EMPLOYMENT TRIBUNALS

Claimant: Mr A Smirnov

Respondent: Ramboll UK Ltd (1)
Ramboll Danmark a/s (2)

Heard at: Croydon by cloud video platform **On:** 25 November 2020

PRELIMINARY HEARING

Before: Employment Judge Nash

Appearances
For the claimant: In person
For the respondents: Ms Anderson of counsel

JUDGMENT having been sent to the parties and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. At this hearing, the tribunal made a number of determinations over the course of the day. All determinations were included in the judgment. These written reasons include reasons for the determinations made in the judgment, save for the claims dismissed upon withdrawal.

Procedural History

2. The claimant entered into ACAS early conciliation against the first respondent in the name of Ramboll on 30 May 2019 and received his certificate dated 14 July 2019. He presented his first ET1 under claim number 2302989/19 on 29 July 2019 against the first respondent only.

3. The claimant entered into ACAS early conciliation against the first and second respondents on 27 December 2019 and received a second certificate dated 30 December 2019. He presented his second ET1 under claim number 2305706/19 on 29

December 2019 against the first and second respondents. There was a third respondent, but this claim was rejected by the tribunal.

4. The claimant obtained two further ACAS certificates dated 30.12.19 one against the first and one against the second respondent.

5. The two claims were consolidated at a preliminary hearing by Employment Judge Wright on 25.6.20.

Issues

6. Following discussion with the parties, it was agreed that the tribunal would determine the following issues: -

    a. Was the claim against the second respondent correctly accepted by the tribunal considering the requirements of the ACAS early conciliation scheme?

    b. Who was the claimant's employer? It was agreed that the claimant was employed by the second respondent until 1 October 2018. The claimant's position was that he was employed by the first respondent under an implied contract from 1 October 2018. The respondents' position was that the second respondent continued to be his employer at all times.

Brief Precis of Facts

7. The following facts were relevant to the issues.

8. The claimant is a British citizen. In Denmark the claimant entered into an employment contract, a contract of service, with the second respondent, a Danish company, on 15.11.15.

9. The claimant sought to return to London and to be employed by the first respondent, a UK company.

10. The claimant's case was that the second respondent told him that he would be an employee of the first respondent once he developed a pipeline of projects to justify the move. The first respondent would employ him in London initially on a three-month contract on the basis that he worked on a Belgrade project. He would then be moved to a permanent contract with the first respondent. The respondents' case was that the claimant was assigned to London as an employee of the second respondent and no assurances were given as to future employment by the first respondent.

11. The claimant moved to London in August/September 2018. Once in the UK his case was that, as expected, he worked a good deal on a project in Serbia whilst waiting for a UK opportunity.

12. On 20 November 2018 he signed an International Assignment Contract with the second respondent. His case was that, having already relocated, he felt that he had no effective

choice but to sign the contract although it was not what had been promised. He considered that the IAC contained worse employment terms than in his original contract with the first respondent.

13. The International Assignment Contract described the first respondent as the "home company" and the second respondent as the "host company". According to the International Assignment Contract, the claimant, "will be employed as project manager and will be reporting to [a UK employee] during the assignment period" and he would be based in London. The contract stated that the assignment period was from 1.10.18 to 31.12.08. His salary was unchanged and paid in Danish Krone by the second respondent into his Danish account. There was no per diem (as common in a so-called ex pat deal).

14. Clause 5 provided that, "The assignee will continue coverage by social in the home country" (sic). Clause 6 provided that "pension contributions will continue in accordance with home company procedures. Clause 7 provided that the claimant was entitled to support with his tax return in the UK. The contract provided that estimated UK taxes would be withheld at payroll and settled after the filing of the UK tax return (although this did not happen in practice). Annual leave would be in accordance with the second respondent's standard terms. It was stated that it was expected that the claimant would not return to Denmark.

15. Whilst working in the UK the second respondent paid taxes on the claimant's salary into his Danish bank account. However, it later concluded that this was in error because he had earned the money in the UK. It then made PAYE payments to the UK tax authorities and tried (and at the date of hearing continued to try) to get the money back from the Danish tax authorities.

16. The International Assignment Contract expired on 31.12.18. The claimant continued to work in the UK. On 14 March 2019 the second respondent emailed the claimant enclosing a signed extension to this International Assignment Contract until 31.03.19. This was signed by the claimant's managers in both the first and second respondent. The email expressly referred to "the extension of your short-term assignment contract." The claimant was asked for his Danish social security certificate. The second respondent sent a follow up email on 19 March asking him for any questions and otherwise asking him to countersign the addendum.

17. After February, the claimant said that he had no project contact with Denmark.

18. The claimant returned to Denmark on a temporary basis in May 2019. The second respondent dismissed the claimant on 28.05.19 with effect on 30.09.19 on conduct grounds.

<u>The Second Respondent</u>

19. The first issue for the tribunal was whether the claimant could proceed against the second respondent although, when he presented his claim on 29.12.19, he did not have an ACAS certificate in the name of the second respondent. The tribunal heard

submissions from the parties on this issue but no evidence as the facts were not in dispute.

20. The applicable law is found firstly at s18 Employment Tribunals Act 1996 as follows

> **18ARequirement to contact ACAS before instituting proceedings**
> (1)Before a person ("the prospective claimant") presents an application to institute relevant proceedings relating to any matter, the prospective claimant must provide to ACAS prescribed information, in the prescribed manner, about that matter.
> …
> (8)A person who is subject to the requirement in subsection (1) may not present an application to institute relevant proceedings without a certificate under subsection (4).

21. This is subject to paragraph 4 of the Schedule to the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 as follows

> If there is more than one prospective respondent, the prospective claimant must present a separate early conciliation form under rule 2 in respect of each respondent …

22. The Tribunal determined the issue as follows.

23. The tribunal firstly considered the caselaw. In *Drake International Systems Ltd v Blue Arrow Ltd* [EAT] 27.01.16 the Employment Appeal Tribunal under its President deprecated what it termed satellite litigation concerning the early conciliation process. According to Richardson J in *De Mota* v ADR Network and another UKEAT/0305/16, "it is no part of the purpose of the early conciliation provisions to encourage satellite litigation". Echoing Her Honour Judge Eady QC in *Mist* (paragraph 53), Langstaff P in *Drake* said:

> "35. It is a happy consequence of my reasoning that the appeal is to be dismissed: if it were not so, there could be a real risk that satellite litigation in respect of the provisions of early consideration might proliferate, with the same stultifying effect that litigation …in respect of … the dispute resolution procedures … Since it appears to have been part of Parliament's intention in enacting the Employment Tribunals Act 1996, sections 18A, 18B and 18C, in the terms in which they were enacted, and the Rules under them, to avoid such a position (see, for instance, the broad reference to "matter", and the absence of requiring any particular detail of any particular "matter" to be specified) and to avoid formalities fettering a fast and fair process of justice, I am confident that the view I have reached better serves its purpose and he compared alternative approach.

24. It was determined in *Drake International* that where there was an application to substitute a fresh respondent there was no need for a second ACAS certificate. In *Compass Group UK and Ireland Ltd v Morgan 2017 ICR 73, EAT*, there was a similarly purposive, non-technical approach in respect of a requirement to contact ACAS relating to any matter.

25. In *Akhigbe v St Edward Homes Ltd and ors 2019 ICR D6, EAT* the Employment Appeal Tribunal held that it is a question of fact and degree whether a second tribunal claim relates to the same matter as the first claim. Laing J held in *Science Warehouse Ltd v Mills 2016 ICR 252, EAT*, that s18A should be given a broad interpretation in order to avoid satellite litigation; amendment is a matter for the tribunal's case management powers and thus out with s18A.

26. The claimant in these proceedings chose to proceed by way of fresh claim, rather than applying to amend his existing claim to join a new respondent. The tribunal accepted that he did so because the first respondent stated in its response in clear terms that the second respondent was in fact the employer.

27. The tribunal considered if the fact that this was a fresh claim differentiated this situation from that in *Drake*, where the first respondent had identified another entity as the correct employer in its response and the claimant had applied to amend the original claim to include the new entity. This claimant did not, for example, present a claim against two respondents having obtained a certificate against only one of them.

28. The tribunal sought to follow the guidance from the EAT that tribunals should seek to avoid satellite litigation on technical issues under the early conciliation scheme, in contrast to the complex satellite litigation caused by the now defunct Statutory Dispute Resolution Procedures. If the claimant had sought to add the second respondent by means of an amendment, following *Drake*, there would be no obvious reason to refuse the amendment. The sole reason the claimant presented his claim against the second respondent, was the position of the first respondent. Accordingly, the tribunal could not see a valid distinction between a claimant who seeks to add a second respondent in these circumstances by way of amendment, and a claimant who seeks to do the same by way of a new claim and consolidation.

29. The tribunal also bore in mind that the claimant was unrepresented. The tribunal had seen fit to consolidate the two claims at the first preliminary hearing. The tribunal found there was a sufficient analogy between a tribunal exercising its case management power to amend a claim to add a respondent, and a tribunal exercising its case management power to consolidate claims, which have effectively the same result.

30. Accordingly, the tribunal determined that the claim against the second respondent was correctly accepted.

31. There was a further issue in that the number of the ACAS certificate was incorrect on the claim form. The tribunal applied rule 12(1)(da) and found that the incorrect number was a minor error and it would not be in the interests of justice to reject the claim. In making this finding, the tribunal again sought to apply the EAT guidance to limit satellite litigation.

<u>The identity of the claimant's employer</u>

32. The second issue was the identity of the claimant's employment. The tribunal discussed with the parties how to proceed. The tribunal explained that the case had been case

managed on the assumption that no evidence would be led at this hearing and both parties wanted to proceed on this basis. Accordingly, the tribunal heard no evidence and proceeded on a submissions only basis.

33. The tribunal found that the documents were consistent with the claimant being an employee of the second respondent. This was stated in terms. The contract and extension could not be read in any other way. The assignment contract was expressed described as an International Assignment Contract. There was no reference to or suggestion of a change in employer. Further, the second respondent continued to pay the claimant's salary whilst he was in the UK.

34. Under ordinary contractual principles, the ability of courts to look behind the written terms of a signed contract is limited to situations where there is a mistake that requires rectification or where the parties have a common intention to mislead as to the true nature of their rights and obligations under the contract, i.e., the contract is a sham.

35. However, according to the Supreme Court in *Autoclenz Ltd v Belcher and ors 2011 ICR 1157, SC*, employment contracts are an exception to this general principle. The Court stated

> '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'.

36. The question in every case is, 'what was the true agreement between the parties?'

37. *In Dynasystems for Trade and General Consulting Ltd and ors v Moseley EAT 0091/17,* the EAT applied *Autoclenz Ltd v Belcher and ors* to determine who was the true employer under the contract. This case also restated that it is the parties' intention at the beginning of the contract which is relevant although their later actions may constitute evidence of the nature of the agreement.

38. In this case, the claimant had relocated to the UK and later presented with a written contract. He was then, the tribunal accepted, at a disadvantage in rejecting this contract. There was an imbalance of power. In the tribunal's view this opened up the question of whether this contract represented the true intentions of the parties at the beginning of the arrangement.

39. However, the tribunal could not find enough evidence to indicate that this contract did not reflect the intentions of the parties. There was nothing in writing to suggest that the claimant had at the time stated that the IAC was inconsistent with any initial agreement. Further, after his moving to London he continued in contact with Denmark and the second respondent, and this would be much less likely if he was employed by the first respondent.

40. The claimant contended that the working situation in the UK was not consistent with Danish law. However, the tribunal explained to the parties that it could not reach a view

on Danish law without expert evidence. However, even if the claimant were correct, this it does not necessarily follow that the claimant's employment with the Danish company ceased and he became an employee of the UK company.

41. The claimant continuing to an employee of the Danish company following his move to London was not merely a matter of form. In the view of the tribunal, the most important factor was that he was paid in Denmark in Danish currency. His pension and annual leave arrangements were expressly unchanged from his contract of employment with the second respondent. Further, his social security arrangements in Denmark continued, as evidenced by the second respondent asking him for his social security details.

42. The tribunal took into account the expectation in the IAC that the claimant would not return to Denmark which indicated that the parties intended a permanent move to the UK. However, whilst this was more consistent with his being an employee of the UK company, it was not inconsistent with his remaining an employee of the Danish company.

43. The first respondent referred to the claimant as an employee when it discussed him with HMRC. However, the situation in respect of taxation was, to put it at its best, confused and inadequate. Neither respondent appeared to know what it was supposed to do.

44. The tribunal accepted the respondents' contention that the emails in March 2019 were consistent with his being the employee of the second respondent.

45. The tribunal reminded itself that in determining the true nature of the agreement between the parties it should take a sensible and robust approach and should not allow form to undermine substance. The tribunal had concerns about how the claimant was treated. It was at first sight less than ideal that the exact contractual situation was only set out in writing some months after he had relocated to England. The respondents' failed to keep the claimant properly informed of his tax position. However, regrettable as these matters may be, they do not overcome the weight of the evidence pointing to the second respondent as the claimant's employer.

Employment Judge Nash

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Date: 31 March 2021

Note
Written reasons will not be provided unless a written request is presented by either party within 14 days of the sending of this written record of the decision.

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