EMPLOYMENT TRIBUNALS

Heard at: London South **On:** 19 July 2023

Claimant: Mr M Carbeck

Respondent: (1) Eros International Limited (in administration)

(2) Eros Network Limited

(3) Eros Media World Plc

Before: Employment Judge Ramsden

Representation:

Claimant In person

Respondent Mr R O'Dair, Counsel

JUDGMENT ON PRELIMINARY ISSUE

1. The Claimant was neither an "employee" nor a "worker" of:

   a) the Second Respondent; or

   b) the Third Respondent,

   for the purposes of the Employment Rights Act 1996 in the period 3 April 2014 to 22 July 2022.

2. The claims against the Second and Third Respondents are therefore dismissed.

REASONS

3. These written reasons are provided at the request of both parties following oral reasons given on the day of the hearing.

Background

4. The Third Respondent is a Bollywood film company, which produces, acquires and distributes Bollywood content throughout the world. The Third Respondent was founded by Kishore Lulla and his family.

5. The Third Respondent is also the direct parent company of the Second Respondent, and the Second Respondent is the direct parent company of the First Respondent. Therefore the Third Respondent is the indirect parent company of the First Respondent. There are numerous other companies that form part of the corporate group headed by the Third Respondent (the **Group**).

6. The First Respondent is a UK operating company, and it is agreed that the Claimant was employed by that entity in the period 28 April 2014 to 22 July 2022, latterly as its Chief Corporate and Strategy Officer.

7. The Claimant resigned with immediate effect on 22 July 2022, and on 23 August 2022 he brought a claim for unauthorised deductions from wages and constructive unfair dismissal. That claim is against all three Respondents.

8. Administrators were appointed in respect of the First Respondent on 14 February 2023, pursuant to Schedule B1 of the Insolvency Act 1986. The effect of this appointment is that the Claimant's claims against the First Respondent are presently stayed. The Claimant wishes to proceed with his claims against the Second and Third Respondents.

9. Pursuant to an Order of Employment Judge B Smith on **8 March 2023**, this preliminary hearing was scheduled to determine whether one or both of the Second Respondent and Third Respondent had an employment relationship with the Claimant over that period.

10. Given the nature of the Claimant's complaints, the relationship between the Claimant and each of the Second and Third Respondents needs to be determined for the purposes of the Employment Rights Act 1996 (the **1996 Act**), as the applicable legislation.

11. If the Claimant was a "worker" of the Second Respondent for 1996 Act purposes, he may be able to pursue his unauthorised deductions claims against it, but he could only pursue his constructive unfair dismissal claim against the Second Respondent if he was an "employee" employed by it for 1996 Act purposes – and the equivalent applies as regards the Third Respondent.

12. Each of the Second and Third Respondents denies that it employed the Claimant, whether as an employee or a non-employee worker.

Key facts

13. Most of the factual evidence presented at the hearing was not disputed, including the fact that the Claimant was an employee of the First Respondent throughout the period of 28 April 2014 to 22 July 2022.

14. The Claimant had a written contract of employment with the First Respondent, dated 3 April 2014. Among other things that contract provided that:

    a) the Claimant was to report directly to the Group Chief Executive Officer (clause 2);

    b) he was to serve the First Respondent as its Head – Investor Relations (his job title was subsequently changed) "*and in such other capacity or capacities within the Group and with such responsibilities as are within the Executive's capabilities as the Company may from time to time reasonable specify*" (clause 2);

    c) his duties included: "*faithfully and diligently [carrying] out the lawful instructions of the Company and/or any other Group Company, as appropriate*" (clause 4.2), *"[using] his reasonable endeavours to promote the best interests of the Company and the Group*" (clause 4.3), and *"[giving] to the Company such information regarding the affairs of the Company and/or any other Group Company as it shall require*" (clause 4.5);

    d) he was to "*comply with all rules, regulations and codes of practice issued by the Company and the United States' Securities Exchange Commission…*" (clause 4.8);

    e) intellectual property (etc.) affecting the business of the Company or any Group Company was protected (clause 11);

    f) the First Respondent's contractual rights to terminate the Claimant's employment applied in situations where the interests of other members of the Group were engaged (e.g., any serious misconduct likely to materially prejudicially affect the interest of any Group company) (clause 12); and

    g) post-termination restrictive covenants protected the interests of Group companies (clause 14).

15. That contract was subsequently amended, on 1 August 2019 and again on 7 June 2022, and the Claimant agreed with Counsel for the Second and Third Respondents that the discussions preceding those amendments involved "*genuine negotiation*". At the time of the second amendment, the Claimant received legal advice, albeit that it appears the scope of that advice did not specifically address the identity of his employer. The content of the above-described clauses were not affected by those amendments, save that the Claimant's job title was changed on 1 August 2019 to Chief Corporate and

Strategy Officer. Those addenda were "*Executed and delivered as a deed*" by each of the First Respondent and the Claimant, with a signature box which reads:

"*Confirmed by:*

By ***Eros International Plc***",

together with a space for two signatures on behalf of the Third Respondent.

16. It was also not disputed that:

a) Throughout the Claimant's employment, the First Respondent was an active trading company, albeit that it was dependent on the Third Respondent and the Second Respondent to put it into funds to meet its obligations;

b) The Claimant was paid, and the Claimant's payroll was managed, by the First Respondent, with income tax and National Insurance contribution deductions made from his earnings by the First Respondent;

c) Shares in, and options over the shares of, the Third Respondent were awarded to the Claimant by way of performance-based bonuses for his work. This was true of a number of senior employees in the Group, including others who had employment contracts with different subsidiaries of the Third Respondent;

d) Three other senior executives of the Group were employed by either the Third or Second Respondent, despite those individuals residing in different jurisdictions to the jurisdiction of their named employer;

e) The Claimant's normal place of work during the course of his employment was the headquarters of the Third Respondent, where he worked alongside employees of other Group entities besides the Third Respondent;

f) Some of the Claimant's work was UK-centred. One example of this is that a substantial portion of the Claimant's time was spent handling some litigation involving a former employee of the First Respondent based in the UK. That litigation concerned share-based incentives awarded to that individual in respect of the Third Respondent's shares. Another is that some of the Claimant's work concerned a bond issued by the Third Respondent but listed (and therefore administered) in the UK;

g) A significant portion of the Claimant's day-to-day activities were for the direct benefit of the Third Respondent. That was clear from the outset of his engagement, given his role involved dealing with investor relations and corporate finance duties, as the Third Respondent was the sole listed entity of the Group. It was also agreed that this had a significant indirect benefit for the other members of the Group, including the First Respondent, which was financially dependent on the Third Respondent;

h) At the time of the Claimant's recruitment, the Third Respondent's Chief Executive Officer (**CEO**) was Ms Deshpande. At some point thereafter Mr Lulla, the Executive Chairman, additionally took up the position of CEO upon Ms Deshpande's departure, before Pradeep Dwivedi was appointed;

i) Mr Lulla was very "hands on", and for a large part of the Claimant's employment he was in very regular contact with, and physically worked alongside, Mr Lulla, in the London office of the Third Respondent;

j) When Mr Dwivedi became the CEO of the Third Respondent, the Claimant was in very regulator contact with him. Mr Dwivedi is based in India, and is employed by an Indian subsidiary of the Third Respondent;

k) The reporting line from Mr Lulla, and latterly Mr Dwivedi, to the Claimant was real – Mr Lulla/Mr Dwivedi instructed the Claimant in the work he was to perform (albeit in the way that a very senior employee is typically "instructed", recognising a fair degree of independent and expertise commensurate with the Claimant's role);

l) The Claimant's email signature included the following:

"*Mark Carbeck*
Chief Corporate and Strategy Officer
Eros International Plc";

m) Public filings for the Third Respondent identified the Claimant personally by name alongside his job title, for example, the Third Respondent's public filing on 29 May 2014 announcing its Indian subsidiary results concluded with the following text:

"*Source: Eros International Plc*

Eros International Plc

Mark Carbeck

Chief Corporate and Strategy Officer…",

which impliedly linked his job title to a role with the Third Respondent;

n) The Claimant fulfilled certain important functions on behalf of the Third Respondent, for example the Third Respondent's Audit Committee Procedures for Handling Reports of Potential Misconduct identified the Claimant as the person to evaluate such reports;

o) The Claimant was named as a member of "Senior Management" of the Third Respondent in its Form 20-F filing with the United States Securities and Exchange Commission;

p) At the time of corresponding about the August 2019 amendment to his contract of employment, the Claimant wrote:

"*given my contract is with Eros International Limited UK (EIL), I need one or both Directors of EIL to sign my service agreement*";

q) In July 2020, the Third Respondent merged with a US-based company, STX Entertainment. In July and August 2020, there was an evaluation of roles and job titles for the senior management team of the Group following that merger. The Claimant objected to a proposed amendment to his job title to add "- Eros UK" to the end of it (so that it would read "Chief Corporate and Strategy Officer – Eros UK"). His objections were because:

i. his role was not "*limited to Eros UK*";

ii. he regarded the addition of this as a "*demotion*";

iii. he said that "*I am not executing my job in the UK alone, in fact very little is done here – vast majority of investors, banks etc are in NY or global*"; and

iv. he considered that "*institutional investors, banks, analysts, etc expect to be dealing with someone from the Group level – as I have been doing for 6 years*".

Mr Dwivedi, who regarded the addition of "- Eros UK" as "*only a statement of facts and restoration of status quo ante, with no bearing on current or future role, or any other title that may be assigned in the future*", agreed to drop this amendment, and the Claimant's job title remained Chief Corporate and Strategy Officer. In the course of that correspondence the Claimant wrote:

"*there is no dispute whatsoever that my contract is with EIL [i.e., the First Respondent]… My preference has been to have my contract at the Plc level as mentioned to you earlier given my role and function is at the plc level. So I would rather not have board minutes for plc explicitly stating my contracted employer is EIL when it is not necessary*";

r) Board Minutes of the Third Respondent dated 30 July 2020 recorded that:

"*at the Prior Meeting, the Board passed a resolution approving, effective as of the Effective Time, a change in Mr. Carbeck's title and position as an employee of the [Third Respondent] from "Chief Corporate and Strategy Officer" to "Head of Special Projects". The Chairman explained, however, that it has been proposed that there be no change at this time to Mr. Carbeck's title or role [i.e., that his title and role revert to what they were before the Prior Meeting]. The Board, after due discussions, deemed this to be advisable and in the best interest of the [Third Respondent] and its shareholders.*

IT WAS RESOLVED THAT, effective as of the Effective Time, there be no change to Mr. Carbeck's title and position; and

IT WAS FURTHER RESOLVED THAT, Mr. Carbeck shall, in accordance with his respective services agreement with the [Third Respondent], continue to have such duties and responsibilities as the Board may from time to time reasonably determine and specify"; and

s) The 7 June 2022 amendment to the Claimant's contract of employment was headed:

"Second Addendum to Service Agreement dated April 3, 2014

Mark Carbeck
Chief Corporate and Strategy Officer
Eros International Limited

Acting in such capacity for Eros Media World Plc".

17. In fact, there is only one fact that is the subject of a dispute between the parties (albeit that they interpret the consequence of a fair number of the agreed facts differently).

18. The Claimant says, that when discussing the terms of his contract of employment in connection with taking up his role with the First Respondent – and those discussions were with Ms Deshpande, the former CEO of the Third Respondent - he questioned why his employer was not the Third Respondent, given it was the latter that was listed on the New York Stock Exchange. The Claimant's written and oral evidence is that Ms Deshpande told him that:

a) it was easier from an administrative and payroll standpoint to have his contract with the First Respondent;

b) it would have no bearing on his day-to-day role or reporting lines, because the reality was that all senior employees were working for the Third Respondent in addition to any local subsidiary which had entered into their individual employment contract; and

c) even though his contract of employment was with the First Respondent, the definition of "employer" in that contract would cover all Group companies (copies of those provisions in the executed contract are appended to this judgment),

and the Claimant did not insist of his employing entity being the Third Respondent.

19. Ms Deshpande no longer works for any of the Respondents, but the Second and Third Respondents' position is that:

a) The Claimant never referred to these points as having been made by Ms Deshpande or at all during the negotiations around the first or second addenda to his contract of employment, nor in his discussions with Mr Dwivedi about his job title, when it would have been natural to have

referred to these points in support of his position that he would have liked to have had been employed by the Third Respondent; and

b) The Claimant's evidence on these discussions with Ms Deshpande should not be accepted.

The hearing

20. The Second and Third Respondents were represented in the hearing by Mr O'Dair. The Claimant presented his own case.

21. The parties had agreed a hearing bundle of 450 pages.

22. The Claimant gave evidence in support of his position that he had an employment relationship with the Second and Third Respondents. The CEO of the Respondent group, Mr Dwivedi, gave evidence in support of the position of the Second and Third Respondents that neither of them employed the Claimant.

23. The key points made by the Claimant were that:

a) His discussions with Ms Deshpande at the time of his recruitment were as described in paragraph 18 above;

b) He returned to the question of whether the employer named on his employment contract was the correct counterparty on the two occasions when amendments to his service agreement were under discussion – in the run-up to the amendments executed in August 2019 and June 2022. The Claimant says that he didn't "*put [his] foot down*" and insist on the Third Respondent being identified as his employer, but the reason that each of those amendments contain confirmatory signatures on behalf of the Third Respondent is because he requested that as a "*compromise*" when his requests for the Third Respondent to be identified as his employer were refused. The Claimant said:

"*I understand it didn't change the nature of my contract, but it got me a little closer to having a legal relationship with the Third Respondent*",

"*I knew at the time that the fact that R1 signed it effected the change. The fact it was confirmed by Plc added comfort and reassurance to the fact that the company would acknowledge that my role was more than EIL, and I had that extra protection. From a legal standpoint, do I think it made any difference? I don't know the answer to that*"; and

"*My preference was to have my contract at [the Plc] level. For whatever reason, there were logistical reasons, timing, money, etc., it didn't happen*"; and

c) In June 2022 the Claimant negotiated changes to his contract of employment (including the change of reporting line to Mr Dwivedi) with Mr

Dwivedi and the founder of the Group, Mr Lulla, those changes included a new award of shares in the Third Respondent, and the Third Respondent was added as "confirmatory signatory".

24. Mr Dwivedi, on behalf of the Second and Third Respondents, said that:

a) Consistent with the terms of his written contract of employment, the Claimant was employed by the First Respondent alone;

b) The Group's practice is to have the local entity in the relevant jurisdiction employ each individual. In the Claimant's case, that was the First Respondent. In Mr Dwivedi's case, that is the Indian subsidiary of the Third Respondent;

c) There have been three individuals employed by entities other than the local Group subsidiary, but those individuals were directors of the Third Respondent, and it was for that reason that their employment contracts were at the Third Respondent level;

d) The Claimant's role as a senior executive encompassed a wide variety of responsibilities and tasks, including overseeing (at a senior level) global financial affairs, working on raising capital for the businesses, overseeing insurance compliance, as well as ensuring that the Group met its corporate governance obligations and compliance. While there were interactions and working synergies across the Group, those did not indicate or imply any employment relationship;

e) The Claimant had no more interactions with the Second and Third Respondents than with other members of the corporate group of which the Respondents are part, yet he has not brought claims against those other group entities;

f) The Third Respondent, or more specifically, the Board of the Third Respondent, did have the ability to direct the Claimant's duties and responsibilities, but that was a consequence of the fact that the Third Respondent, as parent company of the First Respondent, had the ability to make recommendations and, if necessary, stipulate, what the First Respondent did – in the same way as it did for other members of the Group. Mr Dwivedi's position is that this explains the extract from the 30 July 2020 Board Minutes of the Third Respondent set out in paragraph 16.r) above;

g) It was his role with the First Respondent from which the Claimant resigned on 22 July 2022; and

h) The Claimant was always answerable and accountable to the First Respondent as his employer.

Submissions

25. The Claimant's key arguments were that:

    a) While he does not allege that the contract of employment with the First Respondent was a sham, he says that, in addition to being employed by the First Respondent, he also had an employment relationship with the Second and Third Respondents. He provided personal service to those entities, his work was controlled by them, and there was mutuality of obligation between them. His written contract of employment should include the Second and Third Respondents, because of the nature of his day-to-day work;

    b) His work was totally integrated with all three Respondents. His reason for claiming against those three and not the wider group is that he had a written contract with the First Respondent, the focus of his work was for the Third Respondent, and the Second Respondent was "in the middle" in terms of the corporate chain (i.e., a direct subsidiary of the Third Respondent, and the direct parent company of the First Respondent) and a director of the Second Respondent, Mr Lulla, directed a large amount of the Claimant's work; and

    c) In the VAT context, the First Tier Tribunal has recognised the concept of dual employment, and he cited the case of *CGI Group (Europe) Limited v The Commissioners for Her Majesty's Revenue and Customs* TC00678.

26. Mr O'Dair expressed the Second and Third Respondents' position as follows:

    a) It is significant that the Claimant's wages were paid by the First Respondent alone;

    b) It is also significant to look at the substance of the First Respondent. It was a major player on the Bollywood film production market in the UK. It was not a shell, or simply a payroll, company;

    c) As for the share options and share-based incentives provided to the Claimant relating to the shares of the Third Respondent, in a corporate group such as this one, it is not uncommon for share-based compensation to be provided in a non-employer. This was the case for the Claimant here, and numerous others employed by other members of the Group besides the Third Respondent. The fact was that, as the only listed entity in the Group, the Third Respondent was the only member of the Group whose shares the Claimant (and other employees employed elsewhere in the Group) was capable of holding;

    d) The EAT decision in *Clark v Harney Westwood & Riegels* [2021] IRLR 528 makes it plain that the starting point in determining the Claimant's employer is his written contract of employment. If that document reflects the intentions of the parties, then for the Claimant to succeed in his argument that he had a different employer would require him to show when

and in what way the contract was varied. *Clark* is authority for the proposition that, if one comes across a seamless web of behaviour inconsistent with what the written contract seems to say, that seamless web must be considered – but that was not the case on the facts here – and so the written contract of employment is the end of the story;

e) It is not unusual in the context of a corporate group for work to be performed by an employee of one entity for the benefit of another in the group. Furthermore, this is consistent with the express terms of the Claimant's written contract with the First Respondent. The fact that the Claimant performed work for the benefit of the Second and Third Respondents does not alter the fact that his employment was with the First Respondent;

f) The evidence of the Claimant of his pre-contract discussions with Ms Deshpande may - if those discussions in fact took place in the terms the Claimant avers - be a starting point that the contract between the Claimant and the First Respondent did not represent the reality of the shared understanding of the terms agreed by them, but Ms Deshpande has since left the employment of the Group and so her evidence is not available to the Tribunal. Mr O'Dair contends that the evidence of the Claimant on this point should not be accepted, as he did not mention that discussion with Ms Deshpande when renegotiating his contract on either of the two occasions it was amended, or at the time of the corporate merger affecting the Third Respondent when there was discussion about amending his role and job title;

g) *Clark* is one of a number of cases descending from the Supreme Court decision in *Autoclenz v Belcher* [2011] UKSC 41. Those cases are based on the reality that, in many situations, the employee lacks bargaining power. As Lord Clarke noted in *Autoclenz*, the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement represent what was agreed between the parties. In this case, the Claimant was a very able, well-respected and high-ranking employee working in an international group, and account should be taken of the fact that he consulted lawyers at the time of the second amendment to his contract. An appropriate inference should be drawn that he was well-able to challenge if the contract did not represent the agreement that had been reached – and he did not do so;

h) The reality is that at the time the contract was entered into, it represented the real intention of the parties. The Claimant's principal concerns at that time was his remuneration and his job title, and he was not in any way bothered about the identity of the employer with whom he was contracting; and

i) The case of *James v London Borough of Greenwich* [2008] EWCA Civ 35 is authority for the proposition that, where there is already an express contract, another contract of employment will not be implied unless it necessary to do so to make sense of the facts on the ground. In this case there is no need to imply an employment contract between the Claimant and either the Second or the Third Respondent, as the work performed by the Claimant for those entities is readily accounted for by the clause in the Claimant's contract of employment with the First Respondent that he is to provide services to the wider Group.

Law

The legislation

27. Section 23 of the 1996 Act provides that:

"*A worker may present a complaint to an employment tribunal-*

(1) that his employer has made a deduction from his wages in contravention of section 13…"

28. Section 94 of the 1996 Act sets out that:

"*(1) An employee has the right not to be unfairly dismissed by his employer.*"

29. The meaning of the terms "worker" and "employee" are each defined in section 230 of the 1996 Act:

"*(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.*

(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

(3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, 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;

and any reference to a worker's contract shall be construed accordingly.

(4) In this Act "employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.

(5) In this Act "employment"—

(a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and

(b) in relation to a worker, means employment under his contract;

and "employed" shall be construed accordingly."

Case law:

(i) Employment status for 1996 Act purposes

30. The "*employee*" definition in section 230 of the 1996 Act is not particularly informative, referring to "*an individual who has entered into or works under … a contract of employment*", where a "*contract of employment*" is in turn defined as "*a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing*".

31. The seminal, and still applicable despite relating to predecessor legislation to the 1996 Act, case on employment status is that of *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 1 All ER 433, where Mr Justice MacKenna said:

"*A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service.*"

32. The key features of the contract, as identified by Mr Justice MacKenna, are therefore:

a) A two-way bargain, or "*mutuality of obligation*" – that in return for remuneration the employee will work for the employer;

b) *Personal service* provided by the employee to the employer; and

c) In the manner of performance of that work, the employee is subject to the *control* of the employer, and the other features of the contract are consistent with it being a contract of service.

33. The cases of *Nethermere (St Neots) Ltd v Gardiner* [1984] ICR 612 and *Carmichael and anor v National Power plc* [1999] ICR 1226 build on the first of those features, and provide authority for the proposition that there must be an obligation on the putative employer to provide work, and a reciprocal obligation on the putative employee to perform it – this is "*the irreducible minimum of mutual obligation necessary to create a contract of service*".

(ii) Worker status for 1996 Act purposes

34. The definition of "*worker*" in section 230 of the 1996 Act is a bit more fulsome than that for "*employee*", being:

"*an individual who has entered into or works 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".

35. All "employees" are therefore "workers" for 1996 Act purposes.

36. As to the second category of non-employee workers, the legislative language breaks down into three key questions:

a) Is there a contract between the parties?

b) If the answer to a) is yes, does it provide for personal service to be provided by the putative employee to the putative employer?

c) If the answer to b) is yes, is the counterparty to the contract the client or customer of the putative employee?

If these questions are answered "yes", "yes" and "no", then on-the-face-of-it the relationship looks to be one of employer-worker.

37. Guidance on the appropriate approach to take to the third question was provided by the EAT in *Byrne Brothers (Formwork) Ltd v Baird* [2002] ICR 667:

"*Drawing that distinction in any particular case will involve all or most of the same considerations as arise in drawing the distinction between a contract of service and a contract for services—but with the boundary pushed further in the putative worker's favour. It may, for example, be relevant to assess the degree of control exercised by the putative employer, the exclusivity of the engagement and its typical duration, the method of payment, what equipment the putative worker supplies, the level of risk undertaken, etc. The basic effect of limb (b) is, so to speak, to lower the passmark, so that cases which failed to reach the mark necessary to qualify for protection as employees might nevertheless do so as workers.*"

(iii) The necessity of a contract

38. As has been described above, both status as an employee and as a non-employee worker for 1996 Act purposes requires the existence of a contract between the putative employer and the individual performing work. While there is

a line of authority where those legislative definitions of employee and worker have been interpreted more broadly so as to include individuals not working pursuant to a contract (*O'Brien v Ministry of Justice (formerly Department for Constitutional Affairs) (Council of Immigration Judges intervening)* [2013] 1 WLR 522 and *Gilham v Ministry of Justice* [2019] ICR 1655), those cases concern rights derived either from EU law or the European Convention for the Protection of Human Rights and Fundamental Freedoms, and no such rights are asserted here.

(iv) "Dual employment"

39. In the context of employment status, it is well established that it would be problematic if one employee simultaneously had two employers in respect of the same work (so-called "dual employment"). This has been observed in *Cairns v Visteon UK Ltd* [2007] ICR 616, *McTear Contracts Limited v Bennett* [2021] UKEAT 0023/19, *Fire Brigades Union v Embery* [2023] EAT 51 and *Patel v Specsaver Optical Group Ltd* UKEAT/0286/18/JOJ by way of examples, each of which noted the practical challenges that "dual employment" would create if it were ever found to exist, e.g., how is the employee's time to be allocated?, in a redundancy situation, upon which employer would the consultation obligations fall?

40. While the recent cases have shown more caution and not entirely excluded the possibility of "dual employment" (unlike some of the older cases, such as *Laugher v Pointer* [1824-34] All ER Rep 388, where the impossibility of dual employment was expressed in more definitive terms), they nonetheless caution against it.

41. There are two exceptions to this reluctance to find dual employment:

    a) Where the frame of reference for examining whether there is "dual employment" relates to vicarious liability for a worker loaned or hired from one employer to another where control is shared between them, and then public policy reasons point to the importance of liability to ensure that individuals are properly compensated for tortious acts, e.g., *Hawley v Luminar Leisure Ltd* [2006] IRLR 817; and

    b) In the context of general partnerships in England and Wales, where the general partnership itself does not have distinct legal personality from its partners, and so employment is collectively by the partners operating the general partnership from time to time.

42. As to the general position outside these two exceptions, as His Honour Judge Auerbach put it in *United Taxis v Comolly* [2023] EAT 93 at paragraph 46:

    "*While the EAT in* Cairns *observed that the problems [of dual employment] may not be insuperable, I have not been referred to any authority which discusses how they could be overcome or holds that dual employment is legally possible. I cannot for my part see how they could be overcome.*"

43. HHJ Auerbach also observed in *Comolly* that the employment tribunal in that case could not properly find that the claimant there was simultaneously an employee or worker of two employers in respect of the same work.

(v) Implied worker contracts or contracts of employment

44. A contract of employment will only be implied where it is "*necessary*" to do so "*to give business reality to the relationship and the arrangements between the [parties]*" – the Court of Appeal in *Cable & Wireless v Muscat* [2006] IRLR 354 (applying the case of *James*). On the facts of that case, it was necessary to infer the existence of an employment contract, as "*There was no other possible explanation for what they were doing*".

45. Similarly, this test of necessity also applies to whether a contract for section 230(3)(b) purposes (i.e., a non-employee worker contract) will be implied, as shown by the EAT decision in *Comolly*.

(vi) Statutory interpretation of legislation giving workers rights

46. Mr O'Dair has referred me to the decision in *Clark*, and the fact that the EAT held in that case that the starting point should be the written contractual arrangements, and then to enquire if the position has changed thereafter. That case pre-dated the decision of the Supreme Court in *Uber BV v Aslam* [2021] UKSC 5, and I consider that later decision to define the starting point.

47. In *Uber*, the Court clarified the approach in *Autoclenz*. It held that when assessing whether an individual qualifies for statutory rights, the primary question is one of statutory, rather than contractual, interpretation. Furthermore, where the purpose of the statute in question is to "*protect vulnerable workers from being paid too little for the work they did, required to work excessive hours or subjected to other forms of unfair treatment (such as being victimised for whistleblowing)*", the statutory language should be interpreted, so far as possible, in a way which best gives effect to that purpose. This is particularly important as "*an employer was often in a position to dictate such contract terms and that the individual performing the work had little or no ability to influence those terms that gave rise to the need for statutory protection in the first place*". The Court held that "*The written agreements did not provide the appropriate starting point in applying the statutory definition of a 'worker'… the true agreement would often have to be gleaned from all the circumstances of the case, of which the written agreement was only a part*".

48. In some cases, though, the parties may agree that the written agreement records the bargain reached by the parties, and then the tribunal should analyse the terms of that agreement, together with all other circumstances and context relevant to

the relationship between the parties (*Ter-berg v Simply Smile Manor House Ltd* [2023] EAT 2).

The disputed fact

49. As described in paragraph 18 above, the Claimant says that, in his pre-contract discussions with the Respondents, Ms Deshpande, on their behalf, said that:

    a) it was easier from an administrative and payroll standpoint to have his contract with the First Respondent;

    b) it would have no bearing on his day-to-day role or reporting lines, because the reality was that all senior employees were working for the Third Respondent in addition to any local subsidiary which had entered into their individual employment contract; and

    c) even though his contract of employment was with the First Respondent, the definition of "employer" in that contract would cover all Group companies (a copy of those provisions are appended to this judgment).

50. The Second and Third Respondents contend that Ms Deshpande did not say these things, though her evidence is not available as she has since left the Group.

51. The relevance as to what was, or was not, said in those pre-contract discussions is whether those discussions could form a basis for an assertion on the part of the Claimant that the written contract between him and the First Respondent did not represent the reality of the agreement between them, i.e., that their shared understanding of what was agreed by them was something different to that recorded in that written contract. However, the Claimant's evidence is clear that he is not asserting that the written contract between him and the First Respondent is a sham, or does not accurately reflect what was agreed by them.

52. It likely *was* easier from an administrative and payroll perspective that the Claimant's contract was with the First Respondent. It is perfectly plausible that this was said, and I find that it was.

53. As for the second point, the Claimant's account of what Ms Deshpande said is consistent with Clause 2 of his written terms, which provided that his work for the First Respondent as (at that time) its Head – Investor Relations was to involve him serving "*in such other capacity or capacities within the Group and with such responsibilities as are within the Executive's capabilities as the Company may from time to time reasonable specify*". Again, I find that this was said.

54. As for the Claimant's assertion that Ms Deshpande told him that the definition of "employer" in that contract would cover all Group companies, it is plain that the agreement that was executed by both parties did not provide this (the relevant extracts of which are set out in an Appendix to this judgment). I find that there was some discussion about the fact that (consistent with points a) and b)) the Claimant's work would involve services for other Group companies, including the

Third Respondent, and the use of the defined terms “Group” and “Group Company” in the document made the drafting relevant to the articulation of those services (and to the protection of the Group’s interests as regards intellectual property rights, etc.) easier. This is an absolutely common practice in contractual drafting. I find that there was no shared understanding between Ms Deshpande and the Claimant that the reference in his contract to “employer” would in fact include all Group companies. That cannot have been the case, because as the Claimant’s own evidence tells us, he did not insist on his employing entity being the Third Respondent, and there would have been no need for him to do so if he believed that the contract he was executing was being signed by the First Respondent on behalf of all the entities in the Group, including the Third Respondent. I find that Ms Deshpande did not say that the definition of “employer” in that contract would cover all Group companies.

Application to the claims here

There is no allegation that the Claimant’s contract of employment with the First Respondent was a sham

55. The Claimant agrees that his employment contract was, at all times during his employment, with the First Respondent, and that it was not a sham. He also agrees that he had no written contract of employment with either the Second or the Third Respondent.

Was there a contract between the Claimant and either or both of the Second and Third Respondents – i.e., should such a contract be implied?

56. As is clear from the terms of section 230 of the 1996 Act, the Claimant cannot have been an “employee” or a “worker” for 1996 Act purposes unless he had a contract with the relevant employer, i.e., with each of the Second and Third Respondents for his claims of unauthorised deduction from wages and constructive unfair dismissal.

57. Despite the Claimant’s professed understanding of the definition of “Company” in his employment contract, the clear interpretation of that contract is that his employer was the First Respondent. The fact that the defined terms “Group” and “Group Company” included reference to the Company and its wider group does not mean that references to the “Company” – which was the defined term used to identify his employer - should be read as referring to the wider Group entities as well.

58. As stated above, I do not consider that the Claimant’s apparent interpretation that references to the “Company” were to the ‘First Respondent and every member of its Group’ was the shared understanding of him and Ms Deshpande at the time the contract was entered into – that is not what the words say, and the Claimant is evidently a very intelligent man to whom this would have been clear. Moreover,

and more significantly, if that was the Claimant's understanding of what the contract said then there would have been no need for him to make the efforts he did subsequently to have his contract amended to include the Third Respondent.

59. On the basis that the contract entered into was properly between the Claimant and the First Respondent alone, the question then arises as to whether a contract of employment or a non-employee worker contract should be implied between the Claimant and either or both of the Second and Third Respondents.

60. The case law on when contracts of employment (and non-employee worker contracts) will be implied makes it clear that such contracts will only be implied where it is "*necessary*" to do so "*to give business reality to the relationship and the arrangements between the [parties]*" (*Muscat*). This is high test – shown by *Muscat* itself, where it was thought that such an implication would only be made if "*There was no other possible explanation for what they were doing*".

61. Here, as the Claimant acknowledges, his contract of employment with the First Respondent explicitly stated that he was to undertake duties for the benefit of other Group Companies (clause 4), and that doing so was part of his work for the First Respondent (clause 2). Moreover, the parties agree that the Respondents' corporate group was highly integrated, and so it makes perfect sense for the Claimant's contract to require him to perform services for the benefit of the wider Group, and to look to protect the interests of the wider Group in relation to confidential information and post-termination restrictive covenants, for instance. This is a very common occurrence where a senior employee works for a member of a corporate group.

62. Most of the documents referred to above as bearing the Claimant's name in connection with the Third Respondent are readily seen as consistent with the express terms of the Claimant's employment by the First Respondent, that he was assigned certain tasks – even numerous tasks – that were the primary benefit of the Third Respondent. The Claimant was the "internal" expert on the compliance requirements of the Securities and Exchange Commission, and so the whistleblower policy naturally identifies him as the "point person" for reporting concerns in that regard. The public statements about the Third Respondent's performance name him, and give his job title, which present him as representing the Third Respondent to the outside world. That is explicable by his contract with the First Respondent.

63. The one document cited to me where this analysis is more challenging is the 30 July 2020 board minute of the Third Respondent. It is not clear why that board minute would refer to him as an "employee" of the Third Respondent. However, on the balance of the evidence – notably the Claimant's own about the resistance he encountered to changing his employment contract to refer to the Third Respondent as his employer – leads me to the conclusion that the 30 July 2020 board minute simply mistakenly referred to him in that capacity. I do not think that, against the backdrop of the correspondence between the Claimant and members

of the Group where his request for his contract to identify him as an employee of the Third Respondent was repeatedly refused, and Mr Dwivedi's efforts to amend the Claimant's job title to refer to "- Eros UK", it can be said that that the evidence makes it "necessary" to imply a contract of employment between him and the Third Respondent.

64. All of this – including my conclusion that the board minute referred to above contained an error - means that his undertaking such tasks for the Third Respondent is entirely consistent with the terms of his employment contract with the First Respondent, and so the *Muscat* test as to whether it is necessary to imply a contract of employment between the Claimant and either or both of the Second or Third Respondents is not met.

65. This is also consistent with the caution sounded against "dual employment", by the cases of *Cairns*, *Comolly* and *Ebery*, given the practical difficulties that dual employment creates. In this case, those practical difficulties must be thought to be magnified by the fact that the putative additional employers are in different jurisdictions to the jurisdiction where the Claimant resided at the time.

66. Nor do I consider that the way that the Claimant was presented to the outside world makes a difference to this conclusion. In circumstances where there is no acknowledged contract of employment (or worker contract) covering the work performed by an individual for a putative employer, or where there is a question of whether that contract has transferred from one employer to another, evidence such as the Claimant's email sign-off and the presence of his name on corporate filings may be significant. In this case, though, those facts are explicable by a contract of employment already acknowledged to be in place – his contract with the First Respondent, which provided that the Claimant would be required to perform services for other members of the First Respondent's corporate group.

67. The award of shares in, or share-based incentives over the shares of, the Third Respondent is also not, in my view, influential. As Mr O'Dair pointed out, and as, no doubt the Claimant is aware given his profession and expertise, in corporate groups such as this one it is not uncommon for there to be a single share-based incentive scheme applicable to employees employed by other entities. Awards under such schemes often create tax liabilities for the employing entity (even if the incentives are over shares of the parent company) precisely because those awards are made by reason of employment. The fact that here shares, and/or share-based incentives, were awarded over the shares in the Third Respondent do not mean it is necessary to imply that the Third Respondent was a party to the contract that existed between the Claimant and the First Respondent.

Did the acknowledged contract between the Claimant and the First Respondent also, as a matter of fact, involve the Second and Third Respondents as parties to that agreement as joint employers of the Claimant?

68. The Claimant appeared to be asserting that, while his contract of employment with the First Respondent was real and genuine, the reality of how his work operated meant that the true "bargain" between him and the First Respondent also involved the Second and Third Respondents as joint employers.

69. The Claimant cited a First-tier tax tribunal case in the VAT context of *CGI Group (Europe) Limited v The Commissioners for Her Majesty's Revenue and Customs* TC00678. That case noted that joint employment in the tax context is possible, but that is a different legal regime to the employment one, governed by different legislation. The relevant legislation and common law is set by the claims the Claimant is making, and it is the 1996 Act and cases relevant to its application that are determinative.

70. For that same reason, the cases concerning vicarious liability are not relevant, because that concept is a common law one.

71. From a 1996 Act employee/worker status perspective the existence of a general partnership (referred to in that case) can give rise to a single employment relationship between an individual employee and a group of partners, but a critical distinction between that factual scenario and this is that a general partnership is a single business, operating as such. The factual evidence from the Claimant and Mr Dwivedi for the Respondents is that there were material differences between the different Group entities here, including that those entities operated in a variety of different legal jurisdictions, the Third Respondent was publicly-listed, and the First Respondent was reliant on financial support from other entities to survive. The Group did not operate a single business, it was and is simply a very inter-connected international corporate group. This was the clear evidence of the Claimant, given his assertion that his work really was for the Third Respondent more than the First. Consequently, I do not see the general partnership analogy as applicable here.

72. Furthermore, as noted by Counsel for the Respondent, the Claimant renegotiated aspects of his contractual arrangements on two occasions, and resisted an amendment to his job title on the basis of his contractual terms on a third. If he considered that the written contract he had did not reflect the reality of his employment relationship as mutually understood by the Second and Third Respondents, he had ample opportunity to say so and for that to be documented appropriately. However, according to the Claimant's own evidence, he had the ability to, but chose not to, "*put [his] foot down*", i.e., to insist on the contracting employer being amended at that point from the First Respondent to the Third Respondent (or, indeed, the Second Respondent). Firstly, that shows that there was no shared understanding with the Second and Third Respondents that they also employed him, but secondly it shows that the Claimant knew that, too.

73. The Claimant says that he did raise the matter of the appropriate contracting employer on these occasions – which is itself powerful evidence that he appreciated at that time that neither the Second nor the Third Respondent was in fact his employer at that time. If he believed that he was, as a matter of fact, employed by the First Respondent jointly with the Second and Third Respondent, there would be no need to make a change.

74. Moreover, the Claimant said that he insisted on the Third Respondent signing the addenda to his contract in a "*confirmatory*" capacity, which he described as a "*compromise*" position. As much as that may have given him comfort at the time, there is in fact no "in between" status – the Third Respondent was either his employer or it was not, and his own evidence (as described in paragraph 16.q) above) is that he was clear it was not.

75. Consequently, I do not consider that the contract that existed between the Claimant and the First Respondent erroneously failed to include the Second and Third Respondents as joint employers – that was, according to the Claimant's own evidence, not the shared understanding of the parties – it was not even his.

76. All of this leads me to the provisional conclusion that, while the Claimant was an "employee" (and consequently a "worker") of the First Respondent for 1996 Act purposes, he was not an employee or a worker for these purposes of either the Second Respondent or the Third Respondent.

The *Uber* "check"

77. The case of *Uber* prompts me to check whether this conclusion deprives the Claimant of any statutory rights that flow from his not being an employee or a non-employee worker of the Second and/or Third Respondent. As there is no question that the Claimant was an employee (and consequently also a worker) of the First Respondent for 1996 Act purposes, he has those rights with regard to the First Respondent, albeit that his ability to enforce those rights is currently stayed by the effect of the First Respondent's administration.

78. Moreover, the purposive interpretative exercise that the *Uber* case requires is in a situation to "*protect vulnerable workers from being paid too little for the work they did, required to work excessive hours or subjected to other forms of unfair treatment (such as being victimised for whistleblowing)*". I am sure the Claimant would agree that this was not the case here.

79. The Claimant certainly does agree that that the written contract of employment between him and the First Respondent was a genuine one - it was not a sham - and so, consistent with the decision in *Ter-berg*, I should analyse the situation that applied here by reference to that contract as well as the surrounding circumstances. The contract between the First Respondent and the Claimant gave the Claimant rights flowing from his status as an employee – he is not

denied those employment rights by my conclusion that he was not an employee (or a non-employee worker) of the Second and Third Respondents.

Conclusions

80. For all of the above reasons, I find that neither the Second nor the Third Respondent employed or engaged the Claimant, whether as an “employee” or a “worker”, for the purposes of the 1996 Act. The Claimant’s complaints against the Second and Third Respondents are consequently dismissed.

Employment Judge Ramsden

Date 2 August 2023

Appendix: Extracts from the Claimant's contract of employment

THIS AGREEMENT is made the 3rd day of April 2014

BETWEEN:-

1 Eros International Ltd whose registered office is at 13 Manchester Square, London W1U 3PP (the "Company"); and

2 Mark Carbeck…

IT IS AGREED as follows:-

1 DEFINITIONS AND INTERPRETATION

In this Agreement (save as otherwise stated):

…

1.4 "**Group**" and "**Group Company**" shall mean the Company and any other company which is its holding or subsidiary company of such holding company or affiliate of the company from time to time (where "holding company" and "subsidiary" have the meanings given to them by the Companies Act 1974)…

…

2 EMPLOYMENT

The Company shall employ the Executive…