Neutral Citation: [2025] UKFTT 28 (TC)

Case Number: TC09400

FIRST-TIER TRIBUNAL
TAX CHAMBER

George House, Edinburgh

Appeal reference: TC/2021/11615

National Insurance – Secondary Class 1 National Insurance contributions – Host Employer regulation – whether on the facts Appellant provides day-to-day direction/control of employees of foreign employer – yes – whether operator also provides direction/control – no – appeal dismissed

Heard on: 21 – 31 October 2024
Judgment date: 9 January 2025

Before

TRIBUNAL JUDGE AMANDA BROWN KC
JOHN WOODMAN

Between

ODFJELL TECHNOLOGY (UK) LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Andrew Hitchmough KC, Laura Poots and Stacey Cranmore of Counsel instructed by Ashurst LLP

For the Respondents: Mr Adam Tolley KC and Mr Giles Reid of Counsel, instructed by Office of the Advocate General

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 Odfjell Technology (UK) Limited (**Appellant**) in the tax years ended 5 April 2004 to 2014 (**Relevant Period**) in the sum of £16,764,743 with statutory interest thereon. The Decision was issued on 1 October 2021 and explains that pursuant to section 8(1)(c) Social Security Contributions (Transfer of Functions, etc) Act 1999, HMRC 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**). The Notice of Decision and determination of the amounts due dated 17 September 2021 and issued on 1 October 2021.

2. The Appellant is part of a group of companies (**Group**) which offer services in the oil and gas industry. Prior to 2001 the Group only operated on the Norwegian Continental Shelf. However, in 2001 the Group decided to expand its operations to the UK and Singapore. The Appellant was established on 24 May 2002 and a company Deep Sea Management Singapore Pte (**Singapore**) was established in Singapore at about the same time.

3. On 30 October 2003 the Appellant was appointed under its first contract for the provision of platform drilling services for oil and gas installations (**Platforms**) on the UK Continental Shelf (**UKCS**). The operator of those Platforms was Talisman Energy (UK) Limited (**Talisman**). The contract had previously been serviced by an independent third-party contractor. As was (and remains) conventional in the industry, the employment contracts of employees servicing the drilling rigs and employed by the previous contractor were, in the main, transferred to the new contractor; when the Appellant took over the Talisman contract the employees were transferred to Singapore. The transfer was not pursuant to but reflected a transfer which, if made concerning employees in the UK, may have been made in accordance with the Transfer of Undertaking (Protection of Employment) Regulations 1981 (**TUPE**).

4. The Singapore employees were transferred to a second company within the Group, Deep Sea Management Limited FZE (established in Sharjah) (**Sharjah**) on or about 1 January 2007 again by way of a TUPE-type transfer.

5. A second contract was secured on 8 October 2009 for Platforms operated by BP Exploration Operating Company Limited (**BP**). In this judgment we refer to Talisman and BP generically as **Operators**.

6. On or about 1 April 2013 the Sharjah employees were transferred to Odfjell Drilling Deep Sea Management DMCC (established in Dubai) (**Dubai**).

7. The terms and conditions of employment for the employees when working for Singapore, Sharjah and Dubai were relevantly the same. For the purposes of this judgment therefore we refer to Singapore, Sharjah and Dubai collectively as **Offshore Employers** and the employees of those companies as **Offshore Employees**.

8. The Offshore Employees work within a hierarchy of grades reporting to the grade above and ultimately to the Senior Tool Pusher (**STP**). The detail of this hierarchy is set out below (see paragraph 135 below). We refer to those working within that hierarchy and under the STP as **Crew**.

9. Pursuant to contracts entered between the Appellant and the Operators, the Appellant was required to provide well services (drilling) to include all management, supervision,

personnel, materials and equipment, plant, consumables, facilities as specified or reasonably inferred from the contract.

10. As the Appellant did not employ the Offshore Employees, it would have been unable to meet its contractual obligations to the Operators without entering into agreements with the Offshore Employers (successively) under which the Offshore Employers were appointed to provide drilling crews and manpower to the Appellant (the precise terms of the agreements with Singapore, Sharjah and Dubai did vary and we discuss both the nature of the variations and the effect below (see paragraphs 85 to 94) (**Services Agreements**).

11. The Offshore Employers however did not have a UK-based HR infrastructure to enable them to manage the Offshore Employees with the consequence that (again successively) each Offshore Employer appointed the Appellant to provide operational, human resources and logistics services (as with the Services Agreement we discuss any relevant differences between the agreements in paragraphs 95 to 104) (**Consultancy Agreements**).

12. On the basis that the Offshore Employers were neither resident nor present in the UK and considering that the contractual arrangements did not meet the requirements of the HEP no 2ary C1 NICs were paid in the Relevant Period in respect of the Offshore Employees.

13. HMRC issued the Decision seeking to recover the 2ary C1 NICs from the Appellant which was duly appealed, reviewed and the appeal notified to the Tribunal. By the grounds of appeal the Appellant sought to contend that some of the tax years covered by the Decision were outside the relevant statutory limitation period (6 years) and otherwise irrational, procedurally unfair or an abuse of power. This was said to be particularly on grounds that similar decisions issued to other taxpayers had been limited to a period of 6 years whereas the period covered by the Decision invoked section 7 Prescription and Limitation (Scotland) Act 1973 extending the Relevant Period all the way back to the tax year 2003/4 when UK operations and the arrangements commenced. Parallel judicial review proceedings were commenced. Permission having been granted in those proceedings the Appellant does not pursue these arguments before us.

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

LEGAL FRAMEWORK

15. This appeal is the third appeal to considers the HEP in the context of Platforms on the UKCS. The first, *Bilfinger Salamis UK Limited v HMRC* [2024] UKFTT 736 (TC) (***Bilfinger***) was decided on 16 August 2024, Mr Woodman was the member on the Tribunal panel for *Bilfinger*; the second, one of my judgments (sitting with Mr Stafford) was *Aramark Limited v HMRC* [2024] UKFTT 832 (TC) and was decided on 12 September 2024. Both Tribunals determined the appeals against the appellant taxpayers. Judge Blackwell (who sat on *Bilfinger*) and I have both granted permission to appeal to the taxpayers in each case.

16. In view of the similarity of this appeal in terms of identification and interpretation of the relevant law to that in *Bilfinger* and *Aramark* we incorporate only a summary of the relevant legislative provisions.

Statutory context

17. The statutory framework concerning the liability to pay 2ary C1 NICs is provided for under Social Security (Contributions and Benefits) Act 1992 (**SSCBA**) and Social Security (Categorisation of Earners) Regulations 1978 SI 1978/1689 (**SSCER**). Pursuant to those provisions primary C1 NICs (those payable by the employee/earner), 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 (those payable by the employer) 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. The HEP is one such provision.

HEP

18. The HEP as specified in paragraph 9 of Schedule 3 SSCER as inserted by Regulation 4 Social Security (Categorisation of Earners) Amendment Regulations 1994 (SI 1994/726) (**Amendment Regs**) provides that where a person is employed by a foreign employer (i.e. one not resident or present in the UK) but:

> (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.

the host employer to whom the personal service of the person employed is made available shall be the secondary contributor.

19. The relevant definitions for interpretation of these provisions are set out in Regulation 1 SSCER (as amended by the Amendment Regs). There is no dispute between the parties that the Offshore Employers meet the definition of a foreign employer and the Appellant meets the definition of a host employer. The dispute between the parties (as with *Aramark* and *Bilfinger*) is whether the requirements specified in (a) and (b) as quoted in paragraph 18 above apply.

DECISION IN ARAMARK

20. In *Aramark*, Mr Stafford and I reached the following conclusions concerning the correct interpretation of the HEP (see paragraphs [60] – [86] of that judgment):

> (1) The HEP was not to be construed as an anti-avoidance provision per se but was likely to catch many arrangements intended to avoid a charge to 2ary C1 NICs because the HEP was intended to impose liability "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" (paragraph [61]); i.e. the host utilises "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)" (paragraph [64]).
>
> (2) A line is appropriately to be drawn distinguishing "a secondment type of relationship between worker and host employer … and a commercial subcontractor" (paragraph [65]).
>
> (3) The statutory choice to use "personal service" was intended to "carry the meaning conventionally used in employment law" (paragraph [67]) which does not, itself, "incorporate any requirement as to control" which is a "discrete and distinct" component of the employment law test of employment" (paragraph [68]).
>
> (4) The HEP requires the host to have "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 worker's performance of their own work and skills" as a consequence of the requirement in paragraph 9(b) to Schedule 3 that the personal service be "rendered for the purposes of" the host employer's business rather than in the limb 9(a) requirement that the personal service be "made available" (paragraphs [72] – [76]).

(5) As there is no mechanism for apportionment, in order for the HEP to apply the "whole of the worker's personal service must be made available and rendered to the host" (paragraph [79]).

(6) In reaching those conclusions we rejected HMRC's submission that the HEP imposes a liability on a host employer merely by virtue of the personal work and skill of the foreign employer's employees being put at the disposal of the host employer.

(7) The conclusions we reached were broadly consistent in substance to those reached in *Bilfinger* though Judge Blackwell and Mr Woodman considered the requirement for "direction" (which Mr Stafford and I considered to be the same as "day-to-day control") was derived from the limb (a) requirement of paragraph 9 of "making available" or both (a) and (b) and not (b) alone (paragraph [86(3) and (4)]).

PARTIES SUBMISSIONS ON THE LAW

21. We are grateful to all Counsel for their clear skeletons, submissions, and willingness to engage with and answer our questions. We set out below our summary of those submissions on the law and, at paragraphs 177 – 196 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.

Appellant's case

22. The Appellant, in the main, adopted the reasoning in *Aramark* and sought to establish on the facts that the test for the HEP to apply was not met.

23. There were however, three nuances to the *Aramark* analysis which we were invited to make:

(1) The HEP can only apply where the host employer has the right to the personal service of each individual and particular employee such that where the right to substitute one employee for another lies with the foreign employer the HEP cannot apply to impose liability for 2ary C1 NICs on the purported host employer.

(2) That the concepts of personal service being "made available" and "rendered" both require that the host employer has control, management and supervision of the employee of a level and type consistent with a secondment.

(3) The HEP does not deal with the situation where the personal service of an employee is made available to, and rendered for the purposes of, the business of more than one host employer and cannot therefore apply where there is more than one party exercising the level of control/direction required.

24. As regards paragraph 23(1) above the Appellant places particular emphasis on the requirement under the HEP that "the" personal service of "the" person employed is what must be made available and rendered by the foreign employer to the host employer. i.e. that the provision applies only where named individuals are specified. By reference to general principles by which the relationship of employment is determined we are invited to focus on who, as between foreign and host employer, has the right to and in a practical sense actually decides which employees will perform particular assignments. It is contended that whilst the foreign employer makes such decisions the HEP cannot apply. The HEP is said to apply only where specific and identified individuals are selected by the host directed to work by that host.

25. Where an assignment is to be performed by a named individual the question that is then said to arise is whether the personal service of that employee has been made available to the host employer and rendered for that employer's business. In this context, and by reference to

the asserted requirement that the test is applied individual by individual, the Appellant submits that the foreign employer will only make the personal service of the identified individual available to the host employer by allowing the host employer to have control over how that service is used. Only through the requisite level of control exercised by the host can the individual employee be deployed into the host employer's business thereby rendering the personal service in a way of the host's choosing.

26. Turning to 23(2) and by reference to the recent judgment in *HMRC v Professional Game Match Officials Ltd* [2024] UKSC 29 (***PGMOL***) (decided after *Aramark*) we were invited to focus on the de facto granular level of direction or day-to-day control which was required in respect of the roles performed by each individual and the source of that control. Only where the source was the host employer could the HEP apply.

27. The Appellant accepted that day-to-day control could be exercised though a supervisor or through procedures and systems but for the HEP to apply such control must be exclusively and substantively exercised by the host. The provision does not apply where there are multiple employers who exercise the requisite level of control together or separately. This is said to be because the HEP applies where the conditions prescribed in column A paragraph 9 are met in relation to "a" host identified in column B as "the" host.

28. Finally, as regards 23(3) the Appellant contends that the HEP is all or nothing and it is not possible to have more than one host.

HMRC's case

29. For the purposes of the present appeal we agreed that HMRC were entitled to reserve their position that the case presented on the law by them in *Aramark* and *Bilfinger* was correct. For the sake of completeness we summarise their case in this regard:

> (1) As the Appellant accepts that it meets the statutory definition of a host, and the Offshore Employers meet the statutory definition of a foreign employer, the critical focus of the dispute concerns whether the personal service of employees of the Offshore Employers is made available to and rendered for the purposes of the business of the Appellant.
>
> (2) The requirements of the HEP will be met in any situation in which, pursuant to a relationship/obligation between the foreign employer and the host, the foreign employer deploys the personal service owed by employees to it by directing the employees to work for the host following that host's direction to work.
>
> (3) The HEP does not, in HMRC's submission, require there to be any exercise of supervision, management or control, of the employee by the host, any such requirement not being within the express language of the provision and not being implicit within the requirement that personal service be made available or rendered.
>
> (4) HMRC contend that this interpretation is unsurprising because the purpose of the HEP is an anti-avoidance provision.

30. However, on the premise that the judgments in *Aramark* and *Bilfinger* were to be followed HMRC contend that it must be the case that the level of direction or control required under the HEP was necessarily lower than that necessary to establish an employment relationship. Further, and in light of the Supreme Court judgment in *PGMOL*, it was contended that where highly specialist work was undertaken the level of day-to-day control exercised by a host need not involve a right of intervention into every aspect of performance of the employee's duties and may be limited to a requirement that the employee obey the host employer's reasonable directions or simply that the host uses the employee in a way of its choosing.

31. Where teams of employees are provided by the foreign employer to the host it was contended that it was entirely consistent with the provisions of the HEP that the host exercised control, directly through a framework of control over the team leader, with more junior team members being directed by that team leader.

32. Concerning the multiple host issue HMRC contend that the Operators do not and cannot fall within the scope of the HEP because the personal service of the Offshore Employees is not made available to the Operators as the personal service of the Offshore Employees is not put at the Operator's disposal and certainly not in pursuance of the Offshore Employee's employment contracts as would be required in order to be treated as a host under the statutory terms of the HEP. The Offshore Employees are simply working under the terms of the Appellant's contract with the Operator to deliver the services envisaged under that contract as a true subcontractor.

DISCUSSION AND CONCLUSION ON THE LAW

PGMOL

33. We deal first with the impact of *PGMOL* on the conclusions drawn in *Aramark* and *Bilfinger*. *PGMOL* is a case which considers the traditional concepts of contracts for service (employment) v contracts of service (self-employment) in the context of football match officials who, by the very nature of their role, required almost the highest level of autonomy to take on-pitch decisions during matches.

34. It appears to us that in that judgment the Court has clarified the test for employment rebalancing the three limbs of what is commonly referred to as the *Ready Mixed Concrete* test: mutuality of obligation, control and "all other terms of the contract and the surrounding circumstances of the parties' relationship" such that each has an equal and appropriate role to play in answering whether any particular individual is providing personal service under a contract for services with the attendant tax consequences. No longer (and their Lord/Ladyships would say never) has the identification of mutuality of obligation and control been determinative of the status of the individual; both are simply factors to be considered alongside all other relevant terms and circumstances from which an overall view is to be reached.

35. In that context Lord Richards observes:

> "34. Flexibility in approach to deciding whether a sufficient level of control exists is critically important, given the ways in which employment practices have evolved and continue to evolve. The days when the vast majority of the workforce attended at a particular factory, shop or office between set hours to work in highly prescriptive roles have long gone, all the more so following the Covid pandemic of 2020/21."

36. At paragraph [61] he notes that whilst a sufficient element of control is essential in an employment relationship, determining sufficiency of control is a "test that can prove difficult to apply" (with which we agree) where the nature of the services provided leaves little room for intervention. The question is one to be answered by an assessment of the facts in each case and allows for a wide range of circumstances (paragraph [62]). In the context of the test for employment the range of factors to be considered, certainly historically include "the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where is shall be done" (quote set out in paragraph [63] taken from *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and Notional Insurance* [1968] 2 QB 497). However "developments in the patterns of work have, … increased the cases in which some or all of these factors will be absent but where nonetheless it is appropriate to find the necessary degree of control"; such control being identified through

a framework of control, a concept not capable of more precise articulation (see paragraphs [65] and [66]).

37. In the employment context "the requirement for control extends only so far as there is scope for it and, [but] on the other hand, … there must be some control. If only in incidental or collateral matters." (paragraph [68]).

38. Lord Richards notes that the match officials are placed by the FA in a position of institutional independence and draws a parallel to the relationship between a hospital manager and a surgeon or the manager of an opera house and the conductor. However, in such situations where intervention is likely to be minimal a distinction must still be drawn between those who are employed and an independent contractor. At paragraph [71] Lord Richards also rejects the notion that whether there is sufficient control will be determined only by reference to a contractual (including theoretical) right of intervention.

39. As was determined in connection with identifying whether the relevant concept of control for a worker (rather than an employee) was met in *Uber BV v Aslam* [2021] UKSC 5 (***Uber***), control can be identified from the wider facts and is not limited to having a contractual right to give direct instructions. In *Uber* it was determined that the drivers were subject to a "second form of control" through the monitoring of rates of acceptance, ratings etc. all establishing a degree of subordination between the driver and Uber characteristic of an employment relationship (also sufficient for the purposes of concluding the drivers were workers and thereby entitled to certain protections).

40. Applying this broader perspective of control to the match officials it was held that they were subject to sufficient control despite an inability for PGMOL to intervene in matches because of factors such as: an ability to deny future contract appointments, fitness protocol, match day procedures, code of conduct, assessment, merit tables, coaching etc. all of which were relevant to the overall relationship albeit not within the terms of individual match contracts.

41. What we take from *PGMOL* is that in the context of determining the existence of an employment relationship control will be one factor which must be considered alongside the other indicators of employment, including mutuality of obligation or other hallmarks or features of an employment relationship. However, in the context of the HEP, in one sense at least, there is a narrower focus on the sufficiency of control necessary (assuming *Aramark* and *Bilfinger* are correct) for it to be concluded that there is a secondment-like relationship between the employee of the foreign employer and the host rather than the employee being provided as part of a subcontracted service provided by the foreign employer to the host.

42. In our view *PGMOL* encourages a broad view of the sources of control. It may be direct control i.e. through a supervisor (as might commonly be the case with the secondment of junior staff by a professional services firm to a client) but where the skills of the individual are largely autonomous through a requirement to work within a more general framework including by way of procedures or policies which determine where or when or how the secondee is assimilated into the host's business.

Specified individual

43. As set out in paragraph 24 above the Appellant contends that the HEP applies only on an individual-by-individual basis i.e. it applies where the personal service of a named individual are placed under the day-to-day control or direction of the host and the foreign employer has the ability to substitute other employees for that named employee.

44. We do not accept this argument. We cannot see that the use of "the" and "that" in the context of personal service requires the seconded employees to have been selected individually

by the host. Whilst personal service will always be the service of an individual we do not consider that the HEP is limited to situations where the individual is known to and named by the host. It might equally apply to individuals identified by reference to qualifications or particular skills where those individuals then work "by their own hands" in delivery of the tasks required of them and consistent with the identified skills. We do not consider that a right or de facto ability for the foreign employer to substitute one employee for another precludes a conclusion that the HEP would apply as regards each employee working within the host's organisation for the period for which they are working under the host's direction. What is critical therefore is simply to identify that the host directs/controls the day-to-day personal service of individuals employed by the foreign employer. For the reasons stated above a broad interpretation being given to the manner and means by which such control is exercised.

"made available"

45. Whilst accepting that it may make little difference, Mr Hitchmough urged us (or perhaps more properly me) to reconsider my decision in *Aramark* and conclude that the Tribunal in *Bilfinger* was right that the concept of making available (limb (a) of paragraph 9) imputes some concept of control on the part of the host and that the requirement does not arise solely under limb (b) (renders). In his submission where the personal service of an individual is deployed by the foreign employer to the host and thereby made available to the host, the deployment realistically must entail the passing of day-to-day control from foreign employer to host. Put simply there could be no deployment without the passing of control in a relevant sense. Hence the focus, whether under limb (a) or (b) of paragraph 9 is to identify whether it is the foreign or host employer which exercises day-today control or direction.

46. Given that in both *Aramark* and *Bilfinger* it was determined that day-to-day control/direction consistent with a secondment type arrangement was required and in light of the fact that permission to appeal has been given in both cases we consider that it is more appropriate to leave it to the Upper Tribunal to consider this issue.

Multiple potential hosts

47. Mr Hitchmough pitched his submission in this regard as a nuance on the conclusions reached in both *Aramark* and *Bilfinger* that the HEP is an all or nothing provision. The framing of the conclusions in those cases was that as there was no mechanism of apportionment, the whole of the worker's personal service must be made available and rendered to the host such that if the foreign employer retained the ability to divert the employee to other business of its own on a day-to-day basis the HEP could not make the host liable for 2ary C1 NICs. Mr Hitchmough contends that the same conclusion must follow if day-to-day control/direction is exercised by more than one putative host.

48. On the facts we find this issue does not arise. Certainly we can see that there would be considerable difficulty in the operation of the provision if on the facts there were two hosts as the HEP appears to be an all or nothing provision. However, as we do not need to decide the position on the facts of this case we do not so decide it.

EVIDENCE

49. We were provided with a document bundle of 2,032 pages.

50. In addition we received witness statements from:

(1) John Smith (**JS**) who was originally employed by the relevant Offshore Employer for a short period from October 2009 (when the BP contract was won by the Appellant) to June 2010 working on one of the BP operated Platforms in the role as a STP. In 2010 he took an onshore role and was employed by the Appellant as a Rig Manager (**RM**). In January 2012, he was promoted to Operations Manager (**OM**) and in January 2013 to

Vice Principal of UK Operations (**VP Ops**) for the Appellant in which role he served to the end of the Relevant Period.

(2) William Cunningham (**WC**) who was employed successively by the Offshore Employers from when his contract of employment was transferred under TUPE like arrangements from the previous contractual incumbent of the BP drilling services contract in October 2009. For the period from September 2012 until the end of the Relevant Period his role was as an STP.

(3) Nigel Meany (**NM**), who was employed by Odfjell Well Services ME Ltd as vice president for the Middle East and Asia Pacific Region from August 2011 to 1 January 2017 and was a director of Dubai in April 2013 and through to the end of the Relevant Period.

(4) Gail Farquhar, (**GF**) who was employed by the Appellant from July 2011 as HR manager and continued in that role to the end of the Relevant Period.

51. All witnesses gave sworn oral testimony and were subject to cross-examination and re-examination. In the main there was no direct conflict of evidence between the witness statements and the evidence elicited in cross examination. Where there were nuanced differences, we preferred the oral evidence, and this is reflected in our narration of the evidence we received. We have accepted the evidence as we have recorded it.

52. 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."

53. We have not excluded from our consideration any document to which we were referred. However, we do not refer to every document; rather we refer to those on which we rely on to form our view.

54. 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 63 pages and we took oral testimony over 4 days, our recitation of the witness evidence is also necessarily a summary.

55. In our narration for the evidence where appropriate we periodically refer to **Odfjell** as a generic but unattributed member of the Group, this reflects that some of the documents referred to Odfjell or Odfjell Drilling and not to a particular company and that in particular JS and WC were in many regards ambivalent to their precise contractual employer considering themselves to work for Odfjell/Odfjell Drilling.

Burden of proof

56. In this appeal the burden of proof rests on the Appellant. The Appellant must establish 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 was not made available to the Appellant and/or rendered for the purpose of a business carried on by the Appellant, such that no liability will arise under the HEP.

57. If the Appellant cannot so satisfy us, then the Decision for the Relevant Period 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

EY advice

58. We were provided with a single sheet prepared by Ernst Young titled "Key issues relating to the successful implementation of an offshore employment company in the context of UK NIC and PAYE". We do not know its date. However there was a handwritten "FZE" (in the top right hand corner) which may have indicated it was received when Sharjah was being established or simply that it had been filed with paperwork concerning Sharjah.

59. The paper advises:

> "The offshore employment company should have substance and this should exist in two distinct areas. Firstly, it should be the actual employer, ie. both contractually and functionally. Secondly, it should have commercial substance, ie, it is a business entity and commercial contracts are entered into by the relevant parties, with transfer pricing issues considered when determining the charging structure. In effect the UK-based operating company (OPCO) and the offshore employment company should have a contractor/subcontractor relationship. This facilitates OPCO involvement in work performed by the offshore employer.
>
> The operational structure implemented should enable the offshore employment company to demonstrate the following positive factors:" [there then follows a list of the features required including an observation it was common practice that processes for recruitment, training, payroll, appraisals etc. be subcontracted to the OPCO "effectively leaving day to day administration as it is"].

Know your company presentation

60. A presentation from 2003 branded as Odfjell Drilling relating to the establishment of the Appellant and Singapore was also provided to us. We summarise its key relevant features.

Slide	Relevant information from the presentation
2 and 3	There are a number of companies coming under the banner of Odfjell Drilling, most relevant are the Appellant (employer of onshore office staff and well intervention offshore staff), Singapore (employer of majority of offshore employees)
4 and 5	Singapore has no UK place of business requiring all contracts to be signed by a director of Singapore but facilitating NICs savings
6, 8	The bifurcation of the corporate structure complicates the disciplinary processes and requires that the employer of the individual take the disciplinary action. The RM cannot discipline an employee of Singapore.

12	Disciplinaries which do not follow company policy will be automatically unfair under Employment Act 2002.
21 and 30	Chair of disciplinary or appeal hearing must be from the employing company

Operator contracts

61. The two Operator contracts which were performed during the Relevant Period were: the Talisman Contract dated 30 October 2003 and the BP Contract dated 8 October 2009. Both contracts incorporate, subject to specific amendments, the Leading Oil & Gas Industry Competitiveness (**LOGIC**) General Conditions of Contract for Well Services.

62. We understand that at some time in 2013 (and thus within the Relevant Period) BP transferred the operation of the Harding Platform to Taqa. The Appellant continued to provide services as under the BP Contract until losing the contract to KCA Deutag shortly after the end of the Relevant Period. We were not provided with a copy of any contract and assume simply that the terms of the BP Contract were novated to Taqa. We do not therefore consider services provided to Taqa in the Relevant Period separately.

LOGIC terms

63. We set out below a summary review of the relevant provisions of the November 2002 LOGIC terms:

(1) Under Clause 4 the contractor's (in this case the Appellant) general obligations are prescribed. The contractor is obliged to:

(a) Provide all management, supervision, personnel, materials and equipment, (except materials and equipment specified to be provided by the Operator), plant, consumables, facilities and all other things whether of a temporary or permanent nature, so far as the necessity for providing the same is specified in or reasonably to be inferred from the contract.

(b) Carry out all of its obligations and execute work (defined as all the work required to be carried out under the contract) with all due care and diligence and with the skill to be expected of a reputable contractor experienced in the types of work carried out under the contract.

(c) Take full responsibility for the adequacy, stability and safety of all its operations and methods necessary for the performance of the work and keep strictly to the provisions of the contract concerning health, safety and environment.

(d) Except to the extent that it may be legally or physically impossible or would create a hazard to safety, comply with the Operator's instructions and directions on all matters relating to the work.

(e) Be responsible for the programming of the work.

(2) Pursuant to clause 8 the terms provide that the contractor is entitled to assign the contract or any part of it to an affiliate company but may not subcontract the whole of the contract. Parts of the contract may be subcontracted subject to the Operator being given adequate opportunity to review the subcontract. The contractor remains responsible to the Operator for all "work, acts, omissions and defaults of any subcontractor as fully as it they were the work, acts omissions or defaults of the contractor".

(3) Clause 9 provides:

> "9.1 The [Appellant] undertakes to provide sufficient personnel at all times to ensure performance and completion of the WORK in accordance with the provisions of the CONTRACT.
>
> 9.2 All personnel employed on the WORK shall, for the work which they are required to perform, be competent, properly qualified, skilled and experienced in accordance with good industry practice. The [Appellant] shall verify all relevant qualifications of such personnel.
>
> 9.3 Where key personnel of the [Appellant] are specified in the CONTRACT they shall not be replaced without the prior approval of the [Operator]. Any replacement shall work with the person to be replaced for a reasonable handover period.
>
> …
>
> 9.5 The [Appellant] shall make its own arrangements for the engagement of personnel, local or otherwise …
>
> 9.6 The [Appellant] shall be as responsible for any WORK performed by any agency personnel and by any other person provided by the [Appellant] in connection with the WORK as if the WORK was performed by the employees of the [Appellant].
>
> …"

(4) At clause 27.4 it is reinforced that the contractor is an independent contractor and required to "exercise control, supervision, management and direction as to the method and manner of obtaining the results required by the [Operator]".

Talisman specific terms

64. The Talisman Contract formally incorporates the LOGIC terms subject to limited amendments.

65. So far as relevant the amendments are:

(1) In respect of clause 4 there is a specific requirement that the Appellant procure that any subcontractor complies with the requirement set out in paragraph 63(1)(c) above.

(2) Clause 8 is amended to ensure that subcontractors comply with various other clauses of the contract.

(3) Similarly, clause 9.2 is amended to require similar compliance by subcontractors and agency staff.

66. The remuneration schedule provides specified rates and the required numbers of staff at each grade both for onshore support personnel and separately for those working offshore. The contract recognises that crew size is not standard because of the differing levels of equipment on a platform and provides that crew size will be a matter of agreement under the contract between the Operator's representative on the platform (known as the Drilling Supervisor) and the Appellant.

67. The schedule also acknowledges that additional costs associated with personnel on the Beatrice B platform would be incurred. These additional costs, we understand relate to the additional 2ary C1 NICs payable because Beatrice B was in UK territorial waters and not on UKCS. We are not concerned with Beatrice B.

68. The scope of work set out in Section IV of the contract provides that the Appellant shall perform Platform Drilling Operating and Maintenance rig work on Talisman-operated

production platforms under Well Instruction detailed in Section VII – Administration Instructions or as verbally instructed by Talisman's Drilling Supervisor subsequently confirmed by email. The scope also required the provision of engineering support.

69. Section IV sets out the operations to be carried out within the scope of work by reference to "Work Instruction" (as to which see practical explanation in paragraph 147). The Appellant is contractually required to consult with Talisman concerning "methods, procedures, supplies, materials and equipment to be used in all such operations to effect the most efficient performance feasible under all attendant circumstances and consistent with reasonable, prudent and acceptable drilling practices always provided that this provision shall not affect [the Appellant's] status under the contract as an independent contractor."

70. The Appellant is also required to maintain Talisman's equipment through the submission by the Appellant and agreement by Talisman of maintenance procedures then to be followed subject to amendment or development at the Appellant's cost.

71. Responsibility for training of all personnel is on the Appellant to ensure required levels of proficiency and that relevant permits and certificates are maintained.

72. Section V of the contract concerns Health, Safety and Environmental (**HSE**). Under that section the Appellant must comply with Talisman's HSE Management System but also comply with its own such system; being required to collaborate with Talisman to establish and communicate interface arrangements where necessary.

73. The contractual procedures for the issue of work instructions are prescribed in Section VII of the contract and provide that activities to be carried out (and paid for under the contract) must be prescribed in a work instruction which will be given or confirmed in writing, and which must be accepted in writing by the Appellant.

BP specific terms

74. As with the Talisman Contract the BP Contract is made under the LOGIC terms. There are no amendments made to clauses 4, 8 or 9 of the LOGIC terms.

75. Section II of the contract concerns people management. The terms apply to all personnel engaged in performance of the contract including onshore and offshore personnel. BP imposes certain requirements on the Appellant for incorporation into the employment obligations of working on BP Platforms. These include conditions concerning working time, rotas, role descriptions, competency requirements and assessments. BP also requires that there be alignment of the Appellant's employment policies.

76. Section III concerns remuneration providing separate rates for onshore support staff as required and specified under the contract and more generally for those working offshore where rates are contractually determined by reference to nature and location of the work and the "conditions affecting the supply of supervision and labour". We understand, in fact, that certainly for Crew, minimum rates are agreed with the unions and are consistent across all Operators.

77. Scope of work is provided in Section IV. Clause 1.3 reinforces that the Appellant shall provide personnel, materials, services and equipment for performance of well operations (using BP equipment) and drilling facilities management … to support BP's operations". The Appellant undertakes to perform all work in compliance with BP's Drilling & Well Operations Policy. The Appellant is responsible for performing well operations and assisting BP in the co-ordination, supervision and administration of operations carried out by other contractors. BP requires the Appellant to consult with it on methods and procedures used in the drilling operations whilst continuing to ensure that the Appellant remains independent. Organisation and management of the activities performed under the contract is required to be provided

through the Appellant's onshore support operations. Subcontracting of specialist services is also envisaged in Section IV.

78. The scope of work also includes a section on personnel provided by the Appellant. Clause 5.1 requires the Appellant to provide a list of resumés for "all personnel that are going to work under the contract" for approval by BP prior to mobilisation. The Appellant must have a system to ensure competency of all personnel, and ensure that assigned personnel are adequately trained by reference to a training matrix. The contract also provides for a responsibility matrix where drilling and operations (platform) interfaces are prescribed as between "ops", "BP and contractor" and "jointly".

79. Section V concerns HSE. BP requires the Appellant to have a management system for HSE which meets general legal requirements and specific requirements imposed by BP and meeting the risks presented at each BP site. The Appellant is accountable to BP for compliance with management, implementing and monitoring of performance against the Appellant's HSE policies. The interface between the Appellant's and BP's HSE management system is required to be documented where the degree of risk so justifies. Otherwise the Appellant is required to follow BP's management systems.

80. We were provided with the Health and Safety Management interface document prepared under the contract. Part 2 of Section 1 (Core Federal HSE Expectations) and part 3 of section 2 (HSE Management System Interfacing Matrix) show a hierarchy of escalation and responsibility within each of BP and the Appellant, with lines of communication across between the organisations. The stated interface for local performance is between the Appellant's VP Ops and BP's Head of Operations or Well Team Leader (**WTL**) (all onshore positions) and for operational issues is between the STP on behalf of the Appellant and the Offshore Installation Manager (**OIM**) or Well Site Leader (**WSL**) for BP. The STP is shown below the VP Ops in the Appellant's hierarchy and the document specifically provides:

> "All Contractor personnel are responsible for the implementation of the detailed procedures and are accountable to the ODUK [STP] offshore and ultimately the ODUK VP Operations onshore."

81. Part 3 of Section 2 is entitled "plan and set standards"; risk is controlled through handover, risk controls and "permit to work" (**PTW**) through which accountabilities are defined under BP's Integrated Safe System of Work through the Area Authority. Change control requires the Appellant to notify BP of any significant change in, inter alia, personnel and to risk assess such a change.

82. Paragraph 3.4 of section 1 provides:

> "[the Appellant] is responsible for ensuring that their third parties or subcontractors are aware of the site [Local Operating Management System], and that the appropriate mechanism for assessment and management interfaces are in place. Subcontractors schedule to undertake complex or unusual activities will be subject to detailed review, including clarification of competency site management and work controls by the main contractor."d

83. The detail of the interface matrix of policies and procedures is then provided under an introduction which states "Contractors should insert their own [Safety Management System] documents, if applicable, that apply under each category. In the "Comments" column details should be added to show where the contractor's document (in whole or in part) has primacy. This must be agreed with the BP contract rep." We reviewed the detail of the matrix. The Appellant's policies and procedures, both Group and local level, are mapped to BP policies. In the main the comments section identifies that the BP policy has primacy. This includes for drilling and well operations policy and BP's well services operational guidance for well

intervention. The Appellant's level 4 (site specific) time optimised procedures (**L4 TOPS**) take precedence as operational guidance for other well service operations including drilling operations. Each company's own systems apply for document control and specification and whilst BP's system takes primacy for crisis/continuity management and emergency response the Appellant is expected to co-operate in casualty management. The Appellant is required to have its own substance abuse policy which meets the minimum requirements set by BP. A number of the Appellant's health and industrial hygiene fitness policies take primacy (the Appellant's policy is noted as provided by a third-party occupational health provider). The Appellant's competency assurance policy, safety leadership training, prequalification of supplier also take precedence.

84. Under Section VIII there are no identified subcontractors appointed by the Appellant.

Services Agreements

85. There are three Service Agreements entered by the Appellant one with each of the Offshore Employers.

86. The first agreement signed on 4 February 2004 but was effective from 1 April 2003 as between the Appellant and Singapore. The preamble to the agreement stated that Singapore had "considerable experience and expertise in the provision of the Services" the benefits of which the Appellant was "desirous of procuring". We note that plainly Singapore did not have that stated experience. By reference to its first set of annual accounts it was incorporated for the purposes of entering the agreement and providing the services.

87. Pursuant to its terms Singapore agreed to provide or procure:

(1) Manpower services as specified. We summarise these services, providing relevant quotes, by reference to the terms of the agreement as:

(a) "drilling crew and other manpower as requested by [the Appellant] and protect and promote the interest of [the Appellant] in all matters relating to the efficient operation of installations leased, owned or worked on by [the Appellant]";

(b) Documentation relating to personnel including documentation regarding training, medical fitness, and competence;

(c) Assistance in development of business plans for manpower provision;

(d) Recruitment, discipline, and management of personnel;

(e) General logistics including provision of travel arrangements for personnel;

(f) Secondment of personnel to the Appellant as required to provide onshore services or services within territorial waters;

(g) Payroll and pensions administration services;

(h) Compliance by personnel with the Appellant's policies and procedures regarding HSE;

(i) "Daily offshore reports relating to project process, manpower, installation maintenance and operation, incidents and all and any other matters with [the Appellant's] legitimate business that [the Appellant] may from time to time request".

(2) Finance and administration.

(3) Such other related services as may reasonably be agreed between the parties.

88. The remuneration clauses under the contract provide for manpower costs plus 2.5%; additionally, cost plus 5.25% for both costs specifically and directly allocable to the Appellant (other than manpower costs) and for a proportion of general costs not so specifically allocable. Invoices to be raised and payable monthly.

89. This agreement was subject to English law and was on terms that the relationship between the parties was that of independent contractors.

90. The agreement between the Appellant and Sharjah was dated 1 January 2007. It provided for similar services to those under the Singapore agreement; however, rather than being described as manpower services the principal services were described as "drilling services". In place of the particularisation shown at paragraph 87(1)(a) above were:

> "drilling services as requested by [the Appellant] and protect and promote the interest of [the Appellant] in all matters relating to the efficient operation of installations leased, owned or worked on by [the Appellant]"

91. The itemised services in paragraph 87(1) relating to manpower (b) – (e) were removed and there was minor amendment to reflect the language change from manpower services to drilling services. An entitlement to provide drilling services to third parties without the permission of the Appellant was introduced. Financial and administration services were no longer included.

92. The remuneration clause was amended to provide for a blanket 3.5% markup to actual or appportioned costs and reference to manpower costs was removed consistent with the amended wording to clause 3.

93. The applicable law was changed to United Arab Emirates.

94. The agreement with Dubai, signed on 1 April 2013 was in similar form to that of Sharjah providing for the provision of drilling services. The only relevant difference was the introduction of particularisation of drilling services to include the assumption by the Appellant of "supervision and responsibility for supervision and direction and control of personnel seconded" with Dubai retaining overall control and responsibility for those personnel. There was a dispute between the parties as to whether the "seconded personnel" in this regard were those seconded by Dubai to work with and for the Appellant onshore (see paragraph 87(1)(f) above replicated in both the Sharjah and Dubai agreements). Given our factual findings as set out below we do not consider it necessary to resolve the dispute in this regard.

Consultancy Agreements

95. As with the Services Agreements there were three consultancy agreements each signed on the same dates as the Services Agreements.

96. Under the consultancy agreement with Singapore the Appellant contracted to provide services under the headings: operations and human resources and logistics. The operations services included assistance in developing and interpreting the Appellant's policies, manpower planning and documenting and handling insurance claims; and advice and best practice guidance on operational matters. The list of services under the human resources and logistics heading were extensive including recruitment, mobilisation, issue of contracts, employee handbooks etc, verification of competency, advice and guidance on best practice, making appropriate recommendations on grievance and disciplinary matters, provision of group facilities in respect of pensions, benefits etc. Together with a catch all of "such other related services as may reasonably be agreed between the Parties from time to time …".

97. In substance of the items identified in 87(1) all those except the provision of the drilling crew and the daily reporting of activities undertaken by the crew (i.e. (a) and (f)) were contracted back to the Appellant.

98. These services were said to be provided "at the request of" and "on the express approval and instruction of" the Offshore Employer subject to a clause 13 which provided that the Agreement was not intended to create a relationship of agency between the parties.

99. The consideration under the agreement was a fixed monthly sum representing an estimate of the specifically and directly allocable costs plus a proportion of general costs.

100. As identified above the Singapore and Sharjah Consultancy Agreements provided for services to be provided "at the request of" and "on the express approval and instruction of" the Offshore Employer subject to a clause 13 which provided that the Agreement was not intended to create a relationship of agency between the parties.

101. Under the agreement with Sharjah the only service provided under the heading operations was the provision of technical advice and best practice guidance on operational matters. The particularisation of human and resources and logistics services was reduced though remained a broad representation of services connected with the employment of personnel. Some of the services originally under that heading were moved to new headings of health, safety and quality (particularly advice regarding competence, training and regulatory compliance), payroll and payroll accounting services. Intercompany invoicing services were introduced. As with the Singapore agreement the services were provided "at the request of" and "on the express approval and instruction of" the Offshore Employer subject to a clause 13 which provided that the Agreement was not intended to create a relationship of agency between the parties.

102. The monthly fee payable doubled under the Sharjah agreement.

103. The only material change under the Dubai agreement was that technical advice was to be provided at the request of Dubai, but HR, logistics and other services were stated to be provided under the authority provided by Dubai to carry out the tasks all still subject to clause 13 indicating no agency relationship. We saw no formal documentation of the authority.

Invoices

104. We were provided with 12 months of invoices from Sharjah to the Appellant (April 2012 to March 2013). There were 2 per month one; for the costs under the Talisman Contract and one for costs under the BP Contract; the rubric on each was "wages etc. costs for [period] for [contract]". The invoices were accompanied by a schedule which identified individual heads of manpower cost including wages, employer's liability, PMI, pension costs, occupational health etc. plus markup. We did not see any apparent recharge for other costs.

105. We were also provided with invoices issued by the Appellant to Sharjah for the same period for "various platform costs for BP for the month of [period] as per attached spreadsheets". The spreadsheets identified costs incurred by the Appellant in respect of each platform operated by the relevant Operator. We note that the invoicing did not appear to be in accordance with the consultancy agreement i.e. there was no £15,000 monthly charge but rather a more detailed breakdown of costs.

Contracts with employees

106. In the bundle there were two generic contracts of employment and various redacted, but signed, contracts.

107. The first generic contract of employment was for employment with Dubai. Under the terms of the contract Dubai was defined as "the Company". There was some dispute between the parties as to the use of "the Company" within the contract. HMRC contended that the term

was used not only to reference the relevant Offshore Employer but also more generically to refer to the Appellant and more widely to the Group/Odfjell Drilling. We use "the Company" in our initial narration.

108. So far as relevant the contract provided for:

(1) The appointment and probationary period of the employee;

(2) Hours of work and annual leave: normal arrangements being a number of days offshore (14 or 21 days) followed by the same number of days onshore known as "Field Break" during which the employee might be required to undertake training or other onshore duties but subject to meeting the requirement for rest under the Working Time Regulations 1998. The employee was required to devote their full time and attention to the Company.

(3) Place of work to be "any offshore or onshore place of work in the World as directed by the Company … as the Company may require."

(4) Job title/position to be determined by reference to the attachment of a job description but the Company reserved the right to require that the employee perform any job within the employee's skills and capabilities on "assignment to any third parties as the Company may direct". The employee was also required to "comply with and observe all rules and regulations as issued from time to time by the Company or (where applicable) the authorised representative of any client which the Company shall direct you to serve" (client was not defined for these purposes).

(5) A failure to report for a crew change, if not notified in advance, to be treated as an offence under the Company's disciplinary procedure.

(6) A duty to "perform work according to the instructions and orders from any member of the Company's management as well as contributing positively to the ongoing operation of the Company and its clients …" and that "all Company Policies, Rules and Regulations should be adhered to and disciplinary action could result from any breach".

(7) The Company to nominate and notify a check-in point at which the employee was to report with all relevant documentation necessary to then be transported offshore.

(8) The employee to maintain confidentiality in respect of any trade secrets or confidential information relating to the Company or any of its clients.

(9) The rights in any invention, design and/or copyright work to vest in the Company.

(10) Further detail on various matters under the agreement to be found in the Company's Employee Handbook.

109. We consider that it is reasonably apparent that "the Company" was used in this contract in a somewhat loose sense. Certainly we were provided with no rules and regulations developed or devised by Dubai that applied to those it employed; and the nomination of check-in (a very significant communication given the consequence of a failure to attend it) was not, in a practical sense at least, provided by Dubai.

110. We were also provided with a copy of a generic agreement for employment with the Appellant. It was in a different form to the generic Dubai contract, though unsurprisingly, was not materially different in the areas covered (largely because of the employment law requirements and good practice).

111. Under this agreement the Employee Handbook appears to have a greater significance than under the Dubai contract. Under this agreement the employee's position is more generically provided for without reference to a job description. Place of work is "any

worldwide location or facility … mutually agreed". A 36-hour working week is provided for. Safety, security and accidents are managed through policies and regulations laid down by the Company. Confidentiality under this form of contract was secured through a requirement that the employee sign a confidentiality agreement. We were not provided with a generic confidentiality agreement. However we refer below to a redacted and signed agreement for an employee of Sharjah (see paragraph 115).

112. We note (by reference to the signed but redacted contracts provided to us) that both forms of contract were used by the Offshore Employers.

113. Within the material provided for specific employees we could trace employment through the Offshore Employers. One individual originally employed by Singapore on 1 May 2004 (and thereby under the Talisman Contract) had continuous employment from 28 December 2000 and was thus an employee transferred to Singapore when the Appellant was appointed by Talisman. That employee was provided with notification that with effect from 1 January 2007 their contract would transfer from Singapore to Sharjah explaining "There will be no change in any of your terms and conditions of employment and your original commencement date will transfer to the new company".

114. A second employee whose contract was with Sharjah and dated May 2007 had continuous employment from 28 February 1980 (presumably on the Appellant taking on responsibility for a further Talisman platform after the original start date for the Talisman contract). This employee signed a contract in the same form as the generic contract provided for the Appellant and not that with which we were provided for Dubai. The contract for a third employee first employed on 14 December 2009 (with continuous employment from 1 May 2004) was in the form of the Dubai generic contract. However, that for a fourth for employment with Sharjah commenced 1 March 2011 (but with continuous service from 28 February 1980) had reverted to the Appellant's generic form.

115. Attached to an employment contract for an employee of Sharjah using the form of contract provided as the Appellant's generic contract was a signed confidentiality agreement. It was generic to "Odfjell Drilling" and not to Sharjah. It provided that the employee was obligated to hold any "classified information regarding to the business of Odfjell Drilling or their principal in strictest confidence". The same form was attached to the employment contract for an employee transferring from an offshore role employed by Dubai to an onshore role employed by the Appellant on 23 July 2012.

Employee handbook

116. We were provided with a copy of the Dubai Employee Handbook which was restricted to employees working in the North Sea under the Services Agreement and was dated post the Relevant Period (May 2015). The witnesses confirmed that the Handbook was representative of those in the Relevant Period though shorter and clearer.

117. Paragraph 1.4 describes the relationship between Dubai and the Appellant:

> "[Dubai] engages [the Appellant] to act as their agent for all their employees working in the North Sea (UK). This means that it will be an employee of [the Appellant] who will contact you with regard to employment matters and logistics activities. For ease of reference, the HR department referred to throughout this handbook refers to our agent [the Appellant's] HR department.".

118. We note that this description would appear to be contrary to the terms of the Consultancy Agreement (which precluded under clause 13 the creation of an agency relationship).

119. The relevant code of conduct applicable to Dubai employees as per the handbook is an Odfjell Group policy applicable to the whole group and not dedicated to Dubai employees. The handbook also references other UK level policies and procedures, again not those bespoke to Dubai. All employees are encouraged to familiarise themselves with the policies and procedures held on the Odfjell Group company management system (**CMS**). Such policies may be set and applicable at L1 – corporate (i.e. Odfjell Group) level; L2 – Country (i.e. UK) level, L3 business unit (Odfjell Drilling – including both the Appellant and the Offshore Employers) level; and L4 – unit (Platform) level.

120. The Handbook provides the detailed additional (and contractual) information required by employees including detail on the terms of employment (for example regarding a second employment, sickness reporting, information regarding procedures for working offshore etc.).

Other material concerning employees

Job descriptions

121. We were provided with a number of job descriptions the majority of which we do not consider to be pertinent to the decision we need to take. We were not provided with a job description for the STP.

122. The only job description we consider relevant is that for a RM issued in 2012 and revised 2013. The job summary and responsibilities were set out:

> - The Rig Manager is the primary focal point for all aspects of the rig operations, having direct and indirect communication lines with all involved parties, including subordinates, peers, Company Management, client representatives and regulatory body representatives.
> - Delivery of offshore operations in compliance with Odfjell Drilling, client & regulatory requirements to ensure all activities are conducted to high standards in safety & environmental management.
> - Focus on a process for continuous improvements of all drilling & associated activities.
> - Contribute to the initiation of activities to ensure that these are carried out in the spirit of the Company, ensuring all activities comply with the safety, efficiency and quality measures expected from the Company. The key duties of this position include, but are not limited to, the responsibilities detailed below:
>
> Responsibilities
>
> - Provide & visibly demonstrate safety leadership.
> - Monitor, track and maintain overall rig performance reporting. Identify trends and establish root cause and solutions for loss events. Ensure solutions are implemented.
> - Maintain financial control of the rig business unit. Plan, prepare and implement effective budgetary and cost control processes.
> - Maintain compliance of the offshore rig and its personnel with Company policies, procedures and processes.
> - Maintain technical and regulatory compliance of the offshore rig.
> - Review and ensure that the requirements of the clients well programme remains within operational boundaries of the rig as established by the rig specific safety case.

- Support and actively promote the Company's behavioural safety programme and establish site related safety initiatives.
- Ensure communication and information transfer towards clients and other company personnel.

…"

Policies and procedures

123. We were referred to the following policies and procedures. We do not consider it necessary to set out their terms in detail. The witnesses all confirmed that these policies/procedures were the ones that were applied in the contexts to which they related, and we set out their evidence in this regard below.

124. In the table below we identify the policy/procedure and at what level within the Group it was set. Each of the documents (unless otherwise stated) was identified as an "Odfjell Drilling" document applying to both the Appellant and the Offshore Employers (and other corporate entities operating within the Odfjell Drilling division of the Group).

Induction Procedure	L2 (UK)
Leavers Procedure	L2 (UK)
Recruitment of Staff policy	L2 (UK)
Grievance Procedure	L2 (UK)
Sickness and Absence Procedure	L2 (UK)
Appraisal Guidelines	L2 (UK)
Redundancy Procedure	L2 (UK)
Working Hours Procedure	L2 (UK)
Disciplinary Procedure	L2 (UK)
Dubai Company Handbook	Not identified
Appellant Benefits Information Booklet	Not identified

125. Accompanying the Absence management, Grievance, and Promotion Procedures were RACI Charts. As their name indicates these charts identify who will be responsible for, assist with, be consulted upon and informed of the various stages in the procedures. In each instance the identified roles were all roles within the Appellant (i.e. HR, Appellant Manager, and Appellant Senior Manager). The corresponding narrative on one occasion referred to the STP.

126. We were not provided with any of the policies concerning drilling operations. However, as reflected in paragraphs 80 - 83 such policies and procedures were identified within the BP health and safety interface matrix. The matrix refers to nineteen L1 policies including the Corporate Code of Conduct, HSE Policy and Risk Management and Acceptance Criteria; three L2 including COSHH, eight L3 concerning matters such as maintenance strategy, manual handling, HAVS and L4 TOPS are referred to on three occasions (though we understand that there were many hundreds of such policies – see WC evidence below).

Witness evidence

127. In this section, we note that despite this case requiring us to draw very fine but critical distinctions between the Appellant and the Offshore Employers all of the witnesses commonly referred to Odfjell. Individually they unanimously accepted that both they and the employees

of both the Appellant and the Offshore Employees would not distinguish between the companies and that the operations were conducted as those of Odfjell in a very generic sense or Odfjell Drilling (which consisted so far as relevant, of the Appellant and the individual Offshore Employer at the time).

128. We start with the evidence of JS as that enables us to introduce the framework of drilling operations on an Offshore Installation and the interaction between onshore and offshore staff.

JS

129. JS worked in the oil industry for over 40 years, initially in offshore roles on Platforms operated by BP. He was employed by a variety of specialist drilling services providers. On each occasion that BP changed service provider JS's employment transferred to the new provider. JS's last offshore role was as an STP. The Appellant was not the specialist provider for any rig on which JS worked when he was in offshore roles.

130. In June 2010, JS decided to change his career direction to working onshore and joined the Appellant as an Assistant Rig Manager. He explained that becoming a RM from STP was a career option but not one suitable or interesting to every STP. He did not consider that a move from STP to RM would be considered to be a promotion. JS accepted that onshore roles gave an opportunity for career progression not available offshore. He considered any career progression for an STP wanting to remain offshore would require becoming a consultant providing advice to the Operator on drilling matters.

131. We found JS to be an honest witness with a breadth of knowledge to assist us in understanding the drilling services provided by the Appellant and the manner in which such services were provided in the Relevant Period.

132. JS, along with the other witnesses introduced an organogram which Mr Hitchmough invited us to append to our judgment. HMRC objected to our adopting the organogram (which we understand was prepared for the purposes of this dispute) on the basis that there was a risk that it assumed what we need to decide. We have not appended it because of HMRC's concerns; however, we do set out below the relevant aspects of the document which we consider assist in an understanding of the dramatis personae in this appeal.

133. Whilst we did not receive direct evidence from an Operator and take the evidence from JS (and others) we understand that within the Operator there will be an onshore and an offshore team. The person responsible for a Platform appointed by the Operator will be the OIM. His responsibility is to oversee all activities on the Platform. The most senior offshore client representative responsible for drilling operations is the Well Site Leader (**WSL**) to whom offshore geologists and drilling engineers report.

134. Onshore the client team is led by the Senior Drilling Engineer to whom the Well Team Leader (**WTL**) reports. The onshore geologists and drilling engineers report to the WTL.

135. The Group also organises itself with onshore and offshore teams. Offshore the most senior individual is the STP to whom a day and a night toolpusher report (**D/NTP**). Beneath the D/NTP are a team of drillers, assistant drillers, derrickman, deck foreman, assistant derrickman, roughnecks and roustabouts. There is also a maintenance team of mechanics, engineers, electricians and a storeman who report to the Maintenance Supervisor (**MS**). The MS reports to the STP. In the Relevant Period all the Odfjell Group Offshore staff were employed by the Offshore Employers.

136. The onshore hierarchy is amply demonstrated by JS's career. At the top of the reporting line is the VP Ops. The OM is one of the VP Operations' direct reports. Also reporting to the VP Ops are those with direct responsibility for Quality, Health, Safety and Environment and Human Resources. As indicated JS's role as OM included responsibility for all the UKCS

operations. Beneath the OM will be a series of RMs (responsible for one or more Platforms) and reporting to the RMs may be Assistant Rig Managers (**ARM**) (each responsible for a single Platform) and Maintenance Team Leaders (**MTL**). Onshore staff were employed in the Relevant Period by the Appellant.

137. JS's role as a witness was particularly, to assist us with an understanding of the role of the RM and generally the responsibilities of the onshore team in the context of service provision by the Appellant to the Operators. JS variously described the service provided by the Appellant in the context of fixed platform drilling as "a supplier of people, people and equipment" and, "the drilling crew and certain ancillary equipment/supplies to support drilling plus the obligation to inspect, maintain and replace that equipment". The Appellant's expertise being founded in the processes and procedures which governed its operations ensuring safe and effective drilling to be carried out.

138. In JS's view it was these policies and procedures that distinguished one service provider from another. The rig crew, and specific knowledge of the rig's operations, would usually transfer when the Operator changed contractor, Operator policies and procedures would also continue to apply to a new incumbent but the new contractor's policies and procedures (certainly those which applied at corporate, local and business level), and overall contract operations would be the new ingredient into operations. JS was keen to emphasise that the asset level policies would be the purview of the STP who had direct knowledge and understanding of the rig but he accepted that these asset specific procedures also formed part of a cohesive whole with the higher level policies: i.e. a corporate policy concerning safe systems of work would be implemented through more detailed or specific policies at local, unit and finally asset level.

139. JS explained that the RM is primarily a contract manager concerned with the Appellant's performance under the drilling contract with the Operator. The RM is also responsible for ensuring that the agreed budget for such services is met, and otherwise responsible for what the rig delivers contractually in accordance with the job description the terms of which are set out in paragraph 121 above. This would include oversight of all operations to manage contractual accountability to the client.

140. The role involves acting as the interface between the drilling operations performed offshore and the onshore client team through receipt of data and a series of daily meetings. These meetings would include meetings attended by the RM/ARM with: only the STP and/or D/NTP, client offshore representatives and STP, client onshore representatives and some meetings were all parties on and offshore. These meetings would represent a two-way flow of information ensuring that both the Appellant and the Operator client were fully appraised of operations at the drill site, maintenance, and overall safety of delivery. They also provided the opportunity to ensure that those offshore were aware of matters relevant to the operations including issues arising on other installations, shipment delays, weather updates etc. The client's offshore team, through the WSL, would communicate the drilling work plans at such meetings (though as set out below this would be information and not direction for action which required written work instructions (**WWI**)). The meetings may also involve other associated specialist service providers i.e. geologists, mud engineers etc.

141. JS also explained that the RM's role could aptly be described as "expectation management":

> "I'd say the rig manager is a − you're dealing with expectations. You're dealing with expectations of the client. You're dealing with expectations of your 86 guys offshore, the expectations of the maintenance team, expectations of the in the logistics, the expectations from the client 's drilling engineers. So you've

> got you are managing expectations from everyone and you are in the middle, you are that base, and you're the guy that has to be the buffer, explain different things to the client."

142. The RM was particularly concerned with lost time incidents and non-productive time (**NPT**) as under the contract, responsibility for any time not spent drilling needed to be determined as the cost of such time was usually borne by the party responsible for it. The RM was keen to ensure that only such time as was properly attributable to the Appellant carried the associated cost implications.

143. The RM was also the appraisal manager for the STP. The appraisal would be done in accordance with policies and procedures set by or within the Group as they applied to all Offshore Employees. The information used by the RM in the appraisal would be collected from a range of sources including individuals employed by the offshore Operator. The RM was also more generally engaged with the STP offering support and guidance where requested to facilitate and enable optimum performance by the STP in his role overseeing the offshore operations and leading and managing the offshore team. Direct operational decisions were the responsibility of the STP but an RM, particularly one with offshore experience, could offer challenge and encouragement with complex decision making on drilling matters.

144. JS described the role of the RM as discrete and distinct from that of the STP in terms of the individual responsibilities of each role with the STP being responsible for the offshore aspects of the drilling operation. Given the remote location of UKCS Platforms and, often, the immediacy of decisions that needed to be taken the STP would need to take operational decisions without prior consultation. The role of STP was to take such decisions on the information available to them on the Platform (including technical data from the drill site), observations and contributions from the Crew and the offshore client representatives to ensure safe (first and foremost) and effective/efficient drilling operations were carried out as required by the Operator's drilling programme as communicated each day via daily drilling instructions. To that extent at least, the STP was autonomous from the RM; however, JS readily accepted that the STP would usually, where time and circumstances permit, also take soundings from the RM and that such soundings would be factored in, but not necessarily followed, by the STP.

145. The Operator devises the overall drilling programme by reference to well analysis undertaken by the Operator's own (or appointed) engineers, surveyors, seismologists and geologists. The RM is responsible from a contract perspective for agreeing the programme i.e. that the programme can be delivered under the terms of the contract specification and within the agreed budget. A copy of the programme is provided to the STP.

146. Planning to deliver the drilling programme will be a collaborative exercise undertaken involving the Operator, the RM, onshore support functions and the STP. The role of the RM will be to review the plan and seek to head off obvious issues and resolve them with the Operator client before the operational aspects begin, thereby avoiding potential adverse impact on the STP or rig operations.

147. The overall drilling programme is executed through WWI (a series of more detailed instructions prepared for discrete steps in the drilling process) prepared by the Operator's WSL who will obtain input and perspective from the offshore teams of the specialist service providers including the STP. Once prepared, but before finalisation, the WWI will be reviewed by the Operator's onshore WTL (together with onshore engineers etc), with input from the Appellant's onshore team, particularly the RM. Any points of contention raised by either the STP or the RM concerning the effective delivery of the drilling programme through the WWI will usually be managed onshore between the RM and the WTL as both the Appellant and Operator will seek to ensure cordial relations offshore.

148. From WWI daily drilling instructions (**DDI**) are produced by the WSL so as to prescribe the granular detail for each day's drilling activity. The STP, in collaboration with D/NTP and the drillers will review the DDI and agree from a practical perspective whether it is agreed that DDI are safe and feasible to deliver on that day. Once agreed the DDI directs the drilling activity for that day.

149. Safety on a Platform is managed through PTWs. Each procedure undertaken on the Platform requires a PTW which needs to be approved by the OIM. The PTW records the assessment of risk prevention measures which need to be in place when performing particular tasks or procedures; they must address a broad perspective of risk including the interface with other tasks which may be taking place, and which may be impacted by the procedure and/or which may impact the way in which the procedure/task is carried out. The STP is responsible for preparing and submitting PTWs in respect of drilling tasks. However, the PTW will often incorporate a standard Odfjell Drilling (level 2/3 procedure). JS gave the example of "nippling up and down the stack" in which there was a 44 page Odfjell Drilling procedure that would be referenced rather than replicated into the PTW. He went to explain that some PTWs will be routine, but all may need to be amended, sometimes at short notice, to adapt to evolving conditions at the well site/more generally on the rig.

150. When operational problems arise both the STP and the RM will be involved and each may identify issues which will need to be communicated to one another, and to the Operator and ultimately resolved.

151. A key part of the RM role was also liaison with HR and Quality, Health, Safety and Environment (**QHSE**) and the logistics teams, particularly in the case of QHSE in the development of policies and planning training for the Crews on the Platforms over which the RM had oversight.

152. Interface with HR arose in a tripartite way with the STP:

(1) Resourcing: all allocations and shift rotas were prepared by the RM, usually in discussion with the STP. The RM's focus would be on ensuring an effective skill mix to meet the contractual requirement and for delivery of the anticipated requirements of the drilling programme/WWIs. The STP would consider which combinations of individuals worked best from a temperament and relationship perspective. In cross examination JS confirmed that the final say on, in particular, allocation of resources was a matter for the Appellant/RM. Allocation would be likely to need a more strategic perspective across assets and had budgetary implications. The final say on rotas again was ultimately with the RM, but as effective performance was also affected but the cohesion of the team the STP's preferences would be accommodated where possible. Where a STP requested additional or specialist individuals the RM was required to approve the allocation first; in determining whether to approve the RM would balance the cost of potential NPT against the additional resource cost but would also need to ensure "bed space" on the Platform. HR would be involved to identify available and suitable resource from the pool of offshore employees. HR was responsible for mobilising staff going onto the Platform and liaise with the Operator's logistics team.

(2) Evacuation/exceptional circumstances: the STP was empowered to take decisions which permitted crew members to leave the Platform for exceptional circumstances. Where such a decision was taken HR would be notified. The RM would not be involved in the decision to remove but would then work with HR regarding such matters as the impact of removal on the individual's pay, mobilisation of any replacement and as the liaison point with the Operator client regarding impact on service and budget.

(3) Holidays: in accordance with the L2 policy, as reflected in the employees' contracts of employment, offshore employees are expected to take annual leave during Field Break; however, where an individual wanted leave from an offshore shift it was expected that they would try to arrange a shift swap known as "time for time". Annual leave affecting offshore shifts had to be approved by the STP. The RM would then consider the impact of the leave on pay and client budget and liaise with HR to make any necessary adjustments to pay. Approval would be given for such leave only with the acquiescence of the RM, STP and HR.

(4) Appraisals: as regards the Crew, the individual's immediate line manager in the hierarchy described in paragraph 135 above would be the appraiser. At Platform level the STP was required to ensure fairness and consistency. However, consistency across Platforms and adherence to policy on appraisals was ensured by the RM working with HR. Where, through the appraisal process, it was identified that an individual was suitable for promotion the recommendation to promote was taken by the STP in conjunction with HR. The RM's involvement would be to approve the decision, and working with HR, the RM was responsible for managing the succession plan following the change of role of the promotee who may move to a different Platform or otherwise to ensure the appropriate mix of skills by grade and budgetary impact.

(5) Discipline – in cases of potential misconduct by an offshore employee the RM would generally be involved unless the matter could be resolved informally offshore. Where a formal process was required to be followed the RM would usually conduct the investigation. This was in part because the RM could usually more easily make the time but also to remove the potential subjectivity of the STP's direct involvement in the investigation of an incident with their crew. It also ensured that the STP would be available to chair the disciplinary panel. The STP may conduct the investigation if the misconduct was of a highly technical nature. Whoever undertook the investigation they would be supported by HR ensuring that Group level policies on fair disciplinaries were followed. Investigation interviews would follow a question format prepared by HR. HR would also provide advice regarding the recommendation for disciplinary action if necessary. Disciplinary sanctions were given only after a hearing, usually chaired by the STP (unless they had conducted the investigation in which case the hearing may have been chaired by the RM or an STP from a different Installation). At any disciplinary panel HR would again provide support, a hearing framework, and advice ensuring fairness and consistency. The communication of an outcome was made by HR. The employee's right of appeal was to a director of the Offshore Employer again advised by HR.

NM

153. As indicated NM was never employed by either the Appellant nor any of the Offshore Employers though he was a director of Dubai from April 2013 through to the end of the Relevant Period and beyond. His role for his employer was wider than his duties to Dubai with a focus on the development of the Odfjell Group's business presence in the Middle East. This entailed facilitating investment and growth in business services including the move from the Sharjah to the Dubai Free Zone (necessitating the incorporation of Dubai) and the establishment of a human resources function in Dubai (though this HR department was not the HR department responsible for interaction with employees of Dubai working on the UKCS).

154. We found him to be an honest witness keen to help us understand operations in the Middle East and the role of the Dubai company in the Odfjell Group's operations on UKCS. However, and for the reasons we identify as we recount and summarise his evidence, it is apparent that his role as director and in connection with the business of Dubai regarding the

employment of those working on the UKCS was limited, simply because there was little required of him in that capacity.

155. As director there were the formal and routine aspects of his role: reviewing and approving annual accounts, signing off payroll, attending board meetings etc.

156. NM introduced the employment contracts to us and explained that Dubai was responsible, at least in a contractual sense, for usual employee-related matters i.e. ensuring they were paid, contributing to their pensions, holding appropriate insurances, etc.

157. Pursuant to the Services Agreement between Dubai and the Appellant, and as reflected in the language used in the 2013 annual accounts for Dubai, NM explained that the offshore crew/personnel element of the services provided by the Appellant to Operators was subcontracted to Dubai i.e. Dubai provided a sufficiently qualified crew/manpower capable of performing drilling services as required by the Appellant in order to fulfil the Appellant's obligations to its Operator clients also providing daily reports in respect of project progress, manpower, installation maintenance and operation incidents and so on. NM described Dubai as "a body shop supplying people".

158. NM explained that when Operator contracts were won or lost by service providers some but not necessarily all members of the drilling crew were likely to move with the contract (in a TUPE like way). In a situation in which the service provider continued to have operations in an area it was likely that they would look to retain the best staff, particularly those with knowledge of the procedures and policies operated by that service provider. However, that also needed to be balanced with the requests and requirements of the Operator. In many instances the Operator would look to ensure that certain members of the crew (usually the more senior ones) were transferred with the contract to retain continuity and familiarity with the Operator's procedures and the Platform itself.

159. NM accepted that Dubai would not get involved in operational matters and that its only responsibility was to ensure that employees capable of understanding and executing the Operator's drilling programme in accordance with both the Operator and Appellant's drilling procedures were provided to fulfil the Appellant's obligations to the Operator. However, this function was performed by the Appellant through the Consultancy Agreement. NM was also clear that Dubai had no involvement in setting drilling procedures.

160. He was equally clear that no one from Dubai would exercise supervision, direction or control over the individuals working on the platform but that, in his view, the person autonomously directing and supervising the Crew was the STP with the support but not direction of the onshore team although accountability for contract performance rested with the Appellant's employees onshore. All liaison on drilling and personnel matters by the STP was with the Appellant's onshore team and not with the Dubai directors.

161. NM explained the extent of the role fulfilled by Dubai in personnel management:

(1) Recruitment: the only involvement of Dubai was in the co-signature of contracts of employment. All other aspects associated with the identification of a need for recruitment, advertising initially internally and where necessary externally, interviews, communication with potential employees etc. was all undertaken by the Appellant though as NM understood it the STP may also be involved.

(2) Promotions: Dubai management played no part in decisions to promote or communication of promotion but decisions on suitability for promotion were taken by the STP.

(3) Resourcing: Dubai's obligation was to ensure that the services of appropriately skilled Crew was provided on Platforms. However, practically, and in accordance with Group policies, the RM was responsible for the manning of the Platforms (this is expressly provided for in the policy for recruitment (clause 4.2.2)). As NM explained it was the RM that "deployed" the Crew (and STP) to each Platform: "[the Appellant has] their personnel that they require and they put them on the projects that are there". In NM's experience Dubai played no role whatsoever in selecting employees for rotas.

(4) Appraisals: all carried out in accordance with Group/Appellant policies with no direct involvement from Dubai management. All Crew were appraised under the control of the STP but STP was appraised by RM.

(5) Grievances: the UK policy was applied to grievances bought by Dubai employees. The Appellant sets the procedure and allocates responsibility for the steps that need to be followed when there is a grievance. These steps will usually involve an onshore manager undertaking the initial investigation, with the STP chairing a hearing if required, advised and supported by the Appellant's UK based HR function.

(6) Disciplinary: the Appellant would provide technical advice and guidance in accordance with UK employment law and by reference to Odfjell Group policies. Informal discipline would be undertaken by the STP in the moment offshore as necessary. However, formal disciplinary investigations were undertaken, by preference, by the onshore support team so as to facilitate that the STP could undertake the disciplinary hearing. On occasion the role of the STP may be to undertake the investigation in which case the RM would chair the disciplinary hearing. Any appeal against a disciplinary decision was heard by management in Dubai. When hearing an appeal NM would be provided with papers and guidance from the Appellant's HR team.

WC

162. WC was an honest and helpful witness.

163. As indicated above he has worked on Platforms operated by BP for the majority of his working life. From October 2009 his employment was transferred under a TUPE-like arrangement to Sharjah and subsequently to Dubai. He was employed by Dubai up to the end of the Relevant Period. He was clear that who employed him was not a matter which concerned him. He was aware that his legal employment changed over time, some changes required him to change his "coveralls" i.e. the boiler suits he wore might change colour and the badges on them might change, but as far as he was concerned, he worked on BP platforms as part of the drilling team and not much changed – as the STP he was responsible for delivering a safe system of work and achieving the drilling outcome sought by BP and required of the Appellant.

164. WC provided us with a detailed explanation of the role of the STP and his interactions with the OIM and WSL (and other BP employed or contracted specialists), the Crew and the Appellant's onshore team including the RM and HR function. He was clear that he had never interacted with the directors or senior leaders of Sharjah or Dubai or with any HR staff in those locations.

165. Whilst in some regards there is no such thing as a typical day, as there are so many contingencies and variables, there was a consistent pattern or structure to each day.

(1) 5am joining the informal handover between the NTP and the DTP. This meeting would always address any safety issues first and would cover non-productive time and progress against the drilling programme.

(2) 5:30am meeting with the N/DTP and WSL essentially as a 12-hour progress report and planning meeting for start of the day shift.

(3) 5:45am full offshore drilling crew meeting with other third-party specialists, and the full shift handover. All crew members were informed of Platform general information.

(4) Day shift runs from 6am – 6pm. The STP role during the day shift would involve meetings (see below) and considerable paperwork including drafting and reviewing PTWs, reviewing the DDI for the upcoming day and the daily drilling report (**DDR**) for the previous 24 hours. Personnel issues would be handled, principally offshore, but where necessary through the involvement of the RM and/or HR. The STP would also monitor drilling progress, checking statistics reported latterly automatically and previously manually and by speaking with the DTP and driller.

(5) 8am was the first formal meeting with the Appellant's onshore team. Usually attended by the STP and MS (offshore) and the RM, MTL and periodically QHSE (onshore). A safety report would be given by WC, a review and update of the DDR (which is prepared from 00:00 to 23:59 each day and communicated to the RM and the Operator). The DDR records all activity and NPT together with detailed data on the drilling activities. There was a discussion of any NPT or other issues likely to require the RM to provide an explanation to the Operator. The MS would report similarly for the maintenance schedule. The RM would then update the offshore crew on matters relevant to the offshore operations and generally.

(6) 8:45am was the client drilling meeting which involved both the BP onshore and offshore teams responsible for drilling (WTL and WSL), the STP, RM and relevant third-party specialists. This meeting would update the Operator team on all aspects of safety and operation of drilling.

(7) The meetings with offshore and onshore staff were mirrored in the evening as the nightshift began.

166. WC saw a clear demarcation between the role of the STP and the RM. In his experience the RM was responsible for managing the delivery of the Appellant's contract with the Operator i.e. that the key performance indicators for safety, drilling and maintenance performance were monitored and met and where they were not that there was a clear explanation for not doing so. The RM's role is supported through HR, QHSE and technically, from a drilling perspective, by a drilling engineer all based onshore. The RM is the direct onshore point of contact for the Operator.

167. As an STP, WC saw his role as being responsible offshore for the physical drilling activities, ensuring safe working and for the pastoral care of his Crew. However, as the activities were undertaken pursuant to a contract between the Appellant and the Operator the STP role also included the provision of relevant reports and information to the RM so that the RM could perform their function effectively. Daily interaction was generally limited to the provision of the information needed by the RM (through the meetings outlined above); however, WC acknowledged that he was an experienced STP and those more inexperienced may have had greater interaction with the RM. For WC the RM was the onshore conduit to support for offshore operations or where issues arose with the Operator (particularly concerning NPT) but that primarily he had autonomy to take the relevant day-to-day decisions at the well site and with the crew.

168. WC acknowledged that the RM was his appraisal manager but did not consider that the RM directed his daily activities. Appraisals were undertaken by the RM using information/feedback provided by the Crew, the WSL/OIM and the performance data for the drilling operations and not, in WC's view, because he "reported to" the RM. Similarly, WC did not see himself as accountable to either RM or the onshore hierarchy above the RM; he

considered that decisions made on the rig were his responsibility and he was accountable for them. As he explained: if he were negligent, he would expect that he would be dismissed and not the RM or the OM. We accept this as WC's view of the position; he did not, and was not required, to think about the contractual position and, in any event, in his words, it was all Odfjell. We however need to consider the wider picture.

169. WC accepted that, to a greater or lesser extent, his leadership of the Crew and oversight of drilling operations was governed or influenced by procedures and policies set by the Appellant or Group. All applicable policies and procedures are available through Odfjell's CMS and relate to all areas of activity. Personnel policies and procedures (which would prescribe matters such as recruitment, appraisals, discipline) were generally at corporate or local level (i.e. 1 or 2) as were many of the general requirements ensuring safety. Whilst, as WC understood it, there was not necessarily a cascade effect, some policies such as the level 1 safety policies would set the parameters for the more detailed policies at other levels. Odfjell safety policies would either align with or be subservient to those of the Operator. All employees on the Platform knew how to access the relevant safety procedures and policies whether they were the Operator's or Odfjell's.

170. WC briefly explained the procedure when unplanned events caused injury or where NPT occurred. Where the event was serious or needed intervention from onshore (i.e. if equipment from onshore or onshore specialist intervention would need to be quickly mobilised) it would be reported to the RM immediately (day or night); less serious incidents may only be reported during normal working hours. An offshore evidence gathering exercise would be undertaken in accordance with the relevant policies and procedures and reported up to QHSE who would then investigate both to seek to identify a cause (as this would then determine whether the Appellant was liable for any NPT caused) and determine where possible how to prevent it happening in future, feeding into amendment of procedure where necessary.

171. We were provided with a high-level overview of how drilling operations were managed. This reflected JS's explanation, but we consider it appropriate to reflect the STP's perspective:

(1) The drilling programme is prepared by the Operator and sets the overall plan (from start to finish) for each individual well to be drilled. At the outset the programme would be reviewed by the RM in order to understand the planned phases and ensure that the Appellant could deliver against it. Resources (including personnel and equipment, operational procedures etc.) would be managed to the drilling programme so as to limit NPT, so far as could be anticipated. However, it was a document which was in some ways dynamic and would be amended as drilling progressed. Amendment of it would involve the STP's feedback on drilling progress and information gathered through drilling operations. The STP would need to sign off amendments to the drilling programme and all changes would be reported to the RM.

(2) From the drilling programme the Operator prepares WWIs. The WWIs may be as few as 2 pages or as long as 50 depending on the complexity of the drilling operation and the number of portions/segments to it. The role of the STP in connection with WWIs is to execute them (through DDIs) and in accordance with the relevant policies and procedures for performing each of the individual tasks specified in the WWI/DDI safely and efficiently. As WC put it because of the prewritten detailed procedures (L4 TOPS of which WC said there were 800 for the asset on which he worked) "everyone that goes out in the morning knows what they need to do to where they need to go, and the other stuff that I deal with in the day is stuff that hangs off the side of that". Where drilling issues arose under a DDI the STP would discuss the issue with the WSL who would then

amend the DDI (and potentially the associated WWI) and the change was communicated to the RM to manage from a contract perspective.

(3) Concerns arising at the well head would be discussed between the WSL and the STP. Ultimately on safety matters concerning the well the STP could and would make a decision on whether to pause drilling and/or shut down equipment and the RM would be informed because of the NPT consequences. Non-safety matters would be under the operational control of the WSL.

(4) Dialogue with the RM was necessary where onshore support was required i.e. where operations required parts that were not held offshore and needed to be transported out to the Platform. The RM would look to ensure that all such matters were identified on a timely basis so that equipment arrived without the need for NPT.

(5) Management of the safety of all areas of the Platform was under the designated responsibility of an identified individual known as the area authority. The STP was the area authority for areas of the platform defined as drilling areas. This was an important safety role. The area authority was responsible for the preparation of PTWs for each, and every, task undertaken within the area of responsibility and were required to consider the impact of the task on other operations being carried out in the same area. The PTWs were approved by the OIM. Each PTW would be drafted, vis a vis drilling, by reference to both the Operator's safety policies and procedures and those of the Appellant. As indicated above in respect of the BP contract an interface document provided whose policy/procedure was to have primacy. L4 TOPS provided the basis on which the risks associated with detailed well operations were managed and formed the basis of the PTWs for those operations. WC explained that the L4 TOPS were all asset specific though there may be similarities from one asset to another for the same operational task. The management, and where necessary, drafting of a new L4 TOPS would sit with the STP.

172. The STP's role in the management of the Crew was significant:

(1) The STP was the most senior member of staff from the Offshore Employer on the Platform. There were no staff members from the Appellant permanently on the Platform. As such, the STP was responsible for the pastoral needs of the Crew. In order to maintain the safety imperative the grading within the staffing structure was hierarchical and strict with each grade above having direct authority over those immediately below.

(2) Odfjell policies and procedures would provide the framework for efficient and effective Crew management.

(3) WC confirmed that Crew rotas were prepared by the RM and HR onshore to ensure each crew was competent to perform the required activities to be carried out in that period offshore (we assume by reference to the drilling programme and WWI). The drafts were reviewed by the STP to ensure that the allocated crew would work alongside one another. There was therefore a degree of collaboration onshore and offshore in the resource allocation. Once the Crew was offshore, the STP had discretion and authority to switch members between day and night shift as need required to maintain a balance in the personal interactions between Crew members.

(4) The STP may be involved in the recruitment process where a whole new crew were required at the start of a contract where the incumbent's staff did not transfer over. There were no specific examples given of this occurring in the Relevant Period.

(5) Under his pastoral responsibilities the STP would be in the best position to make an assessment of when a Crew member needed to be removed from the Platform due to exceptional circumstances and liaising with the Operator (who was responsible for all

transportation of crew on and off the Platform). Decisions to evacuate were made offshore and communicated to the RM. HR and the other onshore support teams would then arrange for further logistics and backfilling where that was agreed necessary (sometimes the STP would be satisfied that he could run short until the next crew change).

(6) The STP had a limited role in agreeing holiday. He would not be involved where leave was taken during a Field Break. Where an individual agreed a shift swap with another individual to provide back-to-back cover the STP would need to approve the swap before sending it to the RM who would then need to ensure that the overall profile of the Crew was not adversely affected by the swap and that otherwise the logistical implications of the swap could be managed. Only the RM could undertake this overall review because the STP too is on crew rotation.

(7) The STP would undertake the appraisal for the D/NTP and MS. They in turn would appraise the next grade down. WC did not mention and was not questioned about moderation of appraisals. Where the appraisal indicated that an individual was ready for promotion to the next grade the STP would approve readiness and would consider succession from within the existing crew where appropriate. The RM and HR would then be involved.

(8) WC confirmed that the STP would determine whether new hires had satisfactorily completed their period of probation.

(9) In connection with the discipline of staff, procedures and policies played a significant role. The employment contract terms relied on policies and procedures, including as appropriate the employee handbook, to set expectations for conduct and performance. Where breaches occurred the STP was usually responsible for taking decisions on disciplinary action following an investigation usually conducted by the RM. Formal disciplinary action was taken under the guidance and with the direct input and support of the onshore HR team who would plan the hearing and guide the STP though the questions to be asked. Informal discipline was however, managed offshore by the STP.

(10) Grievances were rare but WC's statement confirmed that when they arose, they would be managed by reference to HR policies and procedures and with the HR team's guidance and support.

GF

173. GF is an HR manager and has been employed by the Appellant since 2011. As with the other witnesses we found her to have been honest and we accept the substance of her evidence. However, and through no fault of hers, we found her evidence to be of limited assistance to the issue we have to determine. This is because, by reference to the Consultancy Agreements signed by the Appellant in favour of each of the Offshore Employers, there was no dispute that functionally it was the Appellant that undertook all HR functions on behalf of the Offshore Employers. Confirming the evidence of the other three witnesses the involvement of the Offshore Employers in personnel matters was limited to only the formal requirements for appointment and disciplinary or grievance procedures which, as per the "Know your Companies" presentation (and by reference to the Employment Act 2002) were required to be undertaken by the Offshore Employers together with payroll signoff.

174. Otherwise the Appellant, through the RM and/or HR and/or the logistic functions:

(1) provided the policies and procedures, which it was expected that the Offshore Employers comply with formally and as a consequence of the Consultancy Agreement, so as to provide a framework for:

(a) the conduct of recruitment exercises;

(b) the facilitation of fair and consistent appraisals and promotions;

(c) the management of the disciplinary process ensuing the independence of those investigating a disciplinary incident from those taking the disciplinary decision and thereby ensuring that the provisions of the Employment Act 2002 were met;

(d) the management of grievances; and

(e) absence management.

(2) Pursuant to those policies and more generally the Appellant in fact:

(a) recruited staff (with limited input where necessary from the STP),

(b) moderated appraisals,

(c) authorised and managed holiday requests,

(d) allocated staff to rotas (seeking input from the STP as appropriate),

(e) managed mobilisation to and from the heliport and for evacuations in exceptional circumstances,

(f) actively participated in the disciplinary process providing guidance to the RM (when investigating) the STP and directors in connection with disciplinary hearings and associated appeals.

175. GF was asked to explain the language of the Consultancy Agreements and, in particular the change between the Sharjah and Dubai agreements from the provision of services 'at the request and on the approval of' to 'under an authority to carry out the tasks'. GF considered the wording to be tidier but could not explain the change and was not aware of any formal authorisation or standing delegation of the tasks other than the agreement itself. However, as set out in her evidence and that of the other witnesses it was plain that the Appellant performed all the services specified as requested or empowered and as such there was no dispute who undertook these activities.

176. GF's statement covered what she described as the "two aspects of rig management" which she explained as the offshore aspect: giving instructions to the Crew and supervising drilling; and the onshore aspect: supervising financial performance and compliance with the contract. In her view the STP was responsible for all aspects of offshore rig management and the RM for onshore rig management. In her evidence (including cross examination) she sought to explain the managerial interface between STP and RM. The STP's appraisal by the RM was explained as necessitated because it "would not have been appropriate" for the directors of the Offshore Employer to do such appraisals because "they did not work directly with the STP" and lacked operational drilling experience. The RM was more appropriate because of the close working relationship on a day-to-day basis. She considered that the RM was not in a position of seniority to the STP they simply did different jobs. However, in cross examination she also accepted that there was a level of management above the STP and that the STP was accountable to the Appellant through the onshore management (RM and OM).

PARTIES' SUBMISSIONS ON THE FACTS

177. We were provided with very detailed notes on evidence by each party. We do not replicate those notes and only provide a high-level summary of them. However, we considered them in full.

Appellant's submissions

The Appellant does not have day to day control of the offshore employees

178. We interpret the essence of the Appellant submissions on the facts as inviting us to focus on the Platform. From that perspective the STP was said to have run his Crew autonomously from but with the "support" of the Appellant's onshore resources interacting with the Operator through the OIM and WSL. It was contended that the onshore activities were contract centric serving an entirely independent function to the offshore activities.

179. Offshore the drilling programme was broken down to WWIs and DDIs (into which the STP had, it was said, substantial input and would sign off) and these provided the blueprint for drilling activities undertaken. The WWI and DDI would incorporate or be carried out in accordance with procedures written and amended by the STP in the form of L4 TOPS which, it was claimed, were the intellectual property of the Offshore Employers by virtue of clause 15 of the Dubai template employment contract and previously under the confidentiality agreement.

180. As the area authority and again by reference to L4 TOPS the STP had control of all work done within the designated drilling area (including by other contactors) through the drafting of PTWs which were then approved by the OIM with no onshore intervention.

181. Particular emphasis was placed on the BP interface matrix to limit the role of the Appellant and Odfjell Group policy and procedure documents at L1 – 3. Such documents were said to be universally subservient to the equivalent BP policies with the only Odfjell procedures taking precedence being the drilling and well services operational guidelines (other than for well intervention) L4 TOPs.

182. Given the hierarchy within the Offshore Employees there was no direction given to the majority of the Crew by anyone other than the STP. The only contact Crew members would have with onshore personnel would have been regarding mobilisation and where an HR process was required (i.e. disciplinary or grievance). Even moderation of appraisal would have been unlikely to be visible to the Crew.

183. All offshore accountability ended with the STP who had complete authority to stop drilling or shut down particular equipment where there was a safety concern. In this regard the decision was absolute and could not be overridden even by the OIM save by a decision to remove the STP from the rig.

184. The Appellant resisted any conclusion that the STP was accountable to the RM in connection with the daily activities carried out pursuant to the DDIs. The RM was contended to be a bridge into onshore support (particularly logistics and regarding HR procedures) but essentially the role of the RM was entirely discrete: a contract and client relationship manager whose key accountability was for any NPT attributable to the drilling crew. It was for this reason that the RM had involvement and awareness of the drilling programme, was provided with DDRs (all of which were at least 6 hours out of date) and otherwise liaised with the STP; essentially as sources of information to ensure the effective contract delivery. Unlike the STP, the RM was not provided with real time drilling information; only such information allowed drilling decisions to be made with the immediacy required.

185. The support offered by or through the RM was said to be limited to the implementation of decisions taken by the STP i.e. ensuring the necessary resources were available to adhere to

and deliver the DDIs. Any guidance provided by the RM to the STP was prescribed by the previous experience of the RM. Where the RM had been an STP they may be a valuable sounding board for decisions taken offshore but it would depend on the experience of the RM in that capacity.

186. The explanation of a day in the life of a rig as provided by WC amply demonstrated the autonomy experienced in delivery of drilling services by the STP and his crew, and the demarcation between the role of the STP and the RM.

187. It was contended that the contractual arrangements (starting with the LOGIC terms, Operator contracts, Service and Consultancy Agreements and the employment contracts) in substance supported a conclusion that the personal service of the Offshore Employees was not directed or controlled and thereby not made available or rendered to the Appellant. This was said to be so despite the requirements of clause 4.8 LOGIC conditions which stipulated that the Appellant was responsible for the programming of works.

The Operators also have day-to-day control of the offshore employees

188. As regards the direction and control of the Operator the Appellant again focused on the offshore activities. Reliance was placed on the degree of interaction offshore between the WSL/OIM and the STP and the critical role played by the drilling programme, WWI, DDI and PTWs.

HMRC's submissions

The Appellant does have day-to-day control of the offshore employees

189. HMRC contended that the extent of control which needed to be exercised on a day-to-day basis was limited and amply demonstrated on the facts.

190. It was accepted that the STP was a hugely important role in the management and direction of the other Crew members and that the STP represented the most senior employee within the Odfjell Group on the Offshore Installation. His role required him to operate with a high degree of autonomy authorised to take important operational and safety decision in the moment and without consultation. However, given the position was now clear following *PGMOL*, that was not, it was said, sufficient to conclude that it was the Offshore Employer who had or exercised day to day control of the personal service of the crew members.

191. In HMRC's contention Offshore Employees operated under an organisational hierarchy whose apex was the Appellant and not the Offshore Employers. WC openly accepted that his interface was never with the leadership of whichever Offshore Employer he happened to be employed by but with the organisational infrastructure of the Appellant. The very raison d'etre for the services of the Offshore Employees was to meet the contractual obligations of the Appellant who therefore needed to control the day-today operations of those individuals through the RM and, as necessary, up through the OM and VP Operations.

192. Acting on the front line of accountability to the Operator for performance of operations the RM maintained a daily interface with the STP with oversight and ultimately management of all operations conducted through the STP by the drilling crew.

193. HMRC noted, in particular, that under the Singapore Services Agreement, Singapore was appointed to provide a drilling crew and other manpower. Whilst the language of the Sharjah and Dubai agreements appeared to change, it was contended, in substance, the service provided did not and that was supported by the oral evidence of both JS and NM. Each of the employment contracts provided for the employer to direct where and how the employee worked and that direction was exclusively provided by the Appellant and not the Offshore Employer and, as accepted by NM, the management of the Offshore Employers played no role whatsoever in operational matters concerning the performance of the Talisman and BP contracts.

194. Control was exercised through a network of policies and procedures with responsibility for ensuring compliance with such policies and procedures being exercised by the Appellant's onshore management team. The Appellant prescribed various policies and procedures prescribing how a wide range of activities were to be carried out. Further policies and procedures were imposed through the Appellant's contractual relationships with Operators. HMRC did not accept, as asserted by the Appellant, that the L4 TOPS "belonged to" the Offshore Employers and not did they accept the fact that they were written offshore, usually by the STP, meant that operations were controlled by the Offshore Employers as these procedures were reviewed (in particular from a health and safety perspective) and held by the Appellant. The obligation to follow all relevant policies and procedures was mandated on the Offshore Employer under the Services Agreements.

195. All material HR functions were exercised under the direction and control of the Appellant's HR function. Every aspect of personnel management from recruitment to dismissal and everything in between was guided and controlled by the Appellant's HR function acting, where relevant in accordance with the Group policies and procedures. The fact that it was done under the provisions of the Consultancy Agreements did not affect the conclusion that it was the Appellant that exercised the relevant control because the only involvement by the Offshore Employer in even the critical recruitment and dismissal decisions was essentially administrative.

The Operators do not have day-to-day control of the offshore employees

196. On the evidence HMRC contend that the Operators do not direct or control the Offshore Employees. First and foremost, the evidence of all witnesses was that the RM was the interface with the Operator (certainly as evidenced by the detailed descriptions of the relationship with BP).

FINDINGS OF FACT

197. Having carefully considered all of the evidence we make the following findings of fact 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 was to provide drilling and well services of the type covered in the LOGIC terms and conditions and provided in the Relevant Period to the Operators.

(2) The arrangements pursuant to which Offshore Employees were employed by the Offshore Employers were in place throughout the Relevant Period. We see no particular significance in the use of three successive companies.

(3) Although there is a paucity of evidence it is reasonable to infer from the EY document and the Know your Company presentation that the arrangements (i.e. the employment by the Offshore Employers, the Services and Consultancy Agreements) were implemented with the sole objective of eliminating the UK 2ary C1 NICS charge. We consider this inference to be reasonable despite the evidence that at least Dubai also employed and provided crews to other parties in the Odfjell Group.

(4) Pursuant to the Operator contracts the Appellant alone was responsible for providing the personnel to perform the drilling and well services.

(5) The Operator contracts required the Appellant to provide particular crew roles and in some limited regards may also have stipulated the identity of the individuals performing those roles. These requirements were then met by the Appellant securing the provision of individuals suitably qualified and appropriate to fulfil those roles from the

Offshore Employers through the activities of the RM, and HR who identified and named the individuals rostered into each role.

(6) There was no real right of substitution by the Offshore Employers. Practically, the STP might take a decision that a crew member was not fit to work and send them back onshore then determining whether it was necessary to replace the individual. However, such a decision was made because the Appellant so allowed it as otherwise it fell within the Appellant's responsibilities under the Consultancy Agreement.

(7) The Crew were responsible and accountable to the STP however, the Appellant was responsible for the activities of all subcontractors. The onshore hierarchy therefore existed over the offshore hierarchy such that the STP was accountable to OM and VP Ops. This was explicitly provided as regards all QHSE matters as under the BP contract as demonstrated by the BP interface matrix explicitly.

(8) We accept that the STP and the RM each performed a different role. However, the STP's accountability to the VP Ops was communicated through the RM as demonstrated in the RM's role description. It was as a consequence of this that the RM undertook the STP's annual appraisal.

(9) The Offshore Employers were only contracted to the Appellant and, under the terms of the Services Agreements not contracted (and did not have the assets or contractual relationships) to provide any equipment or materials in addition to the crew/manpower. This position was reflected in the remuneration under the Services Agreement, and on the invoices which were for direct costs of employment only. We therefore consider that the most accurate description of what was provided was that in the Singapore Services Agreement.

(10) The Offshore Employees were all legally employed by the Offshore Employers and pursuant to the contracts of employment the Offshore Employees were directed or required to work on Platforms and to perform roles as required by the Appellant under the Operator contracts.

(11) Without the services provided under the Consultancy Agreements the Offshore Employers had no resources to supply under the Services Agreements other than the personal service owed by each of the Offshore Employees. As a consequence, and in practice, that was all that was provided under the Services Agreements viewed realistically.

(12) Each individual was deployed to the Appellant and thereby made available to it. The individuals were allocated by the Appellant for the purposes of fulfilling its contractual obligations to the Operators and thus rendered for the benefit of the Appellant's business.

(13) Drilling operations were carried out by the Appellant in accordance with the drilling programme as executed through WWI and DDIs and in accordance with the necessary PTWs for each task. It was the Appellant alone that was responsible for performance of those services and ensuring they were carried out as directed by the Operators.

(14) The STP appeared to enjoy a high degree of autonomy in daily decision-making regarding drilling operations and interaction with the Operator's offshore representatives; however, his only authority for doing so was because the Appellant had rostered him onto the Platform and directed such engagement.

(15) Delivery of drilling operations require a complex interaction of both offshore and onshore resources, including the skills and experience of the STP, Crew, RM and the onshore team. The activities of the STP cannot therefore realistically be isolated from that wider pool of resources. Every aspect of operations would therefore be expected to involve and did involve both onshore and offshore individuals.

(16) Operations offshore were carried out in accordance with, and all Offshore Employees were required to adhere to, policies and procedures. The policies and procedures were either set by the Appellant or imposed by the Appellant in consequence of its obligations under the Operator contracts.

(17) On the basis of the explanation given of L4 TOPs the procedures for individual asset-based tasks were prescribed; the procedures were written by the STP but each L4 TOPs would have been required to meet higher level policies and procedures (particularly QHSE) set or imposed by the Appellant (again applying any relevant policies and procedures imposed on the Appellant by the Operators) and otherwise to perform the relevant tasks in delivering the drilling programme.

(18) We do not consider we need to determine in whom any intellectual property in the L4 TOPs vested; whoever "owned" the intellectual property they were held by the Appellant on the CMS and thereby available for use by the Appellant under the contract with the Operator. They directed precisely and in considerable detail how individual tasks were performed and were made available to the Offshore Employees as and when a task needed to be performed through the CMS. They thereby represented direction given to the Offshore Employees by the Appellant.

(19) We accept that to a greater or lesser extent the STP was involved in HR procedures (and personnel matters) however, such involvement was not because the Offshore Employer had directed or even requested such involvement but as a consequence of decision or direction of the Appellant through the HR function/policy/convenience as all HR/personnel matters were carried out by the Appellant.

DISCUSSION

198. The issue for us to determine is whether the facts viewed realistically demonstrate on the balance of probabilities that in pursuance of their employment by the Offshore Employers the personal service of the Offshore Employees was made available to the Appellant and rendered to it for the purposes of the Appellant's business.

199. On the facts as we have found them, we consider that the Offshore Employees were legally contracted to provide personal service to the Offshore Employers. Pursuant to those contracts the Offshore Employees and in accordance with the Services Agreements (viewed realistically and in light of the parallel obligations under the Consultancy Agreements) were directed to work to deliver the Appellant's obligations under the Operator Contracts. In doing so it was the Appellant that told each Offshore Employee through the rostering process when and where they would work.

200. In addition, however, we also consider that despite the apparent autonomy exercised by the STP the Appellant did direct how the personal service of the Offshore Employees was to be performed. This was through the detailed requirements of the DDIs contractually applied through the Appellant, and the various policies and procedures, including L4 TOPs which framed every task undertaken on the Platforms. There is no question in our mind that these factors constitute a sufficient framework for day-to-day control sufficient to conclude that the terms of the HEP are met.

201. On the facts we do not consider that there was any framework of control or actual direction provided by the Operator to the Offshore Employees. Any apparent direction by way of verbal interactions between the STP and the WSL/OIM needed to be confirmed in writing and such instruction was to the Appellant, who had directed the STP to follow such instructions as part of the contract.

DISPOSITION

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

RIGHT TO APPLY FOR PERMISSION TO APPEAL

203. 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.

Release date: 09th JANUARY 2025