



Neutral Citation: [2024] UKFTT 00832 (TC)

Case Number: TC09290

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Taylor House, London

Appeal reference: TC/2021/08695

National Insurance – Secondary Class 1 National Insurance contributions – Host Employer regulation – meaning of personal Service – meaning of made available – meaning of rendered – application on facts – appeal dismissed

Heard on: 15 – 18 and 22 – 24 July 2024

Judgment date: 12 September 2024

Before

**TRIBUNAL JUDGE AMANDA BROWN KC
JULIAN STAFFORD**

Between

ARAMARK LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Sam Grodzinski KC instructed by Fieldfisher LLP

For the Respondents: Mr Adam Tolley KC and Mr Bayo Randle of counsel, instructed by the General Counsel and Solicitor to HM Revenue & Customs

DECISION

INTRODUCTION

1. This appeal concerns a decision (**Decision**) by HM Revenue & Customs (**HMRC**) requiring payment of secondary Class 1 National Insurance Contributions (**2ary C1 NICs**) by Aramark Ltd (**Appellant**) in the period 6 August 2011 to 5 April 2012 and tax years ended 5 April 2013 and 2014 in the sum of £6,830,899 with statutory interest thereon. The Decision was issued on 8 January 2021 pursuant to section 8(1)(c) Social Security Contributions (Transfer of Functions, etc) Act 1999, HMRC having concluded that the Appellant was liable to pay 2ary C1 NICs by virtue of the application of Paragraph 9 Schedule 3 Social Security (Categorisation of Earners) Regulations 1978 as amended in 1994 but prior to the later amendment in 2014. These provisions are commonly referred to as the Host Employer Provisions (**HEP**).

2. The Appellant is part of a group of companies headed by the Aramark Corporation, a US corporation headquartered in Philadelphia, Pennsylvania which owns businesses that provide food services, facilities and uniform services to hospitals, universities, schools, sports stadiums, and businesses with remote workplaces. The Appellant was (and remains) one of the operating subsidiaries and its business includes the provision of catering and hospitality services to offshore installations (**Offshore Installations**) located in the North Sea, several hundred miles from Aberdeen on the United Kingdom Continental Shelf (**UKCS**).

3. Pursuant to contracts entered between the Appellant and the operators (**Operators**) of the Offshore Installations the Appellant was required to provide skilled personnel, tangible goods, and equipment, including food, cleaning and housekeeping materials together representing the services necessary to provide hotel and catering services to the Operators' staff working on the Offshore Installations.

4. In the period from 8 October 2004 until 11 March 2017 the Appellant met its contractual commitments to some of the Operators utilising resources supplied to the Appellant by Aramark US Offshore Services LLC (formerly Aramark US Offshore Services Inc) (**OSI**) pursuant to an agreement between the Appellant and OSI dated 1 June 2005 (**Intercompany Agreement**). The detailed terms of the Intercompany Agreement are discussed below; however, pursuant to the Intercompany Agreement, the employees of the Appellant which had previously been used by the Appellant to service the Operator contracts were transferred to OSI and the Appellant agreed to provide certain defined services to OSI to facilitate the provision of services from OSI back to the Appellant.

5. The Intercompany Agreement was entered into as part of arrangements intended to ensure that the Appellant remained competitive in the market for the services it provided to the Operators by seeking to eliminate the cost of 2ary C1 NICs. The Appellant believed (and continues to maintain) that the arrangements were successful in doing so because OSI (an entity not being relevantly resident or having a presence in the UK) employed the personnel through whom the hotel and catering services were provided but did not cause the personal service of those employees to be made available to the Appellant within the terms of the HEP.

6. For the reasons set out in detail below we dismiss the appeal.

LEGAL FRAMEWORK

Statutory context

7. There is no dispute between the parties as to the meaning or application of the statutory framework of which the HEP forms part. As a consequence, we only provide the highest-level summary of it as appropriate context.

8. The statutory framework concerning the liability to pay C1 NICs is provided for under Social Security (Contributions and Benefits) Act 1992 (**SSCBA**), the provisions of which apply subject to residence or presence in Great Britain. Pursuant to section 6 SSCBA C1 NICs are payable in two parts in respect of earnings from an employed earner's employment: the first part (primary contributions) are payable by the earner, the second part (secondary contributions) are payable (as determined by section 7(1)(a)), in the case of an earner employed under a contract of service, by the employer. "Earnings" are defined in section 3(1) as remuneration or profit derived from employment. An "employed earner" includes a person who is gainfully employed *in Great Britain* under a contract of service (section 2(1)(a)).

9. Thus, and subject to the provisions of Social Security (Categorisation of Earners) Regulations 1978 SI 1978/1689 (**SSCER**), primary C1 NICs, will usually be payable only in respect of the earnings of an individual, resident/present and gainfully employed in Great Britain and 2ary C1 NICs will only be payable where the individual is so employed by an employer which is also resident/present in Great Britain. For these purposes Great Britain is deemed to include the UKCS. The SSCER extend the net as to (or in some instances simply make clear) who counts as a secondary contributor in relation to specified categories of employment.

10. Subject to the provisions of the HEP (one of the categories of employment provided for under SSCER) the parties are agreed:

- (1) The individuals whose earnings are at the heart of this appeal are:
 - (a) Resident/present in Great Britain
 - (b) Gainfully employed in Great Britain pursuant to a contract of service by OSI.
- (2) but OSI is neither resident nor present in Great Britain.

11. As such, and unless the HEP applies, whilst the individuals are liable to primary C1 NICs there is no liability for 2ary C1 NICs.

HEP

12. Given the critical importance of the HEP it is appropriate to set out its terms and the authority under which it was made in full. We also set out the terms of the explanatory note, HMRC guidance and other material on which the parties rely.

13. Section 7(2) SSCBA (formerly section 4(5) Social Security Act 1975) provides:

"In relation to employed earners who—

- (a) are paid earnings in a tax week by more than one person in respect of different employments; or
- (b) work under the general control or management of a person other than their immediate employer,

and in relation to any other case for which it appears to the Secretary of State that such provision is needed, regulations may provide that the prescribed person is to be treated as the secondary contributor in respect of earnings paid to or for the benefit of an earner."

14. Pursuant to that authorising provision Regulation 5 SSCER (as amended by the Social Security (Categorisation of Earners) (Amendment No 2) Regulations 2003, SI 2003/2420) provides:

“(1) For the purposes of section 4 of the Act (Class 1 contributions), in relation to any payment of earnings to or for the benefit of an employed earner in any employment described in any paragraph in column (A) of Schedule 3 to these regulations, the person specified in the corresponding paragraph in column (B) of that Schedule shall be treated as the secondary Class 1 contributor in relation to that employed earner.”

15. The HEP is specified in paragraph 9 of Schedule 3 SSCER78 as inserted by Regulation 4 Social Security (Categorisation of Earners) Amendment Regulations 1994 (SI 1994/726) (**Amendment Regs**) in exercise of powers conferred on the Secretary of State “by sections 2(2), 7(2), 122(1) and 175(1) to (3) of [SSCB92] and of all other powers enabling him in that behalf”.

16. With effect from 6 April 1994, paragraph 9 Column (A) has identified the following category of employment:

“Employment by a foreign employer where—

- (a) in pursuance of that employment the personal service of the person employed is made available to a host employer; and
- (b) the personal service is rendered for the purposes of the business of that host employer; and
- (c) that personal service for the host employer begins on or after 6th April 1994.

Where the employment is as a mariner, this paragraph only applies where the duties of the employment are performed wholly or mainly in category A, B, C or D waters.”

17. As a consequence Column (B) specifies that “the host employer to whom the personal service of the person employed is made available” shall be the secondary contributor.

18. The relevant definitions for interpretation of these provisions are set out in Regulation 1 SSCER (as amended by the Amendment Regs):

““*foreign employer*” in paragraph 9 Schedule 3 to these regulations means a person:

- (a) Who does not fulfil the conditions as to residence or presence in Great Britain prescribed in section 1(6)(a) of the [SSCBA]; and
- (b) who, if he did fulfil those conditions as to residence or presence in Great Britain referred to in (a) above, would be the secondary contributor in relation to any payment of earnings to or for the benefit of the person employed;

“*host employer*” in (paragraph 9 Schedule 3) to these regulations means a person having a place of business in Great Britain.”

19. The Explanatory Note to the Amendment Regs relevantly states:

“Regulation 4 amends Schedule 3 to the principal Regulation by extending the description of employments in respect of which persons are treated as secondary Class 1 contributors to workers seconded on or after 6th April 1994, by foreign employers to employers in Great Britain.”

20. As it was referred to by the parties as a comparison for the purposes of interpreting paragraph 9, we note that for the period during which OSI employed the relevant individuals

for whom secondary C1 NICs have been determined as payable, from paragraph 2 Column (A) Schedule 3 provided:

“Employment, whether or not under a contract of service (not being employment described in paragraph 2 in column (B) of Schedule 1 of these regulations or an employment to which paragraphs 1, 4, 5, 7 or 8 of this Schedule applies) in which the persons employed renders, or is under an obligation to render, personal service and is subject to supervision, direction or control, or to the right of supervision direction or control, as to the manner of the rendering of such service and where the person employed is supplied by or through some third person (including, in the case of a body of persons unincorporate, a body of which the person employed is a member) and (a) where earnings for such service are paid by or through, or on the basis of accounts submitted by, that third person or in accordance with arrangements made with that third person; or (b) where payments, other than to the person employed, are made by way of fees, commission or other payments of like nature which relate to the continued employment in that employment of the person employed”

21. With effect from 6 April 2014 paragraph 9 to Schedule 3 was amended. The terms of the HEP were reframed to be more expansive and a new anti-avoidance provision was introduced as paragraph 5A to SSCER. Paragraph 5A introduced a main purpose test when applying the amended HEP.

22. HMRC’s Guidance on Offshore Intermediaries includes an explanation of the HEP:

“The host regulations

17. The host employer regulations are provided for at paragraph 9 of Regulation 5 in Schedule 3 to the Social Security (Categorisation of earners) Regulations 1978 (SSCER 1978).

Key points on the host regulations

18. The bulleted list below summaries the key points relating to HMRC’s approach to determine whether there is a host employer.

- HMRC’s overall approach is that the host regulations can apply in an arrangement where the worker works in a broad sense for a third party

...

Relevant legislation (pre-6 April 2014)

20. This is provided for in paragraphs 2 and 9 of Regulation 5 in Schedule 3 to the SSCER 1978. Paragraph 9 is referred to as the “host regulations” whereas paragraph 2 is referred to as the “agency regulations”.

21. ... [see paragraph 16 above]

HMRC’s view of these conditions is set out at paragraph 23 below.

...

23. HMRC’s view of the meaning of the conditions in paragraph 9 of Regulation 5 to the SSCER 1978 is as follows:

Para 9(a) “in pursuance of that employment the personal service of the person employed is made available to a host employer”

- The condition at (a) above is met when the worker is, as a matter of fact, providing their service to the host employer.

- Where an individual worker is not named in the contracts, it is HMRC's view that this does not mean that the legislation cannot apply if other evidence points to personal service.
- A worker is providing personal service to a host employer where we identify accepted elements of personal service; the obligation to perform tasks for the host employer.
- The personal service is "rendered for the purpose of the business of that host employer".

...

Composite Service

29. A composite service can include personal service, and that members of a crew can still be providing their personal service. Arrangements must be looked at from the perspective of the worker and his employment obligations.

30. HMRC accept that where the arrangement is a legitimate contract for the provision of a complete service, and the workers, as a matter of fact work for the provider of that service and not the host, these provisions were not intended to apply.

EXAMPLES

- A contract to provide crew and equipment may be viewed as composite since it comprises both the provision of labour and the provision of equipment. If, however, within the provision of labour the crew (workers) are required to provide their personal service to a host employer then the Host Regulations may still apply to that contract.
- A contract is comprised of the provision of a whole crew made up of various job roles. This is still a contract for labour, simply different types of labour to deliver an overall service. If within that contract the various workers are required to provide their individual personal service to a host employer then the Host Regulations may still apply.
- Where a contract delivers an overall service to a host employer, or other client, and the workers' personal service is not required to be provided to the host employer as part of that contract, i.e. they are only required to be provided to the overseas employer, then the Host Regulations would not apply. "

23. And by way of a parallel to the distinction drawn between a situation in which HMRC consider there to have been a supply of staff by an agency and the provision of a complete service, HMRC's guidance ESM2003 states:

"If the agency worker is not engaged under a contract of service the next step in deciding whether the legislation applies is to understand exactly who is contracting with whom to do what. For example, a company requiring some typing work, which is beyond the capacity of its regular staff, could ...

engage an independent contractor to do the work. The contractor undertakes to do the typing work using his own staff, who may be either employed or self-employed depending on the terms and conditions of engagement. In this case the agency legislation does not apply because the contractor is providing a typing service. They are not providing typists. The position is the same as, for example, a plumbing firm that undertakes some plumbing work for a client. The plumber who actually does the work is working for the plumbing firm, not rendering personal service to the client.

AGREED LEGAL ISSUES

24. The parties agree that the issue(s) for us to determine are as follows:

It is common ground that the only issue (the Issue) in this appeal is whether the Appellant is liable pursuant to the Host Employer Regulations to pay Employer's secondary Class 1 NICs in the Relevant Periods in respect of earnings of Aramark OSI employees.

...

The parties agree that for the purposes of the [HEP]:

- (a) [OSI] is a foreign employer;
- (b) [OSI] is the employer of its personnel working on an Offshore Installation;
- (c) any personal service made available by [OSI] to the Appellant in the Relevant Periods began after 6 April 1994; and
- (d) the Appellant is a person or entity having a place of business in Great Britain.

The parties consider that the Issue to be determined is as follows:

[(1)] if and to the extent that, in the Relevant Periods, in pursuance of their employment by [OSI] the personal service of [OSI] employees was made available to the Appellant and that personal service was rendered for the business purposes of the Appellant then the Appellant is required to account for secondary contributions for the Relevant Periods; but

[(2)] otherwise the Appellant is not required to account for secondary contributions for those periods.”

PARTIES SUBMISSIONS ON THE LAW

25. We are grateful to all Counsel for their clear skeletons, submissions, and willingness to engage with our questions. We set out below our summary of those submissions on the law and, at paragraphs 155 to 159 in respect of the facts. The parties should, however, be assured that when preparing this judgment, the terms of the skeletons were reread and the transcript reviewed. Because we do not deal specifically with any point does not mean that it was not considered in the round when reaching our decision.

The Appellant's case

26. The Appellant's starting point was to invite us to determine whether “the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically” (as per [66] *UBS AG v HMRC* [2016] 1 WLR 1005). In this regard, and in summary, it was contended that the purpose of the HEP, determined by reference to its language, the explanatory note and as reflected in HMRC's guidance, was to create a charge to 2ary C1 NICs on a British host without a direct contract of employment with the worker only where that host exercised substantive day-to-day control over the work/personal service of the worker akin to the situation of a secondee. Where, however, substantive control over the day-to-day activities of the foreign employer's employees remained with the foreign employer the HEP cannot apply and no 2ary C1 NICs charge arises in Great Britain.

27. A number of observations on the language of the HEP were made:

- (1) the HEP is engaged only where a worker is contractually employed by a foreign employer and remains so employed throughout;

(2) under paragraph 9(a) the definite article “the” limits the scope of personal service or services;

(3) by reference to the demarcation between 9(a) and (b) the personal service must be both “made available” to, and “rendered for” the purposes of the business of, the host employer;

(4) as there are no provisions providing for apportionment between two entities the personal service of the employee of the foreign employer must be wholly available to the host employer;

(5) in 9(c) “that” personal service (i.e. the personal service meeting the description in 9(a) and (b)) must be “for” the host;

(6) it is the host “employer” which is made liable for the 2ary C1 NICs charge and not simply a host.

28. The Appellant recognised the centrality of importance of the concepts of mutuality of obligation/personal service and control in the context of establishing a relationship pursuant to which parties are engaged by way of a contract of service (employment) or a contract for services as set out in the seminal judgments of *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 (at 515) and *Montgomery v Johnson Underwood Ltd* [2001] EWCA Civ 318 (at [18] – 24]).

29. Flowing from these observations the Appellant submitted:

(1) The requirement that the personal service of a foreign employer’s employee be made available to the host cannot require the foreign employer to surrender its contractual right of control to the host.

(2) It cannot be sufficient in order to meet the requirement of the HEP for the foreign employer simply to have the ultimate contractual right to direct its employees to do work for the host.

(3) The critical question is therefore what more is required than (2) which is less than (1). The answer was posited as that the host must exercise control over the significant working activities or personal service of the individuals thereby integrating them into the operations of the host. Where the foreign employer retains both the right of control and exercises that right in respect of the day-to-day activities the HEP will not apply.

30. In this regard Mr Grodzinski sought to place a firm line between “control” in the sense envisaged to establish whether an individual was engaged under a contract of service or a contract for services (as per *RMC* and *Montgomery*) and the practical and substantive exercise of control required in order for the host employer to become liable to 2ary C1 NICs. It was accepted that the “control” necessary to establish that an individual is an employee is, to a degree, flexible and dependant on both the circumstances of the work and the individual such that an appropriate framework of control will be sufficient. Where the HEP is in question it will have already been established that the necessary framework of control resides with the foreign employer (otherwise the foreign employer would not be the employer at all). Such framework of control was explained to exist above the level of day-to-day control. On the basic employment question day-to-day control may be illustrative as to where the framework of control lies but will not be determinative. However, it is the more granular detail identifying where the practical and substantive exercise of control in the minutiae of operations rests which is determinative for the HEP to apply.

31. Support for this interpretation was said to be confirmed by the authorising statute and as explained in the explanatory note.

32. Mr Grodzinski contended that the relevant authorising provision was section 7(2)(b) SSCBA which explicitly requires that secondary legislation providing for an extension of the scope of the 2ary C1 NICs charge requires the secondary contributor to be under the general management or control of the contributor. However, even were it to be the case that the HEP was implemented more generally within the vires of section 7(2) SSCBA that did not preclude a conclusion that the exercise of control, in the sense contended for, by the host was required as the purpose of the Treasury in bringing forward the HEP could be discerned from the explanatory note.

33. As set out above the explanatory note explicitly states that the HEP was intended to cover “workers seconded” by foreign employers to host employers in Great Britain. It was argued that a seconded worker was to be generally understood as describing an individual working for someone other than their contractual employer as a de facto employee in practice of that other. Examples of such interpretation were provided:

(1) *Alan Edwards v HMRC* [2016] UKFTT 0189 at [29] – [31] concerned a police officer seconded to the Foreign and Commonwealth Office to work in Kosovo determined by HMRC to be liable to primary C1 NICs as a consequence of being paid by his police force throughout and returning to work in the force at the end of his secondment. The case required the interpretation of Family Allowance, National Insurance and Industrial Injuries (Yugoslavia) Order 1958 and in particular whether Mr Edwards was “employed on government service” whilst in Kosovo in which case primary C1 NICs were due. Under the terms of the secondment agreement Mr Edwards was seconded to the FCO and by the FCO to the Kosovo mission. He owed duties of confidentiality and service to the Crown, was based in Kosovo as a civilian police officer and was required to report to and comply with any lawful instruction from the mission line manager. The FTT determined Mr Edwards was not employed by the FCO but employed by his seconding police force but in government service.

(2) *Pervez v Macquarie Bank Ltd (London Branch)* [2011] ICR 266 at [12(3)] considered the position of an individual of Pakistani origin employed by Macquarie Bank in Hong Kong but working in the Bank’s London branch on an international assignment on terms that if the assignment ended he would be required to resign his employment with the bank. When the bank terminated his assignment after 12 months a jurisdictional question arose in the context of his claim for unfair dismissal brought against the London branch and the Hong Kong employing entity. As part of its analysis in determining that the Hong Kong entity should be joined in proceedings the Court had to determine whether the claimant was working in London on a settled and indefinite basis as part of the Hong Kong entity’s operations. The Court observed that “‘Secondments’ come in all shapes and sizes” and different factual scenarios may drive different conclusions.

(3) *Capital Health Solutions v BBC* [2008] IRLR 595 at [44] addressed the status of an occupational nurse working in the BBC. The functions of the occupational health team were outsourced to Capital Health and the claimant was informed that she was due to be transferred under the contract. She objected to the transfer. Following an unsuccessful grievance she was seconded to Capita by the BBC for a period of six weeks following which she brought an unfair dismissal claim against both the BBC and Capita. The Employment Appeal Tribunal determined that despite the apparent terms of the secondment the statutory requirements for a transfer of undertakings resulted in a transfer of her employment from the BBC to Capita.

34. The Appellant accepted that the terms of the explanatory note did not define the concept of a secondment and that in ordinary parlance, as confirmed in *Pervez*, it could come in different shapes and sizes. However, it was contended that particular weight should be given to the explanatory note. This was on the basis, at a general level, that explanatory notes may often represent the only demonstrated purpose for negative resolution secondary legislation which will rarely have been the subject of formal Parliamentary consideration and is conventionally drafted by the department proposing the statutory instrument. In such circumstances, the explanatory notes will provide a reliable guide to the mischief/lacuna it is intended to address.

35. *Goldman Sachs International v HMRC* [2010] UKFTT 205 (TC) supported a conclusion that the HEP applied where the foreign employers employees were treated, at least on a day to day basis as if they were the employees of the host. That case concerned whether Goldman Sachs International (GSI) was liable to 2ary C1 NICs as a host employer in respect of workers employed by Goldman Sachs Services Ltd (GSSL) and formally seconded to GSI. It was accepted on the facts that if GSSL had no place of business in Great Britain then GSI would be the host employer and liable to 2ary C1 NICs. However, GSI contended that the unrepresented GSSL had a presence in Great Britain such that it could not be liable to the 2ary C1 NICs. In that context in that appeal the Tribunal observed at paragraph [46]:

“It seems clear that [the test in sub-paragraph (a) in paragraph 9] means that there must be in place an agreement between the contended foreign employer and the contended host employer that specifically covers the position of the individual primary Class 1 contributor. [The test in sub-paragraph] (b) is a factual test – the primary contributor provides “the personal service” for which he or she is employed to the host employer. I take that to mean that, looking at the matter broadly, the arrangement is that the primary contributor works for the host employer rather than the foreign employer as an employee (and not, for example, as a consultant). This would exclude cases where someone works for both the foreign employer and the host employer to a significant extent but under a single contract of employment. I adopt that interpretation because of the use of the definite article “the” before the reference to personal service. If it were a reference to “personal service” without the definite article then it could be argued that any part of the personal service of the individual would activate the test. On the reading I adopt, and subject to clarification of the proper burden of proof in applying the provision, it must be shown as fact in a broad sense that the individual is working for the host employer and not the foreign employer.”

36. Having set out these observations Judge Williams went on to determine that GSSL was a foreign employer and, before concluding that GSI was a host employer and liable under the section 8 decisions, stated:

“The personal service of GSSL employees present in Great Britain was, largely but not entirely, made available to GSI. ... On the assumptions I have made, the two named individuals against whom the section 8 decisions were made were seconded in this sense to GSI. They worked for GSI and not for GSSL. I have no evidence that, having been seconded to GSI, they did anything other than render personal service for the purposes of the business of GSI, and I so find. ...”

37. The Appellant accepts that HMRC’s guidance may not be used as a legitimate aid to statutory interpretation as per *HMRC v K E Entertainments Limited* [2020] UKSC 28, but contends that HMRC’s published position as set out in the *Offshore Intermediaries Guidance* paragraph [30] (set out above in paragraph 22) and *ESM2003* (set out at paragraph 23 above) is consistent with its own submission. That guidance accepts that where the foreign

employer/agent's supply is of a complete service consisting of a range of components including the output of employees there is no supply of personal service within the HEP or agency provisions.

38. With the HEP limited to a situation akin to a secondment (or the shift of day-to-day operational control of the duties of the workers) the Appellant contends that the commercial sanctity of international subcontracting is preserved. As such we should ask ourselves whether, on the facts:

- (1) the employee receives their instructions from the employer/supplier; and/or
- (2) the employee uses resources and infrastructure of the employer/supplier in order that a broader service is supplied by the employer/supplier.

Only if the answer to both questions is no will the HEP apply.

39. The Appellant's suggested interpretation was also considered to align with the provisions of paragraph 2 to schedule 3. As set out in paragraph 20 above, paragraph 2 renders an agency liable to 2ary C1 NICs where an individual who is contracted (whether under a contract of services or a contract for services) to the agent and who performs their personal service under the supervision, direction or control of the agent. The requirement that direction and supervision be explicit is necessary because of the wider remit of the provision beyond a pure employment scenario. However, both paragraph 2 and the HEP are triggered only where "supervision, direction and control" are exercised by the party to which the 2ary C1 NICs obligation is ascribed.

40. Final affirmation that the Appellant's interpretation of the HEP is correct was also said to come from the amendment made to the HEP in 2014. Whilst the Appellant acknowledged that subsequent amendment to legislation was not generally an aid to interpretation (as per *Project Blue Ltd v HMRC* [2018] UKSC 30 at [33]) the principle that Parliament does not legislate in vain (as confirmed recently in the case of *R (oao Hertfordshire County Council) v Secretary of State for Housing, Communities and Local Government* [2021] EWHC 1093 (Admin)) demonstrated that the provisions of the HEP in force between 1994 and 2014 did not impose the liability now sought to be imposed, otherwise the broadening of the scope of the HEP effective from 2014 would be otiose. By reference to the explanatory note for the 2014 changes the terms of the revised legislation were not stated to clarify the previous statutory provisions but to amend them in order to assist with enforcement.

41. The Appellant challenged HMRC's position that the HEP was an anti-avoidance provision. It did not contain a main or unallowable purpose requirement, in marked contrast to the provisions of section 5A SSCBA introduced in 2014 alongside the broadening of the provisions of paragraph 9.

42. On the question of the relevance or otherwise of the asserted tax avoidance motive for the implementation and continuation of the arrangements pursuant to which OSI supplied the Appellant under the Intercompany Agreement, the Appellant contended that the line of authorities including and concluding with *HMRC v Altrad Services Ltd* [2024] EWCA Civ 720 (*Altrad*) had no effect on the correct interpretation and application of the HEP. Mr Grodzinski accepted that if his case on the substantive exercise of day-to-day control failed then the Appellant's appeal failed. However, if he succeeded on that point, any tax avoidance motive which may be established could not in his view cause an alternative view of the application of the HEP. On the basis that the requisite day-to-day control of the workers by OSI was proven there was no application of the HEP which permitted such control to be ignored as it is not contrived or artificial or in any way tainted by the purpose underlying the implementation of the arrangements by which that control was brought about. Further, the

purpose of the HEP could not be said to have been subverted; the Appellant would simply have established the factual matrix which ensures that neither the actual legal employer (who is out of the jurisdiction) nor the recipient of the supplies of hotel facilities are subject to a 2ary C1 NICs charge.

43. The Appellant contends that HMRC's interpretation of the HEP cannot be correct. If the HEP is engaged simply because there is a contractual obligation of personal service owed by the employee to the foreign employer who may then direct the employee to work in Great Britain within the host employer's business the HEP would apply whenever work was carried out by a service provider present outside Great Britain.

HMRC's case

44. HMRC broadly agree with the proposed approach to interpretation we were invited to adopt by the Appellant as set out at paragraph 26 above.

45. However, HMRC made some wider submissions regarding what they asserted to be a plain tax avoidance motive and the extent to which it should affect the approach we adopted. In their skeleton argument HMRC's position on avoidance was set out as:

“In so far as necessary, HMRC will also refer to *Rosendale Borough Council v Hurstwood Properties (A) Ltd* [2021] UKSC 16 [11] – [17] and in particular to the point at [12] that, as an application of these general principles, where a scheme aimed at avoiding tax involves a series of steps planned in advance, it is both permissible and necessary not just to consider the particular steps individually but to consider the scheme as a whole.”

46. By their note on evidence/closing submissions, and at our invitation, HMRC set out their position on the application of *Altrad* which they considered reinforced their submission as the Court of Appeal confirmed that: “it is not generally to be expected that Parliament intends to exempt from tax a transaction which has no purpose other than tax avoidance”; “if a taxpayer enters into a transaction that does not appreciably affect his beneficial interest except to reduce his tax the law will disregard it”; and it was of “no less importance” to consider tax avoidance schemes as a whole and as they were intended to operate. Applying these principles the note proceeds to adopt a position that on the facts of this case, and by reference to the terms of the HEP as a charging provision, the Appellant had sought to exclude themselves from the charge with the consequence that we should apply the *Rosendale/Altrad* analysis so as to deprive the arrangements of their intended effect.

47. When making oral submissions, Mr Tolley confirmed that the approach we were to adopt was one of viewing the facts realistically and applying the legislation purposively. We were, in particular, invited to construe the words “making available” as coloured by the tax avoidance motive of the arrangements. This was so because one of the obvious purposes of the HEP was to prevent avoidance of 2ary C1 NICs by the use of a foreign employer. In this regard, and in response to a question from the Tribunal as to how far this point went, Mr Tolley confirmed:

“[the tax avoidance purpose] is part of the circumstances that are before you. But what I am not purporting to suggest to you, judge, that you – you will reach a point in the analysis where you think “ah I'm with the appellant but for the fact that it was an avoidance purpose” and then “oh, but it is an avoidance purpose, so I have to reverse my view”.

48. Mr Tolley reinforced that the facts and context of what he considered and described as tax avoidance arrangements gave credence to a conclusion that the personal service of each employee was made available by OSI to the Appellant in order that the Appellant could continue to operate the business post-2004 as it had pre-2004.

49. Regarding the relevant language of the statute which is to be purposively construed HMRC focused on: “personal service” and “making available”.

50. By reference to the seminal textbook on statutory interpretation: *Bennion, Bailey and Norbury on Statutory Interpretation (Bennion)*, we were invited to interpret the HEP as a whole and by reference to a presumption that the legislature was aware of existing common and statute law when the HEP was introduced in 1994. As there is a significant overlap between employment law and payroll taxes including NICs we are entitled to import the established concepts and the legal meaning of phrases inherent within the body of employment law when interpreting the HEP.

51. As a starting point in this regard it is a broad and well-established principle that in respect of any particular employment there will be only one employer (see *Fire Brigades Union v Embery* [2023] EAT 51). On that basis a bifurcated concept of a contractual versus a de facto employer was novel and unmoored to any pre-existing legal analysis within employment law.

52. As to personal service, HMRC contended the words reflected precisely the well-understood part of the definition of a contract of service (as opposed to a contract for services), namely the obligation that the employee work “by one’s own hands”, not “by another”: *Ready Mixed Concrete* [1968] 2 QB 497 per MacKenna J at 515C-E; and the long line of cases which had followed.

53. HMRC contend that it is the employees’ obligation to the foreign employer to work by their own hands which, when made available to the host employer, lays the foundation for the HEP to apply. By their skeleton HMRC state: “It is this obligation (of the employee) which must be made available to the host employer. The requirement is that the foreign employer make available to the host employer that which the foreign employer has at its disposal: the obligation of personal service owed to the foreign employer by its employees.” Thus, it is sufficient for the HEP to be triggered that a foreign employer directs (or is taken to have directed) its employees to work for the host; it then matters not from whom the employee takes instruction or direction as to their terms or manner of performance of their day-to-day activities.

54. As set out in their skeleton, HMRC contend this position is supported by:

(1) The absence of any express reference to control in the HEP particularly when compared to column (A) of paragraph 2 of Schedule 3 SSCER which requires the agency to whom the worker is contracted either under a contract of service or a contract for services to exercise supervision, direction or control over the worker in order that agency regulation to trigger a liability for 2ary C1 NICs for the agency.

(2) The employment law authorities distinguishing employment from a contract for services by treating as distinct elements a requirement for personal service and that of control. As such there could be no question that there be a requirement for the host to control the worker.

(3) The requirements of paragraph (a) of the HEP as interpreted by HMRC showing that, while the factual exercise of supervision, management and control may be an indicator that an employee was “made available”, it is not a necessary component of the statutory test.

55. The personal service so made available must be rendered for the purposes of the host employer’s business pursuant to paragraph (b) of the HEP. HMRC contend that the concept of “personal service” envisaged under paragraph (b) is obviously and necessarily the same as under paragraph (a) (i.e. the performance by the employee of the obligation owed

contractually to the foreign employer) but the personal service must also be rendered for the purposes of the host employer's business. In HMRC's submission there is no requirement for the host to exercise control, supervision, or direction in order that the personal service be rendered for the purposes of the host's business.

56. HMRC also accepted that the explanatory note was an admissible aid to interpreting the HEP but submitted that it provided little assistance in the present case. HMRC urged us to avoid being sucked into an exercise of interpreting the explanatory note with a view to it shedding light on the meaning of the statutory language chosen. Thus, there was no utility in seeking to understand what was meant by the words "workers seconded" in the explanatory note and/or the level of control to be expected to be exercised by the recipient of a secondee in order to then identify the relevant statutory test for the HEP. As a codicil to this point HMRC contend that there is, in any event, no fixed meaning of secondment nor a particular general understanding of what amounts to a secondment. As articulated in *Pervez secondments* "come in all shapes and sizes".

57. The relevance of *Goldman Sachs* was marginalised by HMRC. They contend that the parts of the judgment on which the Appellant seeks to rely are "doubly obiter" and do not, in any event, set out any strict rule that an employment-type relationship must be found for the HEP to apply.

58. As to the Appellant's reference to HMRC's Offshore Intermediaries guidance, HMRC point to the fact that the guidance in question post-dates the 2014 amendment and that on its terms it provides no reasoning capable of assisting the Appellant not least of all because, in any event on the evidence, OSI does not, in HMRC's view, provide a complete service to the Appellant. Similarly, in HMRC's view, the examples given in ESM2003 are irrelevant as it is not addressing the HEP.

59. HMRC's alternative argument was that if the Appellant were correct that control was necessary for the HEP to be triggered the "control" required could not be equated to "control" in an employment law context as, if the host controlled the worker, the host and not the foreign employer would be the legal employer of the worker. Thus, some lesser control must be sufficient to invoke the HEP. HMRC submit that such lesser control will be evident where it can be shown, consistently with the approach confirmed by the Court of Appeal in *HMRC v Atholl House Productions Ltd* [2022] EWCA Civ 501 (*Atholl CA*) and considered in *Crista Ackroyd Media Ltd* [2019] UKUT 327 (TCC) (*Ackroyd*), that there is a framework of control which is sufficient.

Discussion

Statutory purpose of the HEP

60. As set out above, both parties invited us to construe the words of the HEP purposively and to apply the facts realistically. In order to construe the words purposively, we must understand the purpose. HMRC contend that the HEP is an anti-avoidance provision to be interpreted, as a minimum, to catch situations in which a UK employer moves the legal aspects of employment offshore whilst continuing to use the workers in the same way as when they were employed onshore. The Appellant contends that the HEP is intended to treat a host as the secondary contributor where that host has effective and substantive control of the day-to-day activities of the workers.

61. Our view as to purpose is more reflective of the Appellant's position than HMRC's but we accept that it is highly likely that the situation which concerns HMRC would be caught by the HEP by reference to our view of the purpose. We consider that the HEP is intended to impose a liability to 2ary C1 NICs where a party (the host) stands in the shoes of an employer in terms of the substantive day-to-day control of a worker and where that worker is working

in the host's business but contractually employed by a foreign employer. We consider that such a purpose will catch those who artificially seek to place contractual employment outside Great Britain without affecting the daily operations to which the workers are directed and thereby the experience of those workers in the tasks that they perform.

62. In explaining our reasons for so concluding, we start with the provisions of section 7(2) SSCBA which authorise, so far as relevant in this appeal, the Treasury to make regulations providing that a prescribed person (here the host employer) be treated as a secondary contributor either because the employees of the foreign employer work under the general control or management of the host employer rather than the foreign employer and/or because it appeared to the Treasury that the host employer should be so treated.

63. We do not consider we need to decide explicitly which of these possible alternatives caused the Treasury to request the Secretary of State for Social Security to lay the SSCER before Parliament. This is because we consider that the terms of the explanatory note give us a sufficient statement of purpose with which to interpret the statutory language chosen. Both parties rightly accepted that the explanatory note may be used as an "aid" to interpretation. In this regard we note that explanatory notes are invariably drafted by the department responsible for introducing the legislation. They explain to Parliament the purpose for which a provision is to be introduced and are published alongside the act. As acknowledged by Lady Arden (in *R (oao O a minor) v Secretary of State for the Home Department* [2022] UKSC 3) explanatory notes began to be routinely prepared following the second report of the Select Committee on Modernisation of the House of Commons (HC 389, 1997-8) which expressly recognised that the courts might wish to use explanatory notes as a guide to determining Parliament's intention. As such, and in accordance with the guidance given by the House of Lords in *R (oao Westminster City Council) v National Asylum Support Service* [2002] UKHL 38 (at paragraph [5]) an explanatory note which "casts light on the objective setting or contextual scene of the statute and the mischief at which it is aimed" will "always be admissible as aids to construction".

64. The explanatory note to the HEP provides that it amends the provisions of Schedule 3, extending the description of employment in respect of which it was considered necessary to treat a party as a secondary class 1 contributor where workers are seconded by foreign employers to employers in Great Britain. Whilst we agree with HMRC that a forensic exercise seeking to interpret the language of the explanatory note is not appropriate, we consider that the explanatory note unquestionably casts light on the "objective setting or contextual scene" of the HEP and thereby Parliament's purpose in its enactment. Without debate, as is usual for a negative resolution statutory instrument, it must fairly be assumed that Parliament intended to do that which it was asked to do. Using it as an aid to understand the purpose of the HEP so as to then interpret the language used and, recognising that secondments come in all shapes and sizes, it is our view that the purpose of the HEP is to treat as a secondary contributor a GB resident/present party utilising the personal service of workers (employed by a foreign employer) as if they were their own employees as this, in our view, is the critical feature of a secondment (in whatever shape or size).

65. We also consider that such a purpose marks an important line between a secondment-type relationship between worker and host employer which clearly was intended to be caught and that of a commercial subcontractor. That such a line exists is apparent on a purely practical level as the provision plainly was not intended to and does not catch commercial subcontracting (a point accepted by Mr Tolley before us) and this is reflected in HMRC's Offshore Installation guidance which expressly excludes the possibility of the HEP applying where a contractor enters an engagement for a "complete" or "composite service" (as per paragraph 30).

66. Having so concluded that to be the purpose we consider that the interpretation of the language of the provision becomes a comparatively easy task though its application to the facts in any particular scenario, including this one, is not such an easy task.

Personal service

67. Starting with “personal service”, we agree with HMRC that the term “personal service” must carry the meaning conventionally given in employment law. This is consistent with the basic tenets of statutory interpretation as set out in *Bennion* and summarised at paragraph 50 abto bee. As such, personal service means the worker’s “own work and skill in the performance of some service for [their] master” (from *RMC*).

68. We also agree that the employment law concept of “personal service” does not incorporate any requirement as to control. This is clear by reference to the “irreducible minimum” for a contract of service explained in *Montgomery* where the requirement for mutual obligation/personal service is discrete and distinct from the requirement for control:

“18 I consider the safest starting point to be the oft quoted passage of McKenna J in [*RMC*] ...:

“I must now consider what is mean by a contract of service. 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.”

19. MacKenna J made plain that provided (i) and (ii) are present (iii) requires that all the terms of the agreement are considered before the question as to the existence of a contract of service can be answered. ...

23. Clearly, as society and the nature and manner of carrying out employment continues to develop, so will the court's view of the nature and extent of “mutual obligations” concerning the work in question and “control” of the individual carrying it out. ... since the concept of the contract of employment remains central to so much legislation which sets out to adjust the rights of employers and workers, including employees, it must be desirable that a clear framework or principle is identified and kept in mind. ... For my part, I regard the quoted passage from [*RMC*] as still the best guide and as constituting the irreducible minimum by way of legal requirement for a contract of employment to exist. It permits tribunals appropriate latitude in considering the nature and extent of “mutual obligations” in respect of the work in question and the “control” an employer has over the individual. It does not permit those concepts to be dispensed with altogether.”

Relevance or otherwise of the concept of control in interpreting the HEP

69. It is then, in our view, critical to understand this second but discrete element of the irreducible minimum in the context of the further requirements for the HEP to be triggered.

70. When considering the concept of control the courts have explained that control over how the work should be done is relevant but not essential to the question as to whether a relationship of employment exists as the nature and extent of such control will vary dependant on both the role and the experience of the worker. However, where direct control as to “how” to perform personal service is not present there must be a framework of control as the absence of control is antithetical to a contract of employment. In this sense control

reflects a requirement that in order to be an employee the ultimate authority over the worker in the performance of his work resides with the employer (see summary provided of case law up to and including *Montgomery* at paragraphs 19 – 21 of that judgment).

71. In *Ackroyd* the control necessary for the establishment of a contract of employment (whether actual or, in the case of the application of IR35 by way of the assumed or hypothetical contract) is described as having the right to exercise “ultimate” control over the provision of the worker’s services either by way of a direct contractual term or, where there was no express or implied term, through a sufficient framework of control. A distinction is drawn in *Ackroyd* (see paragraph [54]), by reference to the EAT judgment in *White v Troutbeck SA* [2013] IRLR 286, between day-to-day control of work and the situation where the employer “retained the right to step in and give instructions”. In *Atholl CA* the Court of Appeal has confirmed that the requirement for a contract of employment is control in the sense of what, how, where and when the worker carried out their work (see [99] – [107]) as appropriate in the context of the employment in question.

72. Having considered the various shapes and forms that control can take we must determine whether any form of control/direction is implicit firstly within the requirement of “made available” and secondly within the requirement that the personal service be “rendered”. We have determined it is not a requirement of “made available”. We accept that the personal service of a foreign employer’s employee can and will be “made available” to the host employer where the foreign employer puts the employee at the disposal of the host employer entitling them to deploy that worker in the performance of services by their own work and skill (as contended for by HMRC). We do so because we can see no other sensible interpretation to the ordinary meaning of the language of “made available”: made - to cause, arrange or compel; available – ready or able to be used, obtainable. On the basis that there is no relevant statutory definition and no historic case law providing a meaning other than the ordinary meaning we consider it entirely appropriate to apply the ordinary meaning of “made available”.

73. However, we see the distinction which appears to have been drawn by the Courts and tribunals when considering the concept of control as between “ultimate control” and “day-to-day control” to be important in interpreting subparagraph (b) of the HEP i.e. considering whether the personal service of each employee made available to the host employer has also been rendered for the purposes of the host’s business.

74. In this regard we note that the legislature chose to specify cumulative requirements for the HEP to apply. It would have been perfectly possible simply for the HEP to apply where the personal service of a foreign employer’s employee was made available for the purposes of the host employer’s business. So limited, putting the workers at the disposal of the host in circumstances in which the host could then decide whether, when and how to use the personal service so available would have been sufficient for the HEP to apply. However, the HEP applies only where “the personal service is made available” and “the personal service is rendered for the purposes of” the host employer’s business. We therefore consider, consistent with the presumption that Parliament intends meaning in the language it chooses, the word “rendered” must be given some meaning.

75. When considering the meaning to be ascribed to “rendered” we have in mind the purpose of the provision we are interpreting and the line between commercial subcontracting and a secondment-like arrangement. We start with the ordinary meaning of “rendered”: caused to have become and/or performed. We consider that giving the word its ordinary meaning supports a conclusion that the personal service made available must have come, at some level, under the control of the host employer such that the host is using the personal

service in a way of its choosing (rather than that of the foreign employer) within its business. In the broad (but all shapes and sizes) sense envisaged by the explanatory note, so interpreted, the worker has been seconded to the host and assimilated into its business.

76. It is in our view plain that the control required is not “ultimate control” of the type necessary to establish an employment relationship as, if the personal service rendered to the host involved the host having ultimate control, the host would be the employer and the HEP would be irrelevant. We therefore accept, though by a different journey, and with perhaps a number of nuances, the Appellant’s submission that what is required is for the circumstances, viewed as a whole, to support a conclusion that it is the host rather than the foreign employer which exercises control as to the day-to-day granular activities to be undertaken by the worker such that the host can realistically be considered to represent or stand in the shoes of the employer vis a vis the workers’ performance of their own work and skills.

77. We note that this conclusion is consistent with the limited view expressed by Judge Williams in *Goldman Sachs* when he described the HEP as invoked where “the primary contributor works for the host employer rather than the foreign employer as an employee (and not as a consultant)”.

78. Where the relevant control is exercised, we consider that the HEP provision will apply even where the foreign employer may also make available and render other aspects of a service. Thus a composite service of the type envisaged in HMRC’s guidance and which we consider to represent a commercial subcontracting relationship will not involve the making available and rendering of personal service by the foreign employer to the host employer. The foreign employer will exercise effective day-to-day control and direction of the workers as part of an overall provision of a wider service. Where however, personal service is made available and rendered such that the workers are seconded to the recipient the arrangements will fall outside that which would be recognised as a subcontracting relationship.

79. Finally, and for completeness we consider that the provision is all or nothing. There is no mechanism for apportionment and thus for the host to become liable under the HEP the whole of the worker’s personal service must be made available and rendered to the host. If the foreign employer retains the ability to divert the employee to other business of its own on a day-to-day basis (rather than generally as a consequence of the worker’s status as contractually employed) the host will not, subject to a *Hurstwood/Altrad* realistic view of the facts, become liable under the HEP. We note that this was the position recognised by Judge Williams in *Goldman Sachs* in the latter part of paragraph [45] by reference to the use of the definite article “the”. The provisions of paragraph (c) of the HEP which reference “that personal service” also supports this conclusion.

80. Having reached these conclusions we do not feel it necessary to consider the 2014 amendments to the HEP or the introduction of the specific anti-avoidance provisions.

Bilfinger

81. As was known before this case was heard it is the second in a series of four appeals listed before the Tribunal concerning the HEP in the context of workers providing a range of services on offshore installations. The first matter heard was that of *Bilfinger Salmis UK Limited v HMRC* [2024] UKFTT 736 (TC). The judgment was issued after the hearing of this appeal and whilst the judgment was being written.

82. As is readily apparent from a reading of the judgment Bilfinger’s case was presented somewhat differently to that presented by the Appellant, though with some obvious similarities. Our discussion above addresses the arguments presented to us. HMRC’s case in

each appeal held a consistency in its principal argument but also addressed the respective taxpayer's arguments.

83. Once the judgment in *Bilfinger* was released, we invited submissions from the parties.

84. The Appellant submits:

(1) The Tribunal in *Bilfinger* supported its submission that the overall legislative purpose of the HEP was to cover secondments rather than being an anti-avoidance provision.

(2) *Bilfinger* rejected HMRC's primary submission which was said to be identical to the primary submission in this case.

(3) The finding in *Bilfinger* that making available requires some degree of direction placed the focus of evidential examination on the exercise of day to day-to-day control of the employees.

(4) The Appellant's case on the law was vindicated in *Bilfinger*.

(5) The factual scenario in *Bilfinger* differed from that in the present appeal. In particular, the contracts in *Bilfinger* provided for a supply of people and not a complete or composite service and the chain of command was evidentially through the *Bilfinger* equivalent of Aramark.

85. HMRC contend:

(1) It succeeded in *Bilfinger* the Tribunal accepting core elements of HMRC's legal submissions albeit accepting that the judgment had not accepted HMRC's arguments in full.

(2) There are material factual similarities between *Bilfinger* and the present case which drive the same outcome: that the appeal should be dismissed on the facts.

(3) The core factual similarities are:

(a) The work of employees of an offshore company were used to meet the contractual obligations of a UK company to which the overseas company was not a party;

(b) There was a transfer of employment from the UK company to the overseas company and the employees were directed by the overseas company to work for the UK company on the client's installation to discharge the UK company's obligations.

86. We note that our decision on the legal arguments presented to us is similar, but certainly not identical, to that in *Bilfinger*. In particular we note:

(1) We have concluded that the vires for the HEP need not be specifically determined whereas the tribunal in *Bilfinger* considered it to have been authorised under the section 7(2) SSCBA tailpiece.

(2) Both Tribunals consistently interpret "personal service" as a distinct and severable concept excluding any notion of control.

(3) We both agree that no other language of the HEP requires the host to exercise control in an employment law sense and we also both consider that the HEP is not triggered solely as a consequence of the obligation owed by the employer to the foreign employee being put at the disposal of the host (as per paragraph [207] of *Bilfinger*). At paragraph [78] Judge Blackwell describes the additional element as "direction" whilst

we have chosen to describe the additional requirement as exercising day-to-day control. We do so simply because of language used in previous case law on the different types of control in an employment law context. However, we do not see there to be any material difference between “direction” in the sense expressed in *Bilfinger* and day-to-day control as we express it.

(4) Despite our broad agreement as expressed at (3) above we consider that the additional requirement arises from the provisions of paragraph (b) and the requirement that the personal service be rendered for the purposes of the host employer’s business whereas in *Bilfinger* the additional requirement arises under (a) in connection with making available. We note that this may be because *Bilfinger* accepted that the personal service if made available had been rendered to it.

(5) We also both agree that the HEP only applies where the personal service is made available and rendered to the host alone in any particular period.

AGREED FACTS

87. The agreed background facts and the relevant dramatis personae are set out in the Introduction section and not repeated here. The remaining facts pertinent to the issues we have to decide which are agreed between the parties are as follows:

(1) OSI is not resident in the UK and is not present and does not have a place of business in the UK for the purposes of NICs.

(2) Under the Intercompany Agreement, OSI agreed to provide services to the Appellant to enable the Appellant to meet its obligations under the Operator Contracts. The Appellant subcontracted services to OSI for each Operator Contract where (under the terms of the Operator Contract or through other direct agreement with the Operator) the Operator permitted the Appellant to subcontract its obligations.

(3) Clause 2.1 of the Intercompany Agreement provided: "In consideration of the Services Co Fee, [OSI] hereby undertakes to [the Appellant] that ... [OSI] shall provide the Services Co Services..."

(4) Clause 3.1 of the Intercompany Agreement provided: "In consideration of [Aramark OSI] undertaking to provide the Services Co Services, [the Appellant] hereby undertakes that ... [the Appellant] shall provide the UKCo Services."

(5) "Services Co Services" and "UKCo Services" are defined terms in the Intercompany Agreement.

(6) The intended operation of the relationship between OSI and the Appellant and their respective rights and obligations, and the intended operation of the Intercompany Agreement were set out in operations manuals.

(7) There was an initial transfer of employees from the Appellant to Aramark OSI for each Offshore Installation for which the Intercompany Agreement was relevant.

(8) Following the initial transfer of employees from the Appellant to OSI there were two additional ways in which OSI employed employees working on Offshore Installations: (a) where the Appellant won a new contract for an existing Offshore Installation and the Intercompany Agreement was engaged, individuals working on the relevant Offshore Installation would usually transfer their employment to OSI from the previous provider of services under the provisions of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (**TUPE**) (or on the premise that such provisions applied); and (b) to the extent required, further employees were engaged

directly by OSI, with human resource services needed to engage the employees provided by the Appellant.

(9) The offshore hotel and catering industry is unionised. The terms and conditions of employment contracts for employees of OSI working on Offshore Installations in the UKCS were standardised and incorporated terms and conditions from the joint memorandum of agreement between the Caterers Offshore Trade Association, Unite the Union and the Rail, Maritime and Transport Workers Union (the “**COTA Agreement**”).

(10) The most senior member of OSI staff on any Offshore Installation was the Chef or Unit Manager who had responsibility for leading the hotel and catering services on Offshore Installations, including the direct line management of on-installation personnel.

88. We note two further particularly important facts which we understand to have been agreed between the parties, but which were not recorded in the statement of agreed facts:

(1) The first is that not all Offshore Installations in respect of which the Appellant was contracted to provide services to Operators were subject to the subcontracting arrangements with OSI. In some instances, the Operator objected to the subcontracting arrangements.

(2) The second is that each Offshore Installation is staffed by two groups of workers: those dedicated to working on the particular installation (**Core Crew**) and itinerant workers who may be asked to work on different installations (**Ad Hoc Crew**) (together **Crew**). Any worker who works continuously on a particular installation for six months or more becomes contractually entitled, pursuant to the COTA Agreement, to be treated as Core Crew. Where an installation is closed, or the contract is transferred to an alternative supplier, Core Crew have rights not otherwise available to Ad Hoc Crew.

EVIDENCE

89. We were provided with a document bundle of 5,003 pages.

90. In addition we received witness statements from: Mr Andrew McLeod Thomson (**AMT**) current managing director of the Appellant’s Global Offshore division; Donna Joan Vass (**DJV**) formerly HR director for the Appellant’s Global Offshore division; and Douglas Norman Lowbridge (**DNL**) current Chef Manager on the Dunbar installation operated by Total Group. All witnesses gave sworn oral testimony and were subject to cross-examination and re-examination.

91. No evidence was given by any officer of OSI.

92. Given the volume of evidence made available to us this judgment is, necessarily, only a summary. We have carefully considered all documents from the bundle to which we were specifically referred by the parties or to which we have referred below. In doing so we are satisfied that we have acted in accordance with the overriding objective and cognisant of the guidance provided by the Upper Tribunal in *Adelekun v HMRC* [2020] UKUT 244 (TCC) in which it was stated:

“... It cannot be assumed that just because a document appears in a hearing bundle that the tribunal panel will take account of it; if a party wants the tribunal to consider a document then the party should specifically refer the tribunal to it in the course of the hearing (see *Swift & others v Fred Olsen Cruise Lines* [2016] EWCA Civ 785 at [15]). This is not least to give the tribunal adequate opportunity to consider and evaluate the document in the light of the reliance a party seeks to place on it, but also to give the other

party the opportunity to make their representations on the document. That is particularly so where, as here, there were several hearing bundles before the FTT relating to the various previous proceedings and the one containing the relevant additional documents was voluminous comprising 434 pages."

93. We have not excluded from our consideration any document to which we were referred unless so indicated in our consideration of the evidence. However, we do not refer to every document; rather we refer to those on which we rely on to form our view.

94. In the sections concerning the evidence of the individual witnesses we set out the salient points of evidence as derived from their witness statements and through the lens of their oral testimony which, in the main, consisted of lengthy cross-examination. As the statements ran to over 50 pages and we took oral testimony over 3 days, our recitation of the witness evidence is also necessarily a summary.

95. The Appellant presented its evidence carefully by reference to "the Relevant Period" i.e. the period to which the Decision relates 6 August 2011 – 5 April 2014. Mr Tolley steadfastly challenged the relevance of limiting our field of perspective to that period. It is not clear to us why the Appellant so rigidly sought to tether the evidence to the Relevant Period. By reference to the documentary evidence and the evidence of each of the witnesses it is plain to us that the arrangements put in place from 8 October 2004 and effective until 11 March 2017 did not change materially over their period of operation. We have to determine whether in the Relevant Period the consequence of the arrangements rendered the Appellant liable to 2ary C1 NICs and that is what we do but we do so by reference to the evidence of the arrangements over the full period in which they were in operation. The fact that the legislative changes post 6 April 2014 rendered the Appellant definitively liable under the amended HEP does not affect the findings of fact we make on the evidence before us. Nor does the fact that HMRC were out of time to issue section 8 decisions for the period prior to 5 August 2011 affect our view as to the facts.

Burden of proof

96. In this appeal the Appellant bears the burden of establishing that it is not liable as a host employer to pay 2ary C1 NICs. If we are satisfied on the balance of probabilities, by reference to the proper interpretation of the HEP and on the facts, that the personal service of the workers were not made available to the Appellant and/or rendered for the purpose of a business carried on by the Appellant, no liability will arise. If the Appellant cannot so satisfy us then the Decision will stand. There is no dispute as to the quantum of the sums due in the event that the Appellant is a host employer.

Documentary evidence

International Employment Plan

97. During the period 2003 – 2004 Deloitte provided advice to the Appellant concerning a proposed restructuring of the Appellant's offshore services business in the UK. We were provided with the full report of a feasibility study from November 2003 and an executive summary document entitled "Aramark Limited – International Employment Plan" prepared in June 2004. The proposal followed the market in the sense that the report/summary identifies that the Appellant's competitors had undertaken similar restructuring over the period commencing in 1996. The asserted aim for the Appellant was therefore to regain the edge lost to those competitors who, it appeared, had satisfactorily managed to achieve a labour cost reduction by the elimination of the 2ary C1 NICs charge otherwise due in respect of the workforce delivering services to offshore installation operators. The restructuring was to be carried out with minimum disruption to customers, commercial operations and employees. Deloitte noted that circa 700 employees employed by the Appellant were, pursuant to the

restructuring, to be transferred to OSI. Notice of the transfer was given on 8 May 2004. With effect from 1 June 2004 it was proposed that such employees, together with the other necessary facilities to meet the Appellant's contractual obligations to the Operators, would be subcontracted back to the Appellant by OSI thereby ensuring that OSI was able to provide a complete subcontracted service and not simply the provision of staff.

Operator contracts

98. We were provided with four contracts with Operators. Such contracts take two principal forms: those which incorporate, subject to specific amendments, the LOGIC Standard Contract for the UK Offshore Oil and Gas Industry and those that reflect the LOGIC terms. The parties agreed that a contract signed between the Appellant and CNR International (U.K.) Limited (**CNR**) on 11 October 2011 was representative of a contract incorporating the LOGIC terms and a contract made on 1 August 2011 between the Appellant and Nexen Petroleum U.K. Limited (**Nexen**) was representative of a contract reflecting the LOGIC terms. We therefore limit our consideration of Operator contracts to these two contracts.

CNR contract

99. Under the CNR/LOGIC terms the Appellant agreed to provide "all management, supervision, personnel, materials and equipment ... plant, consumables, facilities and all other things whether of a temporary or permanent nature, so far as the necessity for provision of the same is specified in or reasonably inferred from the contract."

100. The Appellant was required to comply with, and strictly adhere to, CNR's instructions and directions on all matters related to the work undertaken pursuant to the contract as specified in the scope of work.

101. The scope of work precisely specifies a menu plan for the delivery of meals and snacks. By way of example the requirements for breakfast specify exactly what range of items shall be available; at lunch and dinner the Appellant must offer a minimum of four main dishes on a rotational basis including a vegetarian dish, jacket potatoes and fillings plus à la carte options to include a fish dish. Themed meals are required to be offered on a twice monthly basis with sample menus provided for such themed meals. All necessary raw materials are required to be procured by the Appellant in order to prepare and serve the catering requirements specified.

102. Similarly specific and particularised requirements are set out in the scope of work for the operation of the bond (akin to a tuck shop); housekeeping for living quarters, dining rooms, galley area, food stores, recreational rooms, offices, exercise rooms, corridors, stairs, bathrooms, toilets etc. with frequency and particulars of cleaning specified for each area; the same applies to laundry services including the provision of specific quality of laundry and its washing.

103. The contract also provides a timetable for replacement of light equipment (including cutlery, bakeware etc.).

104. In terms of personnel the Appellant was required to provide a combination of operational personnel in the form of the Core Crew and the Ad Hoc Crew. The qualifications for workers and training requirements are all particularised. Job descriptions for the unit/field manager (**UM**), chef team leader, food production supervisor, chef, baker, assistant chef, chief steward, and handyman are all provided.

105. The remuneration payable under the contract was calculated separately for onshore and offshore activities with the offshore activities reimbursed at a day rate which included: all costs of food, beverages, materials and provisions, including cleaning consumables required

under the scope of work (as specified in the contract by way of a “shopping basket”) including delivery by the Appellant to CNR’s nominated on-shore delivery point; all costs associated with personnel, container costs, overhead and profit. The calculation of the separate components of the day rate were prescribed in the contract.

106. The shopping basket requirements were extremely detailed i.e. “boneless rump, first grade, steer, grass fed, EU country of origin at £4.26 per kg”, “Cheddar cheese, mature white at £2.51 per kg”. The brand of coffee was identified, with different selected brands for caffeinated and decaffeinated.

107. The personnel rates forming part of the day rates included salary, bonus, PAYE taxes, NICs and all other payroll related costs together with training costs, change-over crews etc. The contract provided:

“[the Appellant] will engage employees on a US payroll basis. If in the opinion of [the Appellant] (acting reasonably in discussion with [CNR] it is appropriate to move employees back to a UK payroll then this will have to trigger a re-negotiation of the labour rates as detailed within.”

108. For each specific installation, the number of crew were identified by reference to the number of persons on board (**POB**) i.e. for 0 - 40 persons on board the Ninian Northern Asset in the period 1 September 2010 to 31 August 2011 4.25 catering crew were required at a day rate of £61.89. However, the contract confirmed that the rates payable to the individual workers were set by reference to the COTA Agreement.

109. In accordance with the general terms of the contract:

(1) The Appellant was not entitled to subcontract the whole of the work but was permitted to subcontract part of the work subject to approval and review (not to be unreasonably withheld) and on condition that the Appellant remained responsible for all works undertaken by any subcontractor (clauses 9.1 and 9.2 LOGIC standard terms).

(2) The Appellant undertook to provide sufficient competent and properly qualified personnel to ensure performance of the work in accordance with the contract and subject to CNR’s right to instruct the Appellant to remove forthwith any worker who was incompetent, negligent, engaged in detrimental activities or not conforming with safety procedures and provide a suitable replacement (clause 9.8 LOGIC standard terms)

110. As originally agreed, the list of approved subcontractors provided for the subcontracting of a range of service provision. Having considered the aspects of the service said to have been subcontracted all subcontractors appear to have been engaged in respect of offshore provision. OSI was not specified as a subcontractor in the contract when signed. However, we understand, by reference to redacted emails we were provided with (and as confirmed by AMT) CNR gave approval for the subcontract to OSI.

111. The contract included a schedule specifying the health and safety requirements to be complied with.

112. Performance under the contract was managed through detailed key performance indicators.

113. Similar specification was separately made by CNR in respect of operations for which the Appellant was engaged relating to onshore facilities operated by CNR. We were not concerned with these operations and have not considered the terms of the contract in this regard.

Nexen contract

114. The Nexen contract provided broadly similar terms to the CNR contract with the consequence that we do not provide the same level of narration on the contract. However, we note:

- (1) The scope of services was set out in exhibit B to the contract and provided for offshore catering, housekeeping and maintenance services on offshore installations including management services to ensure the proper control of the catering/housekeeping/maintenance services. As with CNR, how the services were to be provided was very particularised. Again by way of example, a list of required condiments, including brand, are specified. The exhibit appendices provide specific meal plans.
- (2) Exhibit C sets out the basis of remuneration by reference to “man-day rates” inclusive of all food, consumables, equipment repair costs and personnel costs by reference to the number of POB. The man-day rates may have been reduced where the Appellant was able to secure discounts on supplies of consumables. However, the cost of personnel was acknowledged to be determined in accordance with COTA rates.
- (3) This contract provided for subcontracting subject to approval but did not limit the extent to which subcontracting was permitted. As with CNR subcontracting did not relieve the Appellant of any of its obligations or liabilities under the contract.

Intercompany Agreement

115. On 1 June 2005, the Appellant and OSI entered the Intercompany Agreement effective from 8 October 2004. We were provided with two amendments to the Intercompany Agreement. The first updated the Operator list and the second amended the agreement in order to provide the Appellant with greater authority to deal with HR and personnel issues. The relevant terms of the Intercompany Agreement were:

- (1) Recitals – these acknowledge that the Appellant was party to the Operator contracts listed in Schedule 1 of the Intercompany Agreement (and included the CNR and Nexen contracts) and that it wished to subcontract the provisions of servicing to enable it to meet certain of its obligations under those Operator contracts. However, the Appellant did not intend to novate the Operator contracts or transfer/assign any rights or liabilities under those contracts.
- (2) Pursuant to clause 2.1 OSI undertook to the Appellant that it was to provide the “Services Co Services” to the Appellant in consideration for the Services Co Fee and to use its best endeavours to ensure that the obligations of the Appellant under the Operator contracts were discharged in so far as they related to the provision of the Service Co Services. Services Co Services were defined as:

“the provision of services to enable UK Co to meet its obligations to provide to the [Operators] under the [Operator contracts], including without limitation:

- (a) Catering and similar services;
- (b) Provision of support and other specialist services;
- (c) Control and management of manning levels such as recruitment and dismissal of staff;
- (d) Other services as may be agreed by the parties of this agreement

Which would but for this agreement be performed directly by UKco.”

(3) Clause 3.1 provided that in consideration of OSI undertaking to provide the Services Co Services the Appellant was to provide OSI with the UKco Services. The defined term provided that UKco Services were: “all those services which are immediately prior to [8 October 2004] provided by [the Appellant] to fulfil [its] obligations under the [Operator contracts]”. However, clause 3.1 proceeds to particularise “without prejudice to the meaning of the term UKco Services ... without limitation” that the following services were required to be provided by the Appellant to OSI:

- (a) Personnel services – including without limitation (and by way of a summary of the more complete list provided in clause 3.1): implementing selection and recruitment procedures authorised by OSI (including interviews and making recommendations regarding engagement); issuing employment contracts prepared by OSI; receiving and verifying competence of personnel; providing advice on general employment best practice; assistance with implementation of agreements with third party manpower providers; providing training, welfare service and medical examinations; payroll administration; accounting and administration of a UK bank account for the purposes of carrying out OSI’s obligations in the UK. These services were also supplemented under paragraph 3.6 by services to support disciplinary investigations so as to make recommendations to OSI and to provide the support necessary to conduct appeals against disciplinary decisions in each case with the Appellant acting “as if it were the employer” of OSI’s staff.
- (b) Provision of appropriate materials, goods and equipment when requested;
- (c) Provision of mobilisation, demobilisation and general logistical services for material goods, equipment, and personnel;
- (d) Arrangement of travel and accommodation for OSI personnel;
- (e) Assistance relating to health and safety;
- (f) On-shore technical assistance;
- (g) Provision of appropriate third-party services;
- (h) Payroll accounting;
- (i) Intercompany billing services.

(4) Clause 3.3 provided that the Appellant would make available all equipment and the benefit of third-party supplier contracts.

(5) The fees payable in respect of the Services Co Services and the UKco Services (though we note that the UKco Services were not, pursuant to clause 3.1, made in consideration of the UKco Fee) are provided for in clauses 4 and 5 respectively. The Services Co Fee was stated to be at a “daily rate or in such other manner as may be agreed in respect of each [Operator contract]”. The UKco fee was payable monthly calculated to take account of the reasonable costs incurred by UKco in providing the UKco Services and was payable in addition to a management fee.

(6) Clause 6 records that the Appellant and OSI intended to transfer the contracts of employment of a specified schedule of employees from the Appellant to OSI, subject to the employee’s right to object. Attached to the Intercompany Agreement were template letters to Core Crew employees informing them of the transfer. The first template letter dated 30 September 2004 notifies the employee of the proposed transfer (by reference

to an earlier letter of 3 May 2004). The letter reassures the employee that their employment with “Aramark” will not end but will simply transfer from the Appellant to OSI. The second is dated 18 March 2005 and sent on OSI headed paper and signed for and on behalf of OSI by one of the Appellant’s employees. The letter encloses the new OSI employment contract and invites the employee to raise any queries with their UM. It also emphasises that the contract “contains no material change to [the employee’s] terms and conditions of employment.”

(7) The Intercompany Agreement contemplates at clauses 11.3 and 11.4 that any new contracts entered by the Appellant with Operators may be subcontracted to OSI under the Intercompany Agreement.

116. We were provided with a single invoice number 179 issued on 25 November 2011 issued under the Intercompany Agreement. The invoice stated it was for a “composite charge for period 2 2012 in line with subcontract agreement dated 1 June 2005” and was in the sum of £3,563,065.08 plus VAT. Attached to the invoice was a list of personnel costs by employee reference and including pay code and a description of the charge for period 1 there were 92 employee numbers listed. We could not decipher the majority of charges but certainly, salary, overtime and travel were included and appeared to be for a group of employees but not for an individual Offshore Installation or even a single Operator contract. No food or consumable invoices were particularised as costs forming part of that invoice.

117. We were not provided with accounts for OSI, although we were provided with the corporation tax computations for accounting period ended 27 September 2013. These showed purchases and overheads of £17,089,212 and wages and salaries of £26,964,318 for that year.

Company Operating and Procedures Manual

118. The version of the Company Operating and Procedures Manual (**Operations Manual**) made available to us was that from 2013. We were not led to believe there had been any material changes to it in the period in which OSI was appointed under the Intercompany Agreement and we therefore assume that to be the case.

119. The purpose of the manual was stated to be to provide guidance on the way in which the Appellant and OSI (including personnel of those companies) would operate in relation to the supply of managed offshore services and administrative assistance under the Intercompany Agreement. It was stated to be an administration guide “not normally made available to employees generally”. The documents included sections on:

(1) Corporate governance – providing that the officers of OSI were required to (a) ratify actions taken by the Appellant under the delegated authority provided by the Intercompany Agreement, (b) review commercial strategy against forecasts and results; (c) review changes of policy and (d) monitor the level and quality of support services provided by the Appellant. Quarterly reports provided by the Appellant were to be reviewed at quarterly meetings attended by the relevant officers of the Appellant.

(2) HR and personnel matters –The background to this section noted that: OSI supplied offshore services to the Appellant to assist them to fulfil their obligations to the Operators, OSI was the legal employer of the personnel and contractually responsible for the employment relationship but that “much of the administration and support of these matters [was] subcontracted to the Appellant”.

(a) Specifically as regards recruitment the manual recognised that with the exception of senior roles (Chef Manager/Unit Manager/Camp Boss/Facilities Manager) (**Senior Staff**) “authority [was] automatically provided to the Appellant

and no prior approval [was] required for appointment". For these staff, the OSI relevant member of Senior Staff would notify the Appellant of recruitment requirements and the Appellant would report on its activity back to OSI on a monthly basis. For the Senior Staff prior approval by OSI was required. When recruiting, advertisements may have been in the name of OSI or simply Aramark. Offer letters and contracts were prepared and signed by the Appellant on behalf of OSI, using templates created by the Appellant but approved by OSI. Similarly, as regards leavers, the Appellant was authorised to process leavers and reported quarterly to OSI.

(b) The Appellant was responsible for notifying OSI of expected redundancies at the earliest stage possible.

(c) The Appellant was also responsible for compliance with all TUPE requirements where required through award or loss of contracts or where personnel were to be redeployed to a different contract.

(d) Pay awards for graded staff, determined by reference to the COTA agreement were managed and notified by the Appellant and reported to OSI quarterly. The Appellant made recommendations based on the COTA award for senior staff. Advance approvals were required to be sought by the Appellant for accelerated promotions of graded staff and any promotion of Senior Staff.

(e) The Appellant managed all training and development and performance management on behalf of OSI. Training was reported quarterly.

(f) Disciplinary procedures for graded staff involved a report from Senior Staff to the Appellant which then investigated prior to seeking prior approval from OSI before taking any action. These requirements were subject to a right for the Appellant to remove staff with immediate effect at the request of an Operator. Notification to OSI during an investigation was also required if there was a likely claim against OSI or a risk of commercial loss or reputational damage. Any disciplinary issue notified to the Appellant concerning Senior Staff required prior approval to be obtained before any investigation began. The management of appeals was delegated to the Appellant.

(g) The handling of minor grievances was delegated to the Appellant and reported quarterly. More serious issues and collective grievances required the involvement of OSI at the earliest opportunity and pre-approval was required for any action to be taken.

(3) OSI employees were required to operate under the Appellant's Health and Safety plan and performance against the scorecard was monitored and reported by the Appellant. Offshore accidents were investigated by Senior Staff and had to be reported to the Appellant which would then, as appropriate, report serious incidents back to OSI. All training, welfare support and medical examinations was undertaken by the Appellant at OSI's cost with such provision being reported quarterly.

(4) Finance and reporting was also delegated to the Appellant and considered by OSI quarterly. The Appellant processed and paid all accounts payable on behalf of OSI without approval for payment being required unless the invoice exceeded £5,000 and was not from an existing supplier. Purchase orders were required to be raised on OSI headed paper. The Operations Manual indicated that a bank account in the UK was being established from which all payments would be made; however, that bank account was never actually opened.

(5) Payroll was by reference to timesheets completed by graded staff and submitted by Senior Staff to the Appellant and subject to signoff by the Operator with queries being directed to Senior Staff and subject to internal review by the Appellant. However, payment of salaries was required to be pre-authorised by OSI. The Appellant was the authorised representative for OSI with the tax authorities.

(6) It was envisaged under the Operations Manual that all contracts with third parties relating to the services provided by OSI to the Appellant would be between OSI and the third party or as a tripartite agreement with the Appellant where the supplier also supplied the Appellant. However, the Appellant would negotiate all terms and only required approval for such contracts.

Operations Manual

120. We were also provided with copies of the Aramark Offshore Operations Manual (**AOOM**). We understand that the AOOM applied to all Offshore Installations and not only to those whose personnel were employed by OSI. Certainly, no reference is made to OSI within the AOOM. It is a document whose “owner” was an Operations Manager (**OM**), a role we understand to be an on-shore role, with the incumbent of the role being an employee of the Appellant.

121. The AOOM run to over 100 pages and is very detailed in scope covering: accommodation management, bond management; client and customer relations, contract performance review, financial management, food production management, heli admin services, logistics, managing people, offshore payroll procedures, offshore waste management procedures, purchasing, sub-contractor management, mobilising/de-mobilising a contract, Sarbanes Oxley, compliance, audit and control, live food and bond, emergency response and container management.

122. We note that the document viewed as a whole sought to provide a comprehensive framework providing the delineation and responsibilities between onshore and offshore personnel. For those Operator contracts where the Appellant employed both onshore and offshore staff the delineation represents only a matter of effective service delivery. However, and for present purposes, the parties each relied on the minutiae of the division each seeking to show where control and/or day-to-day direction lay in order to determine the issue in this appeal. The offshore responsibilities under the AOOM lie with the unit manager (**UM**) who is defined as the “Aramark Manager who is responsible for running the Contract on Aramark’s behalf” (with Contract defined as the legally binding document between Aramark and [the Operator] which defines the scope of service and performance levels).

123. As this document remains a live document governing how onshore and offshore employees work together, we use the present tense:

(1) The introduction and definitions section. The document states that it “explains the policies, procedures and systems by which we run our offshore business” (our emphasis). The role of the UM in respect of the manual itself is to maintain the hard copy (switching out obsolete pages etc) and instructing and training their team to work according to its terms.

(2) The information said to be found in the AOOM is:

- “1. Step by step procedure.
2. Controls that must be applied.
3. Basic standards which must be achieved.”

(3) The objective of Section 1, concerning accommodation management, is stated to be to “enable the [UM] to provide an efficient and cost-effective accommodation

service that maintains a clean, healthy and hygienic environment”. It requires the UM to manage and organise the accommodation services within agreed quality standards, inventory levels, budgetary constraints, and contract specification and to manage the personnel under the control of the UM. The specifications of service then provide greater particularisation as to how the service is to be provided in broadly similar terms to the service specification set out in the Operator contracts. In this section all responsibility rests with the UM. The OM has no specific role.

(4) Similarly, all responsibility rests with the UM in connection with bond management. The UM is required to manage the bond shop in line with the Appellant’s contractual terms and guidelines and to achieve the financial targets set by the Appellant. The prices set for the goods in the shop and the nature and amount of the change fund are determined by the OM. The process of reconciliation of sales is carried out by the UM but sent to the OM.

(5) Under client and customer relations the AOOM recognises that the UM is the most senior Aramark representative offshore and therefore on the front line of interaction with the Operator. However, the UM works with the OM to promote and maintain good relationships with the Operator, and “constantly strives for continued improvement within the delivery service by the ARAMARK team”. The UM is required to adhere to the Operator contract documentation, in particular the scope of works. However, any concerns regarding the contractual obligations are to be resolved in consultation with the OM who bears ultimate responsibility for “ensuring that action required to rectify [a] problem has been taken”.

(6) Responsibility for contract performance review sits between the UM and the OM. The objective notes that effective management is the key to the success of the Operator contract through maintaining control of the various areas of responsibility. The UM is responsible for those aspects of the contract under their purview (catering, housekeeping and additional support) with the OM communicating key performance indicators (**KPIs**) and supporting, coaching, and counselling the UM to achieve the KPIs. This section provides that the OM conducts the UM’s career management process by which the UM’s performance is assessed.

(7) The OM communicates financial management targets to the UM and then supports, coaches, and counsels the UM to ensure those relating to housekeeping, catering and additional support services are achieved. There is a high degree of granularity as to the financial targets to be agreed by the OM including stock levels and the procedures in place for the management of stock, purchasing etc. The UM is responsible for the day-to-day implementation of the procedures as prescriptively set out in the AOOM or agreed with the OM.

(8) Even as regards food production management the responsibilities are split between the UM and the OM. Whilst the UM “actively manages the compete stockholding, the food production, menu planning and inventory levels” they must do so within the unit budget and contract specification (as set by the Appellant) and otherwise in accordance with the Appellant’s procedures and specifications as agreed with the Operator and subject to monitoring by the OM.

(9) We note, though no party expressly took us to the Logistics section, that the responsibility for the movement of personnel and the resourcing of each trip was that of the Appellant. The UM’s involvement was solely to investigate instances of “non-conformance” with advice from the Appellant’s HR team.

(10) The section on “managing people” was a particular focus of both parties. This section prescriptively explains the process by reference to which workers are inducted into Aramark generally and to the unit on which they will work. The UM is responsible for offshore components of the induction and undertakes the first three required trip assessments. For Ad Hoc Crew, the UM will undertake a monthly assessment for the first trip essentially by way of what appears to be probational performance assessment. Annual appraisals for all employees are conducted with the immediate manager. The AOOM provides that the OM will support and coach the UM, review, and sign all appraisal forms and report back to the UM with any comments from the appraisal forms.

(11) Training for employees is of significant importance to the Appellant. Responsibility for monitoring, managing, and delivering training sits across the managing director (responsible for high level strategy), UM for a training plan for the unit, the delivery of basic offshore training and ensuring that each individual meets their training requirements. The Logistics/Payroll manager, senior HR (management and function) and logistics also all have a role to play.

(12) UMs are required to participate in the Management Induction Programme on appointment. Under the programme their performance against certain required competencies are assessed and approved. The OM monitors that the UM is progressing and completing the relevant modules/assessments required.

(13) First line individual performance of graded unit staff is the responsibility of the UM initially through annual appraisals and subject to receiving support and guidance from the OM and HR. Separate disciplinary procedures are prescribed for situations described as conduct issues (where the employee is able but not willing) and capability issues (willing but not able). In the latter situation the AOOM recognises that the issue is likely to be resolved by training and/or through occupational health. Disciplinary action may be required regarding a conduct issue; given the possible consequence of a conduct issue the AOOM specifically requires input from the OM or HR.

(14) In respect of grievances line management is the first line unless the grievance concerns the line manager themselves. The UM will usually be involved at the informal investigation stage with the OM’s involvement coming only when, and if, the grievance cannot be resolved informally.

(15) Any situation involving redundancy requires that the Appellant’s procedures are adhered to with the involvement of HR; however, the UM is likely to carry out the consultation interviews.

(16) All overtime by unit staff must be authorised by the OM and usually ultimately the Operator.

(17) Purchasing responsibility is split between the contracts department (which negotiates and agrees supplier contracts and issues supplier lists to the OM and UM), and the UM, who may only purchase from approved suppliers and must follow specified purchasing procedures, obtaining, where necessary, appropriate approvals from either OM or directly from the Operator.

(18) We note that the UM has a limited role as part of a team including HR, OM, and logistics in respect of the delivery (but not creation) of a mobilisation or de-mobilisation plan.

Reporting material

124. We were provided with quarterly reports prepared by the Appellant and provided to OSI for quarters ended 30 June 2011 and 30 September 2011.

125. The reports each contain some general information, which was identical in each, setting out key points concerning contracts of employment, recruitment, disciplinary procedures, redundancy, and grievance procedures. These key points delineate responsibility between the Appellant and OSI broadly reflecting the Operations Manual. They provide that a nominated director be involved in any significant HR action concerning Senior Staff. In the case of recruitment the notes also state that approval would be sought from OSI (the same is not stated to be the case for redundancy, disciplinary or grievance). All procedures concerning Senior Staff leading to any decision were managed by the Appellant “as delegated” by OSI. For graded staff HR decision making was entirely in the hands of the Appellant and reported to OSI on a quarterly basis.

126. The reports then provide a list of new starters, disciplinaries/dismissals, grievances, and redundancy. We note that, included within the grievance information, was a collective grievance regarding the Icelandic ash cloud, which must have been ongoing as the eruption occurred in April 2010. Data was provided on employee training given.

127. Also provided within the report is profit and loss and other financial information as envisaged in the Operations Manual.

Distributor agreement

128. We were provided with a copy of an agreement between the Appellant, OSI and Strachans Limited dated 22 June 2012. It is a tripartite supply agreement pursuant to which Strachans was appointed by both the Appellant and OSI (who throughout the agreement were, together, referred to simply as Aramark) as the preferred provider of food, cleaning products and disposables, equipment, uniforms and textiles and products for the bond in respect of Offshore Installations where such installations are “Participating Locations”. We understand that all the food, consumables etc. provided to the Offshore Installations with which we are concerned were supplied to OSI by Strachans and then supplied by OSI under the terms of the Intercompany Agreement despite the provisions of clause 11.3 of the Intercompany Agreement but reflecting the provisions of the Operations Manual. Under the agreement between Strachans and OSI the price of food and consumables needed to meet the terms of the Operator contracts was provided by reference to a formula that included the cost of the goods and an agreed markup by reference to category of goods and the costs of distribution.

129. Under clause 3 of the Strachan’s agreement participating locations would place orders in writing or through the online ordering system operated by the Appellant. We assume the use of that system was made available to OSI by the Appellant pursuant to clause 11.3 of the Intercompany Agreement. The orders were then processed by Strachans for delivery to the nominated delivery point for loading on to vessels and transported to the Offshore Installation (as per the Operator contracts the Appellant was responsible for delivery to the nominated delivery point from which the Operator then took responsibility for transportation to the Offshore Installation).

130. The invoices available to us in the bundle from Strachans were made out to OSI c/o the Appellant. We assume that, as OSI did not have a UK bank account, all the invoices issued by Strachans were paid by the Appellant. As indicated above, we saw no recharges by OSI to the Appellant in respect of food or cleaning consumables.

Contracts with employees

131. We understand that the employment of Ad Hoc Crew was not transferred until 6 April 2006. We were provided with the standard letter dated 16 March 2006. We were also provided with FAQ's and, so far as relevant these FAQs provided:

“What happens if I am put on a platform where the client has not agreed to the transfer to [OSI].

Any such location will still be contracted to [the Appellant] and accordingly, you will be seconded to [the Appellant] for the duration of that period. This will be processed automatically by our Payroll function and will neither have any impact on your terms and conditions nor require any active input from yourself. (original emphasis)

132. We understand that the template contract attached to the Intercompany Agreement was used in respect of the Core Crew of the Appellant listed in schedule 2 to the Intercompany Agreement and for employees subsequently recruited to work on the Offshore Installations in respect of which OSI was engaged as subcontractor. This was not however, all employees working on Offshore Installations. As confirmed by AMT there were Operators which did not give their consent to the Appellant subcontracting to OSI. The Core Crew working on those Offshore Installations continued to be employed or were employed upon recruitment by the Appellant. We were not provided with example or template contracts for employees of the Appellant performing similar or identical roles as those employed by OSI but assume that the terms and conditions were the same and only the name of the employer was different.

133. The template agreement and those we saw for a number of employees provided that the employer was OSI and stated that they met the requirements for a statement of applicable terms as required by section 1 Employment Rights Act 1996. Place of work was stated to be on offshore installations as allocated to the employee on the UKCS or any other reasonable location. The contract incorporates the COTA. The agreements we saw were signed for and on behalf of OSI by an OM or a senior OM, i.e. an employee of the Appellant.

Other material concerning employees

134. We were also shown examples of disciplinary materials. The letters are on OSI headed paper and are signed for and on behalf of OSI by an employee of the Appellant. Invitations to disciplinary procedures name the person inviting as an employee of the Appellant and interviews were conducted on shore at the Appellant's offices. The narrative of a letter communicating the outcome of a disciplinary takes account of the comments and views of both the UM and the OM. The letter is signed for and on behalf of OSI by an employee of the Appellant.

135. Copies of new employee assessment sheets were provided to us, completed by the UM. These had only space for signature by the employee and the UM. Staff appraisal forms provided for space for comments from the UM (as appraising manager) against specific competencies and general comments with space for signature by a senior manager (though often on those we saw there was no senior manager's signature).

136. There was a copy of the employee handbook in the bundle. We note that it does not appear to be an OSI handbook but one generic to all employees either of the Appellant or OSI working offshore or on remote sites. The handbook covers the topics we would expect to find in any employee handbook. Section B4 concerns reporting for duty which requires those living more than 26 miles from the departure point to travel to the point of departure the day before a shift begins. The Handbook provides that where there is a failure to report on time it is “assumed [that the individual] has terminated [their] employment voluntarily without notice or reason]. An employee who does not contact the HR department within a 24-hour

period, prior to or immediately after the crew change and can provide an explanation for [their] absence, may receive a disciplinary warning in the form of a final written warning.”. Similarly, there is an obligation (B13) to hold and carry a valid passport and failure to do so is also a disciplinary matter. Similar stringent requirements are imposed regarding certifications and health and safety compliance.

Witness evidence

AMT

137. We found AMT to be an honest and competent witness and we broadly accept his evidence. There were some minor matters on which AMT’s evidence was not entirely clear but we did not consider them material to the decision we have to take.

138. AMT has been an employee of the Appellant since 2006 at various levels in the business and within various departments/divisions. His predominant responsibilities throughout his period of employment have been associated with the UKCS and Offshore Installations though at various points he has also had other responsibilities.

139. AMT explained:

(1) The circumstances in which operations on an Offshore Installation are carried out are all but unique. The remote location, inaccessibility and, prior to more recent developments in technology, communication constraints together create a substantive constraint on the degree to which onshore operations were directly involved in the daily functioning of an Offshore Installation.

(2) The role of the operations function is focused on the Operator and ensuring that the contracts are performed in accordance with its terms to the satisfaction of the Operator. That role sets the context for the interactions between operations and the individual UMs on the various Offshore Installations operated under the Operator contract or contracts for which the OM will be responsible. It is critical that the operations team has full visibility of the performance of the contract in order to manage any questions or issues arising from the onshore Operator team.

(3) The UM is responsible for the management offshore ensuring high quality in budget delivery. They are also on the front line with the client 24 hours per day 7 days per week throughout the year (shift by shift) and have the key relationship with the Offshore Installation Manager (**OIM**). The UM therefore performs an essential role in the performance of the Appellant’s contractual obligations to the Operator. It was noted in the statement that “[The Appellant] win[s] contracts based on the reputations of OSI’s [UMs] and how easy they are to deal with, this is really important to the [Operator] when selecting their catering service provider.” The UM’s primary concern is safety and ensuring that the safety requirements set by the Operator are met.

(4) The UM line-managed the offshore staff both in a reporting sense and in terms of directing their day-to-day activities. The UM was the first point of contact for any issues faced by staff whilst offshore, whether those issues be work or domestic issues. The OM, and in extremis (in the event of a need to evacuate from the Offshore Installation), logistics would be available to advise and assist the UM to manage and resolve issues. This was part of the UM’s duties associated with offshore personnel management carried out in accordance with the Operations Manual and AOOM (see discussion above). Involvement of the Appellant’s onshore support was consistent with the procedures and protocols set out in those documents.

(5) Whilst the UM reported to an OM in terms of annual appraisals and provided contract performance review data to the OM there is, and certainly in the period in

which OSI was the employer of staff, a high degree of autonomy in terms of the UM's activities whilst on duty on the Offshore Installation, akin to monitoring as opposed to supervision. Interactions between the UM and onshore staff have increased with technology and an assessment of current interaction levels may give a distorted view as to quite how autonomous the UM was when employed by OSI. At all times, the UM has been solely responsible for ordering food and consumables, meal planning etc. within the financial constraints of the Operator contracts and, to the extent necessary, in consultation with the OIM. Such consultation would be required particularly where, for example, there were transportation difficulties, and the UM was making do with what was on the Offshore Installation pending the arrival of supplies. Where, again by way of example, supplies were required to be delivered by helicopter rather than sea the UM would then engage with operations and logistics to ensure that the delivery could be made from Strachans. Certain emergencies: disciplinary matters, significant breach of policies, complaints, or injuries would also require dialogue between the UM and the OM.

(6) On a routine basis there was therefore little need for communication between the UM and the OM with communications being limited to contract performance reporting. Generally, the UM would act by reference to the AOOM (a document owned and drafted by the Appellant (operations, logistics and HR)) but by reference to such adaptation as was driven by the precise circumstances of the Offshore Installation on which the UM operated. The AOOM was drafted by reference to the Aramark Safe System Active Monitoring protocols (**ASSAM**) which might need to be adapted to the particular environment; such adaptation would be down to the UM and communicated by the UM to the unit team.

(7) Consistently with the terms of the Operations Manual/AOOM the UM was entitled to place food orders as required. The UM was expected to stay within budget, but the budgets would be monitored by operations onshore as part of contract management and for reporting to the Operator. The OM would intervene where unauthorised overspends or unauthorised out of scope items were identified. Authorisation by the OIM was always sufficient but authorisation could also be provided by operations where necessary. Whilst the arrangements with OSI were in place all food ordering and management was considered to be OSI's responsibility under the Intercompany Agreement.

(8) The number of staff required on each Offshore Installation is determined by the Operator and by reference to the POB. The Appellant's obligation under the Operator contract was to provide such services as were required. Always included were catering and housekeeping services. On some Offshore Installations heli admin was also provided. The precise allocation of grades and roles of staff were determined and driven by the Operator, usually through the OIM. These requirements may have been communicated to the Appellant either directly through the OM or through the UM. It would be the responsibility of the Appellant's logistics team to identify the individual team members to service the unit per shift (usually 21 days). Changes in POB could lead to the flexing of the number of workers required. The POB change would usually determine what reduction or increase in staffing was required but again it was the responsibility of the logistics team to identify precisely who would be allocated or removed from the Offshore Installation. Under the COTA agreement any member of graded staff removed due to a POB change would, nevertheless, be paid for the full period of their shift and it may therefore be agreed that reductions were effected only at shift change. These immediate decisions would usually be agreed between the UM and

the OIM without prior involvement of onshore staff and changes implemented at shift change.

(9) When allocating staff to an Offshore Installation, or even a shift, the logistics team would aim to ensure a degree of continuity of shift team and an appropriate balance between Core Crew and Ad Hoc Crew. The UM had no say in the precise allocation of individuals and was expected to manage the teams as allocated.

(10) Graded staff are paid in accordance with the COTA Agreement.

(11) The payment under the Operator's contract with the Appellant is determined on a day rate basis which includes all costs including the salary and employment costs of the graded and Senior Staff.

(12) One of the principal means by which staff become employed to work for either the Appellant or OSI was under the TUPE when the Appellant took over a contract for a new Offshore Installation. Employees, particularly graded COTA employees, may also leave employment through another provider winning a contract previously operated by the Appellant. Senior Staff would usually remain with their employer rather than transfer under TUPE and be reallocated within the original employing company such that the company winning the contract would place one of its own senior staff to run a newly acquired Offshore Installation contract.

(13) Recruitment by way of advertising of roles was not an active function which needed to be performed by the Appellant on behalf of OSI or itself. Offshore work pays well, and shift patterns are generally more attractive than for other catering and hotel type services. As a consequence, the Appellant predominantly receives speculative cvs and applications from which it can select its employees. These candidates would be screened by the Appellant and employed as needed to maintain staffing levels on Offshore Installations.

(14) All individuals working offshore have to hold certain health and safety and medical certifications. It is the responsibility of the logistics team to ensure that all workers maintain the relevant certifications and only undertake shifts whilst the certifications are valid. However, there is an industry "passport" system which holds up to date information on relevant certifications which the logistics team use but which is also available to UMs. In addition the UMs would confirm that the "mix" of relevant qualifications on the Offshore Installation was correct.

(15) The physical transportation of staff to the Offshore Installation is the responsibility of the Operator; however, the Appellant must ensure that all those requiring to be transported are ready to travel at the appointed time. This requirement under the Operator contract is what drives the terms of the employee handbook referred to in paragraph 136 above.

(16) Operations staff very infrequently attended Offshore Installations.

DJV

140. DJV had three periods of employment with the Appellant from January 2005 – 6, January 2007 – December 2010 and February 2019 – shortly prior to the hearing. She thereby worked for the Appellant only during the initial period during which the arrangements were in operation. We did not find her evidence to be particularly relevant to the issue before us but summarise what we consider to be relevant.

(1) In essence DJV confirmed that the policies, procedures and interactions between the UM, OM, and the HR department were as provided for in the Operating Manual and AOOM.

(2) DJV accepted that the only direct evidence of involvement of OSI senior management in personnel matters and decision making was contained in the quarterly reports and then only as the recipient of data rather than as decision maker (as there were no minutes of the quarterly meetings). However, she stated that she considered that the requirement for prior approval of decisions requiring such approval were followed. The HR department or OM would prepare a report recommending a proposed course of action which was sent to OSI management. She had had personal involvement in the preparation of such reports. The reports would set out the facts, law and policies followed by a recommendation for action. Due to the comparatively low volume of formal disciplinary and grievance procedures the need for reporting was not significant.

(3) It was at least implied that the role of operations and the HR department was the same for all Offshore Installations (as is reflected in the AOOM) and not dependant on whether the staff on the Installation were employees of OSI or of the Appellant. In neither case did the HR department have any decision-making authority and could simply make recommendations for management to accept or reject; though recommendations were usually accepted.

(4) It was accepted that there was substantial delegated authority granted under the Intercompany Agreement to the Appellant who ran, so far as it was necessary due to the number of speculative applications, the recruitment process for OSI staff, set the framework for appraisals, and was involved, at a level consistent with the Operations Manual and AOOM in disciplinary and grievance procedures.

(5) DJV confirmed that as the Aramark group of companies were party to the COTA Agreement, pay for all staff was essentially determined through collective bargaining. Whilst the COTA Agreement pay scales only applied to graded staff the pay for UMs was determined by uplifting previous UM pay by a similar percentage to the COTA pay rise. Therefore there was not much that the Appellant needed to do to advise OSI on pay rates/scales. However, she stated that pay recommendations were made for UMs for approval by OSI management in the US.

(6) It was her view that the UM was responsible for all front-line human resources matters for offshore staff on their unit including the evaluation for more senior appointments to the UM's Offshore Installation. An experienced UM would, most commonly, manage the vast majority of situations themselves with no input from those on shore.

(7) The UM would certainly take the lead for medical situations arising on the Offshore Installation working with the Operator's on-board medic, arranging evacuation through logistics where absolutely necessary. In cases of longer-term illness or injury, we assume of Core Crew, the UM would be the point of contact for the employee and the UM would liaise with the HR department as appropriate for guidance on management, return to work etc.

(8) In relation to appraisals of graded staff she stated that any involvement by the Appellant by way of review was minimal and administrative in nature and/or for the purposes of overall talent management which would be fed back to OSI management as part of the quarterly reviews. She accepted that the OM was required to support and

coach the UM where necessary in the process with the HR department providing additional advice where necessary.

(9) The OM was confirmed as the appraising and line manager of UMs. In that role the OM was expected to support, coach and counsel the UM “in respect of all aspects of the [UM]’s role”.

DNL

141. We found DNL to be an honest straightforward witness who wanted to be helpful and, at times, gave overly long answers and explanations to his own perception of the question asked rather than answering the question put to him. His evidence did not always corroborate that given by AMT and DJV. We accept that his evidence represents his perspective and may or may not reflect the experience or perspective of other UMs. We do not consider it appropriate to marginalise his evidence where it conflicts with that of AMT or DJV as we consider that their evidence, which may represent the general approach of the Appellant, provides an onshore perspective of what was intended to happen at a corporate level; DNL’s is particular to his experience offshore.

142. DNL was openly agnostic to any forensic reflection on who employed him in a contractual sense – he worked for Aramark. He did not consider who he worked for significantly impacted how he performed his role which he considered to be to autonomously run the unit for which he was responsible and to provide the quality of service expected by the OIM on site. He had never had any contact or communication with management of OSI in the US. He had no concerns that he was working for a US based employer.

143. During his career with the Aramark group of companies DNL exclusively worked offshore. He was initially employed by OSI in 2005, following a speculative application, as a chef on Beryl Alpha as part of their Ad Hoc Crew. He was comparatively swiftly promoted to chef team leader on the Murchison installation where he worked until 2013. In that capacity he was the most senior OSI employee on the installation but worked to a field manager who was responsible for a number of installations. The field manager was the UM for present purposes. He gained relevant experience and in 2013 was promoted to work as a chef manager moving to the Dunbar installation. As chef manager he was the UM for that installation. The move to Dunbar was facilitated by the Appellant having been appointed to the contract in place of the previous incumbent. The remainder of the Core Crew who had serviced Dunbar prior to the Appellant winning the contract were TUPE’d to OSI.

144. DNL considered himself to be responsible for the service delivered by OSI on Dunbar. On a day-to-day basis his activities were guided/directed by: (1) a thorough and complete understanding of the scope of works specified in the Operator Contract between Total E&P Services Ltd and the Appellant, (2) the AOOM; (3) engagement and discussion with the OIM and (4) his own experience, knowledge and skill on how to deliver a high-quality operation offshore. A particular emphasis was placed on (3) and (4) with (4) having been enabled by a deep working knowledge of (1) and (2). The AOOM was described as DNL’s bible. He described his job as keeping the Operator happy.

145. It was accepted that DNL’s main onshore contact was an OM employed by the Appellant. DNL described his interaction and relationship with the OM as principally a channel of information pursuant to which information relevant to the performance of the contract was communicated to the OM whose responsibility it was to manage overall contractual compliance as distinct from detailed delivery. In the initial period of his role as a UM direct communications with the OM or other onshore staff were limited, often limited to an update or courtesy weekly call. Improved technology has increased the frequency of communication and more multi-participant teams/zoom meetings are held offering an

opportunity to report on a more real-time basis, but the substance of the autonomous authority remained. However, he accepted, though he could not recollect a situation in which it had arisen, that he was accountable to the OM for the decisions he took and if those decisions resulted in an issue raised by the OIM it would be a matter in which the OM would become involved.

146. DNL gave a detailed description of his duties on shift. Shortly prior to the shift beginning there would be a handover from the UM running the previous shift. He would arrive on shift by helicopter. His contracted working hours on shift were 07:00 – 19:30 but as the UM he was effectively on duty or on call for the full two-week shift. During each shift he autonomously ran the service taking the relevant decisions on a daily basis to ensure high quality delivery. Daily crew meetings were his primary means of communication with the operating crew (which would include both Core and Ad Hoc Crew members). At that meeting the basic tasks for each day would be communicated, in accordance with the scope of works and agreed delivery routine as set out in the AOOM/ASSAM the latter adapted as appropriate by DNL so as to accommodate the particular requirements of the Dunbar installation. The crew would be supervised to ensure delivery as delegated. Each day would also involve interaction and engagement with the OIM particularly if there were any out of the ordinary or additional requirements or anticipated changes (e.g. in POB). The Crew would take instruction only from DNL subject to a caveat that a direct request to a Crew member from the OIM, if in accordance with an ASSAMs, would be followed and reported back to DNL.

147. DNL's tasks also involved meal planning, food ordering following the procedures laid down in the AOOM, and admin (including wages sheets, processing invoices, hygiene inspections, delivery of onsite staff training, paperwork etc.)

148. Meal planning must meet the prescriptive terms of the scope of works and the budget set in the Operator Contract and cascaded to OSI through the Intercompany Agreement. Where the OIM requests out of budget provision and the OIM agrees to meet any associated additional cost there is no requirement to seek permission from the operations team, but DNL would usually report the position for information purposes. Interaction with operations is required where there is a mismatch between the scope of works and the budget – as had been recently experienced with food price inflation. In this scenario operations was able to provide advice on cost cutting.

149. DNL considered food ordering to be undertaken by him autonomously with no effective control or input from the operations team. Assessment of food spoiled, particularly on arrival, is a decision taken between the UM and the Operator's medic on site. Where a decision is taken to destroy food operations are informed but permission to destroy is not sought.

150. The management of staff on installation is a key part of DNL's role. He confirmed that the number of staff on the installation is determined by POB and thereby by the OIM and that it was not his role to resource appropriately skilled crew members. He stated that he was not involved in the recruitment of staff and accepted the team allocated to him by logistics; though he noted that there was little churn in staff, particularly on Dunbar because of the favourable shift patterns and the comparatively high budget for service provision. However, once on his unit and under his management, the performance and wellbeing of staff were considered to be his responsibility; he described them as his family. DNL saw part of his role as to develop the crew. He gave an example of an ambitious steward who he assisted and nurtured and who qualified as a chef.

151. When illness on installation occurred, he would be informed but the immediate point of contact for the crew member was the on-installation medic who would take them off shift or refer them to an Appellant-appointed onshore doctor who would determine if evacuation was required. For injuries to his Crew DNL would be the first to know and the appropriate management and reporting procedures provided for in the AOOM and ASSAMs would need to be followed by him; though such incidents were, in his experience, rare.

152. All Crew on his shift are line managed by DNL. As a consequence, he is responsible for managing performance and dealing with any underperformance in accordance with the AOOM. In the main his experience was that individuals had the appropriate skills and did their jobs adequately and this was generally managed through daily interaction and the annual appraisal process. He completed the appraisal forms and submitted them to operations/the HR department then “let the process take care of itself”. He gave a single example where apparent under-performance needed to be managed and that was done through conversations with DNL and a note on his appraisal form.

153. By these series of narratives DNL confirmed that he followed the procedures set out in the AOOM in terms of the decisions he took himself and where and when he reported data and information up to operations.

154. He had only on one occasion in his career within the Aramark group of companies had to deal with a disciplinary issue and it was not strictly performance-related but concerned use of social media. On that occasion DNL and the OIM had determined to remove the individuals from the installation and advice was sought from operations who DNL then understood sought input from the HR department. Given his limited experience in this regard DNL was not able to assist further with disciplinary or grievance procedures from his own experience. He indicated that had matters arisen with which he did not feel comfortable dealing with he would follow the AOOM and seek advice from operations/the HR department.

PARTIES SUBMISSIONS ON THE FACTS

Appellant’s submissions

155. The Appellant submits that on the evidence it has proven that it is OSI and not the Appellant which exercised control and management over the most significant aspects of the OSI employees working on Offshore Installations. For the graded staff this is exercised through the UM and by way of autonomy of operation by the UM. The Appellant points out that it is no part of HMRC’s case that the Operators are liable as host employers and yet if the effective day-to-day exercise of control is not carried out by the UM the next most suitable candidate would be the OIM.

156. The following findings or inferences relevant to our decision were invited by the Appellant:

(1) It is the Operator of the Offshore Installation generally and the OIM specifically that sets the overall staffing levels required by reference to the number of POB. Those requirements are communicated through the UM to the Appellant’s logistics function which would then identify the most appropriate individuals to resource the Operator’s needs. The logistics function’s role in this regard, on behalf of OSI, bore no significance or relevance when determining whether it was the Appellant or OSI who exercised the requisite control of the employee whilst they were performing their duties on the Offshore Installation.

(2) The precise way in which OSI came to employ the staff (following the original transfer, through the operation of the TUPE regulations or having been recruited either

actively or by way of speculative application) is not a relevant consideration in determining whether personal service was made available and rendered and, by reference to Appellant's proposed interpretation of those provisions, who exercised the most significant control over the work carried on by the OSI employees.

(3) Critical to the Appellant's case was the agreed fact that all staff working on the Offshore Installation were directly line-managed by the UM. The consequence of such line management was that the UM was responsible for directly instructing the OSI graded workers in their day-to-day activities through the daily meeting and through supervision. The UM, and the UM alone, would provide instructions to the staff. The relationships between the UM and the graded staff on board the Offshore Installation were close-knit and mutually dependent – more like family than work colleagues. The UM performed trip assessments for Ad Hoc Crew and undertook all aspects of the annual appraisal cycle for Core Crew including the management of under-performance. The OM's role in this process was limited to administrative aspects.

(4) Although the UM reported (in the sense of annual appraisals) to the OM and more generally provided data to the operations team through the OM, the UM had sufficient autonomy and independence that the role of the OM was insufficient to represent substantive control over the UM's day-to-day activities. From when the shift Crew, including the UM, boarded the helicopter to be transported to the Offshore Installation, to their return onshore, the UM, having consulted with the OIM, directed, controlled, and managed the physical operations carried out through and by the OSI employees. The UM's relationship with the onshore team was a remote one akin to providing information on the activities carried out but not one where the onshore team influenced the activities in any material sense, not least of all because the operations team did not have the necessary skills or experience to meaningfully influence such activities. Onshore operations' concern was with the contract and the Operator. The UM was responsible for ensuring that the hotel services were delivered effectively, efficiently and on budget. There was a marked difference in role reflecting the contractual obligations of the Appellant to the Operator and OSI in terms of delivery of the services.

(5) Regarding the AOOM, we were invited to take the evidence of the witnesses in preference to the terms of the manual itself as representing what happened in practice. However, even by reference to the terms of the AOOM it was clear that the UM had a more important role in all matters concerning OSI staff than the Appellant's staff, particularly in the context of events which were very infrequent (i.e. grievances, disciplinary etc.). To the extent that the onshore employees of the Appellant were involved in these events, i.e. because formal action was required, the final decision was taken by OSI management on the recommendations submitted by the Appellant.

(6) The UM was the principal individual responsible for induction and training of staff as regards their daily functions and operations.

(7) The responsibilities delegated to the Appellant pursuant to the Intercompany Agreement, particularly payroll, involvement in the pay arrangements through COTA, formalities associated with employment contracts etc. were also of little relevance in determining whether personal service was made available and rendered as the appropriate focus of attention was on day-to-day activities and not the overall framework of employment.

(8) The intention and objective of the Intercompany Agreement was for the outsourcing of all catering housekeeping and similar services from the Appellant to OSI

in order for the Appellant to meet its contractual obligations to the Operators with the Appellant performing a range of HR, logistical, payroll and administrative services to enable and facilitate OSI in the performance of its obligations under the Intercompany Agreement. OSI contracted for the provision of food and consumables and supplied them as part of a composite service of hotel services to the Appellant as subcontractor under the Operator contracts. In this context the UM was an important and pivotal aspect of managing the relationship with the Operator.

(9) The continuity of operations pre and post the implementation of the Intercompany Agreement, 2014 legislative change and the ultimate unwinding of the arrangements could have no bearing on the correct interpretation of the facts. The workers delivering the services to operators were, as a matter of undisputed fact, employees of OSI during the period in which the Intercompany Agreement was operative. Pursuant to that agreement an overall hotel service and not personal service is rendered.

HMRC's submissions

157. HMRC invited us to contextualise the witness evidence by reference to the documentary evidence and, in the case of any difference, to rely on the documents (as per the guidance exhorted in *Gestmin SGPS S.A. v Credit Suisse (UK) Limited and another* [2013] EWHC 3560 (Comm)).

158. By reference to the documentary evidence and their primary case HMRC contended that it was plain that the OSI employees were made available to the Appellant. Each individual was contracted to provide personal service to OSI and, pursuant to the terms of the Intercompany Agreement that personal service was made available to the Appellant and rendered for the purposes of the Appellant's business. The working experience was said to be the same for Crew employed by OSI and Crew which continued to be employed by the Appellant. HMRC highlighted that for Ad Hoc Crew workers could be seconded one shift and subcontracted a second shift (depending on the Offshore Installation on which they were working) and they would have no different experience at all. It was, in HMRC's submission this ubiquitous experience which demonstrated that the personal service was made available and rendered.

159. If, as we have found, the question of control were relevant HMRC contended:

(1) The relevant "control" was the factual exercise of control and not a contractual right of control. In the present case whilst OSI might have the contractual right of control it was plainly the Appellant that exercised the control over the workers on the Offshore Installations.

(2) The role of OSI management was ex post facto approval of HR decision-making (recruitment, disciplinary and grievances) which had been delegated and then taken by the Appellant. This was so even where the UM was involved in the initial stages of any of these processes. There was no OSI involvement in operational performance of the offshore Crew.

(3) This was apparent because the Appellant was the contractor to the Operators. It was the Appellant's experience in the management and delivery of such contracts that ensured that the worker met the offshore service requirements on a day-to-day basis supported and facilitated by the onshore provision from the Appellant. Despite the introduction of OSI it was the Appellant that remained exclusively responsible for service provision on the Offshore Installations pursuant to contracts that required it to "ensure proper control" of the services.

(4) Subcontracting to OSI was not intended to introduce any change in operations for the workers or the Operators. There was continuity of operations from the period prior to the signing of the Intercompany Agreement and once it was wound down.

(5) The workers employed by OSI were agnostic as to their employer and looked to the Appellant for such direction and control as was necessary and appropriate to ensure that the Operator was happy with service provision on a day-to-day basis.

(6) There was complete interchangeability between Offshore Installations operated only by Aramark and those subcontracted to OSI. Core Crew could be moved (subject to the COTA Agreement) and Ad Hoc Crew were moved. All operated under the same conditions and pursuant to the same procedures set by the Appellant.

(7) The UM always reported to the Appellant's OM: in terms of annual appraisals; for the provision of data/information on performance of the services at the Offshore Installation; and more widely in accordance with the AOOM. Communication between the UM and the onshore teams was consistent (irrespective of whether the Appellant or OSI employed the UM – prior to the introduction of the Intercompany Agreement or because an Operator refused the subcontracting arrangements). Whilst historically more constrained by communication infrastructure the relationship between OM and UM provided the means by which offshore and onshore worked together to deliver the services required under the Operator contract whoever held the contractual employment of the UM.

(8) As the UM directed the day-to-day activities of the Crew the direction the UM received from the Appellant cascaded down to all members of offshore Crew.

FINDINGS OF FACT

160. We have considered all of the evidence before us. We have not found it necessary, as invited by HMRC, to focus on the documentary evidence in preference to the evidence of the witnesses. We found their evidence to be substantively consistent with the documents.

161. Having carefully considered all of the evidence we make the following findings of fact (in addition to those agreed between the parties) relevant to our decision and/or those which may be relevant to the Upper Tribunal should our decision on the law be incorrect:

(1) The purpose of the Appellant's business, so far as relevant in this appeal at least, is the provision of catering and hotel services to Offshore Installations pursuant to Operator contracts.

(2) The arrangements were implemented with effect from 8 October 2004 and in place until 11 March 2017. Time limits precluded HMRC from issuing decisions under section 8 SSCBA for any date prior to 6 August 2011. Legislative changes resulted in the Appellant accepting that they were required to pay 2ary C1 NICs from 6 April 2014. The Decision therefore relates to a shorter period than the whole period in which the arrangements were in place. However, on the evidence before us the arrangements operated on a broadly consistent basis throughout the period in which the Intercompany Agreement was in place and the workers were employed by OSI.

(3) The arrangements were implemented with the sole objective of eliminating the UK 2ary C1 NICs charge to allow the Appellant to remain competitive in the market for the provision of services to Offshore Installations where the Operators of those Offshore Installations consented to the subcontracting arrangements. We were not provided with any evidence of a wider plan to improve efficiency and thereby be competitive. We cannot therefore determine that the Intercompany Agreement formed

part of a wider plan for cost cutting. Accordingly, we conclude that any improvement in pricing was a consequence and not an objective of the arrangements.

(4) Operator contracts were substantially similar but not identical in terms of the Appellant's ability to subcontract. However, the arrangements in place with OSI under the Intercompany Agreement were the same irrespective of the terms of the Operator contracts. Accordingly, we infer that the effect of the Intercompany Agreement (though not well supported by the drafting of it) was to subcontract certain, but not all, of the Appellant's obligations under certain, but not all, Operator Contracts. Whilst the definition of "Services Co Services" was expansively drafted we consider that the services in fact supplied (consistently with the non-exhaustive particularisation provided within the definition) were "catering and similar supplies, provision of support and specialist services; control and management of manning levels" and, to the extent not covered under "catering and similar supplies": housekeeping, helipad, handyman and other services which we must infer to have been agreed between the parties given the nature and scope of activities performed by OSI employees on the relevant Offshore Installations.

(5) In order to meet its obligations under the Intercompany Agreement the services of each individual Crew member employed by OSI were caused or arranged (and even compelled) to be ready and able to be used by the Appellant in performance of its contractual obligations to Operators upon the decision (required to be undertaken in accordance with the COTA Agreement) of the Appellant through the logistics team. Neither OSI management nor the UM had any involvement in the allocation of Crew to specific Offshore Installations.

(6) The Intercompany Agreement provides for the fee payable to OSI to be at a daily rate or as agreed in respect of each Operator contract. As it appears to us from the only invoice available to us, in fact the line-item cost of each individual (salary, overtime, travel etc.) was charged on a global basis each quarter on a cost plus basis. We have no evidence at all as to how food and consumables were charged but we infer that they too were charged at cost plus a markup to the Appellant. We find, on the evidence before us, that OSI did not charge on a daily rate basis and did not invoice on a contract-by-contract basis.

(7) Under the terms of the Intercompany Agreement the Appellant provided a broad range of services to OSI to facilitate the provision of the Service Co Services. There is a significantly greater particularisation of the services the Appellant is to provide to OSI than the other way round.

(8) The practical implementation of the Intercompany Agreement is as set out in the Operations Manual. Whilst there appeared to be only one version of it, it states that it was intended to ensure that the processes and procedures set out were reflective of current operations. We therefore treat the document as setting out the basis on which operations were conducted. We found no material difference between the document and the witness evidence.

(9) The terms of the Operations Manual support our conclusion on the effect of the Intercompany Agreement. In particular it sets out the limited role of OSI as that:

- (a) it is the "contractual employer", contractually responsible for the employment relationship, but that much of the administration of such relationship was delegated to the Appellant;

(b) the role of OSI management was limited to reviewing, approving, or ratifying proposals and decisions made by the Appellant regarding HR, health and safety, finance, and accounting etc.

(10) We have no evidence that the OSI management board had the skills and knowledge to direct day-to-day activities, and we were told and find that OSI management did not interact with or provide any substantive direction to its employed staff. DNL had never communicated with OSI management in the US.

(11) Although the evidence was not entirely clear on this point, we accept the evidence of AMT and DJV that the key decisions associated with the employment of staff i.e. in connection with recruitment, promotion, pay levels, discipline and dismissal, were taken either directly, and in advance, by OSI management, or through the delegated authority granted to the Appellant and subsequently ratified by OSI management through quarterly reporting.

(12) However, neither the Intercompany Agreement nor the Operations Manual provides guidance as to how the physical delivery of the subcontracted services was to be carried out. On the face of it therefore the Appellant had rendered itself unable to meet its obligations to the Operators to provide all management, supervision, personnel materials equipment, plant consumables and facilities required under the contract whether through or by a subcontractor. There are simply no provisions, KPIs etc which would facilitate this.

(13) We find that this is because, despite the contractual employment arrangements, it was the case that the Appellant exercised substantive and day-to-day control over the effective performance of duties through individuals employed by OSI. The principal means by which that control was exercised was through the AOOM and ASSAMs. These were documents drafted and owned by the Appellant. It does not appear that they were ever considered or reviewed by OSI management and they are not referred to in the Operations Manual. The AOOM expressly states that it “explains the policies, procedures and systems by which [Aramark] run our offshore business” and in this context Aramark included OSI. It also set out the procedures, controls, and standards for delivery.

(14) The AOOM was the “bible” by which UMs operated when working to meet the scope of services provided under the relevant Operator Contract. As accepted by DNL his understanding of these documents formed the foundation on which he led the Crew and orchestrated and supervised the delivery of the hotel services on the Offshore Installation. It was his experience of operating in accordance with the AOOM that facilitated and enabled him to act autonomously whilst remaining accountable to the operations team.

(15) We accept that a UM, particularly one who had worked up through the ranks would autonomously determine what needed to be done on a day-to-day basis on the Offshore Installation in conjunction with the OIM. However, given that ultimate accountability was through the UM to the OM or operations team in terms of performance of the contractual services any superficial appearance that OSI directed day-to-day operations was an illusion.

(16) Only through such direction/day-to-day control could the Appellant comply with the terms of its contract with the Operators.

(17) In the end we do not consider that the terms of the AOOM concerning the management of people (as set out in section 9) are particularly relevant. Critical, in our

view, are the sections 1 – 6 pursuant to which the services contracted by the Operator are performed.

(18) We accept that OSI purchased food and other consumables in order that it could provide the catering, housekeeping and other services. We find that that too was done through the UM using procedures and by reference to policies imposed on the UM through the AOOM by the Appellant. In effect the Appellant exercised the same day-to-day control over the purchasing of food and consumables as it did in respect of the personal service of the OSI employees.

162. On the evidence made available and by reference to the invoicing we have seen we can only conclude that there was a supply of staff and that the personal service of such staff was made available to the Appellant and rendered for the purposes of the Appellant's business.

163. On the basis of our finding in respect of the day-to-day control exercised by the Appellant over OSI's employees and for the reasons identified in paragraph 78 above we consider that the Intercompany Agreement does not constitute a commercial subcontracting relationship between OSI and the Appellant. OSI's employees were, for these purposes "seconded" to the Appellant. OSI also supplied food and consumables but that does not convert the secondment into a commercially subcontracted service.

164. We have reached our conclusions without particular reference to the factual analysis in *Bilfinger* though note that we have essentially reached the same conclusion.

DISPOSITION

165. On the basis that it is accepted that the Appellant meets the definition within the HEP of a host employer and OSI of a foreign employer, in order to succeed in this appeal it was necessary for the Appellant to show that OSI was not only the contractual employer of the offshore Crew but that on a day-to-day basis it was OSI that exercised control of the operation/delivery of the offshore Crew individually or collectively.

166. On the facts as we have found them, and by reference to the legal test that we consider it appropriate to apply, we consider that whilst not a sham OSI was little more than a contractual shell. There was a management team in place which was sufficient to take the decisions required of OSI under the Intercompany Agreement as specified in the Operations Manual. But those decisions were limited to formal HR/contractual and certain financial decisions taken on the basis of recommendations made by the Appellant.

167. We consider that OSI did not exercise any effective or substantive day-to-day control over the Crew. In particular OSI did not direct or supervise how the personal service of the individual Crew members was performed. Whilst the graded Crew reported to the UM, the UM directed them precisely in the performance of their duties by reference to "step by step procedure[s], controls ... and ... basic standards" to be applied and achieved in accordance with the Appellant's AOOM.

168. In our view, it was the Appellant that exercised the substantive day-to-day control of the Crew with the consequence that the personal service of the Crew including the UM was made available to the Appellant and rendered for the purposes of the Appellant's business.

169. We therefore dismiss the appeal for the reasons stated above.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

170. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent

to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

**AMANDA BROWN KC
TRIBUNAL JUDGE**

Release date: 12th SEPTEMBER 2024