined and applied by a proper appreciation of the law.

26. In **Secretary of State for Education and Employment v Bearman & Others** [1998] IRLR 431, an issue arose as to whether the reality was that the Claimant and two other co-Claimants were employed by the Employment Service or by another. The contract was in the name of the other. The Judge adopted the approach urged upon it that where a decision of an Industrial Tribunal involved a determination of mixed law and fact, the Employment Appeal Tribunal could only interfere with the decision if there had been a misdirection in law and the decision was perverse. Ascertaining whether A is employed by B or by C involved construction of the relevant documents and the finding and evaluation of the relevant facts. At paragraph 22 Morison P said this:

> **"22. We are unanimously of the view that there has been a misdirection in this case. It seems to us that the correct approach would have been to start with the written contractual arrangements and to have inquired whether they truly reflected the intention of the parties. If they did, then the next question was whether, on the commencement of their employment, the applicants were employees of the Employment Service or employees of RBLI. If the conclusion was that, when properly construed, on commencement of their employment the applicants were employed by RBLI, then the chairman ought to have asked the question: did that position change and if so, how and when?"**

27. Ms O'Halloran points out that there the Judge was looking to see whether the documents reflected the reality of the agreement between the parties.

28. I reached the conclusion here that, first, this is not a case in which **James v Greenwich**, **Tilson** and **Halawi** have anything direct to say beyond general principle. They were cases in which there was no question but that the individual concerned had a contract with the agency to supply their services to others. The only issue was whether, if so supplied under that contract to another, that other should be treated in law as the true employer: in other words, that a further contract should be implied, this time between worker and end-user. The position here, as Ms O'Halloran points out, is different. What is an issue is with whom one and the same contract exists. It is not accepted here that the contract the Claimant had was with the Jordanian Company at all. On paper he did: in reality it is said he did not. That issue would therefore first have to be determined before there could be any conclusion reached as to the proper identity of the party contracting as employer.

29. It is not in issue here that there was a contract, the terms of which are relevant to the relief that the Claimant sought. The issue is with whom: that was, perhaps unusually, but in the particular circumstances of this case, in question at the outset. The question was therefore not one of implication - whether there was a contract between two known parties - it was a question of identification: which of the possible parties, for it must have been at least one, was the employer of the Claimant? Accordingly, I have little hesitation in rejecting the first ground, seductively as it has been advanced by Mr Baker. It is not a case where it is common ground that A is employed by B, who supplies his services to C, in which the issue is whether A has become an employee of C: it is a case in which it is in dispute that A is employed by B at all, and where the issue is which of the possible entities is otherwise to stand in what would have been B's shoes.

The Second Ground

30. It is argued that **Autoclenz v Belcher** was misapplied. As to this, what Mr Baker argues is that **Autoclenz** looks to establish the true agreement *at the outset* made between the parties. Therefore, what is not in issue are matters which had happened some time after the contract was entered into - which might be said to reflect a view of the contractual arrangements - which is different from that in fact entered into at the outset.

31. In the ground of appeal it is put in this way, that at paragraphs 59 to 62 of the Judgment the Judge appears to have considered what was an accurate reflection of reality throughout the period of employment. That was not the test because she should have limited her enquiry to evidence from which implications could properly have been drawn as to what was agreed in 2011. Mr Baker complains that the Judge's approach in those paragraphs demonstrates that she did not begin by considering the parties' intentions at the time of contract and inquire whether they had changed (as the extract from **Bearman** might suggest they should), but instead she considered the overall nature of the relationship, and, thirdly, erroneously considered who undertook which functions instead of focusing her analysis on the identities of the parties to the contracts of employment; this was contrary to a dictum of Lady Stacey at paragraph 39 in **Wittenberg v Sunset Personnel Services Ltd & Others** UKEATS/0019/13 (21 November 2013), "*the test is who actually was the employer rather than who carried out some of the functions that an employer has to carry out*".

32. These grounds are supported by pointing out that the Judge had relied upon the fact that the Jordanian Company had provided neither safety equipment nor tools. In the Notice of Appeal it is said that his salary was discussed with Mr Le Carpentier and Mr Gaston adding "*Both of these individuals were officers of the First Respondent*". I have to say that as I read

the Judgment the Judge came to the opposite conclusion as a matter of fact - that they were not officers of the Jordanian Company, and made that a particular feature of her decision. That is not as an individual finding of fact challenged as being a misunderstanding of the evidence. It is, it seems to me, open to the Judge to make such a finding and indeed at this level I therefore have to accept and adopt it.

33. It is added that the Judge, in reaching her conclusion, relied upon the fact that the Claimant followed instructions from individuals who were officers of the Second and Third Respondents. This points to the fact that that is in part what the contract might be expected to lead to given the terms of clause 3. In addition, the facts were that during 2015 (note the year) he had spent a lot of time working in the London office and had salary discussions with Mr Gaston. Rhetorically, asks Mr Baker, how could discussion and acts in 2015 affect what was actually decided in 2011? He sums it up in paragraph 10 of the grounds by arguing that Tribunals are not entitled to look at all the circumstances of the case to determine who the most appropriate employer is but must focus on what was agreed.

34. With that in mind, I turn to the Judgment. In paragraph 59 where the Judge begins to express her conclusions in the four relevant paragraphs (59 to 62), she describes the issue for her as "*whether that express term*" - that is the way she puts the identification of the employer in the contract of 22 August 2011, it may not strictly be a term rather than an identification of the contracting party, but nobody takes a point on that - "*accurately reflected what was agreed between the parties*". That is a simple statement of the principle in **Autoclenz**. The last paragraph in that section of her Judgment (paragraph 62, which I have cited above) repeats that approach, "*I am satisfied that the express term … does not reflect the actual agreement between the parties*". From first to last, therefore, it might be thought she had in mind not looking at

what happened in the operation of the contract as if it made a difference, but looking to see what was the initial agreement.

35. Mr Baker has a point, for if evidence of what contractual terms were agreed in 2010 or 2011 was in part provided by that which happened in 2015, it might be thought at first blush that a matter which could have no real bearing was taken into account. The retort by Ms O'Halloran, however, is persuasive to me. That is that if one sees a seamless stream of events - all of which are consistent, one with the other - which appear to demonstrate that at no stage throughout the entirety of the time when, on the Respondents' argument, the Jordanian Company was the employer did the Respondents and their Associated Companies ever behave as if he were (save in one respect, which is the identity of the bank account from which he was paid) this is good evidence as to what was initially agreed. It is not shown that any other Company was acting as employer on the Jordanian Company's behalf. Thus, understood as part of the whole picture, the point the Judge made is compelling; the argument against it falls away. This is not a case, as it seems to me, in which one can forensically separate out a succession of single events and argue that they are single events upon which too much weight has been placed. The eloquence of a chapter is not to be determined by focusing upon the first or isolated paragraphs within it. The Judge found that the whole story was of employment by a Company which was not the Jordanian one.

36. Accordingly, I see here no failure of approach by the Judge in what she said she was doing, and no evidence that compels me to take the view that she was not faithful to what she had said she was doing and what she said at the end she had done. She was looking at the initial agreement. The reality is that it must always be the case that actions after an agreement has been made may help as evidence, not as being conclusive but as evidence, of the nature of

that agreement. After all, if the parties to an agreement have indeed agreed X but they behave as if they have agreed Y, that would be surprising. If, however, they have agreed Y it is entirely to be expected. To behave as if they have agreed Y is therefore some evidence that they have indeed done so. It is not conclusive, and of course in many cases there may be contractual terms which are simply never acted upon because the occasion for doing so never arises. In such cases it would be futile, as many authorities show, to suggest that they are not still terms of the contract merely because they have not been put into operation. However, though the weight of it must be examined with care, it can be evidence as to what was in fact agreed to look to see if the parties had behaved as if that were the case, particularly immediately after the date of initial agreement, but following on from that as well, and equally so where there is an unbroken series of events telling overall the same tale. For those reasons I do not see any force in ground 2.

The Third Ground

37. I turn to ground 3. This is an argument that the decision was perverse. The argument focuses centrally upon the fact that here there was a written agreement. There was no written agreement, by contrast, establishing that the Claimant was an employee of the Second Respondent as the Judge found. Moreover, the Claimant had specifically asked at the outset whether he was going to be officially employed by a UK Company or some overseas Company and was told he would be employed by a Jordanian Company, which the First Respondent was. In the light of that, it is argued that the decision that the written document, which in Mr Baker's submissions is the starting point for the argument, can be said to be wrong or a sham or in error where it is perfectly clear.

38. The Judge said in her findings at paragraph 60 that both parties knew and understood from the outset that the Claimant would in fact be employed by the Second Respondent. Mr Baker argued that simply does not and cannot fit with those facts. Moreover, the conclusion was informed by events in 2015, whereas the contract was entered in 2011. If the Tribunal had correctly narrowed its focus to examine pre-contractual negotiations, and such evidence as there was as to pre-contractual events which were probative, it would have concluded that the relevant evidence was that which what the parties knew at the time.

39. Further, it is submitted that the Tribunal's reliance upon Paul Gaston's role in negotiating salary and giving direction was irrational. A large part of the reasoning of the Tribunal to the effect that the Second Respondent was the Claimant's employer was that the Claimant was under his control: but the Claimant's employment contract, which was on the face of it made with a Jordanian Company, also named him (Paul Gaston) as the Claimant's line manager. It therefore gave him an authority, on the face of it conferred by the First Respondent, through the terms of contract.

40. As to this part of the appeal, Ms O'Halloran submits that this is nowhere near perversity. The Judge found as a matter of fact that Paul Gaston was throughout acting for the Second Respondent. There was nothing that showed that he ever worked for the First Respondent.

41. My conclusion as to this begins with identifying that perversity is, as Mr Baker had to recognise, a high hurdle. It is not necessary to cite authorities, so well-known are the principles that they have been expressed in different terms by this and other Tribunals in several cases:

"flies in the face of reality" is one such term, "defies belief" is another, "would raise astonished gasps from the objective observer" is a third.

42. On the basis which the Judge set out her decision cannot, it seems to me, be said to fly in the face of reality. To look a situation in which at one and the same time, on 22 August 2011, those offering employment to the Claimant are describing one contracting party as being a Jordanian Company but also issuing him with a letter for him to send to the passport office which describes him as an employee of the Second Respondent almost inevitably raises the question whether the contract can be relied upon to identify the proper party. Since everything else is either neutral or points in the direction that the Second Respondent was acting as employer, it is not unreasonable then to come to the conclusion that it was the employer.

43. The test of perversity does permit, in terms similar to those adopted by Mann LJ in the **Clifford v Union of Democratic Mineworkers** case, of different conclusions reached by different Tribunals on matters of fact. But the question here is the factual question: whether the Judge on these facts could be said to have stepped so far outside the line of what was permissible as to be in error of law. Whichever expression is used to describe perversity, I cannot see that she was.

The Fourth Ground

44. I come then finally to the fourth ground of appeal. Here the argument is that the meaning of a contract is a matter of law. So it is. It is therefore for this Court to look at the contract and ask in context - because all contracts must be construed in context - whether the wording was misinterpreted by the Judge. The argument that it was is that the Judge read the clause - clause 3 - as meaning that "*You may be required by an officer of* [inserting those three

words] *the Company, to carry out your duties ...*". Accordingly, if the Judge was wrong in so construing this contract and took that into account, as she said she did in reaching her overall conclusion, she would arguably be wrong as to her overall conclusions, and the consequence would be that the appeal should be allowed.

45. I look therefore with close focus at paragraph 3. The Company is defined at the top of the page (looking at the 2012 version) as the Jordanian Company. A company itself cannot "require a person" to do anything because a company has no personal identity: it is a corporate entity which has to act, and can only act, through people. So what is meant by the words "*You may be required by the Company ...*"? The submission of Mr Baker is that that can accommodate those who are authorised by the Company to give those instructions. Ms O'Halloran's retort is that there was no evidence that anyone who gave instructions was so authorised by the First Respondent and, indeed, she draws attention to the fact that though it is supposed to have acted as a recruitment agency, in effect an agency supplier of workers to the Second Respondent, there is no invoice from one to the other which was put before the Tribunal showing that was the internal financial arrangement between those Companies. She adds that in looking at the clause, it is a highly unusual one because it envisages the Claimant could "*act as an employee of any other Associated Company*"; not acting under the instructions of, nor acting as ***if*** an employee, but acting ***as an*** employee. I had initially read that as if it had the word "if" in between "as" and "an", but on reflection I am not sure that it is right to insert that. It is difficult to understand how "acting as if an employee" or "acting as an employee" may differ from acting in other capacities, unless it be to accept the control of others. She argues that the person may therefore be under the control of an associated Company and directed by it, within its powers as would-be employer, to go and work for somebody else entirely, without

any say so from the Company which is nominally the contracting party (the Jordanian Company in this case).

46. Such an interpretation may give rise to some difficulties, but essentially it is not that which is an issue. The Judge did not, as I understand it, take her stand upon that particular point. Rather she focused upon what was required by the Company and came to the conclusion (expressed in paragraph 61 at the bottom of page 18) that this did not correspond with anything that was thereafter done. The instructions to the Claimant, she notes, did not come from the First Respondent. She noted further that working exclusively for other Companies was not consistent with those clauses. Mr Baker takes issue with that but I think he is in error in doing so. The clause seems to me to envisage that there will be at least some time during which the Claimant would have duties to carry out for the Company as described in the contract, that is the Jordanian Company. The fact is he never did.

47. The matter is one of contract and therefore not to be determined by what happened, but by what was agreed. But there is a reflection here of the overall argument, the context of this case, that what happened is evidence of what was agreed and what was agreed, as I have already held, the Judge was entitled to think was that the Second Respondent would be the contracting party. In short I do not think that that aspect of the contract was misinterpreted by the Judge. On a natural reading I would have to say I would expect that somebody authorised by the Company would be expected to give the instructions. (If authority was challenged, it could be established.)

48. In any event the Judge did not view this question of contractual interpretation as a matter distinct from the other matters which she was considering, but as part and parcel of the

overall picture. It was that overall picture which led her to her conclusion expressed in paragraph 62. In my view she was entitled to regard it as more consistent with the overall picture as she saw it than it was with the Respondents' arguments.

49. I should add that I would not have been enamoured of the cross-appeal had it been necessary to argue it. With respect to Ms O'Halloran, she hardly pressed the cross-appeal in any event and I think she was right not to press it further than she did. The evidence that the Judge accepted did not point with any greater weight at all towards the Third Respondent being the contracting party. It might be argued, I suppose, that there was more evidence in respect of the Third Respondent than there was in respect of the First, but that is no basis here for concluding that the Third Respondent was the employer. If the truth is that the argument as to what the contract said took precedence over that which the evidence showed to the Judge, then that would have answered this argument too, and for that reason I do not think there is any weight to be attached to the cross-appeal.

Conclusion

50. In conclusion, therefore, this appeal must be and is dismissed.