EMPLOYMENT TRIBUNALS

Claimant: Mr L Best
Mr P Massey
Mr B Lockton

Respondent: AKW Medi-Care Limited
DLP Limited

OPEN PRELIMINARY HEARING

Heard at: Birmingham Employment Tribunal **On:** 11/11/2019-15/11/2019

Before: Employment Judge Mark Butler

Representation

Claimant: Mr L Best represented himself, Mr P Massey and Mr B Lockton were represented by Mr D Bunting (Counsel)

Respondent: Ms H Higgins (Counsel)

JUDGMENT

The decision of the employment tribunal is that:

1. Mr Best has been found to have been an employee of Goldsun Trading Limited. He was found not to have employee or worker status with either AKW Medi-Care Limited or DLP Limited. His claims are dismissed.

2. Mr Massey has been found to have been an employee of Goldsun Trading Limited. He was found not to have employee or worker status with AKW Medi-Care Limited. His claims are dismissed.

3. Mr Lockton has been found to have been an employee of Goldsun Trading Limited. He was found not to have employee or worker status with either AKW Medi-Care Limited or DLP Limited. His claims are dismissed.

REASONS

These are the full written reasons as requested by the parties, having already received judgment and oral reasons that were handed down at the end of the hearing, on 15 November 2019.

4. The various claims in this case arise following claim forms being submitted by each of the three claimants on 17 July 2018.

5. At a case management preliminary hearing on 22 January 2019 before Employment Judge Broughton, this case was listed for a 5-day Open Preliminary Hearing to determine a number of preliminary matters, namely:

    a. Was there a contract between AKW Medi-Care Ltd or DLP Limited and any of the claimants?
    b. What was the employee/worker status of each of the claimants in respect of that employer?
    c. Was there sufficient territorial jurisdiction? and;
    d. Did the alleged disclosures to Mr Geldart fall within s.43B of the **Employment Rights Act 1996**, for the purposes of a whistleblowing claim?

6. I note from the Tribunal file that the whistleblowing allegations were withdrawn in April 2019. This open Preliminary Hearing therefore focussed on the matters related to employment status, who the relevant employer was, and the question of territorial jurisdiction.

7. Each claimant brought claims for unfair dismissal, wrongful dismissal and unpaid wages, which is said to include holiday pay. Mr Massey brought his claim against AKW Medi-Care Limited alone, whilst Mr Best and Mr Lockton brought their claims against AKW Medi-Care Limited and/or DLP Limited. Employment status, and the question of who the employer is was crucial to each of the claimants' claims respectively. Each claimants' claims were brought subsequent to a decision that they would no longer receive payment following the purchase of DLP Limited by PenantPark in March 2019. This in effect brought their services within this Group of companies to an end.

8. The position of each respondent was quite simple. They both submitted that none of the claimants were ever an employee or worker of either of them. Both submitted that each claimant had their contract and had been an employee or worker of Goldsun Trading Limited, who had not been named as a respondent in this claim. In the alternative, at least in respect of Mr Best and Mr Lockton, if there was found to be any employee or worker status with DLP Limited, it was submitted that there was an issue over jurisdiction in terms of territorial reach of the rights for which they were basing their claims, with that company, DLP Limited, being an Isle of Man based company.

9. I heard evidence from each of the three claimants, with no further witnesses for any of them. For the respondents, I heard from Mr Geldart, who was appointed the Group finance Director from 24 May 2016, although he had been employed in other financial positions by DLP Limited previous to this role. I also heard evidence from Mr Geldart's predecessor, Mr Baker, who was Group Finance Director from September 2009 to 31 July 2016. I was assisted by a bundle of evidence that extended to 2082 pages. Although, I was not taken to documents that reached anywhere near that number of pages.

10. I am grateful to counsel for Mr Massey and Mr Lockton, a Mr Bunting, and counsel for the respondents, a Ms Higgins, for providing me with their skeleton arguments and a bundle of authorities in advance of the hearing starting. These were most useful and assisted me in considering the matters that came before me. I also had sight of an agreed list of issues and an agreed list of facts before the hearing commenced. Again, these were of use.

Issues

11. It made sense, on a practical level, to break this case down in to manageable issues.

12. The issues appeared quite straightforward, at least in the question I was being asked to determine: In effect I was being asked, at least in the first instance, to decide on who, if anybody, was each respective claimant an employee and/or worker of. This question was important in respect of each individual claimant, and each live claim in this case. It was only having determined this matter that I may then have needed to determine questions concerning territorial jurisdiction. I considered the following questions to be of importance:

    a. Did any of the claimants have an express contract with either Goldsun Trading Limited, DLP Limited or AKW Medicare Limited?

    b. If there was an express contract, on the face of that document could it be properly classified as a contract of employment or is it some other form of contract?

c. If there was an express contract that could be classified as a contract of employment, did it reflect the reality of the relationship, or was it a sham? If any of the claimants were found to have a contract of employment with Goldsun Trading Limited, and this provided a framework in which the relationship worked, and this reflected the reality of the situation, then that claimants case would go no further and would have their claims dismissed.

d. If that was not the case and the case did go further, then the next question I was faced with was: could there be a contract of employment or worker contract implied between any of the claimants and AKW Medi-Care Limited?

e. And if not: could there be a contract of employment or worker contract implied between Mr Lockton and/or Mr Best and DLP Limited?

f. And then finally, If Mr Lockton and/or Mr Best did have an implied contract of employment or worker contract with DLP Limited, were they within the territorial reach of the Employment Rights Act 1996, and the other legal regimes under which their claims were being brought?

13. For the avoidance of any doubt, the final three of these questions (para 12(d)-(f)), relating to implication and territorial reach of rights, are not answered in this judgment, as it was not necessary to do so given the decision I reached in relation to the first three of those questions (the questions posed at para 12(a)-(c)).

Law

14. I read the skeleton arguments of both Counsel who appeared in this case and heard oral submissions by both. However, before hearing closing submissions, I highlighted two cases to Counsel that may need to have been reflected on before submissions were made. This was particularly due to each claimants' secondary position. The two cases were: **Cairns v Visteon**, [2007] ICR 616, EAT, and **Viasystems (Tyneside) Ltd v Thermal Transfer Ltd** [2005] IRLR 983. Both Counsel were given time to consider those cases in advance of closing submissions. For completion, I read and took account of written closing submissions by Mr Best, who did not attend on the final day. Mr Best did not advance any additional case law in his written submissions for my consideration.

15. Although I read and heard analysis on a number of cases by Counsel, I do not repeat them all here. I restrict this part of my judgement to lay out the key legal provisions and case law that I was taken to and that were important in assisting

me in reaching my decision; although the other legal sources I was taken to have also been considered and reflected upon.

16. Section 230(1) of the **Employment Rights Act 1996** defines an employee as:

> *"an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment [i.e. a contract of service]."*

17. Section 230(3) of the **Employment Rights Act 1996** defines a worker as:

> *"an individual who has entered into or works[/worked] under —*
>
> *(a) a contract of employment; or*
>
> *(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual."*

18. One thing that is clear in respect of both employee status and worker status is that there needs to be a contract between the parties, which will then be classified accordingly.

19. Section 227 **Companies Act 2006** considers the position of director's service contracts:

> (1) For the purposes of this Part a director's "service contract", in relation to a company, means a contract under which—
>
> (a) a director of the company undertakes personally to perform services (as director or otherwise) for the company, or for a subsidiary of the company, or
>
> (b) services (as director or otherwise) that a director of the company undertakes personally to perform are made available by a third party to the company, or to a subsidiary of the company.
>
> (2) The provisions of this Part relating to directors' service contracts apply to the terms of a person's appointment as a director of a company.
>
> They are not restricted to contracts for the performance of services outside the scope of the ordinary duties of a director.

20. Ms Higgins submitted that s.227 clearly envisages individuals holding a service contract with a company and providing services to them, whilst also being able to provide services to subsidiaries. She submitted that providing services to a subsidiary is not inconsistent with having a service contract with the parent company.

21. Section 228 **Companies Act 2006** explains that there is an obligation that all such service contracts be in writing:

> (1) A company must keep available for inspection—
>
> (a)a copy of every director's service contract with the company or with a subsidiary of the company, or
>
> (b)if the contract is not in writing, a written memorandum setting out the terms of the contract.
>
> …
>
> (7) The provisions of this section apply to a variation of a director's service contract as they apply to the original contract.

22. Turning to the case law that was important to this decision. In particular, consideration was given to the cases of **Mr Horst Wittenburg v Sunset Personnel Services Ltd & others** UKEATS/0019/13, **James v London Borough of Greenwich** [2008] ICR 545, **Tilson v Alstom Transport** [2011] IRLR 169, **AutoClenz Ltd v Belcher and ors** [2011] ICR 1157, **Uber BV and ors v Aslam and ors** [2019] ICR 845, **Protectacoat Firthglow Ltd v Szilagyi** [2009] ICR 835 and **Dynasystems for Trade and General Consulting Ltd and ors v Moseley** EAT 0091/17. I have set out some of more relevant paragraphs from these decisions below and added underlining to some of the key parts within those paragraphs.

23. **Mr Horst Wittenburg v Sunset Personnel Services Ltd & others** UKEATS/0019/13, per the Honourably Lady Stacey:

> Para 39 *"…the test is who actually was the employer rather than who carried out some of the functions that an employer has to carry out… functions such as payroll are often carried out by contractors. Therefore a finding about which company carried out that function does not necessarily indicate which company is the employer."*

24. **James v London borough of Greenwich** [2008] ICR 545 CA, per Lord Justice Mummery (with whom Thomas LJ and Lloyd LJ agreed):

> Para 23 *"After a valuable review of the relevant case law covering the range of circumstances which give rise to the question whether a contract of employment exists and, in particular, the circumstances of agency workers, in which there is normally no express contract of any kind between the end user and the worker, it was stated that the question is whether some contract, pursuant to which work is being provided between the worker and*

the end user, can properly be implied according to established principles. The judgments of this court in ***Dacas*** *and* ***Muscat*** *were cited and analysed. It was correctly pointed out (paragraph 35) that, in order to imply a contract to give business reality to what was happening, the question was whether it was necessary to imply a contract of service between the worker and the end user, the test being that laid down by Bingham LJ in* ***The Aramis*** *[1989] 1 Lloyd's Rep 213 at 224*

> *" …necessary …in order to give business reality to a transaction and to create enforceable obligations between parties who are dealing with one another in circumstances in which one would expect that business reality and those enforceable obligations to exist."*

Para 24 *"As Bingham LJ went on to point out in the same case it was insufficient to imply a contract that the conduct of the parties was more consistent with an intention to contract than with an intention not to contract. It would be fatal to the implication of a contract that the parties would or might have acted exactly as they did in the absence of a contract."*

Para 30 *"The real issue in "the agency worker" cases is whether a contract should be implied between the worker and the end user in a tripartite situation of worker/agency/ and end user rather than whether, as in "the casual worker" cases where neither the worker nor the end user has an agency contract, the irreducible minimum of mutual obligations exists. In the agency worker cases the problem in implying a contract of service is that it may not be necessary to do so in order to explain the worker's provision of work to the end user or the fact of the end user's payment of the worker via the agency. Those facts and the relationships between the parties are explicable by genuine express contracts between the worker and the agency and the end user and the agency, so that an implied contract cannot be justified as necessary."*

Para 43 "*In brief, the circumstances in which the Council received and paid for work done by Ms James for the Council and the facts about the working relationship between them did not lead irresistibly to the result that they were only explicable by the necessary existence of a contract of service between them.*"

Para 44 "In my judgment, the ET made no self misdirection of law in rejecting Ms James' claim to be an employee of the Council. She might have thought that she was an employee, even though she

had a contract with an agency and changed agencies. She might have appeared to others to be an employee, having been paid for doing work for the Council over a number of years. She could hardly be described as a "temporary worker." However, on proper legal analysis applied to the uncontested facts, it was not necessary to imply a contract of service between the parties and the ET made no error of law in rejecting her claim to the status of a Council employee."

Para 45: "I add that I agree with the EAT that in this case the question of the presence of the irreducible minimum of mutual obligations, which was addressed by the ET and by Mr Jonathan Cohen on behalf of the Council in his skeleton argument, was not the essential point. The mutuality point is important in deciding whether a contract, which has been concluded between the parties, is a contract of employment or some other kind of contract. In this case, on the findings of fact by the ET about the arrangements, how they operated in practice, about the work done by Ms James and the conduct of the Council, there was no contract at all between Ms James and the Council: there was no express contract and there were insufficient grounds for requiring the implication of a contract."

25. Ms Higgins submitted that these principles are well-established and have been applied in various subsequent cases. She provided the example of **Tilson v Alstom Transport** [2011] IRLR 169. She took me to paragraphs 7-10 off HHJ Peter Clark's judgment. Paragraph 10 is of particular interest:

> "*it is not enough to form the view that because the Claimant looked like an employee of the Trust, acted like an employee and was treated as an employee, the business reality is that he was an employee and the ET must therefore imply a contract of employment"*.

26. In relation to sham contracts, I was referred to **AutoClenz Ltd v Belcher and ors** [2011] ICR 1157 by both Counsel. Of particular interest are paragraphs 32 and 35 of Lord Clarke's judgment:

Para 32 *"…he, (LJ Aitkins in Consistent Group Ltd v Kalwak ("Kalwak")) correctly warned against focusing on the "true intentions" or "true expectations" of the parties because of the risk of concentrating too much on what were the private intentions of the parties. He added:*

> *"What the parties privately intended or expected (either before or after the contract was agreed) may be evidence of what, objectively discerned, was actually agreed*

between the parties: see Lord Hoffmann's speech in the Chartbrook case at [64] to [65]. But ultimately what matters is only what was agreed, either as set out in the written terms or, if it is alleged those terms are not accurate, what is proved to be their actual agreement at the time the contract was concluded. I accept, of course, that the agreement may not be express; it may be implied. But the court or tribunal's task is still to ascertain what was agreed."

I agree."

Para 35 *"…the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem."*

27. **Uber BV and ors v Aslam and ors** [2019] ICR 845, as per Lord Justice Underhill VP, when analysing **Autoclenz**:

Para 120 *"It is an essential element in that ratio that the terms of the written agreement should be inconsistent with the true agreement as established by the tribunal from all the circumstances. There is nothing in the reasoning of the Supreme Court that gives a tribunal a free hand to disregard written contractual terms which are consistent with how the parties worked in practice but which it regards as unfairly disadvantageous (whether because they create a relationship that does not attract employment protection or otherwise) and which might not have been agreed if the parties had been in an equal bargaining position.In that connection it is worth noting that the facts in Autoclenz were very stark. The written agreements provided (a) that the putative employer was under no obligation to provide work to the claimants, nor they to accept it, so that they were engaged on a casual basis shift-by-shift, and (b) that they were entitled to provide substitutes. The reality, however, was that it was understood on both sides that the claimants would be available to work, and would be offered work, on a full-time basis, and that they should provide their services personally. There was thus a plain inconsistency between the contractual paperwork and the parties' mutual understanding as appeared from how they worked in practice; and the tribunal was thus entitled to draw the conclusion that it was the latter and not the former that represented the real terms of the agreement."*

Para 121 *"The question therefore for the ET in the present case was whether, in all the circumstances of the case and taking a worldly-wise approach, the reality of the relationships between Uber, driver and passengers was inconsistent with that apparently created by the Agreement (and the Rider Terms). That is a question of fact: although the precise question is different, the approach required by Carmichael v National Power plc [1999] ICR 1226 plainly applies here also – see per Lord Hoffmann at p. 1233C"*

28. **Cairns v Visteon**, [2007] ICR 616, as per HHJ Peter Clark:

Para 17 ***"****What, it seems to us, concerned the Court of Appeal, particularly Sedley LJ (see paragraph 78 in* ***Dacas****) was the possibility that Mrs Dacas had no employer for statutory unfair dismissal protection purposes, and this defied common sense. In these circumstances we fully understand the policy considerations arising. Where the contract between worker and agency is one for services then it may be possible to imply a contract of service between worker and end-user so as to provide protection under part 10* ***ERA****. However, where it is common ground that she is employed by the agency, and thus is protected under part 10, we can see no good policy reason for extending that protection to a second and parallel employer. If the only reason is, as appears to be the argument for the Claimant in the present case, that she would have a better prospect of establishing unfair dismissal against the end-user rather than the agency, then we can see no basis for departing from what has been the common understanding from at least of the Judgment of Littledale J in* ***Lather v Pointer*** *in 1826. A servant cannot have two masters. That of course does not prevent him from having different employers on different jobs or, as in the case for example of* ***Land v West Yorkshire County Council*** *[1981] ICR 334 (CA), severable parts of the same contract of employment with one employer."*

29. Mr Bunting made a submission that a misrepresentation of the true position between the parties may result in a tribunal finding the contract, or an element or elements of the contract to be a 'sham' but that, for a document to be considered a sham, it is *not* necessary to show that the contracting parties intended to deceive others. In making this submission he relied on **Protectacoat Firthglow Ltd v Szilagyi** [2009] ICR 835, CA.

30. I was further taken to the case of **Dynasystems for Trade and General Consulting Ltd and ors v Moseley** EAT 0091/17. A case where the conduct of the parties required there to be an implied contract to make sense of the relationships.

31. Having set out in detail important legal sources, this judgment now turns to my findings of fact in this case.

Findings of fact

I make the following findings of fact, on the balance of probability based on all the matters I have seen, heard and read. In doing so, I do not repeat all the evidence, even where it is disputed, but confine my findings to those necessary to determine the issues in this case. But this is a case, where on consideration of the documents and the oral evidence, there is a lot of common ground between the parties in terms of the facts.

32. For clarity I will be using the term Group throughout this judgment when I am referring to the entire structure of companies, which included Goldsun Trading Limited, DLP Limited, AKW Medi-Care Limited and other subsidiaries of any one of those;

33. Goldsun Trading Limited was the holding company that was established by the ECI Partners for the purpose of purchasing DLP Limited, which included, as part of the purchase, DLP Limited's associated subsidiaries. This took place in February 2008. Goldsun Trading Limited did not carry out trading activities itself, but it was from here that a number of important Group functions lay, including:

    a. Being the part of the Group where strategy was developed, directed and implemented;

    b. Holding the relationships with banks and investors, in particular in relation to contractual relationships and financing agreements, and;

    c. Where the Group assets and debts were held.

34. The relationships within the Group were as follows:

    a. Goldsun Trading Limited had 100% share ownership of DLP Limited, which was its only asset.

    b. DLP Limited in turn had 100% ownership of AKW Medi-Care Limited.

c. AKW Medi-Care Limited had 99.99% ownership of AKW International, with the remaining 0.01% held by DLP Limited.

And those are the parts of the Group that I am interested in for the purposes of this judgment.

35. AKW Medi-Care Ltd was the brand known to customers, this was the UK sales arm of the Group. DLP Limited was the Product Development arm of the group. AKW International was the subsidiary concerned with sales of products outside of the UK market. It is within these three subsidiaries where the 'on the ground' work took place. The work of the subsidiaries was interconnected, with each subsidiary relying on others to succeed. In particular, DLP Limited was important to the AKW companies and vice versa, and activities of all benefitted the Group as a whole, as well as benefitting the holding company in terms of increasing its value. This was described as being the case in the evidence of both Mr Geldart and Mr Baker. I considered this to be a logical conclusion given the shareholding structures described above.

36. It was based on where 'on-the-ground' work was carried out that led the claimants to referring to 'AKW Limited and DLP' when discussing the Group. However, in reality when they were stating 'AKW Limited and DLP' they were actually referring to the entire group, which included Goldsun Trading Limited. This was accepted by both Mr Massey and Mr Lockton under cross-examination but was less clear with Mr Best. But on balance, and having considered what each witness had said, and the written documents, then that is my finding.

37. Mr Tony Clarkson was the Chairman of Goldsun Trading Limited. He had no other appointments with any other part of the Group. The Group was directed, in effect by two strategic Boards. The Goldsun Board and the Goldsun Executive Board.

38. The Goldsun Board was made up of a select few individuals, but included Tony Clarkson as Chairman of the Group, Mr Massey as Group CEO, Richard Geldart as Group Finance Director, and a John Hayhurst representing ECI Partners. They held monthly Goldsun Board meetings. This was primarily to deal with high level strategy of the Group.

39. The Goldsun Executive Board consisted of:

a. Tony Clarkson, as non-executive Chairman,

b. John Hayhurst representing ECI Partners,

c. those with Company-wide responsibilities, which included each of the three Claimants, and representatives from specific arms of the Company, such as Lisa March, who although employed by AKW Medi-

Care Limited, was the Group Human Resource and Health and Safety Director, and members from AKW International.

40. The Goldsun Executive Board was made up of representatives across the Group to ensure that matters relating to the Group as a whole was considered in its meetings.

41. The Goldsun Executive Board held monthly Executive Management Meetings. The role of the the Goldsun Executive Board was to consider the group as a whole, and to ensure strategy of the Group was being followed. This was the evidence of Mr Geldart, a matter that appeared to be accepted by each of the claimants, and a matter that was supported by minutes of at least one of the documented meetings.

42. Mr Best entered an express contract, a service agreement/contract with Goldsun Trading Limited, on the 05 June 2013, although he had been appointed to his role as Group Product and Design director since 10 October 2010. His service agreement/contract was at pp.261-283 of the bundle.

43. Mr Best's service agreement/contract had been varied by Deed on 23 February 2015.

44. Mr Best carried out work in the UK, in the Isle of Man, in Belgium and in China, as explained in the agreed facts. He had a home-office but would travel to other offices. Mr Best was line managed by Mr Massey, and would take instructions and directions from Mr Massey, with him giving such as instruction as part of his role as CEO of Goldsun Trading Limited; again this is taken from the agreed facts. Mr Best did not hold any statutory directorships within the Group. The proportion of time he carried out in the UK and the Isle of Man would vary throughout is time with the Group.

45. Mr Massey entered into an express contract, a service agreement/contract with Goldsun Trading Limited, on the 04 October 2010. He was appointed as CEO of the Group on this same date. His service agreement/contract was at pp.444-466 of the bundle.

46. Mr Massey's service agreement/contract had been varied by deed on 23 February 2015.

47. Mr Massey was appointed a Statutory Director of Goldsun Trading Limited from 4 November 2010, as well as holding a Statutory Directorship in AKW Medi-Care Limited. Mr Massey's primary place of work was at the offices of AKW Medi-Care Limited. Mr Massey was required to and did attend at other offices within the Group.

48. Mr Lockton entered into an express contract, a service agreement/contract with Goldsun Trading Limited, on the 05 January 2011, although this did not commence until 01 March 2011. He entered this contract to provide service as Group Operations Director. His service agreement/contract was at pp.605-627 of the bundle.

49. Mr Lockton's service agreement/contract was varied by deed on 23 February 2015.

50. Mr Lockton had a home-office and would travel to other offices. He held Statutory Directorships in Goldsun Trading Limited and AKW Medi-Care Limited.

51. Neither Mr Massey nor Mr Lockton were given additional remuneration for having taken up Statutory Directorships. This was considered to form part of their Service Agreement. This is not disputed.

52. It makes sense to consider the service agreements/contracts of all three claimants together. This is because these written agreements/contracts, referred to as service agreements, had common terms within them. The following findings thus will proceed as follows:

    a. Findings in relation to common terms and conditions, followed by

    b. Findings in relation to how the claimants' relationships worked in reality

    I have inserted sub-headings to assist with breaking up the findings appropriately for ease of navigation.

General contract matters

53. Each respective service agreement/contract had a section explaining who the parties were. This explained that Goldsun Trading Limited was the party that each claimant was entering a contractual relationship with. And that this entity would be described as the "Company" throughout the document. For the avoidance of doubt, the contract also makes use of the term 'Group Companies'. This is defined in each respective contract as being 'the Company and its subsidiaries and any holding Company for the time being of the Company and any subsidiary of such holding company and Group company means any one of them'.

54. With each respective claimant, the service agreement/contract contained terms in relation to appointment to the company, continuous employment, duties, normal hours of work, place of work, remuneration, and holidays, amongst other matters. Although I do not intend to make findings in respect all of these. However, the more important contractual terms for the purpose of this decision

have been considered, and compared to the reality of the working relationships of each claimant.

Working for different parts of the Group

55. At clause 2.1 of each claimant's service agreement/contract, it was expressed that the Company, meaning Goldsun Trading Limited, '…may at its discretion through the Board or a nominated committee of the Board acting in good faith, reasonably require him to perform other duties or tasks not within the scope of his duties whether for the Company or any other Group Company'.

56. Further at clause 4.1 of each claimant's service agreement/contract, it was explained that each claimant 'shall carry out such duties and functions, exercise such powers and comply with such instructions in connection with the business of the Company and the other Group Companies as the Board or any director to whom he reports reasonably determines from time to time and shall comply with all the Company's rules, regulations, policies and procedures from time to time in force'.

57. Mr Massey did do work specific to AKW Medi-Care Limited, he did do work specific to DLP Limited, he did do work specific to AKW International, and he also did work that can be properly described as Group-wide work, in that it was not specific to any particular subsidiary company, but for the benefit of the Group. As did Mr Best and Mr Lockton. In terms of work that was done across the Group by each of the claimants, rather than for specific subsidiary companies within the Group, there are numerous examples. These included:

    a. Each attended Executive board meetings on a monthly basis.

    b. Each had a role to play in meeting prospective sellers, and/or preparing the business for sale.

    c. Mr Massey engaged in conference calls with the Group Finance director on a weekly basis.

    d. Further, where the success of Goldsun Trading Limited is dependent on DLP Ltd, as its only asset, which in turn is dependent on the success of AKW Medi-Care Limited and AKW International, work done in individual subsidiaries, clearly has benefit for and must be work for the benefit of the parent company. I accept both Mr Geldart's and Mr Baker's assertions that it is not possible to isolate work done for one subsidiary as not being work done for the overarching parent company.

58. I make no finding on the proportion of work that was spent doing work for the Group or individual components of the Group or the Group. It was not disputed that this was flexible depending on need and varied throughout each claimants' working relationship.

59. The clauses at paragraphs 55 and 56 reflected the reality of how each claimant worked, as described at paragraphs 57 and 58.

Pay

60. Clause 8 of each claimant's service agreement/contract dealt with pay. This explained that salaries were payable by the Company or any other Group Company. Bearing in mind the interpretation section of each contract, this meant that contractually the salaries of each claimant respectively could be paid directly by Goldsun Trading Limited, DLP Limited, AKW Medi-Care Ltd, AKW International or any other part of the Group.

61. Goldsun Trading Limited did not have its own Human Resource ('HR') function. However, there was HR function elsewhere in the Group.

62. Employees of Goldsun Trading Limited were serviced by the HR department of the Group Company in which they were situated. This meant that much of the correspondence with the claimants in respect of pay came from a subsidiary company, and was on headed paper of that subsidiary. Of note was the use of the payroll function of the subsidiary in the relevant tax jurisdiction. This led to payment being made by AKW Medi-Care Ltd to each of the claimants for work done in the UK. Records of this pay was on AKW Medi-Care Limited payslips. Ms Higgins submits that this was just a result of making use of payroll in one of the subsidiaries. Whereas Mr Bunting submits that this was indicative of where the contract of employment was. However, I find that reference to AKW Medi-Care Ltd on such documents was simply a consequence of using payroll and HR function of AKW Medi-Care Ltd. This was very much an administrative function. This was a consistent answer given by both witnesses for the respondent, was consistent with the documentation, and was a logical approach in the circumstances. This approach was not indicative of where the claimants' contracts were. The contractual right to pay, and how it was paid came from the contract with Goldsun Trading Limited. But again, this approach, in my view, is consistent with the express service agreement/contract.

Salary review

63. Clause 8.2 of each of the claimant's service agreement/contract explains salary review. Salary would be reviewed by the Board or the remuneration Committee. The Board was defined as being the Board of the Company, that being Goldsun

Trading Limited, whilst the remuneration committee was defined as being a Committee appointed by that Board.

64. Mr Massey had his service agreement/contract varied. This was in relation to both pay and notice. This was signed by Mr Clarkson and countersigned by Mr Hayhurst. They could only sign as representatives of Goldsun Trading Limited, as they held no office with any of the other companies within the Group. This was therefore signed and actioned by Goldsun Trading Limited. Mr Massey accepted this under cross examination. Similarly, when Mr Best and Mr Lockton had salary increases following a review, they accepted under cross-examination that the deed of variation, although it had not been, would have to be signed by Mr Massey in his role as CEO of Goldsun Trading Limited.

65. The way salary review is expressed in each claimant's service agreement/contract is consistent with how the salary review operated in practice.

Bonuses

66. Clause 8.3 of each claimant's service agreement/contract dealt with the position of bonuses, that were operated through Goldsun trading Limited.

67. In practice, all the claimants were involved in bonus schemes. Each claimant accepted that they were in Goldsun Trading Limited bonus schemes, one of which was the Executive Board Bonus. This is also consistent with Mr Geldert's evidence on his switching of bonus schemes when he took up a Group-wide role from his previous role in DLP Limited. He explained that he was switched from the Senior Managers Scheme, which was available to employees in Management positions in subsidiaries, to the Executive Bonus Scheme. This was confirmed by Mr Massey under cross examination.

68. The way that each claimant's bonuses operated in practice was consistent with the written terms of the service agreement/contract.

Termination of the contract

69. Mr Best and Lockton's service agreement/contract reserved the power of Termination to the Company, that being Goldsun Trading Limited at clause 19, whilst the same clause was contained at clause 18 in Mr Massey's service agreement/contract.

Directorships

70. Each claimant had a clause in their service agreement/contract relating to directorships. This enabled the Company, Goldsun Trading Limited, to request each or any of the claimants to become a director or officer of the Company of any other Group Company, without any additional remuneration. This was contained at clause 23 in Mr Best and Mr Lockton's service agreement/contract, and at clause 22 in Mr Massey's service agreement/contract.

71. Mr Massey and Mr Lockton took up Statutory Directorships, as requested by Goldsun Trading Limited.

72. What happened in practice with respect directorships is consistent with this contractual clause.

General findings

73. As a whole, the service agreement/contract that each claimant signed regulated their relationship, explained how their relationship would work, and with whom the relationship was with. This service agreement/contract reflected the reality of how each claimant worked, and the terms reflected what happened in practice. It is wholly consistent with the work that they did, the way they did it, and the way in which they were remunerated.

74. Expectations and intentions of the parties are important to consider when looking at the contractual relationships, but not determinative. But I find that each claimant knew and expected to be contracting with Goldsun Trading Limited, as the parent company of the Group, and the controlling arm of the Group.

75. All three claimants, when they entered this contract knew that that service agreement/contract was regulating their employment relationship with Goldsun Trading Limited, a company they knew to be their employer. Both Mr Best and Mr Massey under cross examination accepted that the service agreement/contract when looked at objectively looks like an employment contract. While Mr Lockton, accepted that it did look like an employment contract, but for the use of the phrase 'Service Agreement'. Further, Mr Massey explained under cross examination that he 'honestly believed Goldsun Trading Limited was employer under service agreement, but not on day to day business'. The taxation advice of KPMG was also important to this finding. All three were described as Goldsun employees in that advice, and yet at no point did any claimant question this.

76. Each claimant accepted a role with the word 'Group' in its title. At no point did any of the claimant express that that title was incorrect. And further, as highlighted by Ms Higgins in her closing submissions, Mr Massey himself stated under cross examination, towards the end, that he had been advised that he

would be part of the NewCo, not that he would continue to be part of AKW Medi-Care Limited or DLP Limited.

77. Each claimant became a shareholder in Goldsun Trading Limited. As part of this, each signed a s.431 ITEPA 2003 election. All three claimants accepted that they understood that this would only be signed if and when they were buying shares in their own employer. This clearly shows that they each had an understanding of that Goldsun Trading Limited was their employer.

78. The tax documents did state AKW Medi-Care Limited. However, I find that these were an automatic consequence of the payroll function.

79. The claimant's P45 was not issued by AKW Medi-Care Limited. These were only received following a Subject Access Request.

80. The three claimants were Group directors. They were part of the management team of the Group as a whole. They were the senior persons of this group. They are highly intelligent persons. There is no significant imbalance of bargaining power in this case.

Conclusions

81. There was an express contract between each claimant and Goldsun Trading Limited, in the form of a service agreement/contract. There was no other express contract in place. This has to be my starting point.

82. This service agreement/contract provided Goldsun trading Limited with control over each claimant, which was duly exercised. It had the ultimate power of control over the claimants by virtue of this contract: in terms of duties, what it could require the claimants to do, in terms of payment and bonuses. It also retained the power of termination.

83. Goldsun Trading Limited could also require each of the claimants to undertake work at any of the subsidiaries and could require them to take up directorships of any part of the Group. And this is precisely what happened in practice. This forms part of the control that Goldsun Ltd held over each claimant.

84. It is not disputed that the claimant's provided work personally for AKW Medi-Care Limited and DLP Limited. This is consistent with the service agreements. Each claimant did work for different parts of the Group, which varied from time to time, with periods doing more work for one subsidiary than another. And each claimant did provide work for the Group in the form of meetings and developing strategy. Mr Massey did have further work duties in terms of the Group in that he had interactions with investors, lenders and through appointments. This is all consistent with the service agreement/contract.

85. The service agreement/contract provided for pay, and enabled pay through a subsidiary. Payment was made out of the Group, through the vehicle of AKW Medi-Care Limited's payroll. However, this was, alongside other employee expenses, recharged up through the company, and accounted for in consolidated accounts of the Isle of Man part of the Group. The ultimate paymaster in these circumstances was the holding company, that being Goldsun Trading Limited- as this was money going out of group, which was fully owned by Goldsun Trading Limited. It would be illogical to find otherwise.

86. Mr Bunting did raise some matters to suggest that the reality of the situation was inconsistent with a finding that the claimants were employees of Goldsun Trading Limited. In particular, he submitted that a number of important documents, including the documents that showed that tax and National Insurance was being paid by AKW Medi-Care Limited, showed the reality of the relationship. However, as explained above, this was due to a need to comply with the requisite income tax authorities and ensure the appropriate tax was being paid. These were not inconsistencies that troubled me in reaching the decision I have.

87. This agreement was not a sham agreement. It reflected the reality of what was happening. And incidentally, the service agreement/contract satisfied the groups obligations under the Companies Act.

88. All three claimants in my judgment were, on the balance of probabilities more likely to be employees or workers of Goldsun Trading Limited rather than of AKW Medi-Care Limited or DLP Limited. That was the correct employer. They did work for the subsidiaries of the Group as part of their agreement with their employer.

89. For the avoidance of doubt, there is no room to imply a contract between any of the claimants and AKW Medi-Care Limited, or between Mr Best and Mr Lockton and DLP Limited. In neither of their cases is it necessary to imply a contract to give business efficacy to the relationships, as their relationships are already provided for in an express contract, and it is working. Therefore, there is no contract between any of the claimants and AKW Medi-Care Limited, or between Mr Best and Mr Lockton and DLP Limited which can be classified as a contract of employment or worker contract. All claims in this case against AKW Medi-Care Limited and DLP Limited are therefore dismissed.

90. Given this finding, I make no decision in relation to territorial reach, as it is simply not necessary in this case.

Employment Judge **Mark Butler**

Date__19/12/2019___