EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100191/2023

Held in Glasgow Employment Tribunal on 19-21 August (and in chambers on 22 August 2024)

Employment Judge Murphy

Mr D Taylor	**Claimant** **In Person**
Doosan Power Systems SA	**Respondent** **Represented by** **Ms L Usher - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:

1. The claimant was not an employee of the respondent in terms of section 230(1) of the Employment Rights Act 1996 ("ERA") at the material times. His breach of contract complaint is dismissed for want of jurisdiction.

2. The claimant was not a worker employed by the respondent in terms of section 230(3) of ERA in respect of the employment in connection with which he claims wages were deducted. His complaint under Part II of ERA for unauthorised deductions from wages is dismissed for want of jurisdiction.

REASONS

Introduction

1. This public preliminary hearing took place in the Glasgow Employment Tribunal on 19 to 21 August 2024. The claimant (C) complains that the respondent (R) withheld monies to which he says he was contractually

entitled under a written agreement between the parties called the Transaction Bonus Agreement (TBA). He claims the sum of £67,354. It was clarified in C's further particulars of his claim and at the hearing that he brings his complaint under Part II of ERA and, in the alternative, as a claim for damages for breach of contract pursuant to the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 ('the Order'). R resists both complaints and maintains the Tribunal lacks jurisdiction to hear C's wages claim under ERA on the basis that C was not an employee of R or a worker engaged by R. R likewise says the Tribunal lacks jurisdiction to hear C's breach of contract complaint as C was not an employee of R.

2. Additionally, R resists the complaints on the basis that it says C had no entitlement to the sum claimed. With respect specifically to the wages claim under ERA, R further argues the sum claimed is excluded from the definition from wages as a non-discretionary bonus.

3. On 29 March 2023, R applied to strike out C's claim on the grounds that it had no reasonable prospects of success. The letter asserted the Tribunal lacked jurisdiction because C lacked the requisite employee or worker status. At a preliminary hearing (PH) on case management, an employment judge (EJ) ordered on 6 April 2023 that the case be set down for a one-day PH on 5 June 2023 on 'Employment Status / Strike-Out / Deposit Order'. In the event, due to a number of postponements, both that hearing and subsequently listed replacement hearings did not proceed. A further Case Management PH took place on 24 October 2023, by which time there had been considerable further correspondence and activity. At that PH, the EJ ordered that a three-day PH to 'consider the issue of the claimant's employment status, and the respondent's application for strike out / order for deposit … on the basis of the arguments set out above.'. That three-day listing was later extended to 4 days. It was clear by that time that both parties envisaged leading evidence they believed would be contentious (C envisaged calling potentially 2 witnesses other than himself and R proposed calling a witness for whom an interpreter was needed). Work on a joint bundle of productions was also underway.

4. At the outset, I identified an ambiguity about whether it was envisaged that our 4-day PH would be limited to deciding whether C had reasonable

prospects of establishing he had employee or worker status (i.e. a strike out hearing under Rule 37(1)(a)) or whether it was envisaged that this issue would be determined substantively (a preliminary hearing to decide those jurisdictional questions on a final basis).

5. I explained the practical consequences for the procedure followed and that that, if the hearing were on the strike out application, prolonged study of the documents and assessment of disputed witness evidence would not usually be appropriate. I explained, given the summary procedure in relation to such applications, it would be unlikely such a hearing would take four days or indeed more than one day. I explained that, on the other hand, if the hearing was a substantive PH, I would hear witness evidence on matters of dispute and make final findings in fact to resolve them and decide the question of employee / worker status in a way that would be final (subject to the usual appeal / reconsideration rights).

6. During an adjournment, parties considered which type of hearing they envisaged based on the previous correspondence and orders and, indeed, which type they would prefer. Both parties agreed their preference was that the hearing was used to decide the jurisdictional question of C's employee or worker status substantively (and not just whether he has reasonable prospects of establishing such status). It was agreed that all other issues relating to liability and remedy, including whether the sums claimed fell within the definition of wages, would be held over for consideration at a final hearing if the Tribunal was found to have the necessary jurisdiction.

7. At the substantive PH, I heard witness evidence which was taken orally from the witnesses. C gave evidence in his own right and did not, in the event, call any further witnesses. R led evidence from Sukjoo Kang who was at material times CEO of R and Chief Financial Officer of R's subsidiary, Doosan Babcock Limited (DBL) until the sale of DBL to the Altrad Group on 25 September 2022. Mr Kang gave evidence by video link from South Korea. A Korean interpreter, Ms Laundy, also joined the hearing remotely. Mr Kang preferred gave his evidence in English but from time to time he asked Ms Laundy to translate questions when he was concerned he had not fully understood these.

8. A joint set of productions was lodged running to 163 pages. The witnesses referred to some but not all of the documents in the file in the course of their evidence.

Issue to be determined

9. The purpose of the PH is to determine C's status at the material times, and specifically whether he was an employee of R under s.230(1) or a worker of R under 230(3) of ERA, or neither.

Findings in Fact

10. The following facts, and any further facts set out in the 'Discussion and Decision' section, are found to be proved on the balance of probabilities or have been agreed by the parties. The facts found are those relevant and necessary to my determination of the issues. They are not intended to be a full chronology of events.

The contract of employment between C and DBL (2011-2022)

11. It is common ground that C was employed by a company called DBL from 24 October 2011 until 31 December 2022. He was initially employed by DBL as an Industrial Relations Manager. At the time of his appointment, DBL was known as Doosan Power Systems Limited. It changed its name to Doosan Power Systems UK Ltd on 14 February 2013 and changed its name again on 1 May 2013 to Dooson Babcock Ltd. After the sale, the same company had a further change of name to Altrad Babcock Limited on 27 September 2022. For simplicity of reference, throughout this judgment, the company of R who the parties agree employed C from 24 October 2011 to 31 December 2022 is referred to as DBL, irrespective of the time period. DBL was a subsidiary of R until its sale on 25 September 2022 to the Altrad group. C continued to be employed by DBL after the sale completed until his employment with DBL ended on 31 December 2022.

12. Before his employment with DBL began, C was sent an offer letter on or about 5 October 2011. It enclosed a Statement of Terms of Employment. The offer letter included the following text, so far as relevant:

Dear Doug

I have pleasure in offering you the post of IR manager with Doosan Power Systems at a salary of... per annum on the basic terms and conditions as set out in the attached Statement of Terms of Employment...

...

13. C signed the enclosed 'Statement of Terms of Employment' on 12 October 2011. The Statement included the following clauses so far as relevant to this PH:

1. Employer

Doosan Power Systems Limited (hereinafter called "the Company" or any Company which is a holding Company or a subsidiary thereof.

4. Appointment

*You are employed as an **IR Manager**. This title does not define or limit your employment. Subsequent alterations to your job title will be notified to you in writing and recorded in the Human Resources Department.*

5. Job Accountabilities

The Company has a policy of active development of employees. To develop this you may be required, after consultation, to undertake revised job accountabilities as part of a Personal Development Plan. This may be within your own function or elsewhere.

…

8. Normal Working Hours

*Your normal working week is **37** hours and the allocation of these hours will be advised to you by your Line Manager.*

…

9. Place of Work

Your place of work will be Porterfield Rd, Renfrew PA4 8DJ and on any of the Company's sites as required…

17. Grievance Procedure

If you have a problem relating to your employment you should raise it with your immediate superior. If the matter is not settled at this level, you may follow the grievance procedure as set out in the Human Resources Policies and Procedures.

18. Disciplinary Procedure

The Company's Disciplinary Procedure is explained in the Employee Handbook.

19. Confidential and other information

You will not, without the consent of Doosan Power Systems Limited whether during or after your "Engagement", use to your advantage or disclose to any third party, confidential information of Doosan Power Systems Limited, its parent, subsidiary companies, Clients / Partners thereof....

In addition you will not, without the consent of the Company publish or knowingly permit to be published any oral address or written matter in any way relating to the organisation or affairs of the Company.

20. Company Property

All documents.. and other articles … relating to the business of Doosan Power Systems Limited which comes into your possession or is created by you during your engagement shall remain the property of Doosan Power Systems Limited. On termination of your Engagement the aforementioned items shall be returned to Doosan Power Systems Limited.

…

22. General

You are required to devote the whole of your time and attention during working hours to the discharge of your duties, and not without written permission of the Company directly engage in or be concerned or involved in any business of any kind whatsoever, except that of and for the

Company (except as a shareholder or debenture holder of any limited liability Company listed on a recognised Stock Exchange).

…

14. From the beginning of his employment with DBL, C reported to a senior employee of DBL. He was paid by DBL. The work he undertook was for the business of DBL. He was heavily engaged on work to support DBL in its endeavours to secure contracts in the nuclear new build sector, including strengthening relationships between DBL and energy sector clients and creating the terms and conditions on which DBL's construction workforce and construction employees of other entities working on the same projects would be employed. He was also responsible for building and managing TU relationships. He was promoted to HR Director, Nuclear (a grade S4 role) and his salary increased. On 22 April 2013 he was sent a letter confirming the promotion and pay increase with effect from 1 May 2013. The letter said: 'In all other respects your remaining terms and conditions of employment will remain unchanged'

15. In his promoted role C still had a Director of HR, also employed by DBL, above him in the structure to whom he reported. C's involvement and interactions with the wider group remained limited before and after his promotion to HR Director, Nuclear. He was not asked to give direct HR support to group companies other than DBL itself.

16. The Director of HR to whom C reported was absent for much of 2017. From early 2017, as the next most senior HR employee, C assumed many of his duties and responsibilities. He acquired an additional 60 people within the HR team employed by DBL who fell within his remit. Later that year, the Director of HR left, and C was promoted to Director of HR (a Grade S1 role). C's salary increased and on 5 December 2017, DBL sent a letter confirming the changes with effect from 1 October 2017. That letter also said: 'In all other respects your remaining terms and conditions of employment will remain unchanged.'

17. At the material time in 2017 and thereafter until 2022, DBL had between 3,500 and 5,000 employees working across the UK on different client sites.

Up until 2017, C had relatively little interaction with DBL's parent company, R.

18. In 2021, C was promoted again to sit on the Executive Leadership Team in the position of Director of HR and Corporate Services and his salary and notice period increased. On 11 May 2021, DBL sent a letter confirming the changes with effect from 1 May 2021. That letter also said: 'In all other respects your remaining terms and conditions of employment will remain unchanged.'

Work done by C for R (2017-2022)

19. R had undergone significant changes during the preceding years. In around 2012, R had previously been a large company with a substantial headcount and had more employees than DBL at that time. However, in or around 2014, there was significant restructuring, and R became essentially a holding company. Its workforce shrank considerably, and it latterly employed a small staff which provided services relating to tax, treasury, accounting and management to other group companies including DBL. R's HR team reduced to a very low number and by 2018, R had no internal HR employees at all.

20. From April 2017, Sukjoo Kang was appointed the CEO of R and he also held the role of Chief Financial Officer of DBL in that time period. He was employed by and paid by R in relation to his duties for both entities. By the time DBL was sold to Altrad in September 2022, R employed only 25 people.

21. When S Kang took up his post in 2017, his predecessor explained to him that a chargeback arrangement existed among the group companies whereby R would charge for its services to group companies including DBL and whereby group companies like DBL would charge R for services it provided to R. The mechanism wasn't documented. Relevant annual charges were not calculated by reference to timesheets or invoices prepared by the relevant company making the charge. Instead, there was an agreement based on the level of services to be given as to what the annual charge for the service would be. This had been set up some years before Annually, a calculation was carried out and, to the extent a company

was owed by another group company for the services provided to that company (after charges for any services received by that company had been offset), the relevant intragroup payment would be made.

22. DBL charged R for HR services under the arrangement (as well as legal and finance services). R charged DBL for finance services and S Kang's services. C had no knowledge of this arrangement. He had no input into calculating what the annual charges would be for HR services to R and had no visibility of how these intragroup charges affected the HR budget. C's lack of awareness or briefing on these matters remained even after he was promoted to Director of HR in 2017 and thereafter throughout the remainder of his period of employment with DBL.

23. C spoke to S Kang for the first time in a phone call in around February 2017. DBL's Director of HR was, by then, absent. DBL was undergoing a redundancy programme and Mr Kang wanted to discuss potentially adding to the programme redundancies of certain employees of R. Following that call, S Kang regularly called C about HR enquiries and instructions relating R's employees (as opposed to DBL's). Many of the tasks which S Kang instructed C to do for R in were repeated on an annual basis, including:

    a. Supporting annual competency performance reviews for R's employees (C spent between around 40 and 64 hours per year from 2017 and 2022);

    b. Supporting recruitment of employees for R (C spent between around 20 hours and c.36 hours per year from 2017 to 2021);

    c. Supporting the deployment into R of assigned employees from its parent organisation in South Korea including dealing with visas / accommodation / travel (C spent between around 12 hours and 40 hours per year from 2017 to 2022);

    d. Interaction with the Home Office re compliance with visa requirements by employees assigned into R from its South Korean parent (C spent between around 12 and c.18 hours per year from 2017 to 2022);

e. Completing annual tax returns / tax equalisation process for employees assigned into R from its South Korean parent (C spent between around 16 to 30 hours per year from 2017 to 2022);

f. Carrying out interim pay reviews for R employees identified by S Kang (C spent between around 8 and 24 hours per year from 2017 to 2022);

g. Supporting annual pay reviews for R executives and employees including benchmarking work (C spent between around 20 and 32 per year from 2019 to 2022).

24. In addition, from time to time, S Kang instructed C in relation to other HR matters which arose for R. In 2018, C supported R with issues surrounding the engagement of a South Korean national and spent around 20 hours on the matter. In 2020, C spent around 24 hours, supporting S Kang regarding Mr Kang's management and recording of his own working time between the UK and the Czech Republic and his compliance with relevant tax regimes. In 2021, C spent about 20 hours on this work. In 2022, C undertook for R a substantial investigation into alleged financial audit regulatory breaches including work on a disciplinary process. This work took C about 120 hours. It affected employees of DBL as well as of R. In the same year, C also spent 60 hours supporting disciplinary procedures undertaken by R and about 56 hours supporting R regarding the emigration of one of R's employees to Portugal.

25. All of the time spent on the tasks mentioned in the preceding paragraphs is approximate. In the remainder of this judgment, the work described in paragraphs **23** and **24** above which C carried out for R on S Kang's instructions is referred to as the 'Annual Work'. (This term is used for convenience; it is recognised that not all of that work was repeated on an annual basis, but it is all intended to be included in the defined term).

26. C was not asked to and did not complete time sheets for the Annual Work. The approximate time as set out above refers to time spent personally by C on the tasks. C was free to, and sometimes did, delegate tasks or aspects of tasks to others in the DBL HR Team. He did not offer them additional payment for doing so or arrange for R to make payment to them. Because of pressures on the team's capacity, he did not always delegate

even tasks of a relatively operational / administrative nature. C had a non-hierarchical approach whereby he would sometimes 'roll his sleeves up' and do tasks which were commensurate with a more junior role if they needed done.

27. C remained accountable for the tasks in that S Kang expected C personally to update him on progress and to ensure the tasks were adequately carried out. He was instructed in relation to them by S Kang, who liaised with exclusively with him regarding updates or their completion. C had no discussion with S Kang regarding the capacity in which he was being instructed to carry out this work for R. There was never any discussion about whether C would be paid for the work. C was not paid any monies separate to his salary with DBL in relation to this work undertaken for R on S Kang's instruction. C didn't consider the matter of remuneration for the tasks at the time. He was extremely busy throughout the period with work for DBL as well as the work for R. He did not consider whether he ought to have been remunerated for the work undertaken for R until the end of 2022 when he felt cheated out of a bonus payment (discussed further below). It was at that time that C reflected back and concluded that he ought to have been paid for his work for R separately and additionally to his DBL salary.

28. C latterly reported to the CEO of DBL (Employee 6). Raised no formal grievance or other complaint, either to Employee 6 or to S Kang or otherwise about S Kang's instructions to C regarding the Annual Work.

29. Following C's appointment to the Executive Team in May 2021, despite his responsibilities regarding the DBL HR budget and his discussions with the DBL Finance Director about the same, C had no awareness of or visibility on the intra-group charging arrangements under which DBL charged R for the Annual Work.

30. In August 2022, a calculation was carried out by accounting staff of intragroup charges owed, among others by R to DBL and by DBL to R. C was not privy to these charges nor the financial transfers that followed. They included charges for HR Services but also other types of service in both directions. For the years 21 and 22 combined, the HR charge by DBL to R was £86,654. However, after charges for services DBL provided to R were offset against charges R provided to DBL in these years, it was

calculated that DBL owed R the sum of £154,491. This was paid before the sale of DBL. There was an error in the calculations done by the relevant accounting staff. They prorated the figures for 2021 when they ought to have prorated the figures for 2022 to take account of the calculation being done part way through 2022 to facilitate the sale.

The Transaction Bonus Agreement (TBA): May 2021

31. By January 2021, it was known by the Executive Team of DBL, and by C, that R and R's parent in South Korea proposed to sell DBL by way of a share sale. In around January 2021, the Bid Team from Korea attended meetings with C and the Executive Team. Employee 6, following one of his meetings with the Bid Team lead, shared with C and the Exec Team that there was a proposal to incentivise DBL's senior management, including C, to support the sale. At that point the buyer's identity was not yet known.

32. C and the Executive Team colleagues participated in work related to the prospective sale. They liaised with the bid team from January 2021. They helped prepare to advertise the company for sale. They participated in management presentations to the prospective buyers who expressed an interest in the company. They worked to present the business in the best light possible. As loyal employees and senior managers of DBL, they were heavily invested in finding a good home for the business and its employees. They were undertaking the work necessary to seek to achieve that outcome.

33. On 19 May 2021, Mr Kang emailed C a Transaction Bonus Agreement (TBA) for his review and signature. Mr Kang signed the TBA on 14 May 2021 and C signed it in 20 May 2021. Other members of DBL's Executive Team received and signed agreements in similar terms. DBL was not party to the TBA. The parties to the TBA were C and R. Employee 6 had made representations to S Kang requesting that R, rather than DBL, would be liable to pay the transaction bonuses to the Executive Team, given that after the sale, control of DBL would pass to the new owners. Additionally, from an accounting perspective, if DBL had liability for the transaction bonuses, this could affect the attractiveness of the transaction to prospective buyers and the purchase price DBL may fetch.

34. The TBA was relatively brief. It is not necessary to reproduce its terms in full. Nothing in the TBA stated expressly that it was intended to create any employment or worker relationship between C and R or that it was not. Relevant excerpts for present purposes are reproduced below:

> *This Transaction Bonus Agreement … dated as of the 14th day of May 2021... is made and entered into by and between Doosan Power Systems SA... ("DPS SA") and Doug Taylor (the "Executive").*
>
> *WHEREAS DPS SA is engaged in a contemplated transaction pursuant to which Doosan Babcock, a limited liability company... (the "Company") is proposed to be sold to an unrelated third party (the "Transaction")*
>
> *WHEREAS the services of the Executive are an integral part of the successful consummation of the Transaction and the continued preservation of the Company's business pending the consummation of such Transaction; and*
>
> *WHEREAS, DPS SA desires to incentivise the Executive to assist and cooperate in the proposed Transaction and to maximise the value of the Company pending the consummation of such Transaction by providing Executive with the right to receive a transaction bonus (the "Transaction Bonus")*
>
> *NOW, THEREFORE, in consideration of the covenants and agreements set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:*
>
> *1. Transaction Bonus. To incentivize the Executive to assist, cooperate and to encourage him / her to work towards, the successful consummation of a Transaction, and subject to such Transaction being closed, DPS SA shall pay the Transaction Bonus to the Executive in an amount no less than 100% of the Executive's annual salary up to a maximum of 150% of the Executive's annual salary (it being understood that the final amount of the Transaction Bonus shall be determined by DP SSA upon consideration of the following performance factors: (a) meeting due diligence expectations, (b) meeting the transaction timeline, (c) deal value and (d) the effective delivery of management presentations, of which clause 1(d)*

shall be given the most weight). The Transaction Bonus shall be paid within 60 days following the consummation of the transaction.

2. Conditions to Payment. DPS SA's obligations pay the Executive the Transaction Bonus is subject to (i) the Executive's continued performance in good faith of all of his duties and responsibilities as an executive of the Company and any other duties and responsibilities reasonably requested by the Company or DPS SA in connection with the Transaction as well as the consummation of the Transaction, and (ii) the Executive's continued employment by the Company as of the closing date of the Transaction.

35. The TBA contained sundry other clauses, including a confidentiality clause with respect to the agreement's terms, a non-disparagement obligation on C in respect of DBL (only), terms regarding the taxation of the bonus, a provision that the agreement would terminate on 31 December in the event of a failure to consummate the sale by that date and various 'boiler plate' clauses dealing with matters like severability, assignment and governing law.

36. The TBA also contained an 'entire agreement clause' as follows:

This Agreement contains and constitutes the entire agreement between the parties pertaining to the subject matter hereto. Any modifications of this Agreement must be in writing and signed by the Executive and a duly authorised officer of DPS SA.

37. C did not discuss with R why the agreement was entered between C and R as opposed to C and DBL. He formed the view it was so that the liability for Executive Team bonuses would not be flagged up to potential buyers during the due diligence process, potentially affecting DBL's value.

The Reverse Transition Services Agreement (RTSA) – 25 September 2022

38. Prior to the sale's completion, C inputted into a document being worked on around August 2022. The document was later used by R and DBL as an appendix annexed to an agreement called a Reverse Transition Services Agreement (RTSA). The RTSA was entered between R, DBL and another group company called Doosan Digital Innovation Europe Limited (DDIE).

Unknown to C, the RTSA was entered among these parties on 25 September 2022 at the time of completion of the sale of DBL to Altrad.

39. The document into which C inputted formed part of a wider appendix called 'Exhibit A'. The part C had participated in drafting was headed 'Part 2 – DBL Services to DPSSA'. That page contained a list of various types of services including finance, tax, treasury legal and HR. C provided drafting regarding itemised HR services within that list. Twelve different types of HR support were itemised including, for example, 'HR General Advice' 'Annual Benchmarking' and 'Visa/ immigration and GMS support.' C had compiled that list upon request and had been asked to estimate charging rates for DBL to provide those services to R and DDIE. Although C never saw the frontend agreement, he knew from his involvement in the preparation of the appendix of an intention that DBL provide services, including HR services, to R post sale at the charging rates in the appendix. Those rates were tweaked before the agreement was finalised by others.

40. Notwithstanding the appendix menu of HR rates for which C provided drafting, neither C nor any other member of the DBL HR team provided any further HR services for R post sale. C remained an employee of DBL for a few months thereafter but had no further contact with S Kang. C's understanding was that there was a lack of appetite on the part of DBL's new owner to provide HR services to R and DDIE. To C's knowledge, the only continuing collaboration between DBL and the Doosan group after that date related to IT services with DDIE.

41. The front end to the RTSA provided for the provision of services by DBL to R and DDIE during a 12-month transitional period after the sale. A definition of Services was included in the RTSA as follows:

> ***"Services"*** *means the Finance, Tax, Legal, and HR services that the Service Provider has continually provided to the Service Recipients since 1 May 2014 as described in* ***Exhibit A*** *under the terms agreed to between the parties as described in the draught of the Management Recharges Service Agreement.*

Sale of DBL and payment of C's transaction bonus – September 2022

42. The sale of DBL to Altrad completed on 25 September 2022. On 22 September (three days prior to completion, C was paid £123,585 (gross) by R by way of a transaction bonus. PAYE deductions were made. This sum met the minimum 100% of his then salary mentioned in the TBA but was less than the potential maximum 150% of salary that the TBA contemplated.

Observations on the Evidence

43. In this case, the vast majority of the key facts were agreed or undisputed.

44. There was some variance between C and Mr Kang regarding the manner in which instructions were given and C refuted any implication by Mr Kang that in 2017, Daehee Kim (DK) used to give C instructions in connection with work for R prior to C's appointment to the Executive Team. C accepted that during the period in question he reported to DK, who was the Vice President of Corporate Services (which included HR) and was employed by DBL. However, C's evidence was that most of the day-to-day management instructions regarding the Annual Work came from SK. SK's evidence was that before C's promotion in May '21 to the Executive Team, SK liaised more heavily with DK regarding the Annual Work.

45. To the extent this poses any conflict, I accepted C's evidence on the balance of probabilities that the majority of his instructions regarding the Annual Work came from SK, including in the period from 2017, before C's appointment to DBL's executive team. C was specific and detailed in his evidence about the nature and typical timings of his communications with SK about the work to be done. SK, on the other hand, was vaguer. He didn't deny liaising with C in the prior period.

46. C disputed SK's evidence that DBL had charged R for the HR services it provided to R for many years, including the period of C's involvement in providing those services between 2017 and September 2022. Parties viewed this as a central factual conflict in the case. However, for reasons which will become clear in the 'Discussion and decision' section of the judgment, the issue is much less critical to my ultimate decision than was perhaps envisaged.

47. C's evidence was that he knew nothing about any such arrangement at the time and that it was simply not credible that he would not have done so, given the roles he occupied. He also pointed to a scarcity of documentary support for such an arrangement. He observed it was mentioned for the first time in the context of the present proceedings in April 2024. He argued that the spreadsheet which was produced to the Tribunal by R was artificially created and highlighted apparent errors in the document which seemed to have applied a pro rata reduction of 8 months out of 12 to the year 2021 instead of the year 2022 in which the sale took place.

48. S Kang's evidence was that he was made aware of the charging arrangements by his predecessor in post when he started his role as CEO of R in 2017. He said that by that time, R's HR function was already very limited. He acknowledged it was not based on time sheets and invoices but his understanding was that the charges were based on mutually agreed figures which had been historically proposed by a project team. He observed that much of the HR work needed was annually repeated and was the same kind of work auto generated for DBL and other group companies under the group's HR system. He said he hadn't seen any written services agreement documenting the arrangement from 2014 and didn't know if one existed. Mr Kang said he was surprised that C was not aware of the arrangement. He explained his failure to mention it to C by reference to his assumption that C was already aware of it. When asked about the omission to raise the RTSA until deep into the proceedings, S Kang said he was more focused on the TBA. He said, essentially, that he did not fully realise the relevance of the RTSA and the charging arrangement until late in the process.

49. I gave careful consideration to the witness evidence on this issue and the documents which were spoken to. I concluded, on the balance of probabilities, that neither the RTSA nor the spreadsheet document were falsified or bogus, if such was C's suggestion. C himself had some level of awareness in August 2022 of a proposal to provide HR services to R and charge for them after the sale. He inputted into the appendix and no doubt inferred that the document was going to be used as part of an agreement governing the post-sale period. I concluded on the balance of probabilities that the RTSA was a genuine agreement which was prepared in

anticipation of the sale by DBL to Altrad. There was no real evidence to support a contrary conclusion.

50. I was not persuaded that any aspect of the RTSA had been changed or 'doctored' for the purposes of the present proceedings. My understanding was that C was suggesting the 'Services' definition in the RTSA may have been so. The only circumstance which might be claimed to point to such a possibility seemed to be R's tardiness in mentioning or producing the document itself in these proceedings. I acknowledge C's frustration at the long delay in R's raising of this matter, and the implications for the progress of his case. Nevertheless, I accept S Kang's explanation that he simply wasn't focused on the RTSA when inputting into earlier responses and that he himself failed to appreciate the potential relevance of the document until late in the proceedings. It is not an uncommon occurrence that relevant documents are not identified or raised by a party until late into proceedings. It is certainly not a practice which the Tribunals endorse or encourage in our efforts to ensure efficient case management, but it is a reality which arises with unfortunate frequency. In this case, it is perhaps unsurprising that the relevance of this definition to the question of C's employment / worker status may not be immediately apparent to Mr Kang, who has no specialism in these matters.

51. Likewise in relation to the spreadsheet of charges, I conclude on the balance of probabilities that the spreadsheet was prepared prior to the sale and reflects a calculation of charges between R and DBL relating to the years 2021 and 2022 which was done in August 2022 in anticipation of the sale. Again, the delay in producing has caused understandable exasperation for C but is explicable by S Kang's lack of focus on the potential relevance of intra-company charging arrangements at an earlier stage. C also errors in the figures in that the pro rata calculation had been applied to the wrong year (2021 instead of 2022. I was not convinced that the error lends support to the hypothesis that the spreadsheet was falsely created after the fact to bolster R's defense of C's claim. It seems equally probable that calculation errors might be made by accounting staff in the process of preparing an authentic calculation as a bogus one.

52. On balance, I accepted that a mechanism of intra-group charging was in place in the period from at least 2017. This involved not only DBL and R but other group companies. It is not an implausible proposition *per se* that companies in a group should provide services to each other nor that they should charge for doing so. I noted the relative lack of documentary evidence for the historic charges applied in previous years, but I was not persuaded this rendered S Kang's account of the practice incredible.

53. Nothing in these findings implies any criticism or distrust of C's evidence. I found Mr Taylor to be a credible and reliable witness. I accepted his evidence that he had no awareness of the annual charging practice b between R & DBL. The two positions are not irreconcilable albeit I acknowledge it is something of a curiosity that C was not briefed on the practice, particularly following his appointment to the Executive Team from May 2021. Ultimately, however, as mentioned, the question of DBL's charging failing to charge for the Annual Work has scant bearing on my reasoning below.

Relevant Law

54. Section 230 of ERA provides:

> *"(1) In this Act 'employee' means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.*
>
> *(2) In this Act 'contract of employment' means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.*
>
> *(3) In this Act 'worker' (except in the phrases 'shop worker' and 'betting worker') means an individual who has entered into or works under (or, where the employment has ceased, worked under)*
>
> *(a) a contract of employment, or*
>
> *(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue*

of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

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

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

(5) In this Act 'employment'—

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

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

and 'employed' shall be construed accordingly."

ERA: Protection of Wages

55. Under the section 13 of ERA, a worker has the right not to suffer unauthorised deductions from his wages.

"*13 (1) An employer shall not make a deduction from wages of a worker employed by him unless—*

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

56. ERA contains a definition of wages for the purposes of the provisions. The relevant parts (for present purposes) are produced below.

27 Meaning of "wages" etc.

(1) In this Part "wages", in relation to a worker, means any sums payable to the worker in connection with his employment, including—

(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,

….

but excluding any payments within subsection (2).

(2) Those payments are—

(a) …

…

(e) any payment to the worker otherwise than in his capacity as a worker.

57. Under section 23 of ERA, a worker may complain to an employment tribunal that an employer has made a deduction from his wages in contravention of section 13. Where a tribunal finds such a complaint well founded, it shall make a declaration to that effect and order the employer to pay the amount of the deduction (section 24 ERA).

Employment Tribunals (Scotland): Breach of contract jurisdiction

58. The Employment Tribunal has jurisdiction to consider claims for recovery of damages for breach of contract pursuant to the Order. There are limits on the Tribunal's jurisdictions and certain types of claim are excluded. The damages available are capped at £25,000. Article 3 of the Order, so far as relevant for present purposes, is in the following terms:

Extension of jurisdiction

> ***3.*** *Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if—*
>
> *(a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in Scotland would under the law for the time being in force have jurisdiction to hear and determine;*
>
> *(b) the claim is not one to which article 5 applies; and*
>
> *(c) the claim arises or is outstanding on the termination of the employee's employment.*

Caselaw relating to assertions of multiple employers

59. On policy grounds, the courts have been resistant to the prospect of an employee having two or more employers contemporaneously in relation to the same work. In **Patel v Specsavers Optical Group Ltd** UKEAT0286/18, Judge Stacey applied the 'well established principle' that in general terms, one employee cannot simultaneously have two employers in relation to the same work. As the EAT observed, the concept of dual employment could give rise to confusion and farcical consequences in the event of conflicting instructions from two employers. It could give rise to difficult questions about which employer would have the right to dismiss, discipline or direct the employee.

60. It is an issue which has also arisen in the context of cases involving individuals working for an end user through an agency. In **Patel**, the EAT referred to such a case (**Cairns v Visteon UK Ltd** [2007] IRLR 175) in which it was held that it was not necessary to imply an employment contract between the individual and end user in circumstances where the individual had a contract of employment with the agency for the same work in question. In **Patel**, Judge Stacey referred to the policy considerations in **Cairns** which militate against dual employment given the structure of ERA, including questions like which employer would be responsible for disciplinary matters or for consultation in the event of redundancy or for paying compensation awarded for an unfair dismissal.

61. A requirement of necessity has been identified before implying a contract of service in cases concerning tripartite agency relationships (**Dacas v Brook Street Bureau (UK) Ltd** [2004] ICR 1437, **James v London Borough of Greenwich** [2008] EWCA Civ 35). These cases, like **Cairns**, discussed the circumstances in which a contract of service could be implied between and agency worker and an end user.

62. The principles are not restricted to cases involving agencies. In **United Taxis Ltd v Comolly** [2023] EAT 93 (28 June 2023, unreported), the factual circumstances, briefly put, were that a taxi driver drove customers of one respondent using the taxi owned by another respondent. In **Comolly**, the EAT ruled the Tribunal below had properly concluded that, under Mr Comolly's contract with Mr Tidman, Mr Comolly provided services to him in exchange for payment but had erred in finding that Mr Tidman also had a contract with United Taxis under which he also did work for it. There was no necessity to imply such a contract, and the tribunal could also not properly find that he was simultaneously an employee or worker of two employers in respect of the same work.

Submissions

63. Both C and Ms Usher spoke to helpful skeletal written submissions. The entire content of both submissions (written and oral) has been carefully considered and taken into account in making the decision in this judgment. Failure to mention any part of these submissions in the judgment does not reflect a lack of consideration. The submissions are addressed in the 'Discussion and Decision' section below, in which I set out where the submissions were accepted, where they are not, and the reasons for this.

Discussion and Decision

Breach of contract claim jurisdiction: Employee Status?

64. For the purposes of C's breach of contract claim, for which employee status is required, it is important to be attentive to the period during which the asserted employment relationship subsisted. Under article 3 of the Order, the Tribunal has jurisdiction to hear C's breach of contract claim only if the claim arose or was outstanding on the termination of his asserted

employment by R. C's claim is for damages arising from an alleged breach of the TBA.

65. The operative clause of the TBA which C says R breached includes the following terms:

"…*subject to such Transaction being closed, DPS SA shall pay the Transaction Bonus to the Executive … The Transaction Bonus shall be paid within 60 days following the consummation of the transaction*."

66. The transaction closed on 25 September 2022. R chose to pay bonus as it turned out it was going to pay on 22 September 22. However, that does not mean his entitlement to the bonus monies crystallised on that date. C's claim is that the payment made on 22 September was short. Be that as it may, to the extent he had an entitlement to more bonus, that did not crystalise under the TBA terms until 24 November 2022 (the last date falling within 60 days of 25 September 2022). Any breach by R in failing to pay the 'whole' bonus could not, therefore, occur until 24 November 2022.

67. Given the article 3 requirement that the breach arise or be outstanding on the termination of the employment, an employment relationship must have subsisted on 24 November 2022 for jurisdiction to be established.

68. C says the employment relationship commenced in September 2017 and that he continued to perform work for R until 2022. It was his evidence that he had no further contact with S Kang after the sale completed on 25 September 2022 and did not do any further work for R of any kind after that date either pursuant to the RTSA or at all. The main focus of C's case has been the Annual Work he carried out for R. His evidence and submissions have not centred on any asserted obligation to perform work under the TBA itself. In any event, to the extent any such obligation is asserted, this came to an end when the transaction 'consummated' on 25 September 2022. Any work obligations under that contract arose from the imperative to 'assist, cooperate and … work towards, the successful consummation' of the sale.

69. To establish jurisdiction for his contractual damages claim, a finding would be required that C had an employment contract with R which was still

subsisting on 24 November 2022, notwithstanding the absence of any work or indeed contact between C and R for almost three months.

70. There is no evidence before me to sustain such a finding. C's own evidence implied an acknowledgement on his part that whether he did or did not provide any further HR support to R after the sale was not a matter between himself in a personal capacity and R. When asked what happened between him and R between 25 September and 31 December 2022, C said he'd no further contact with R. He went on to explain that the new owner of DBL was not keen to support other parts of the Doosan business and that they only felt compelled to continue to collaborate with DDIE on the IT side. This evidence seemed to me to be consistent with an understanding on C's part that any question of his continuing work for R was something which lay entirely in the hands of DBL (as controlled by Altrad) and not something which arose from a subsisting contract of service between himself and R.

71. I conclude that C did not have a contract of service with R which subsisted on 24 November 2022. As at that date no work had been carried out by C for R within the last 60 days. There was no evidence of any mutuality of obligation ongoing between C and R at that time. There was no evidence that R remained under a duty either to provide work or pay to C or that C was under obligation to accept any work (the 'wage/work bargain'). On the contrary, C's evidence tended to suggest his own belief was that even if R wanted him to provide HR support after 25 September 2022, he would have been under no obligation to do so. His evidence tended to suggest he understood he would be constrained from doing so in circumstances where Altrad was resistant. That would also accord with the terms of clause 22 of C's contract of employment of DBL which continued to bind him on 24 November 2022 and under which he would require DBL's consent to carry out work for another business.

72. It is unnecessary to decide whether C was an employee in the period from early 2017 until 25 September 2022 because, even if he was, that finding would not be sufficient to establish jurisdiction under the Order.

Wages claim jurisdiction: Worker status?

73. In ERA, the other party to the worker's contract is referred to as his employer and the worker relationship is referred to as employment (s.230(5)). I use the same terminology, but lest this causes any confusion, this section of the judgment is concerned only with whether C has the lesser status of worker required for a wages claim and not whether he was an employee. If is not established that C was a worker for the purposes of the Wages provisions of ERA, it would follow that he wasn't an employee either.

74. For a Tribunal to have jurisdiction in relation to a wages claim, ERA does not require that the deduction was made on or before the termination of the worker's employment. It is possible to claim a deduction made after the termination of the worker's contract if that is when the wages were payable (**Robertson v Blackstone Franks Investment Management Ltd** [1998] IRLR 376). Therefore, it is not necessary for C to establish worker status as at 24 November 2022 when his entitlement under the TBA crystallised, and establishing a worker contract that ended before that date could suffice.

75. Nevertheless, the provisions in Part II of ERA include certain requirements which have implications in this case regarding the specifics of the worker contract which is needed for jurisdiction. As mentioned, C's case focused on the Annual Work performed from 2017 until September 2022 which is described in paragraphs **23** and **24**. However, it is worth restating that C's wages claim does not relate to that work. As it happens, he was not paid by R for the Annual Work, but he brings no claim for the wages he says he ought to have received for it. His claim is for short paid bonus which he says was payable under the TBA. His obligations under the TBA were quite distinct from any obligation he may have had to perform the Annual Work.

76. In Part II of ERA "wages", in relation to a worker, is defined as 'any sums payable to the worker *in connection with his employment*' (Section 27) (my emphasis). It may be trite but it bears pointing up that the basic concept of wages is that they are payments in respect of the rendering of services during the employment (**Delaney v Staples** [1992] IRLR 191, HL). Ms Usher alluded to this point in her oral submissions when she acknowledged that there was a contract between C and R in the form of

the TBA but that the evidence of both C and S Kang was that it was to incentivise work done for DBL which was unrelated to the tasks C was required to undertake for the benefit of R.

77. C seeks the alleged deducted bonus. It follows that, for his claim to succeed, it must be established that this sum was *in connection with his 'employment'* as a worker (s.27(1) ERA). This is underscored by section 27(2) which excludes from wages any payment payable to C 'otherwise than in his capacity as a worker'. Even if C was a worker for the purposes of the arrangement to do the Annual Work, that of itself would not suffice to establish jurisdiction since the wages sought were not in connection with that employment. The only context in which the Annual Work could have a potential bearing is if C establishes not only that he had a worker's contract with R for the Annual Work, but also that when he later entered the TBA in 2021, its terms enlarged and became part of that worker's contract.

78. However, it is also worth observing that, although C's case has focused on the Annual Work, it is unnecessary that he shows that this work was done pursuant to a worker contract with R. Whether or not this was the case, what is essential is that any bonus allegedly payable to C under the TBA was payable in connection with his employment by R as a worker. Otherwise, C cannot succeed, even if he had a worker's contract with R in relation to the Annual Work.

79. C's submissions were structured on an analysis of the Annual Work arrangements against the test for a worker contract. I do not follow that structure, given my remarks above. I begin instead by analysing the TBA arrangements. However, it is instructive at this stage to apply the assumption C contends for that when he entered the TBA he already had a pre-existing worker's contract with R to perform the Annual Work. I make no finding that this was so but apply the assumption for argument's sake to test whether it is, in fact, relevant or necessary to decide whether there was pre-existing worker contract for the Annual Work.

80. On the basis of that assumed position, the contractual backdrop in May 2021 when the TBA was entered was that there was in place (i) a continuing express contract of employment between C and DBL which had

subsisted since 2011; and (ii) a continuing implied worker contract between C and R which had subsisted since 2017. Under the former, C had been carrying out his tasks and duties for DBL; under the latter, he had been performing the Annual Work for R. Though the contracts ran concurrently, the work for each 'employer' was distinct.

81. Under C's employment contract with DBL, he had various express and implied duties and obligations. He required to spend at least 37 hours per week performing duties for DBL commensurate with his role as Director of HR Corporate Services and his membership of the Executive Team. This included having responsibility for DBL's HR team who in turn required to support the HR function in relation to DBL's workforce of between 3,000 and 5,000 people. He had his duties to support DBL in its endeavours to secure client contracts and his responsibilities for TU relationships. C also had the usual implied duties to DBL of obedience, competence, care and loyalty.

82. C and his DBL colleagues on the Executive Team had been made aware in January 2021, before the TBA was entered, that R proposed selling DBL to a buyer to be identified. This had generated work for them as senior management employees of DBL. They required to liaise with the bid team in relation to the structure of the proposed transaction. They worked to prepare to advertise the company for sale. They worked to promote the prosperity of the business and to present the business in the best light possible. They, as the company's most senior managers, were heavily invested in finding a good home for DBL's business and employees. C undertook all these duties as part of his employment contract with DBL.

83. In May 2021, when C's work in connection with the prospective sale was already underway, TBA agreements were offered. The incentive the document envisaged was offered not only to C but to other members of the Executive Team who did not do the Annual Work for R and had no implied workers' contracts with R for the provision of HR services.

84. The TBA was a bilateral agreement between R and C. The key requirements for C if he was to be successfully awarded the maximum are identifiable from the TBA as being 'to assist, cooperate and work towards the successful consummation of the sale of DBL', including specifically:

(i) meeting due diligence expectations;

(ii) meeting the transaction timeline;

(iii) promoting a high deal value;

(iv) effective delivery of management presentations;

(v) continuing to perform all of his duties and responsibilities as an executive of DBL and any other duties or responsibilities reasonably requested by DBL or R in connection with the transaction/its consummation;

(vi) continued employment by DBL as of the closing date.

85. I refer to these as the 'Bonus Duties'. They are entirely distinct from the Annual Work C was performing for R under what is assumed at present to have been a worker's contract. On the other hand, they overlap entirely with C's pre-existing duties in his capacity as an employee on DBL's executive team in the most senior HR role in the company. If the TBA had never been entered, C would, in his employed role with DBL, be subject to DBL's reasonable management instructions to perform the same work I have called the Bonus Duties in good faith with or without an incentive bonus. He would require to undertake this work for DBL in return for his salary. Indeed, he was doing so before he entered the TBA. The work required of C under the TBA by R formed part of the work C was already obliged to perform under his contract of service with DBL.

86. Ms Usher cited a number of authorities which on the presumption against dual employment or worker status (**Laugher v Pointer** (1826) 5B & C 547, **Cairns**, **Patel**, **James v Greenwich** and **Connolly**). C did not specifically address me on these arguments.

87. Ms Usher's submissions on the general principle against dual employment have considerable force on the facts of the present case. If there was a subsisting worker's contract relating to the Annual Work, the caselaw she cited poses serious difficulties for C in his proposed characterisation of the TBA as part of an expanded version of that contract. The overlap between the Bonus Work and C's duties under his contract of employment with DBL would mean, in effect, that C would have two employers in respect of the

same work. As the appellate courts have observed, that concept raises may practical conundrums having regard to ERA's structure of protections (e.g. **Patel**). As Ms Usher reminded us, the EAT also confirmed in **Comolly** that the general rule against dual employment equally applies in a case where it is contended the claimant was an employee of one respondent and a worker of another.

88. I agree with Ms Usher that the principles set out in the agency cases like **Dacas** and **James v London Borough of Greenwich** are applicable in the present situation where a worker contract with R in relation to the Bonus Work would coexist with employment status with DBL in relation to that work. I see no public policy basis nor any business necessity for departing from the usual principle and implying a worker contract between C and R in relation to the TBA obligations. C had all the usual statutory employment protections and rights in connection with his employment with DBL. He would have the normal protections from unfair dismissal or in the event of redundancy and protection from unauthorised deductions in respect of his salary. It is true that he, like his other colleagues on the Executive Team who equally entered TBAs with R as opposed to DBL, he would not have a remedy in the Employment Tribunal to recover the Transaction Bonus as a section 13 claim, but he would have had a common law remedy in the civil courts.

89. Irrespective of whether there was or was not a subsisting worker contract between R and C for the Annual Work, I conclude that any such contract was not extended in May 2021 to encompass the terms of the TBA. Nor do I find that the TBA founded a new and distinct worker contract between C and R relating exclusively to the Bonus Work. The duties in relation to which C was incentivised under the TBA were duties which already fell to him under his contract of employment with DBL. Nothing in the terms of the TBA indicated R intended to displace DBL as C's employer. On the contrary, the TBA expressly envisaged C's continued employment by DBL (clause 2). The TBA merely gave C an additional incentive over and above his remuneration arrangements with DBL, to perform his employment duties for DBL in a way that would maximise the value of that company pending its sale. In those circumstances, it is unnecessary to imply any

employment or worker contract between C and R with all the conceptual and practical problems this would entail.

90. Given my findings based on the identified assumption, it is unnecessary to come to any conclusion about whether an implied worker contract had or had not been established between R and C with respect to the Annual Work. This would not alter the decision.

Conclusion

91. The claimant was not an employee of the respondent, as defined in s.230 (1) of ERA as at 24 November 2022 when the asserted breach occurred because at that date there was no irreducible minimum obligation on R to offer work and / or pay nor on C to accept / perform work for R. It follows that the Tribunal lacks jurisdiction to hear C's breach of contract claim, which is dismissed.

92. C was not a worker (or employee) engaged by R in connection with the work envisaged by the TBA for which he says he was short paid wages in the form of bonus. That work formed part and parcel of his employment duties with DBL. It is not necessary to imply a contract between R and C in relation to these duties (or to characterise them as extending any pre-existing worker contract between the parties). There are sound policy reasons to decline to do so, given the parallel 'dual' employment and worker contracts that would entail with DBL and R respectively. The Tribunal, therefore, lacks jurisdiction to hear the claimant's complaint of unauthorised deductions from wages and this complaint is dismissed.

L Murphy
Employment Judge

20 September 2024
Date

Date sent to parties **24 September 2024**