EMPLOYMENT TRIBUNALS

Claimants: Mr K Schrijvers

Respondents: (1) Masteron Group of Companies
(2) MSB Ardoe House Limited
(3) M-Brandon Tradeco Limited
(4) Brandon Hall Hotel Limited

Heard at: Birmingham (via video link) **On:** 9-12 January & 13-14 February 2023

Before: Employment Judge J Jones

Representation
Claimants: Mr L Wilson (counsel)
Respondent: Mr R Kohanzad (counsel)

JUDGMENT having been sent to the parties on 17 February 2023 and written reasons having been requested by the claimant on 28 February 2023 in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

The claim and the issues

1. By a claim form presented on 13 August 2021, following ACAS early conciliation between 2 July and 9 August 2021, the claimant brought claims of unfair dismissal, for a redundancy payment, notice pay, holiday pay and arrears of pay. In summary, the claims arose out of the claimant's work in connection with two spa hotels in the UK – Brandon Hall and Ardoe House. Mr Wai Ceong Choy and Mr Wai Hin Choy (collectively referred to herein as "the Choy brothers"), business men resident in Malaysia, were the investors in the hotels.

2. The claims were considered by Employment Judge Perry at a private preliminary hearing on 20 May 2022. It became clear to the Judge during that hearing that the respondents named in the claim form (with the possible exception of the 4th respondent) had not been the claimant's employer at the

material time and were therefore not the correct respondent to the claims he brought. It was clear that the claimant would need to amend his claim to substitute or add another respondent if his claims were to have a reasonable prospect of success. The claimant had already in fact applied in October 2021 (p63) to add/substitute Masteron Sdn Bhd ("Masteron SB") as a respondent on the basis that this was in fact the name of the entity which he had mistakenly described as "Masteron Group of Companies" in his claim form (the first respondent).

3. In their response to the claims, the respondents each denied that they had been the claimant's employer and alleged that the claims should be struck out in any event because any employment contract(s) was unenforceable due to illegality.

4. The respondents' position was that the claimant was employed by the trading arm of the Brandon Hall spa, MSB Admiral Limited, which went into liquidation in November 2020. Thereafter, the respondent suggested that the claimant was TUPE-transferred to Brandon Tradeco Limited, a new entity which took over the running of that hotel, along with all the staff working at Brandon Hall.

5. Following the private preliminary hearing before EJ Perry, the claimant was directed to submit any application to amend to add additional respondents by 17 June 2022, which he duly did by filing draft amended particulars of claim. He applied to add Masteron Sdn Bhd ("Masteron SB"), Mr Wai Ceong Choy and Mr Wai Hin Choy as respondents to the claims on the basis that he had been employed by Masteron SB or, in the alternative, by the Choy brothers personally.

6. EJ Perry listed this preliminary hearing in public to determine the following issues:

    6.1 The claimant's application to add additional respondents;
    6.2 who the Claimant's employer was;
    6.3 in the event illegality was pursued and it became apparent that issue needed to be addressed in the view of the trial judge, to determine the issue of illegality.

7. The proposed respondents were represented along with the existing respondents for the purpose of responding to the applications to amend to add them to the proceedings.

The hearing

8. The hearing was held using CVP (the Tribunal's video conferencing platform), with the consent of the parties.

9. The Tribunal was provided with a joint file of documents 1109 pages in length. Page numbers in these reasons are references to the page numbers of the hard copy of that joint file or bundle, unless otherwise stated.

10. The Tribunal also received a chronology, cast list, agreed list of issues, skeleton arguments and written submissions from both counsel.

11. The Tribunal heard oral evidence from the following witnesses (in the following order):

    - Mr Karel Schrijvers, the claimant
    - Mr Phil Walton, the former Group Financial controller for the Choy brothers' UK companies
    - Mr Wai Ceong Choy
    - Ms Angela Clay, independent HR consultant and owner of HR:4UK

    Each witness produced a written statement as their evidence in chief and was cross-examined.

Findings of fact

12. Based on this evidence, the Tribunal made the following findings of fact:

    12.1 The Choy brothers are property developers based in Malaysia. Mr Wai Ceong Choy is an experienced business man. He was educated in part in the UK, where he completed a law degree. He is a shareholder in approximately 100 companies in Malaysia and elsewhere, most often with his brother, Wai Hin Choy. Some of these companies operate under a group structure, others are owned and run independently by their shareholders. Many of the companies have "Masteron" in their title. They are referred to on occasion for convenience as "the Masteron Group of Companies" but there is no corporate entity of that name nor is there a single holding company. There are at least six public listed companies in Malaysia with "Masteron" in their title. One of these is Masteron Sdn Bhd (Masteron SB), the entity that the claimant applied to be substituted for the first respondent in these proceedings.

    12.2 The claimant is a Belgian national and business adviser of long-standing. He has worked for 35 years out of Southeast Asia on an ex-pat contract basis i.e. without the payment of tax. He told the Tribunal that he would not work on any other basis. In 2015 the claimant met the Choy brothers and began to contract with Masteron SB to do work on a consultancy basis for that company in relation to property developments in Malaysia. The claimant was living in Malaysia at that time but provided his consultancy services via a Singaporean company owned by him called IMHS Ltd. The claimant worked for other clients as well as Masteron SB. His contract with Masteron SB was via the Choy brothers who provided him with tasks and instructed him as to how they were to be done. During this engagement claimant issued between 20 to 30 invoices from his Singaporean company IMHS Ltd to Masteron SB.

12.3 In early 2017 the Choy brothers opened a conversation with the claimant about the possibility of him taking up employment in the UK in connection with a new venture of theirs. This was the purchase of a spa hotel in Coventry called Brandon Hall, with a second spa hotel, Ardoe House, soon to be added to the portfolio.

12.4 Brandon Hall was purchased by the Choy brothers in May 2017 and was owned by a UK company incorporated by them for the purpose called Brandon Hall Hotel Limited, the fourth respondent in these proceedings. When Ardoe House was purchased in early 2018, that was owned through a new Choy brothers' company "MSB Ardoe House Limited", the second respondent. These property companies were in turn owned by "MSB Global Limited", at that time a company incorporated in Guernsey.

12.5 Another UK company, "MSB Admiral Limited" was incorporated in the UK to be the operating company for the Brandon Hall hotel and spa. Similarly, when Ardoe House was bought it was operated through a separate limited company – MSB Admiral Ardoe Ltd.

12.6 On 12 May 2017 the claimant emailed Choy Wai Chong under the subject "package" (p191). He wrote:

> *"As discussed earlier if you don't mind I need to discuss my package so we are all on the same page with no misunderstandings.*
>
> *Datuk, as you may be aware I discontinued my services with other clients to fully concentrate on Mastron (sic) Malaysia and U.K. properties.*
>
> *Although I finished ending March my fees of RM 15000 will still be applied till the end of April .*
>
> *From May onwards :*
>
> *The main issue is the monthly remuneration. I indicated in my package send to you some time ago GBP 8000 /month / tax free. We agreed we would find solutions on the tax issue. For the first 2 or 3 months the tax might not be an issue and can pay to my Singapore account. I was informed I do not need a work permit nor do I need to register in the UK.*
>
> *I also informed you that until we have a second property I will try to get some money in Iran.*
>
> *For the moment May with the take-over June 1 it looks like I will not have much time to go to Iran as Mastron (sic) UK is clearly my priority. For Iran June should be ok in the middle of June for a week or so*

With that I propose that for those 2 months (May and June) the salary is cut down to GBP 6000 as we are not making any revenues in May for Brandon yet and I will be getting some from Iran in June.
Although for me its a bit of a problem for May with no Iran income.

Once a second property is online we go to GBP 8000 and drop Iran .

The rest of the items are standard :
- insurance
- medical
- car
- housing
- F&B
- one way economy ticket for the family (3)
- bonus

Your thoughts Datuk WC

Karel"

12.7 On 9 July 2017 the claimant sent a draft employment agreement to Wai Ceong Choy (p667). This was adapted from an agreement used by the claimant in recent employment in Thailand. It was expressed to be subject to Thai law (clause 18) although disputes were to be heard in the UK. The claimant was to be an employee with the title "owner's representative/general manager/group adviser hospitality UK and Malaysia". The draft contract did not identify an employer. This contract was referred to during the proceedings as "the Thai Contract".

12.8 On 13 July 2017 Wai Cheong Choy sent an email entitled "Moving Forward Employment Agreement" to the claimant copying in his brother, Wai Hin Choy, and Richard Ng (p205-6). Richard Ng was a close business associate of the Choy brothers and the Financial Controller of their Malaysian businesses. The email read as follows:

"Karel…

1.This mail goes to RN and CWH so that we will all be on the same page on this matter."

[Mr Choy then referred to the fact that he had done some Googling on the tax position in the UK and it included an extract showing the tax bands for basic and higher rate tax and personal allowances in the UK, continuing..]

"3. Your package (starting with GBP 72k PA (with work on Iran consuting) & will rise to GBP 96k upon the 2" d property , where Iran work will be dropped) involve the following factors :

• It will be tax free

• The employment contract above will be DETAILED to allow for the compliance with UK Home Office Requirments such that your wife BIBI will have residency status and allow for either part time or full time work in the UK . This employment contract will be LIABLE for UK income tax and other statuory deductions. Please let me know the MINUMUM requirements from the UK HOME OFFICE . Based on the TAX table above ... I AM SUGGESTING THAT YOUR UK PAYROLL SHOULD BE SAY GBP 28k PER ANNUM. This contract should be signed by MSB ADMIRAL LTD being the Trade Co for the Brandon property . Here MSB Admiral will make take payments for this income.
• For your ADVISORY work to the MALAYSIAN HOTELS (Wnydham / FOUR POINTS / 2 RADDISON) I AM SUGESTING THAT YOUR CONSULTANCY CHARGES be set at GBP 30k pa. This will be invoiced by IHMSLtd and remitted to your Singapore Account .
• I am also pleased to inform that the RED LION LTD has agreed to provide to your Children a scholarship of GBP 14 pa.

The above is only a draft, please study through and let me have your comments."

12.9 On 30 July 2017 the claimant replied to Wai Ceong Choy's email (p 894), stating that there was a typo and that the "scholarship" was in fact £2,000.00 per month x 12 - i.e.£24,000.00 per annum. Breaking down the 3 elements of proposed remuneration, the claimant wrote:

£28,000.00 UK
£30,000.00 Singapore
£24,000.00 Scholarship

Total £82,000.00

and added that it would be necessary to reduce the Singaporean amount to £20,000.00 to bring the total to £72,000.00 (£6,000 per month).

The claimant proposed that this arrangement started in September adding that it would be important to "*have the agreement going for documents application*". The email concluded with a reference to how the claimant's wife was to be employed on a zero hours contract in the business so she was "*seen to be allowed to be here".*

12.10 At this stage, the Tribunal found there was an eagerness from the claimant to press ahead with the drafting of an employment contract because it was needed as evidence to enable the claimant's wife and family to enter the UK prior to the commencement of the new school term. On 18 August 2017, the claimant instructed Angela Clay at HR:4UK to draft an employment agreement to reflect the terms that had been agreed between him and Wai Ceong Choy in the exchange of emails on or about the 30 July 2017.

12.11 The company which instructed Ms Clay was MSB Admiral Limited. This was clear from the Client Agreement (page 767) and Ms Clay's evidence. All

the instructions regarding the work came from the claimant personally and Angela Clay had no contact with the Choy brothers until on or about the 18 November 2020. The claimant sent a copy of Wai Ceong Choy's email of the 30 July 2017 to Ms. Clay on 18 August 2017, simply forwarding it with the words "as discussed".

12.12 On 26 August 2017 Angela Clay sent a draft employment agreement to the claimant accompanied by 2 side agreements, one for the proposed consultancy work and one for the "scholarship" (email, p 209). In the covering email, Ms. Clay asked a number of clarification questions of the claimant to enable her to complete the drafts. These included questions about the term of the appointment. The claimant had suggested that the employment agreement would be for a fixed period of 5 years. Ms. Clay had in fact put in the draft employment agreement an open-ended term, terminable on notice, as being more appropriate and she sought to confirm her instructions. The other issue that Ms Clay raised was the nature of the proposed payment of salary to the claimant and the fact that it was going to increase from £72,000.00 to £96,000.00. The plan was that these draft agreements and side letters would be discussed further before being finalised.

12.13 The draft employment contract sent by Ms. Clay to the claimant (p953) included was between the claimant and MSB Admiral Limited, as the employer. The agreement was to commence on 1 May 2017 and be terminable by the employer on 12 months' notice period. The claimant's job title was to be "Owner's Representative, General Manager and Group Hospitality Advisor" with a salary of £28,000.00 per annum, to be paid net of tax. There was no reference to the work location.

12.14 On 18 September 2017 the claimant emailed Angela Clay to chase up the finalisation of this employment contract as he put it "it was needed for the registration papers" (p210). Angela Clay replied and an arrangement was made for her and the claimant to meet on 19 September 2017 to agree any amendments to the contract and for her to return the draft to the claimant the following day. On the 21 September 2017, which was the Thursday of that week, the claimant sent an email to Wai Ceong Choy (p213) which read as follows:

> "*Attached is the employment agreement needed for the visa papers for Bibi and the kids. Could you kindly sign it at your earliest convenience. This is for the UK purpose and is needed as soon as possible.*
> *This is the 2800 one, next week I will send the "Global" one, the one that covers the overall agreement*".

12.15 This email appears to have included a typographical error - the reference to 2800 should in fact have been reference to 28,000, reflecting the annual agreed UK salary. It appears that this email then led to an error that persisted throughout the claimant's employment in that he then became paid £2,800.00 per month via a UK payroll.

12.16 The difference in this draft agreement sent to Wai Cheung Choy by the claimant and the original draft agreement sent to the claimant by Angela Clay was at clause 2. This related to terms of appointment. The amended or second draft included a 24 month fixed term, plus a 6 month notice period. The Tribunal concluded, on the balance of probabilities, that this amendment was made before the agreement was sent to Wai Ceong Choy for signature. This was because it was one of the particular issues that Angela Clay had flagged for further discussion in her initial email to the claimant, and the Tribunal concluded it was likely that it would have been discussed by Ms Clay and the claimant at their meeting on the 19 September 2017. The term included in the draft sent by the claimant to Wai Ceong Choy was something of a compromise between a 5 year fixed term agreement (which had pros and cons for the claimant) and an open ended agreement terminable on notice. It was not likely in the Tribunal's view that Wai Ceong Choy would have amended this clause in type before signing the agreement and sending it back to the claimant without mentioning it. There would have been something less than transparent in that kind of behaviour and the relationship the Tribunal heard about between the parties was open and honest at that time. Further, the Tribunal accepted the evidence of Angela Clay that she only sent agreements out in PDF format to discourage concealed amendments of this type. The agreement was sent to Mr Wai Ceong Choy and he signed and returned it via an email from his secretary on 30 September 2017 (p649). He signed in fact on every page. For ease of reference, this signed contract will be referred to as "the Admiral contract".

12.17 It was clearly the claimant's intention to produce a second contract which he called the "Global" agreement. By this phrase the Tribunal concluded that the claimant meant an agreement covering all the elements of his remuneration. Not only did the claimant expressly state that this was his intention (p213) but also an annotated version of the Admiral contract, (p 807), produced by Ms. Clay with her handwritten notes on, suggested that this was to be amended so as to turn it into a second contract – or "Global Agreement" as she had handwritten across the top. The main changes to the Admiral contract were going to be that "MSB Admiral Limited" was to be replaced with "Masteron Group of Companies" and the payment was going to be changed to £96,000 net of tax. The Tribunal concluded that an amended, second or "Global" agreement probably was produced by Angela Clay, but, the urgency created by immigration formalities having passed, it was not sent by the claimant to the Choy brothers.

12.18 The Tribunal reached this conclusion based on the totality of the evidence. For example, contrary to other documents, there was no email trail before the Tribunal to demonstrate that such a "global" agreement was sent by the claimant to Wai Ceong Choy. Secondly, it would not have been an agreement that made any sense to Wai Choy because there was no entity called the Masteron Group of Companies. The Tribunal concluded that he would have been very likely to have observed this and raised it with the claimant. It was likely there would have followed some form of email exchange about the fact that, as drafted, the contract was an attempt to enter into an agreement with a corporate entity that was not in existence. Thirdly, it

was common ground that there was no signed version of such an agreement and the Claimant did not assert that such had ever existed. Fourthly, the claimant's urgent need for a written employment contract soon passed as the claimant's wife and children's visa applications had been submitted, accompanied by the Admiral contract. Finally, the exchange of emails that happened later - on 19 October 2020 - suggested that the global agreement had never been forwarded by the claimant to Wai Cheung Choy.

12.19 Returning to the chronology of events, between December 2017 and January 2018, there was an exchange of emails between the claimant and his immigration adviser, Daniel Metibamou. This culminated in an email from the claimant which referred to the fact that the claimant had already sent a copy of my employment agreement duly signed by the hotel owners (p219).

12.20 The Tribunal found that what had been sent to the immigration advisor was a copy of the Admiral contract. The claimant's salary in the UK was paid by cheque at that time and the immigration advisor sought a letter to confirm the source of payments. The claimant requested this on the 19 January 2018 and received a response from Richard Ng on 22 January 2018. Mr Ng's letter, on MSB Admiral Limited headed notepaper, (p181) simply read as follows:

> *"To whom it may concern, this letter is to confirm that Mr Karel Henri Schrijvers is an employee of MSB Admiral Limited and his salary is paid by cheque."*

The content of this letter was not queried by the claimant. In fact the claimant accepted during his evidence that he was an employee of MSB Admiral Limited at some point in time, on the terms and conditions set out in the Admiral contract at p649.

12.21 Despite the initial proposal of a 3-way split for payments to the claimant i.e. UK payroll, consultancy fees and a school fees bursary, the school fees arrangement soon waned due to issues with the school and the timing of payments from the respondent. By 2018, the claimant was in practice receiving the following remuneration. First, he received £2,800.00 net per month through payroll i.e. subject to the prior deduction of UK tax and national insurance. The sum was grossed up for tax and NI to achieve this net payment. The claimant also received a second payment each month of £5,200.00 which was also paid net to him. This element was not paid through payroll, i.e. subject to deduction of tax and national insurance. This made a total payment to the claimant each month of £8,000.00, net of tax and national insurance, or £96,000 per annum, from approximately 2018 onwards.

12.22 The timing of the payments made to the claimant was erratic at times although he was, the Tribunal found, always paid. The payments of £2,800.00 came from MSB Admiral Limited initially. The balance of £5,200.00 emanated from one or more corporate entities owned by the Choy brothers. Principally, they came from MSB Global Limited, the Guernsey based company and ultimate owner of Brandon Hall. After Ardoe House was

purchased in approximately May 2018, the claimant was switched to its payroll and was thereafter paid every month £2,800.00 via the payroll for that entity. The claimant worked at and for Ardoe House as well as Brandon Hall once the purchase completed. There were no other changes to the claimant's terms and conditions of employment and there was no documentary evidence to indicate that the parties intended that there would be a change of employer at this time for any reason.

12.23 Mr Phil Walton joined MSB Admiral Limited on 1 November 2018 as an accountant. He soon became the Group Financial Controller for all the UK companies linked to Brandon Hall and Ardoe House. Shortly after he started, Mr Walton made enquiries of the claimant about the written terms of his employment when the claimant asked for a reimbursement of a speeding fine as expenses. The claimant sent him a copy of the unexecuted contract in the name of Masteron Group of Companies – in other words, the draft "global" agreement. Mr Walton had no idea that there was no legal entity called "Masteron Group of Companies" nor that the agreement had not been signed by Wai Ceong Choy. The claimant was Mr Walton's senior in the organisation and he had no reason to query it.

12.24 Mr Walton inherited the payroll arrangement that existed for the claimant in that he was on the payroll by this time of MSB Admiral Ardoe Limited, although he was carrying out work for both Brandon Hall and Ardoe House. Mr Walton also inherited the arrangement whereby £2,800.00 net was paid to the claimant via payroll and £5,200.00 was paid to the claimant in cash separately each month. Mr Walton recorded these sums in the company accounts of MSB Admiral Ardoe Limited as a loan to MSB Global Limited although no inter-company invoices were raised for the claimant's services. Mr Walton raised a question about whether or not tax and national insurance should be paid in relation to the £5,200.00 monthly payments to the claimant, but was advised by Mr Ng that the tax was being taken care of in a different way. He accepted what he was told.

12.25 In March 2020, the first UK national lockdown due to the Covid 19 pandemic took place. Both hotels closed and all staff were furloughed. The claimant and Mr Walton provided advice to the Choy brothers and Richard Ng regarding how the furlough scheme in the UK was to work. On the 25 March 2020, Wai Ceong Choy emailed the claimant (p390) enquiring how he and his wife were to be paid as he wanted to make sure the claimant and his family were provided for. The claimant's reply on 26 March 2020 (p389) was as follows:

> "*thank you for your concern in regards to us.*
> *For me my salary was always split in 2 parts:*
>
> *2,800 on the books*
> *5,200 other*
> *Total 8,000*
>
> *So I will get 2,800.00 at 80% - will be almost 2,500.*

The 5,200.we will think about much later and see how we go about it … not on my mind at this time.

Bibi at 2000 at 80% is about 1600 so we are ok to hang on"

The Tribunal concluded that, in this email, the claimant was advising Wai Ceong Choy that he and his wife would both claim furlough based on their UK payroll salaries and would receive 80% of the monthly amounts as a consequence.

12.26 The claimant was duly included in the furlough scheme application for all staff on the payroll of MSB Admiral Ardoe Limited. The claimant thereafter received payments through the furlough scheme based on his "on the books" salary (p 731).

12.27 Due to ongoing challenges to the hospitality industry from the Covid-19 pandemic, the Choy brothers commenced discussions in approximately September 2020 regarding potential liquidation of the 2 UK hotel trading companies, MSB Admiral Limited and MSB Admiral Ardoe Limited.

12.28 On 19 October 2020, the claimant sent an email to Wai Ceong Choy (p485) stating "*attached is my contract of employment, this is the one we called Global Contract as we have another one for the local employment purpose…. I'm looking for my email to you with this contract, should have it by tomorrow morning*."

12.29 Later the same day, the claimant emailed Wai Ceong Choy again (p203). This time the claimant said "*found it…my earlier email was wrong…the starting salary was 6k or 72k per year increase with 2k with Ardoe or 96k/year. Contract was sent to you July 9 2017. So the salary split with 5.2 k and 2.8k totalled 8k.*" The Tribunal found that the agreement attached to this second email on 19 October 2020 was the Thai contract.

12.30 On 12 November 2020, both MSB Admiral Limited and MSB Admiral Ardoe Limited went into liquidation (pages 521-522). The claimant received redundancy and other payments from the Insolvency Service as an employee of MSB Admiral Ardoe Limited. The claimant accepted during his evidence this was incorrect in retrospect because, although he was paid via MSB Admiral Ardoe Limited, he had been an employee of MSB Admiral Limited and not an employee of MSB Admiral Ardoe Limited.

12.31 On or about the liquidation date, all employees of MSB Admiral Limited TUPE-transferred to a new entity, Brandon TradeCo Limited, which became, and remains, the operating company for Brandon Hall. The claimant still lives and works at Brandon Hall and is paid by this new company, Brandon TradeCo Limited, which is operated by the claimant's wife. There is a dispute in another court about the ownership of Brandon TradeCo Limited and it is not necessary for the Tribunal to trespass upon the facts of that matter any further in order to determine the issues in this case.

12.32 On 8 January 2021, Wai Cheung Choy gave the claimant 6 months' notice of termination of his employment. The claimant's employment ended on the 1 July 2021. The claimant lodged a grievance about the termination of his employment on 29 April 2021 (p647) in which he claimed to have been employed by "Masteron (the Company)" and described his role as "managing the Ardoe and Brandon Hall Hotels".

12.33 The Tribunal accepted that managing the two hotels did indeed form the vast majority of the claimant's work between 1 May 2017 and 1 July 2021. The Tribunal heard evidence from the claimant that he explored other ventures in the UK for the Choy brothers from time to time during his tenure, but the Tribunal heard no evidence of any or any substantial work by the claimant for the respondents outside the UK and did not find that such took place.

12.34 The reference to "consulting" to run alongside UK employment prior to the inception of the claimant's employment in 2017 was, the Tribunal found, a means for avoiding the payment of UK employment-related tax and national insurance, not because of any serious intent on the part of either party that the claimant should work only part-time in the UK and should do other work outside the UK for the Choy brothers on a regular basis. The Tribunal noted that no invoices for consulting work were sent by the claimant from his Singaporean company to the Choy brothers for consultancy work, even though this had happened frequently in the past.

The Law

13. The application for determination was an application to amend the claim by adding Masteron SB, Mr Wai Ceong Choy and Mr Wai Hin Choy as respondents. The application was made in writing by the claimant on 17 June 2022 (p122).

14. Rule 34 of the Employment Tribunal Rules of Procedure states:

> **Addition, substitution and removal of parties**
>
> 34. The Tribunal may on its own initiative, or on the application of a party or any other person wishing to become a party, add any person as a party, by way of substitution or otherwise, if it appears that there are issues between that person and any of the existing parties falling within the jurisdiction of the Tribunal which it is in the interests of justice to have determined in the proceedings; and may remove any party apparently wrongly included.

15. The question for the Tribunal was therefore whether or not there were any issues to be determined in the interests of justice and within the jurisdiction of the Tribunal between the claimant and Masteron SB, Mr Wai Ceong Choy and/or Mr Wai Hin Choy. If so, in its discretion, should the Tribunal permit the

amendment, balancing the hardship to the respective parties of refusing the amendment against that of granting it?

16. The parties accepted that the principal issue for the Tribunal in determining this application was the question of whether or not the proposed respondents, or any of them, were the claimant's employer at the time of his dismissal, governing work carried out in or closely connected to the UK so as to be potentially liable to him for unfair dismissal and the redundancy and other payments he claimed. The claimant accepted that, if they were not, it would not be appropriate to join them as respondents to the claim. The respondent described this as the "central question" in the application and did not argue that, if the proposed respondents were the claimant's employer, the amendment should still not be granted.

17. The principles for ascertaining the correct employer are summarised in **Clark v Harney Westwood** [2021] IRLR 528. Where the only relevant material to be considered is documentary, the identity of the employer is a question of law. Where there is a mixture of documents and facts to consider, the identity of the employer is a question of mixed facts and law taking into account all of the relevant evidence. Any written agreement drawn up at the inception of the relationship will be the starting point of any analysis of the question and it will be necessary to enquire whether that agreement truly reflects the parties' intentions. If the written agreement reflects the true intentions of the parties and points to one person being the employer, any assertion that the employer was someone else will require consideration of whether there was a change of employer at some point and if so, how, for example by novation. It may be relevant to consider whether the parties seamlessly and consistently acted throughout the relationship as if the employer was one particular person and not the other. Documents created separately from the written agreement, without the knowledge of the employee, and which purport to show that a particular person is the employer should be viewed with caution and it would be a rare case where such a document could contain persuasive evidence as to the party's intention.

18. If the Tribunal found that the proposed respondents, or any of them, were the claimant's employer at the material time, then the question of the potential illegality of the claimant's contract of employment fell to be determined. It was argued by the respondent that the payment each month to the claimant of £5,200 "off the books" was a fraud on the Inland Revenue because it was an arrangement designed to avoid the payment of UK tax and national insurance, of which the claimant was the architect and responsible party. Further, or in the alternative, it was said that there had been fraud by the claimant in claiming a redundancy payment, holiday pay and furlough payments as an employee of MSB Admiral Ardoe Limited, rendering the contract of employment illegal and unenforceable.

19. **Patel v Mirza** [2016] UKSC 42, makes clear that a fraud on HMRC, amongst other bodies, can render a contract of employment unenforceable. The broad principles are that:

(i) the distinction between illegality in inception and illegality in performance is unlikely to be particularly significant;
(ii) public policy is a material factor and suggests that the preservation of tax collection is likely to remain a strong policy factor pointing towards illegality in arrangements designed to, or operating so as to, frustrate that collection;
(iii) Tribunals should consider the proportionality of striking down arrangements leading to complete loss of valuable statutory rights.

20. The Tribunal was also referred by the claimant to the case of **Okedina v Chikale** [2019] EWCA Civ 1393, [2019] IRLR 905.

Conclusions

21. The Tribunal considered first the question as to who was the claimant's employer. The Tribunal concluded with little difficulty that the claimant's employer was MSB Admiral Limited from the 1 May 2017 to 12 November 2020 when that company went into liquidation. It was then likely that the claimant's employment transferred to Brandon Tradeco Limited under the provisions of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) and this company remained his employer until he was dismissed on 31 January 2021, with effect from the 1 July 2021.

22. There were a number of reasons why the Tribunal came to this conclusion on the evidence.

23. Starting with the contractual position, the Tribunal found that there was a contract of employment agreed and signed by Wai Cheung Choy (the Admiral contract) and put forward by the claimant to the Home Office as his contract of employment in support of applications for entry clearance to the UK. This contract clearly stated that the claimant's employer was MSB Admiral Limited. The Tribunal accepted that this agreement did not include the claimant's full agreed remuneration. This was because the parties were seeking to avoid recording the claimant's full remuneration in a UK contract of employment so as to reduce, they hoped, the requirement to pay UK tax and national insurance on his full package. Various proposals had been mooted in order to achieve this – including the direct payment of school fees, or the use of consultancy fees invoiced through the claimant's Singaporean company. In the event, these other arrangements were either not put in place at all or were not sustained. In all other respects the Admiral contract include the terms and conditions of the claimant's employment in the UK.

24. The Tribunal went on to consider whether this document truly reflected the intention of the parties. It was, the Tribunal found, always envisaged by both parties that the claimant would be employed by MSB Admiral Limited in the UK. This was clearly stated in Wai Cheung Choy's email to the claimant dated 13 July 2017, and not questioned in the claimant's response. The claimant instructed HR:4UK on behalf of MSB Admiral Limited and was the party who advised Ms Clay to include this company as the named employer in

the draft agreement. All the other employees of Brandon Hall were employees of MSB Admiral Limited. When the claimant commenced work in the UK, apart from the property owning entity for Brandon Hall, there was no other obvious or credible alternative employer of the claimant for the proposed work of managing the hotels Brandon Hall, and later, Ardoe House.

25. Furthermore, the claimant himself admitted during his evidence to the Tribunal that, at some point in time (the dates of which he did not specify) he was an employee of MSB Admiral Limited on the terms and conditions set out in the Admiral contract. The claimant's remuneration came to be paid by MSB Admiral Ardoe Limited but this did not signal a change in his employer, and the claimant did not allege that it did, despite accepting a redundancy payment on behalf of this company from the UK government when it too went into liquidation.

26. The other suggestions by the claimant as to who his employer was were not in the Tribunal's view credible. The "Masteron Group of Companies" is not a legal entity; it is a trading style or collective noun. Masteron Group of Companies is not another name for Masteron SB. The latter is an entirely separate company, incorporated in Malaysia, as the claimant knew having engaged with it on a consultancy basis for 2 years prior to being employed in the UK. As a corporate entity, the Tribunal heard no evidence to link this foreign entity to the work the claimant was carrying out in the UK managing Brandon Hall and Ardoe House.

27. The Tribunal found there to be no suggestion in the evidence it heard from the claimant of any intention by either party to enter into a personal contract with either of the Choy brothers. All parties in this case are savvy business men and it would be unlikely in the Tribunal's view that there would have been any intention on the part of any of the parties, including the claimant, to enter into a personal contract of employment with either, or both, of the Choy brothers. The Tribunal considered, but dismissed, the claimant's argument that Mr Wai Cheung Choy's instructions to him regarding his work provided evidence of such a direct contractual relationship. Mr Wai Cheung Choy and his brother Wai Hin Choy were the ultimate owners of Brandon Hall and Ardoe House. It was to be expected that they would provide instruction on the work to be done and the manner in which it was to be done. The claimant accepted in evidence that he had also received instructions from the Choy brothers when working as a consultant for Masteron SB in Malaysia, yet this had not created any form of personal contractual relationship with them.

28. The claimant's employer was MSB Admiral Limited until it ceased to exist following voluntary liquidation in November 2020. By the time of the claimant's dismissal, the claimant was employed by Brandon Tradeco Limited. in relation to whom there was no application to amend the claim to include it as a

respondent, no doubt as it is asserted by the claimant elsewhere to be a company in the ownership of the claimant's wife.

29. In those circumstances, the claimant's application to amend to add Masteron SB, Wai Cheung Choy and Wai Hin Choy as respondents to the claim must fail. In the wording of rule 34, there are no issues between those parties and the claimant falling within the jurisdiction of the Tribunal which it is in the interests of justice to have determined in these proceedings.

30. Turning to the existing respondents to the claim, the claimant accepts that the first, second and third respondents were not his employer at any material time and are not potentially liable to him in relation to any of the claims he brings. Therefore the claims against those parties were struck out.

31. Mr Wilson, counsel for the claimant, did not have instructions to withdraw the claim against the fourth respondent, but it cannot credibly be argued that Brandon Hall Hotel Limited, which was the property corporate entity for Brandon Hall, was the claimant's employer and the claimant did not contend in his evidence that this was so. Accordingly, the claim against the fourth respondent was also struck out.

32. In light of these conclusions it was not necessary for the Tribunal to go on and consider the question of illegality. As it appeared to the Tribunal from the evidence it heard, however, that there was a considerable amount of salary for work carried out by the claimant in the UK i.e. £5,200.00 per month, being paid from or via a UK employer to the claimant, upon which UK tax and national insurance was not paid, Mr Wai Cheung Choy, as a Director of MSB Admiral Limited at the relevant time, was given the appropriate warning against self-incrimination in discussion with his counsel, prior to giving evidence to the Tribunal. The Tribunal noted that both the claimant and Mr Wai Cheung Choy were quick to distance themselves from any knowledge or apparent interest in how and why the tax affairs of the company in this respect had been arranged in the way that they had, and to argue vociferously that any responsibility for the arrangement lay with the other.

33. The Tribunal also expressed its disappointment that such experienced and successful business men had not been able to avoid such a costly dispute, at UK taxpayers' expense, over the simple issue as to who employed the claimant, when the issuing by the respondent to the claimant of a contract of employment, complying with section 1 Employment Rights Act 1996, prior to or shortly after the commencement of his employment would have been likely to have avoided this.

Costs

34. Having heard the Tribunal's decision together with its reasons, given orally, the respondents applied for their costs of the proceedings to be paid by the claimant.

35. The basis of the respondents' application was Tribunal Rules of Procedure, rule 76(1) which states that a Tribunal may make a costs order, and shall consider whether to do so, where it considers that a party has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings or part, or the way that the proceedings or part have been conducted, or where any claim or response had no reasonable prospect of success. The respondents argued that the claims had no reasonable prospect of success and in the alternative, that it had been unreasonable for the claimant to bring or continue with them.

36. The respondents relied in particular on a letter that it had written to the claimant not long after the claim was commenced and before the first preliminary hearing for the purposes of case management. The letter was dated 10 January 2022 and was headed "Without prejudice save as to costs". In it, the respondents' solicitor set out the reasons why the respondent argued that the claims had no genuine prospects of success and put the claimant on risk as to costs. There was detailed reference in the letter to the contractual documentation that had already been shared between the parties and the fact that, in summary, the claimant had not been able to identify his employer and therefore the correct respondent to the claims.

37. The Tribunal considered the test in Rule 76 which is in fact a 3-stage test, but only the first and second stages were engaged in this application. The first stage is to consider whether or not it could be said that the gateway, or threshold, in Rule 76 had been crossed. In this case, the Tribunal asked itself could it be said that the claims had no reasonable prospect of success or, in the alternative, that the claimant was unreasonable to pursue them?

38. The Tribunal looked at the claims against each of the Respondents in turn. In relation to the first respondent, it was, in the Tribunal's view, correct that there could not ever have been a reasonable prospect of succeeding in a claim against the Masteron Group of Companies for the simple and unassailable fact that that company was not a legal entity and never had been.

39. In relation to the second respondent (MSB Ardoe House Limited) there was no reasonable prospect of the claimant succeeding against it because that was not an employing entity but a property company and the claimant could not and did not, in fairness to him, seriously argue that he had ever been employed by it.

40. Similarly, M-Brandon Tradeco Limited, the third respondent, was not asserted to be the claimant's employer and by the time of the preliminary hearing in May 2022 it was acknowledged that those three respondents could not be the claimant's employer (see para. 2.13 of EJ Perry's order, p115).

41. Brandon Hall Hotel Limited, the fourth respondent, was the property company for Brandon Hall and again the claimant has not ever seriously suggested a basis upon which that party could have been his employer. Although the claimant indicated at the first preliminary hearing that he would provide clarity in relation to the position of the fourth respondent in relation to his claims in his written application to amend, he did not do so.

42. In relation to the claim as currently constituted, therefore, the Tribunal concluded that it had no reasonable prospects of success.

43. However, the discussion does not end there because the claimant made an application to join the three respondents that was the subject of this preliminary hearing. Dealing first with what were the prospective sixth and seventh respondents (the Choy Brothers), on balance the Tribunal concluded that the threshold test there had also been passed in that there was no reasonable prospect of the claim succeeding against those individuals. Yes it was right that the claimant had a relationship with them, and that they were the ultimate owners of the hotels that the claimant was employed to manage, but there was no realistic basis to suggest they had ever employed him in a personal capacity and the claimant called little evidence to support that contention.

44. With regard to the prospective fifth respondent, Masteron SB, the position was more difficult. Whilst it is certainly right to say that the claimant had a history of engaging with that company and could therefore be aware of its existence. In the Tribunal's view that was not the same as saying that he had no reasonable prospect of being able to persuade a Tribunal that this entity had in some way an involvement in his employment after the 1 May 2017. According to the findings of fact at the outset the Choy brothers and the claimant were in discussions that envisaged there would be a broader relationship between them simply than him just being the employee of a UK corporate entity. That basis was in the event never fully clarified and certainly never set out in a clear set of contractual documents. There was certainly therefore an open question when the claimant began work in the UK, as to where was the part of the contractual relationship that dealt with a far bigger remuneration package than that which was set out in the Admiral contract, and with whom was that relationship? It was not wholly unreasonable for the claimant to seek to bring into the proceedings the only Malaysian entity whom he could identify as being potentially the other party to the envisaged additional concurrent contractual relationship.

45. The Tribunal then considered the second stage of the test under rule 76, namely whether or not the Tribunal should, in its discretion and in all the circumstances of the case, make a costs order in favour of the applying party. Having found that there was no reasonable prospect of the claimant succeeding against certainly the 4 existing respondents and that the application to join 2 further respondents had no reasonable prospect. Having weighed up all the factors put before it by both parties, the Tribunal declined to exercise its discretion to grant the respondent's application for costs.

46. In coming to this conclusion, the Tribunal first of all cautioned itself that hindsight bias is an easy trap to fall into. In other words, what may seem obvious once four days of evidence and detailed submissions by both counsel have been heard, may not have been as obvious at the outset. Secondly, the respondent had already applied unsuccessfully for costs against the claimant at the preliminary hearing (case management) before EJ Perry in May 2022. At paragraph 1.11 of EJ Perry's order of 20 May 2022 (p114) he said "I heard the respondent's application for costs pursuant to Rule 76(1) (a),(b) and (2). I considered for the oral reasons I gave that currently the threshold of each was not met and in any event even if it had been nor was I minded to exercise my discretion." He added "the respondent may repeat however that application in due course". So the claimant at least knew that as of May 2022, notwithstanding the respondents' costs warning letter of January 2022, whilst there might be a further application for costs from the respondent at a later stage, an Employment Judge had not thought at that time that he had been unreasonable in bringing his claim or that the claim had no reasonable prospect of success. The Tribunal had instead at that time listed this present hearing and instructed him to set out his application to amend to add additional respondents in writing.

47. Secondly, the threshold test in Rule 76 was not crossed in relation to the prospective fifth respondent, Masteron SB. Unpicking the costs incurred in relation to the defence of the claims against the other respondents would be very difficult and the respondents did not put forward any realistic basis upon which this could be done.

48. Thirdly, the claimant is a Belgian national, English is not his first language and, until 2017, he had never before been employed in the UK. It was clear to the Tribunal that, whilst he is an experienced business man, at times he did not find it easy to understand the Tribunal process or the questions being asked of him. The Tribunal also considered the difficulty which undoubtedly exists in understanding corporate structures and entities in any jurisdiction, but particularly one in which one has not before lived or worked. The strict principles in UK law of corporate protection are not easy to grasp, or perhaps to accept.

49. The Tribunal concluded that this was a situation in which the claimant would have been likely to have been very heavily dependent on the legal advice that he received, in deciding whether to bring or continue proceedings. Of course the Tribunal does not know what that was. The claimant has been advised by the same solicitors throughout the proceedings, and at least since May 2022, the same counsel.

50. It was clear to the Tribunal that the claimant genuinely felt that his dismissal had been unfair and that the Choy brothers in some guise or another should be held accountable for that. It is often the case that the identification of the correct respondents to proceedings where there are complex corporate structures is a matter about which litigants need considerable support from their legal advisers. It involves questions of law and not just questions of fact.

51. The Tribunal, however, rejected Mr Wilson's rather surprising submission that a party (especially one represented by solicitors and counsel) can come to the Tribunal saying, in effect, "I need help to identify who my claims are against". It is for a claimant to identify the correct respondent to his claim. There will be situations in which the position is not clearcut, for example, as the Presidential Guidance on Case Management foreshadows, where there has been a subsequent TUPE transfer, but that was not the complicating factor here.

52. Finally, the primary responsibility as the employer to set out in full and in writing the terms of its employment relationship with the claimant in a clearly drafted document, was that of the respondents. Had they done so, the very considerable costs which they have, the Tribunal was told, incurred in defending these proceedings might well have been avoided.

53. For these reasons, the Tribunal concluded that it would not be appropriate to exercise its discretion to order the claimant to pay the respondents' costs of the proceedings in full, as was sought.

Employment Judge J Jones
24 April 2023