THE EMPLOYMENT TRIBUNAL

Claimant: Mr B Miljkovic

Respondent: Drum Risk Limited

Sitting At: London South **On:** 4 and 5 December 2023

Before: Employment Judge Morton (Hybrid hearing)

Appearances:
For the Claimant: In person
For the Respondent: Ms S Crawshay-Williams, Counsel

WRITTEN REASONS

Introduction

1. Following a case management hearing before Employment Judge Webster on 15 March 2023 the case was listed for an open preliminary hearing for the purpose of deciding:
    a. whether the Claimant had in fact acquired the rights under UK law that he was seeking to assert (unfair dismissal, a right to the national minimum wage and breach of contract) given the facts of his employment;
    b. if so, whether the Tribunal had jurisdiction to hear those claims; and
    c. the Claimant's status and whether he was either a worker or an employee of the Respondent within the meaning of section 230 of the Employment Rights Act 1996 ("ERA") at the time of the matters giving rise to the claims.

2. I gave an oral judgment at the hearing on 4 and 5 December 2023 holding:
    a. that the Claimant was not employed in Great Britain at the time of the matters giving rise to his claim, meaning that the Tribunal could not therefore deal with his claims of unfair dismissal and unlawful deductions from wages under ss98 and 13 ERA as those rights did not apply to him; and
    b. that the Tribunal did not have jurisdiction to deal with the Claimant's claim of breach of contract because the Claimant was not an employee at the time his employment was terminated as required by Article 3 of the Employment Tribunals (Extension of Jurisdiction) Order 1994.

3. The Claimant applied for written reasons on 18 January 2024 and his application was in time. Reasons for the judgment are set out below.

The hearing

4. The hearing was a hybrid open preliminary hearing with the Respondent and one of its witnesses attending the employment tribunal in person and the Claimant and the other Respondent witness joining remotely.

5. I was referred to a bundle of documents and three witness statements. Any reference to page numbers below are references to page numbers in the bundle. The Claimant gave evidence on his own behalf and the Respondent's evidence was given by Peter Hopkins, Managing Director and founder of the Respondent and Gergana Kaneva the Respondent's Head of Administration Europe. Ms Kaneva joined the hearing remotely.

6. The Claimant said that he had not had the documents for the hearing, and had had difficulty downloading them because of a poor internet connection. The Respondent directed me to correspondence that had taken place in November 2023, concerning the bundle and submitted that the Claimant could have accessed the documents in good time and clearly had had access to the internet in the run up to the hearing. As the Claimant had a good internet connection at the start of the hearing, I suggested that the bundle was sent to him again during a short adjournment. He was then able to access documents to which he was referred during the hearing.

7. Before the hearing started it was necessary to seek confirmation of the Claimant's whereabouts in order to ensure that no permission was needed for him to give evidence from abroad. It was initially thought that he was in Serbia, and that he did not have the requisite permission to give evidence from there. The Respondent said that it intended to apply for a strike out on that basis. However the Claimant satisfied me and the Respondent that he was in fact located in Hungary by showing the Tribunal and the Respondent a contemporaneous screenshot from the maps app on his mobile phone, which confirmed his location. I ascertained that no specific permission is required to give evidence from Hungary. Both I and the Respondent were content with the Claimant's evidence that he was in a location from which he would be able to give evidence and the Respondent confirmed that it would not pursue a strike out application.

8. Despite having a good internet connection at the start, during the hearing the Claimant had intermittent difficulties with his internet connection and background noise. Nevertheless, as two days had been allocated to the hearing, it was possible, despite a number of interruptions, for me to hear the relevant evidence and submissions within the time available and to give an oral judgment.

The claims and the issues for the hearing

9. The Claimant had originally brought claims to the Tribunal of:
    a. unfair dismissal;
    b. failure to pay the national minimum wage;
    c. unlawful deductions from wages in respect of failure to pay the minimum wage;

d. breach of contract in the form of failure to pay the costs of him travelling from Italy to Spain (his home) and failure to pay him a daily allowance in accordance with the HMCTS Scale.

10. His unfair dismissal claim had been struck out on the basis that he had insufficient service to bring it. He appealed against that decision and at the time of the hearing the outcome of that appeal was unknown. I therefore proceeded on the basis that the unfair dismissal claim might still need to be determined at a full merits hearing.

11. I decided that I would deal first with the issue of whether the Claimant was able to rely on the rights in respect of which he brought his claims and would then go on to deal with his employment status, to the extent that that was necessary in light of my decision on the territorial reach of the statutes he was relying on.

Findings of fact

12. My findings of fact concern only the matters that needed to be determined for the purposes of the preliminary hearing. I made those findings on a balance of probabilities on the basis of the witness evidence and documents. I have set out the facts in what seem to me to be a broadly logical and chronological order, but in the hearing I first heard evidence and submissions on the territorial reach of the rights the Claimant was claiming and gave my decision on that issue and then heard evidence and submissions on the matter of the Claimant's status, having determined that the Tribunal would have jurisdiction to deal with a breach of contract claim, but not any claim under the ERA.

13. The Respondent is an audit and control service provider and a limited company registered in England. Mr Hopkins described its activities in his witness statement as securing commodities by deploying inspectors, managers and auditors globally. Its operations include collateral management, stock monitoring, inventory and stock checks, and loss and legal recovery investigations. For example, if it is working for a bank that is financing goods, the Respondent will supervise the goods in their raw and finished form.

14. At the time of the hearing and the matters giving rise to the claim the Claimant was a Spanish citizen living in Spain. He holds a Serbian passport and is able to work across the EU. On 31 August 2021 he sent an email to the Respondent expressing an interest in working for the company. He was interviewed the next day by Ms Kaneva by means of a Skype call. At the time Ms Kaneva was in Bulgaria and the Claimant was in Spain. Ms Kaneva was in fact employed by the Bulgarian subsidiary of the Respondent which houses its HR function and the administration of the Claimant's contract and provision of insurance, including a death in service benefit, was conducted through that subsidiary. The Claimant said that he was unaware of Ms Kaneva's whereabouts when she recruited him and was aware only that he was applying to an English company that employed people to work abroad on a worldwide scale. The Claimant underwent several further interviews and the Respondent decided to appoint him as what it described as a consultant.

15. The Respondent's business model involves engaging individuals with appropriate skills. A range of contracts is used, including some providing for engagement on a

project-by-project basis as commodities inspectors. The projects are located in a wide variety of jurisdictions. The Respondent did not dispute that it engages the inspectors through the English limited company and that the contract is governed by English law. Mr Hopkins' evidence was that this was in essence a matter of convenience – the company works across many jurisdictions with individuals in a wide variety of circumstances. It would not be practicable to choose on a case by case basis the law of the jurisdiction with which an individual worker has the closest connection.

16. Individuals such as the Claimant are provided with a contract such as the document at page 169, which is described as a consultancy agreement and describes those engaged under it as self-employed. It requires them to be responsible for their own tax and other payments such as national insurance (clause 7.1). The pay offered at the time was a fee of 700 Euros per month, pro rata for days worked, with no entitlement to pay for days not worked and no entitlement pension, bonus, holiday, sickness or other fringe benefits. There was no obligation on the Respondent to provide work (which it described as 'rotations') and if a rotation was offered there was no obligation on the individual to accept it. Even if accepted, a rotation could later be cancelled by the individual. The Respondent did however provide paid accommodation to the individuals it recruited, travel costs to rotations and insurance, including death in service benefits. The agreement contained a statement that nothing in the terms of the agreement would render the Claimant an agent, officer or employee, worker or partner of the company and required him not to hold himself out as such. In apparent contradiction with some of these terms the contract was also described as a one year fixed term contract.

17. An agreement dated 24 September 2021 was sent to the Claimant (page171) and his commencement date was 20 October 2021. The Claimant signed the agreement on each page. In his evidence the Claimant said that had been told that if he was willing to work he would be given work, but if he refused work he would not be paid. He disputed however that he was self-employed or a contractor as described in the agreement and refuted the suggestion that he was responsible for his own tax. He also asserted that he had understood that if he refused a rotation he would not be offered any more work by the Respondent. The Respondent disputed this, and provided evidence of other individuals notifying it of their unavailability to perform certain assignments, stating that there would have been no repercussions for doing so (pages 239, 240 and 242). Taking into account this documentary evidence I preferred the Respondent's account that individuals could refuse assignments if they were unavailable and that that would not mean that they would not be considered for future work.

18. There was other documentation (the Work/commute permit for Drum personnel) at pages 229 and 264 which described the Claimant as an employee of the Respondent, but Mr Hopkins asserted that that was an error. The Claimant also put it to Mr Hopkins that the job advertisement at page 437 referred to a "competitive salary and benefits" and amounted to a job offer on the terms set out in the advertisement. Mr Hopkins said that the advertisement was intended to catch a broad range of applicants, and increase the number of individuals who would apply. In practice however it had offered the Claimant a consultancy agreement rather than a salaried role (an agreement that the Claimant had accepted) and the

use of the word "salary" was inaccurate in the circumstances. Some individuals sent the Respondents invoices for their work and others simply sent emails. Pay would be calculated by reference to time sheets or attendance sheets. He said that the term "salary" was used because the term "fee" is not acceptable in some of the jurisdictions in which the Respondent operates.

19. As the Claimant was not represented I also asked Mr Hopkins about clause 3.3 of the agreement the Claimant had signed which appeared to state that he was being given a one-year fixed term contract. I put it to Mr Hopkins that this was ostensibly incompatible with an arrangement in which there was no obligation on the Respondent to provide work or on the individual to perform work if it was offered. Mr Hopkins' evidence was that in practice individuals are asked if they are available and if they are they are then deployed to a rotation. If not then they may be deployed on a rotation on a later date. It was not uncommon for individuals offered rotations not to turn up. He accepted that the agreement was, in this sense, "badly worded". His evidence was that good staff are difficult to find and the Respondent likes to build up a pool of individuals it can call upon, some of whom may go off to do other things and then return to the company.

20. Mr Hopkins was also asked about a reference in the documentation (the "Standard Operating Procedures") at page 142 to "garden leave" which is a term ordinarily associated with employment contracts. He said that there are some individuals who have worked for the Respondent for years, are regarded as key personnel and may receive payments on a discretionary basis to disincentivise them to leave between assignments.

21. I find on the basis of the discrepancies between the written documentation and the oral evidence of what actually happened in practice that the written documentation was not a reliable record of the working relationship between the Respondent and the individuals it engaged to work for it and that that relationship would need to be gleaned from the specific facts of the case and would not necessarily be the same in relation to every individual the Respondent engaged. I set out my conclusions on the nature of the relationship in the Claimant's case below.

22. The Claimant first performed a rotation in Greece which ran from 20 October 2021 to 21 December 2021. The Claimant's role was to audit and monitor processed and unprocessed tobacco held at the Respondent's client. His home was in Spain, but on this occasion he travelled to Greece from Serbia.

23. There was then a period of no work between 22 December 2021 and 2 January 2022, when work recommenced for two days, at which point the project ended early (the original expected date was 15 January 2022 – page 184). He did no work for the Respondent and received no payment in the form of fees between 22 December 2021 and 2 January 2022 or between 5 and 25 January 2022. The Claimant was paid for the work he did do on a pro-rata basis in Euros to his Spanish bank account. The Respondent also paid for the Claimant to travel back to his home in Spain at the end of his rotation. He did not raise any concern about his payments at the time. In cross examination he disputed these facts and said that he had received some payments in that period, but I preferred the Respondent's evidence that he was not entitled to be paid any fees for periods when he was not

working – there was nothing in the documentary evidence to support the Claimant's assertions and the Claimant's evidence was not clear either about the nature of the payments he said he had received or the payments he said were due to him and that he had not received.

24. On 25 January 2022 the Claimant began a second rotation in Italy, of which he had received details on 10 January 2022. The Claimant also disputed this, but his assertion that it was not true that he was to start a new rotation on 25 January 2022 contradicted the documentary evidence and I preferred the Respondent's account of the dates on which the Claimant was undertaking work for which the contract entitled him to be paid.

25. In cross examination the Claimant could not remember precisely when he last actually performed work for the Respondent, but said in answer to a question from me that he had been scheduled to work until 22 April 2021, but had received confusing instructions and thought that in fact he had worked for a few days beyond that date. He gave evidence that he had received instructions to travel to the next rotation, in Poland (he was not entirely sure that it was Poland) but also said that when the rotation in Italy came to an end and he was supposed to return home to Spain, the Respondent ceased to communicate with him. His recollection of events was therefore somewhat confused and unclear.

26. The Respondent's evidence was clear that the Claimant had ceased to work for it on 22 April 2021. Mr Hopkins gave the following evidence, which the Claimant did not challenge. The numbers refer to page numbers in the bundle:

The rotation was due to commence on 25 January 2022 and end on 14 April 2022 [296]. A Letter of Authority dated 24 January 2022 was sent in respect of the Claimant's second rotation [311]. It explained the Claimant would be travelling from Serbia to Bergamo, Italy with the purpose of monitoring raw material (scrap) and finished goods (billets) stored at a client of the Respondent. The letter confirmed the Claimant was "contracted under Consultancy Agreement by DRUM Risk Limited, London as a Consultant". A schedule attached to the letter said that the Claimant's start date would be 15 [sic] January 2022 and his finish date would be 22 April 2022, unless advised otherwise by management in writing [312]. The Claimant signed this agreement…. On 25 April 2022, Mr Egelic confirmed to the Claimant that his last day working on the rotation was 22 April 2022 and that Drum Risk would not be responsible for his travel journey home because it was the Claimant's decision to stay with his friend in Italy [349, 376].

27. I therefore find that the Claimant performed no further work for the Respondent after 22 April 2022.

28. The Claimant did not dispute that he never travelled to Great Britain for work or performed any work in Great Britain during his time with the Respondent. He was unable to do so because he would have required a visa to work in Great Britain and did not have one at any time during his employment with the Respondent.

The relevant law – territorial scope of UK employment rights

29. Given that the Claimant never did any work on UK territory, what rights can he claim?

30. Dealing first with whether the Claimant could claim a right to be paid the UK national minimum wage, the rights contained in the National Minimum Wage Act 1998 ("NMWA") are an example of rights that only apply to those working in Great Britain. S.1 provides that persons who, under their contracts, are working, or ordinarily work, in Great Britain qualify for the national minimum wage ("NMW"). Case law that developed in relation to s196 ERA before that section was repealed will be relevant to this question, as s196, prior to its repeal, provided that only those who ordinarily worked in Great Britain could bring claims under the ERA. In relation to that, the Court of Appeal in Carver v Saudi Arabian Airlines 1999 ICR 991, confirmed that, for the purposes of the ERA prior to the repeal of s196, the place where an employee "ordinarily works" was to be decided by reference to the terms of the employee's contract of employment, having regard to the whole period contemplated by the contract at the date it was made. Where the contract of employment was inconclusive as to where an employee ordinarily worked as it is in this case (the Claimant could have been sent to a wide range of different locations in order to carry out his work), the matter was to be determined according to where the employee's base was, going by "the conduct of the parties and the way they have been operating the contract" following Todd v British Midland Airways Ltd 1978 ICR 959, CA.

31. The ERA is now silent on the territorial scope of the rights it confers, although S204 ERA states that the proper law of the contract is immaterial when considering any question arising under the ERA, including the territorial reach of rights conferred by it. In my oral reasons at the hearing I expressed the view that this made the choice of English law in the contract an irrelevant factor in this case, but I have now reconsidered that aspect of my reasons in light of the decision of the Court of Appeal in The British Council v Jeffrey and Green v SIG Trading Ltd [2018] EWCA Civ 2253, in which the Court held that an express choice of law clause in a contract of employment could be a relevant factor in determining the strength of connection of the employment to Great Britain. However, it was also held in that case that a tribunal may consider it appropriate to give greater weight to a specifically negotiated choice of law provision than one which was included as a matter of course in a standard from contract.

32. The principles that a tribunal needs to apply when deciding whether someone who is not actually working on UK territory has nevertheless acquired UK employment rights, has therefore been set out in case law, which has developed a test of "close connection". The leading cases are Lawson v Serco [2006] UKHL 3 and Ravat v Halliburton Manufacturing and Services Ltd [2012] IRLR 315. In Lawson the House of Lords held that the right to claim unfair dismissal (and by extension other rights conferred by the ERA) will only exceptionally cover employees working and based abroad, such as the Claimant in this case. Lord Hoffman identified three categories of employees who might be covered:

    a. Standard cases: employees ordinarily working in Great Britain. The question is whether the employee was working in Great Britain at the time of their dismissal, or the matter complained of.

    b. Peripatetic employees, such as airline pilots, cabin crew, management consultants or salesmen. A peripatetic employee's base should be

treated as their place of employment, and therefore peripatetic employees will normally be protected if their base is Great Britain (Todd v British Midland Airways). A peripatetic employee's base is normally where an employee begins and ends a "tour of duty". What happens in practice should be considered, not just what the contract states. Relevant factors may include where the employee's travels begin and end (this, in practice, is likely to be the decisive factor); where the employee has their home; where the employee is paid and in what currency; and whether the employee is subject to National Insurance contributions. Lord Hoffman also said that the mere fact that the employer was a company registered in Great Britain would not be sufficient to establish Great Britain as the employee's base.

c. Expatriate employees: an employee who lives and works entirely or almost entirely abroad. Where an employee is working and based abroad, the fact that they were recruited in Britain by a British employer will not be sufficient to bring them within the ERA 1996. "Something more" will be required. A true expatriate will only be protected in exceptional cases. Those protected might include those working for a British employer operating within an extra-territorial political or social enclave in a foreign country or an employee such as a foreign correspondent on the staff of a British newspaper.

33. Employees who do not fit into the above categories, but who have "equally strong" connections with Great Britain and British employment law, might also be covered.

34. These broad categories are illustrative and not exhaustive, hence the need in individual cases with different sets of facts, to apply the broad principle of “close connection”. However, there is in effect a presumption, that an individual who works wholly outside Great Britain will not be protected unless there is an exceptional factor such as a much stronger connection with Great Britain and British employment law than that of any other system of law. The case law has established that a range of factors may be relevant. Those applicable in this case are: where the employee was recruited, where the work is done, where the employee is based, the parties’ choice of law (see above), where the employment relationship has been managed, where the employee’s home is and whether they have a home in Great Britain, where the employee gets paid and in what currency, where the employee pays tax and makes social security contributions and where the employer is registered. Ravat established that for the “close connection” test to apply, the employment must have stronger connections with Great Britain and British employment law than with any other legal system.

35. The position is different as regards contractual rights. Under section 15C of the Civil Jurisdiction and Judgments Act 1982, in matters relating to an individual employment contract, an employee may sue the employer in one of three places, including, where the employer is domiciled in Great Britain as it is in this case, in the courts for the part of Great Britain where the employer is domiciled (section 15C(1)(2)(a)). The authorities have taken a broad approach to the question of what amounts to “employment” in this context and where there is a relationship of subordination involving a power imbalance, the contract will fall within the scope of

the legislation, meaning that workers as well as employees can rely on these provisions.

36. However, for the Claimant to bring a claim of breach of contract to the employment tribunal in England he must establish that he was an employee within the meaning of s230(1) ERA, and not merely a worker under s230(3)(b). The underlying statutory provision being s3 of the Employment Tribunals Act 1996, which applies to any claim for breach of a contract of employment, or other contract connected with employment and not to a wider category of worker contracts. That being the case it is necessary to consider the law on employment status, and in particular the distinction between employees and workers.

Submissions on territorial scope

37. The Respondent submitted that the NMWA contained a clear provision to the effect that in order to claim right to the NMW an individual needed to be ordinarily physically working within Great Britain. In that respect the NMWA differs from the ERA.

38. As regards the Claimant's rights under the ERA the Respondent relied on Lawson and Serco is applying not only to the unfair dismissal claim but to any claim under the Act. It submitted that the Claimant in this case was in the third category identified in Lawson but not one of the exceptional cases that would enable him to claim rights under the ERA. Everything that the Claimant did was done outside Great Britain. His lack of a visa entitling him to work in Great Britain pointed away from there being a UK connection and there was a closer connection in this case with Spain, where the claimant was resident and held a bank account into which he was paid in Euros. If he had paid any tax it would have been likely paid in Spain. The Respondent's HR function was in Bulgaria, in a separate subsidiary, the Claimant was recruited from there and was informed from there about his rotations. His travel insurance was a Bulgarian policy created in Bulgaria. There was therefore very little connection to Great Britain other than the company's main office being there and certainly, in the Respondent's submission, an insufficiently strong connection to pass the test set out in Lawson and Ravat. Furthermore, the claim for unlawful deductions from wages was parasitic on the claim under the NMWA.

39. As regards the Claimant's breach of contract claim the Respondent relied on the same principle as that set out in Lawson as there is no provision in the Employment Tribunals Act dealing with the territorial scope of a breach of contract claim. For the reasons set out in paragraph 32 above I did not think that was the correct approach.

40. The Claimant made most of his submissions at the start of the second day of the hearing, having heard the Respondent's submissions on the previous day and having been given time overnight to consider the points that he wanted to make. I explained the legal principles to the Claimant and asked him if he understood, the subject being a complex one. He said that he had a broad grasp and acknowledged that the principles were complex. His submissions were cogent and addressed the correct points, but in order to assist him I asked him to explain his connection to Great Britain. He said that he could not see how he could be more closely

connected to any other country than Great Britain. He had no relationship to any other company than the Respondent and no relationship with any place other than Great Britain. He said that he was providing services for a British company and not to anyone in Italy or Greece and the British company was receiving the benefits of that work. The Claimant also based his arguments on the fact that the company is global and he might have been asked to work anywhere.

41. He also submitted that he would be without rights if UK law did not apply to his contract.

42. The Claimant submitted that the fact that some people are now digital nomads is something I should take into account.

43. He also relied on the choice of law in the contract. He argued that the possibility that work could be carried out or arise anywhere made English law the only possible law applicable to the contract. He had no contract with the Bulgarian company by whom he was hired or with any company in Italy or Greece where he carried out his work. His closest connection was therefore with UK law. Some of the Claimant's submissions did not therefore accord with the facts as I found them.

Conclusions on territorial scope

44. It is common ground in the case that the Claimant never worked in Great Britain and had no right to do so. He has no home or base there of any kind. During the course of his engagement he worked only in Greece and Italy. He lived in Spain and returned there between his rotations. Accordingly, the parties did not conduct themselves or operate the contract as if the Claimant's base was Great Britain and the Claimant cannot rely on the NMWA to confer on him a right to be paid in accordance with the NMW.

45. I agreed with the Respondent that the Claimant in this case does not fall within the exceptional category of peripatetic workers identified in Lawson. He did not operate out of Great Britain, never worked there, was not recruited there, had no visa entitling him to work there, and no other personal or work-related connection with Great Britain. In practice he had virtually no connection with it save that he entered into a contract with an English company and English law governed the contract. As to the Claimant's argument that the Respondent is a global company and he might have been asked to work anywhere, this was not established on the facts, but even if it had been, the mere possibility that he could have been sent to work in Great Britain does not establish a connection with Great Britain.

46. The Claimant argued that he would be without rights if he is unable to enforce his claim in Great Britain. I do not accept that argument - in my view the Claimant may well have acquired rights in Italy or Greece where he performed his work and if he received advice to the contrary, which he suggested that he did (and which may not have been correct advice), that by itself would not be enough to confer jurisdiction on a UK tribunal to apply a right that would not otherwise be available to the Claimant. A different approach has been taken in the past by the courts when dealing with EU derived rights (for example in Bleuse v MBT Transport) but I was not dealing with such rights in this case.

47. As regards the Claimant's submission concerning digital nomads, the Claimant is not a digital nomad and I must decide this case on the basis of his actual circumstances, not hypothetical circumstances applying to others.

48. As I have noted earlier in these reasons, the choice of law clause in his contract is a factor that I could take into account, following the decision in Jeffrey. The Claimant regarded this as a point of connection with Great Britain. I agree that it is a point of connection, but the Respondent chose English law for its template contracts because it worked across so many different jurisdictions with individuals who themselves came from a wide variety of jurisdictions. The choice of law clause was therefore in this case one of convenience and not something that connoted any particular connection with Great Britain.

49. I do not think that the fact that the Claimant was engaged by a Bulgarian entity - a fact of which he was unaware until this hearing was in and of itself a material factor - if there had been facts pointing to a strong connection with Great Britain, the fact of his having been technically engaged by a Bulgarian entity is one to which I would have given little weight. However, the fact that the Claimant was recruited in Bulgaria, together with the fact that the relationship was managed from Bulgaria and the HR function was operating from there is a material factor pointing away from a connection with the UK.

50. In summary, what points to a connection with Great Britain is the fact that the Respondent is an English company and the work the Claimant did was done for the benefit of an English enterprise, together with the choice of law clause, although that was included largely for the convenience rather than because the work done under the contract was particularly connected to Great Britain. What points away from a connection with Great Britain is the fact that the Claimant lives in Spain, returned to Spain between rotations, was paid in Euros into a Spanish bank account and would accordingly be liable to pay tax there (all of which suggest that his base is in Spain), that he has a Serbian passport and no entitlement to work in Great Britain and has no home in or other connection to Great Britain. There was no suggestion that he ever would be sent to work in Great Britain. He performed his work for the Respondents in Italy and Greece (where he would accordingly potentially have acquired rights under Italian and Greek law).

51. Despite the cogent arguments put by the Claimant, weighing up the factors that arise, I find that there is an insufficiently close connection with Great Britain in this case for the Claimant to acquire rights under the ERA, applying the close connection test set out in Ravat. The Claimant's argument was that there was no other jurisdiction to which he had a closer connection. I do not think that is right. I accept that when there are complex facts – an individual with no right to work in the UK, with a Serbian passport, resident in Spain recruited in Bulgaria, entitled to work anywhere in the EU other than Great Britain and employed to work in Greece and Italy by an English company, it is not obvious where the closest connection lies and the decision I made had to be weighed up carefully. It seems to me however that looking at the facts as a whole, the Respondent is correct – the closest connection was with Spain, where the Claimant lived and was paid and where he would have been able to work had a rotation arisen there, and not with

Great Britain. That being the case, the Claimant is not entitled in this case to rely on rights arising under the ERA.

52. As noted above however, the position as regards the Claimant's breach of contract claim is different and relies on the question of his status – was he self-employed as the Respondent maintained, a worker or an employee?

Relevant law – employment status

53. The ERA defines employees and workers as follows:

> **30 Employees, workers etc.**
>
> **(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.**

54. Employment status has been considered numerous times in the courts and although certain legal principles have merged, the question of status has to be considered on a case by case basis. For the purposes of many the rights set out in the ERA, "employment" must be distinguished not just from "self-employment" but also from worker status – some rights are available only to employees, whilst many other rights, such as the right not have unlawful deductions made from wages, are available to employees and workers alike. The right to bring a claim of breach of contract to the employment tribunal is a right available only to employees and not workers.

55. The analysis of where the dividing line should be drawn is a fact sensitive one. An employment relationship is one which meets the criteria set out in Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497 in which McKenna J held that for a contract of employment to exist, "(i) The servant [employee] 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 [employer]. (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 the master. (iii) The other provisions of the contract are consistent with its being a contract of service".

56. In subsequent cases the concept of an "irreducible minimum" of obligations as emerged as the standard that must be met for an employment relationship to arise. This irreducible minimum will consist of personal service (ie no possibility of the provision of service through a substitute worker), a sufficient degree of control by the employer and a sufficient degree of mutuality of obligation, represented by an ongoing obligation on the part of the employer to provide work and on the part of the employee to accept work when offered. Where this mutuality of obligation is missing, as in Carmichael v National Power [2000] IRLR 43, a contract of employment does not arise, although a worker contract might.

57. Recent guidance has developed through the case of Uber v Aslam [2021] ICR 657, which approved the approach developed in Autoclenz v Belcher [2011] ICR 1157, both of which are cases dealing with circumstances in which, as in this case, the written terms of the contract do not appear to reflect the reality of the working relationship. In the case of Ter-berg v Simply Smile Manor House Ltd and ors [2023] EAT 2 the EAT set out the approach employment tribunals should take in such a case in light of these appellate decisions, that is, in relation to clauses to the effect that a written agreement is not intended to create a relationship of employment or a worker relationship, as existed in this case: (a) As held by the Supreme Court in Uber, such a clause will be void and ineffective if, upon objective consideration of the facts, the tribunal finds that it has as its object the excluding or limiting of the operation of the legislation in question (pursuant to section 203(1) Employment Rights Act 1996 or the equivalent provisions of other legislation); (b) In any event, if, apart from such a clause, the other facts found by the tribunal point to the conclusion, applying the law to those facts, that the relationship is one of employment or a worker relationship, such a clause cannot affect that legal conclusion; but (c) If neither (a) nor (b) applies, then, in a marginal case, in which the tribunal finds the clause to be a reflection of the genuine intentions of the parties, it may be taken into account as part of the overall factual matrix when determining the correct legal characterisation of the relationship.

Submissions – employment status

58. The Respondent referred me to the test in Ready Mix Concrete and said that this was a case in which there was a clear lack of mutual obligation. It submitted that lack of mutuality was relevant to worker status as well the status of employee and that even a worker contract required some mutuality. The evidence showed that the degree of flexibility in the arrangement between the Respondent and individuals such as the Claimant was incompatible with mutual obligation. The

evidence showed that there were no repercussions if an individual did not want to take on a rotation. Individuals were asked if they wanted to take on the work – they were not allocated it in the expectation that they would do it automatically.

59. As for the terms of the agreement, the Claimant was said to be responsible for his own tax (and in practice no deductions for tax were made). There was no payment when he was not working and no benefits such as pension, holiday or sick pay. This suggested that the reality of the situation was that the Claimant was an independent contractor and not an employee or worker.

60. The Claimant submitted that there was in reality mutuality of obligation in the sense that he would not have been given more work had he refused a rotation. He also pointed out that no invoices were involved in the relationship – he did not submit invoices in order to be paid. He thus highlighted a discrepancy between the written agreement and what was actually happening in practice. He also said that none of the consultants were paying their own tax. He also submitted that the Letter of Authority that he was given to enable him to engage in the rotation and work for the Respondent's clients had the effect of making him a representative of the Respondent and that that fact implied that an employment relationship had arisen. He was personally performing the work. He also wanted to make a good impression at the start of the relationship and did not want to turn down work.

Conclusions - employment status

61. Having heard the evidence and submissions I find that the Claimant was not an employee of the Respondent but nor was he a self-employed contractor.

62. I have focused on what happened in practice in the case. I find that the Claimant was given a set of documents (that he signed and signed for) at the start of employment, that only partially reflected the working relationship between the parties. The Claimant was clearly not self-employed. He was not in business on his own account and as he rightly pointed out, he was providing services for the Respondent's clients and not directly to the Respondent. He was in a subordinate relationship that involved control by the Respondent. He had to provide his services personally – there was no evidence in the case of any substitution arrangements being present. However, the documentation also did not reflect the reality that there was in practice no mutuality of obligation between the parties. The documentation was in fact internally inconsistent in a number of respects, including the inclusion of a clause connoting a fixed term, but in accordance with the case law on employment status, and in particular Autoclenz v Belcher, I am obliged to consider primarily what happened in practice, not what was written down.

63. In this case that has consequences for the cases advanced by both parties. I am not persuaded that the Claimant was self-employed, as the Respondent submits, but nor am I persuaded that he was an employee within the meaning on s203(1) ERA because of the lack of mutual obligation. The Claimant did not have to perform the services he was offered and the documentation showed that flexibility was afforded to individuals who could not perform particular assignments - they were not blacklisted as the Claimant suggested but might start an assignment late, or not at all and then resume work at a later date. I accepted the Respondent's oral

and documentary evidence on this issue. The Claimant might have been keen to make a good impression at the start of his engagement by accepting the work he was offered, but that is a different point and does not mean that he was obliged to do so in the sense required to establish that a contract of employment exists. Nor was the Respondent obliged to offer work to him and at the start of January 2022 it did not do so. He did not complain at the time, he did not receive payment, he did not in fact seek payment for that period and he then resumed work when work became available again at the end of the month. These facts are all consistent with an arrangement lacking in mutual obligation.

64. I accepted Mr Hopkins' evidence about the basis for and nature of these arrangements. He described a business that has a need for a core staff of salaried employees and a pool of suitably qualified so-called consultants, who can be called upon as and when required to meet the fluctuating demands of the business. The Claimant was one of this pool of individuals - he was not guaranteed work but nor did he need to take it if it was offered. Even if work was accepted it could be turned down - so that there was not even mutuality of obligation in that sense. I disagreed with the Respondent that this prevented even a worker relationship from arising. Following the Court of Appeal's decision in NMC v Somerville [2022] EWCA Civ229, lack of mutuality even to that degree is not incompatible with worker status. I therefore find that the Claimant was a worker within the meaning of s203(3)(b) ERA. The lack of provision for pension, holiday pay and other benefits and the arrangements for tax do not in my judgment prevent the worker relationship arising – applying the definition in s230(1)(b) ERA, clearly the arrangement was one in which the Claimant was undertaking personally work to for the Respondent in a relationship that was not a business to client relationship in which the Respondent was the client.

65. The lack of mutuality of obligation I have found to characterise the relationship is however incompatible with employment status within the meaning of s230(1)(a) ERA and the Claimant's complaint of breach of contract cannot therefore be considered by this Tribunal.

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Employment Judge Morton
Date: 12 April 2024