EMPLOYMENT TRIBUNALS

Claimants: **1 Mr R Patten**
2 Mr M Verbeek
3 Mr A Kazem-Malaki

Respondents: **1 David Brosnan**
2 W2P Anaerobic Digestion

Heard at: **Southampton** **On: 29 November 2019**

Before: **Employment Judge Hargrove**

Representation
Claimants: **In Person**
Respondents: **No attendance, contents of ET1 considered**

REASONS

1. A hearing of these claims took place in Southampton on 29 November 2019.That hearing was notified to the parties by a letter from the Employment Tribunal dated the 16th of April 2019, addressed to the respondents at an address Inforad house, Smithstown industrial estate, Shannon, County Clare SW55 9QT.
2. The Respondents did not attend the hearing and were not represented. In their absence, the Employment Tribunal considered the contents of the three Tribunal files and the response form received from the 31st Respondent on the 11th of May 2019, and subsequent correspondence from the first respondent. The principal evidence to the Employment Tribunal at the hearing was given on oath by the claimant Mr Patton, who relied upon the bundle of documents, and evidence was also received from the other two claimants, including documentary evidence.
3. There were three principal issues which I had initially to decide: –
   3.1. Did the employment tribunal have territorial jurisdiction to consider these claims or were there any other reasons why they should not be heard?
   3.2. By whom were the claimants employed?
   3.3. Were the claims lawful claims i.e. not tainted by illegality in that the manner in which the work was done under the contract, and payments

received for it, were not such as to amount to a fraud on the revenue to which the claimants were a party?.

4. These are the facts I find.

4.1. The first claimant (Mr Patton) presented his claim to the Employment Tribunal on 11th April 2019. He named as first respondent David Brosnan and as second respondent W2P anaerobic digestions. He claimed to have been employed as CEO from 1 August 2018. He claimed unpaid salary up to the date of the proceedings, and thereafter up to his resignation letter addressed to the first respondent dated 3 May 2019.

4.2. The second claimant (Mr Verbeek) also presented his claim on 11th of April 2019, claiming to have been employed as senior engineering manager also from first of August 2018. He too claimed unpaid salary up to the date of the proceedings, and thereafter up to his resignation letter dated 10th of June 2019.

4.3. The third claimant (Mr Kazam Milaki) presented his claim on 16th of June 2019. He claimed to have been employed as electrical design manager from 1 August 2018 until his resignation on 1 February 2019. He claimed unpaid salary for that period. He had applied for an EC certificate on 23rd of April 2019 and it was issued on the 22nd of May 2019. He had presented his claim within 28 days of receipt of the EC Certificate. Accordingly his claim, and indeed all of the claims, were received in time.

4.4. A response was received from the first respondent on the 11th of May 2019. He claimed that the claims were time expired – which is incorrect in all three cases; that they were not his employees (but he did not specify who they were employed by if anyone). He also claimed that they had made claims to the Irish workplace relations commission (WRC); that the two claimants had made claims in two different EU jurisdictions “to give them the same result”; that he was resident in Eire and was not registered as an employer anywhere.

4.5. On receipt of this response, letters were sent out to the first and second claimants asking whether they had issued proceedings in Eire, and if so, to provide copies of claim forms and details of the stage the proceedings had reached. Each of these claimants gave a detailed response to the tribunal on the 28th of May and 29th of May 2018 enclosing documents including WRC complaint forms. They indicated that they had submitted WRC complaint forms on the 2nd of April 2019 and had also made the required applications for early conciliation because they were aware of the time limits (three months) for bringing claims to the employment tribunal in England and Wales.

4.6. On 25th of June 2019 an employment judge ordered all three claims to be combined.

4.7. On the 9th of July 2019 the first respondent wrote to the tribunal asking a series of questions about the claims to which the employment tribunal was not obliged to respond. The Tribunal is not there to give advice to a party, but to respond to applications for a case management order. If the respondent wished to object to the admissibility of the claims he should have made an application or attended the tribunal hearing, of which she had had ample notice. In any event, a detailed response to the questions was given by the first and second claimant, to whom they had been copied by the tribunal, which response was also copied to the first respondent by the tribunal on the 23rd of July. Also on that day an employment judge directed that the hearing proceed on the 29th of November 2019 with an extended time of one day. The first respondent again wrote to the

employment tribunal on the 25th of November 2019 asserting that the matter still stood before the Irish RWC, and that that body had jurisdiction and that he would not, on the advice of senior counsel, be attending the hearing. If that advice was given, it was entirely inappropriate. Nothing further was received from any respondent.

4.8. Each of the claimants produced to the employment tribunal individual pro forma statements of terms and conditions naming them as employees and the employer as "W2P anaerobic digestion".The normal place of work was to be headquartered in Ireland and based in the south-east of England. The employments all began on 1 August 2018. A job title was included in each case as identified by each claimant in his claim form to the tribunal. The individual salaries were identified. At the bottom of each page there are the initials of the individual claimants, and the initials DB which I identify as being those of the first respondent. The contracts are also signed by the first respondent. In addition to the reference to the claimants being based in the south-east of England, I am satisfied that they worked exclusively in the UK. Insofar as they received any salary, it was paid in cash in unusual circumstances. Again in the UK. I am accordingly satisfied that the employment tribunal has jurisdiction to hear these claims, even disregarding the principles in Lawson v Serco. I am not concerned with the fact that the claimants may also have filed complaints in Eire, but I consider it highly unlikely that if similar principles about territorial jurisdiction apply in Ireland, any Irish court or similar body dealing with employment disputes would have jurisdiction over employments in England. I note from paragraph 27 of the STC that it expressly states that the statement of terms and conditions "is written in accordance with the laws in England and Wales".

4.9. As to the identity of the employer, the Employment Tribunal did a search of Companies House, which revealed the existence of W2P Anaerobic Digestion UK Limited, not incorporated until 9 October 2018, three months after the claimants' employment began, and dissolved on the 14 May 2019, of which the first claimant was recorded as sole director. Mr Patten explained that he had been asked by the first respondent to set up the company because of the circumstances of the approaching Brexit; that he had done so but that it had never traded; had never had any assets or a bank account; and that the claimants' employment never transferred to the company. In the circumstances, Mr Patten had applied to dissolve the company. He played on his mobile phone videoconferences of discussions with Mr Brosnan which indicated to me that the claimants were taking direction from him and that he, Mr Brosnan, was latterly attempting to enter into an arrangement whereby the claimants could be employed by the company. I accept that it never happened. I find that W2P anaerobic digestion was no more than the trading name of the first respondent, Mr Brosnan, and this was strongly supported by the evidence of the claimants as to the circumstances in which they had come to be employed by him. Earlier in 2018 the company by which they had all been employed as part of a team, which was engaged in the design and sale of anaerobic digesters, had become insolvent, administrators had been appointed in April 2018, who had initially attempted to sell the business as a going concern. Mr Brosnan had been interested in purchasing it, and had put in a bid, which had fallen through. Shortly following that, Mr Brosnan had approached the claimants to work for him directly, which they had accepted.

4.10. I am satisfied that although it is highly unlikely that any tax or National Insurance were deducted by the respondent from the irregular cash payments made to the claimants, and that any payments were submitted to HMRC under PAYE, the claimant were not party to any scheme to defraud the revenue. I note for example that the third claimant wrote to HMRC on 20 May 2019, notifying full details of his employment by the respondent, and asking for an enquiry into Mr Brosnan's activities, and for the HMRC record of tax and NI submitted by him in respect of the claimant's employment.
4.10. I was also satisfied that the claimants were each owed the sums for salary set out in the Judgment.
4.11. Any application for reconsideration must be made under Rules 70 to 72 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 in writing within 14 days of the sending of these reasons. The application must set out in detail any reason why the Judgment should be set aside, no valid grounds having been identified in the original response or subsequent correspondence from the respondent.

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Employment Judge Hargrove

Date: 6 February 2020
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