Case number: 1406407/2023

EMPLOYMENT TRIBUNALS

Claimant: **Mr Z Kang**

Respondent: **General Nuclear International Limited**

Heard at: **Bristol** **On: 31 October & 1 November 2024**

Before: **Employment Judge Oliver**

Representation
Claimant: Represented himself
Respondent: Mr M Humphreys, counsel

RESERVED JUDGMENT

1. The Claimant was not an employee of the Respondent within the meaning of section 230 of the Employment Rights Act 1996.

2. The Claimant was not an employee of the Respondent within the meaning of section 83 of the Equality Act 2010.

3. The Claimant was not a worker of the Respondent within the meaning of section 230 of the Employment Rights Act 1996.

4. All of the Claimant's claims depended on him being an employee or worker. The Tribunal does not have jurisdiction to hear these claims and they are dismissed.

REASONS

1. This is a claim for:

   a. Unfair (constructive) Dismissal, contrary to s.94 & s.98 of the Employment Rights Act 1996.
   b. Outstanding Holiday Pay.
   c. Direct Discrimination, contrary to s.13 of the Equality Act 2010, relying on the protected characteristic of race.

d. Detriment, contrary to the Employment Relations Act 1999 (Blacklists) Regulations 2010.
e. Indirect Discrimination, contrary to s.19 of the Equality Act 2010.

2. This Preliminary Hearing was heard over two days. Judgment was reserved as submissions finished after 1pm on the second day of the hearing, and there was not sufficient time to deliberate and deliver a full oral decision in the afternoon.

3. A Mandarin interpreter was available during the hearing. Both the Claimant and the Respondent's witnesses confirmed that they preferred to give evidence in English. The interpreter assisted with translating extracts from written documents and was available to assist with verbal communication if needed.

4. I dealt with a number of preliminary matters at the start of the hearing:

a. The Claimant had provided a third version of his skeleton argument on 23 October 2024. This was used as his witness statement at the hearing. The Respondent's witness statements had addressed some matters in an earlier version of this skeleton argument, but the third version was provided after statements had been exchanged. The Respondent agreed to use the latest version of this document and was permitted to put supplementary questions to witnesses on new matters arising from that document.

b. The Claimant had also provided additional documents with the third version of his skeleton argument. Documents were due to have been provided by 16 September 2024. The Respondent did not seek to exclude all of these new documents, but objected to the inclusion of some sensitive/confidential information. The Claimant provided redacted versions of some of these documents. After discussion it was decided that the Judge would consider the majority of these documents as they were potentially relevant to the issues, with redactions as provided by the Claimant. The Judge would not consider the confidential content of example weekly and annual reports, but would consider an example email showing how a weekly report had been sent and allow questions on the existence of these reports to be put to the witnesses.

c. The Respondent sought to make an amendment to their grounds of resistance when sending their skeleton argument on 2 October 2024. This was an additional amendment, as the Respondent had already provided amended grounds in accordance with the order made at the last hearing (by 30 August 2024). The Claimant did not object to the amendment. I permitted it on the basis that it clarified issues that were already covered in the Respondent's witness statements.

Issues

5. There was a Case Management Preliminary Hearing on 23 July 2024. The issues for this Preliminary Hearing relate to the Claimant's employment status:

a. Was the Claimant an employee of the Respondent within the meaning of

section 230 of the Employment Rights Act 1996? This applies to his claim for unfair dismissal.

b. Was the Claimant an employee of the Respondent within the meaning of section 83 of the Equality Act 2010? This applies to his claims for direct and indirect race discrimination.

c. Was the Claimant a worker of the Respondent within the meaning of section 230 of the Employment Rights Act 1996? This applies to his claim for holiday pay and blacklisting detriment.

6. As all of the claims depend on the employee being either an employee or worker of the Respondent under the relevant definitions, the Tribunal will not have jurisdiction to consider these claims in the form they have been put by the Claimant unless he is able to show that he was an employee or worker. The Claimant argues that he was an employee of the Respondent.

Evidence

7. There was an agreed bundle of documents and the additional documents provided by the Claimant (as referred to above). I read and considered these documents to the extent they were referred to by the parties in evidence and submissions.

8. I read the witness statements and heard evidence from:

a. The Claimant (using the third version of his skeleton argument as his witness statement).
b. Mr Huai Zhou (HR Business Partner seconded to NNB Generation Company).
c. Mr Zhishen Liu (Senior HR Operations Manager seconded to the Respondent).

9. I considered the written skeleton arguments from the parties and the oral submissions from both parties at the end of the hearing.

Facts

10. I have considered all of the evidence and submissions, and find the facts necessary to decide the issues in the case.

11. The Claimant was employed by China Nuclear Power Engineering Company Limited ("CNPECL"), a company based in China. He had three written employment contracts with CNPECL. Two fixed term contracts (from 15 July 2009 to 31 July 2014, and from 1 August 2014 to 31 July 2019), and a further contract from 1 August 2019 until this was terminated in 2023.

12. CNPECL is part of a group of companies headed by China General Nuclear Power Group ("CGN"). The Respondent is General Nuclear International Limited ("GNI"). GNI is a UK company and is also part of the CGN group of companies. It is the UK registered subsidiary of CGN.

13. CGN is in partnership with EDF Energy ("EDF") to build the Hinkley Point C

nuclear power station in Somerset ("HPC"). NNB Generation Company (HPC) Limited ("NNB") is responsible for building HPC. NNB is owned 33.5% by CGN and 66.5% by EDF.

14. In 2019 the Claimant moved to the UK to work as a project manager in relation to HPC. He was seconded by CNPECL to GNI, and was then seconded from GNI to NNB. I have seen the secondment agreement dated 13 June 2019 between NNB, GNI, CNPECL and the Claimant. CNPECL is named as the employer. The start of the agreement records, "*You are employed by your Employer and have been seconded to GNI. GNI has agreed with NNB to provide your services to NNB on a temporary basis as a secondee…on the terms of the secondment agreement entered into between GNI and NNB on 29 September 2016*…". The secondment agreement includes confidentiality obligations for NNB's information, and agreement that all intellectual property rights created during the secondment belong to NNB. The secondment agreement also requires the Claimant to agree that he will comply with all NNB policies and instructions, and that he will not do any work other than that required for the performance of the secondment.

15. NNB and GNI have a separate agreement dated 29 September 2016 which sets out a framework for secondment of "*employees of CGN's group into NNB*".

16. Mr Liu explained GNI's corporate function. He says that GNI has one office in central London. It currently directly employs 12 people. It also has 16 individuals who are secondees from the wider CGN group to GNI, which includes his own role. There are also employees of the wider CGN group who are seconded to GNI and then further seconded to NNB to work on nuclear sites. The Claimant was in this last group, working at HPC (the "HPC Team").

17. Mr Liu says that GNI has two main roles in the UK. Firstly, to manage CGN's investments in the UK, which includes HPC. Secondly, to facilitate China-based employees for the CGN group being seconded to the UK to assist NNB in operating the HPC project. He says that this primarily involves managing each secondee's visa application process and acting as their "sponsor" in the UK.

18. I heard evidence from the parties about how the Claimant worked in practice in the UK. I find the following facts.

19. **Visa sponsorship and move to UK**. GNI is the sponsor of CGN ex-patriates working in the UK. GNI pays visa application fees, immigration health surcharge and private medical insurance for these individuals, including the Claimant. NNB organised "destination services support" for the Claimant through a relocation service contractor, which included support with finding accommodation, setting up utilities and finding a school for his child (and paying tuition fees). These services were managed by NNB's contractor and paid for by NNB.

20. **Pay**. GNI manages payroll for the HPC Team, including the Claimant. GNI paid the Claimant's salary and benefits, and made required tax deductions. NNB reimbursed GNI for the full amount of these costs.

21. **Expenses**. Work-related expenses were initially paid to the Claimant by GNI, and fully reimbursed by NNB. Later they were paid directly by NNB. I have seen

a document "HPC/SZC Expat Team Reimbursement Guidelines", produced by the Claimant, which sets out the process for claiming expenses from GNI. Mr Zhou explains that initially NNB did not have a standardised process for paying expenses, meaning they were paid by GNI and reimbursed, but later the procedures were standardised and secondee expenses were managed and paid directly by NNB.

22. **Daily work and equipment**.

    a. The Claimant's daily work was as part of the HPC team working at NNB's sites. His role was as a Project Manager, reporting to a Delivery Manager within NNB. He was provided with an NNB security pass and required to wear NNB company uniform when at the HPC construction site. NNB provided him with a laptop and a smartphone. He had an NNB email address.

    b. GNI also provided the Claimant with some equipment. He was given a SIM card to help with making arrangements when first arriving in the UK. The Claimant says that he also had a phone from GNI. He had a laptop which enabled him to access CGN's systems. He also had a CGN email address. The Claimant says this address was kangzhiguo@cgnuk.co.uk. Mr Zhou says this is to enable employees to receive their monthly payslip and obtain reimbursement of expenses.

23. **Management**. All seconded employees had a "home" and a "host" manager.

    a. The Claimant's "home" manager was initially Mr Xiaohui Zeng, and then Mr Huiping Yu. He was the home manager for all employees seconded to NNB to work on the HPC site. Mr Zhou says that the role of the home manager is to assist with the move to the UK. This involves pastoral care and support, assisting with passing the required construction board exam and information security test to work at the HPC site, and completing NNB onboarding training. Mr Liu says that Mr Yu is the Pre-Operation Director at NNB and manages a department of about 200 people working on the HPC site. He is also a statutory director of NNB.

    b. The Claimant's "host" manager was an NNB employee. The host manager was the line manager for all work done at the HPC site. The Claimant had more than one host manager while he was seconded to NNB. They were senior managers employed directly by NNB.

    c. During the Claimant's time in the UK, he was not directly managed by anyone at CNPECL and he was not given work instructions by CNPECL.

24. **Annual leave and travel**. The Claimant was required to agree any requests for annual leave with his line manager. He would then submit requests for approval to GNI. Mr Zhou says that approval from GNI was only required if the Claimant was taking annual leave outside the UK. This was because GNI was the sponsor of the Claimant's visa and so had to ensure that travel outside the UK was permitted within the rules. The Claimant provided a redacted version of a document, "General International Limited Expatriate Employee Foreign Affair

Training Material", which sets out rules about passports and travel. This shows that seconded individuals had to hand in their personal passports to GNI's office (which is due to rules from China about foreign travel), and personal travel from the UK to third countries was managed by the General Manager of GNI. Another redacted document, GNI "Policies on Foreign Affairs Management", shows similar information. Mr Liu explained that part of GNI's role is ensuring that secondees adhere to Foreign Affairs Management requirements from the Chinese government.

25. **Appraisals**.

a. The Claimant's general performance appraisals were carried out by his NNB manager. Mr Zhou says that NNB would also provide GNI with feedback on an annual basis, which is passed to CGN. I have seen some example emails between Mr Zhou and the host manager, where Mr Zhou asks for the Claimant's performance evaluation result based on HPC performance ratings, and the manager replies with a rating and feedback.

b. The Claimant says that 50% of his score related to work carried out for the interests of CGN group, including safeguarding their investment. He says that the CGN group grading system was applied to him. He was upgraded in 2022, and this process was run by GNI HR. CNPECL was not involved in his grading.

c. Mr Liu says that the Claimant's argument is not correct, and the annual appraisal all relates to work done for NNB, based on feedback from the NNB line manager. The home manager then determines the grading and ensures that is it in line with CGN's internal grading system. He says that GNI has no control of the grading. It is reported back to CNPECL via GNI so that there are continuous employment records within the CGN group system. Grading levels are updated based on performance at NNB so that secondees are kept on appropriate levels compared with their colleagues in China.

26. **Weekly reports**. Mr Zhou says that the Claimant was not required to provide GNI, or any other member of the CGN corporate group, with reports about his work at NNB. The Claimant disagrees with this, and says he was required to provide weekly reports. He provided an example email headed "NNB Weekly Report-BOP Project manager from April 20 to April 26", which was sent to two individuals with a "cgnuk.co.uk" email address. The email says that it was sent from his personal email because he was "unable to log onto CGNUK email". I accept that the Claimant was sending weekly reports in this way, usually through his CGN email address. The Claimant confirmed in evidence that this report was sent to a manager who also worked at the HPC site. Mr Zhou gave evidence about this at the hearing and explained that the managers this email was sent to were also secondees to NNB, and part of the HPC team.

27. **Monthly reports**. The Claimant also says that he was required to contribute to monthly reports. I have seen a redacted example of a monthly report which shows that he did contribute some information to this report. This report is sent to the CGN group in China. The Claimant says this report was sent to a senior

manager in GNI first. Mr Liu gave evidence that this report was collated by another HPC expat, and was sent to a manager in the board office department of GNI to help at board meetings.

28. **Weekly meetings and training**. Mr Zhou says in his statement that there were bi-weekly meetings with the home manager for the wellbeing of seconded ex-pats at the HPC site, to share knowledge of day to day work, help them settle into the role, and give home managers a better understanding of how they are doing on the project. The Claimant also says that there were bi-weekly meetings – a China Communist Party meeting, and a team meeting. He says that the team meetings were mandatory. A representative of CGN expatriates would present training relating to the work carried out in the UK, and he also gave presentations on his work. He says that the "GNI manager" would give an update on what was going on in the CGN group, explain expectations and plans, and assign tasks to people. He would also answer any questions or concerns from team members.

29. **Team structures.** I have seen some documents showing team structures. This includes a document "HPX Team Organisation and Management" published in August 2020, which has an organisation chart. This chart shows the Claimant along with a number of project managers, under the overall management of the Project Team Lead Mr Zeng (who was the Claimant's first home manager). The Claimant says that the various references to the "expat team" in documents shows that this was a separate "department" of GNI. Mr Zhou explained in his statement that the structure charts show the structure within the HPC project, not within GNI. The parties agree that all members of this expat team were seconded to work at the HPC site for NNB in the same way as the Claimant.

30. **Tax return and "employment" letters**. The Claimant's tax returns were completed for him by accountants and name his employer as GNI. The Claimant also produced two letters from GNI headed "confirmation of employment". The first of these states, "Please accept this letter as formal confirmation that Mr. Kang Zhiguo is expatriated by CGN group to General Nuclear International Limited and is on secondment to HPC since 12nd January 2019 as MEH Project Manager". The second states, "Please accept this letter as formal confirmation that Mr Kang Zhiguo is expatriated by CGN group to General Nuclear International Limited since 12 Jan 2019 as Project Manager". These letters were provided to help the Claimant obtain tenancies in the UK.

31. **Family information**. The Claimant complains that he was required to update GNI if his wife was employed, and he says this shows GNI control of both him and his family. Mr Liu says this was related to visa sponsorship, as GNI also pays the visa application fees and immigration health surcharge for family members. They expect to be informed so they can ensure immigration details are correct and they don't incur unnecessary costs.

Applicable law

Secondments

32. There is limited authority on secondments and their effect on employment relationships. A "secondment" does not have a specific legal status. An individual

can remain employed by one company and be seconded to work at another for a period of time. This is the most usual position – the secondee remains employed by their original employer. However, an employment relationship could be created with the company to which an individual is seconded, based on the usual tests relating to employment status.

33. There is one relevant appellate authority on secondments and employment status, as set out by REJ Pirani during the case management hearing.

34. In ***Fitton v City of Edinburgh Council*** EATS 0010/07, F was employed as an International Unit Manager in the Council's education department. In February 2003, she was seconded to ELLP, a corporate body involved in the provision of education. It was later agreed, at F's behest, that the arrangement would become "open-ended" and in August 2003 she expressly relinquished her post with the Council. After the commencement of the open-ended secondment, the Council had no right to require anything of F, nor did she have any right to demand anything of the Council. It continued to pay her salary but on the basis of a financial arrangement with ELLP. The EAT held that the tribunal was entitled to conclude that F was employed by ELLP from August 2003, and not by the Council, her original employer. Accordingly, F could not bring unfair dismissal and sex discrimination claims against the Council after her arrangement with the third party came to an end. In so holding, it decided that the fact that all the parties referred to the arrangement as a "secondment" was not determinative since the facts suggested otherwise.

Employment status

35. Employees and workers are defined in section 230 of the Employment Rights Act 1996 ("ERA").

36. An employee is an individual who has entered into or worked under a "contract of employment". A contract of employment is defined as "*a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing*" (section 230(2) ERA).

37. A worker means an individual who entered into or works under - (a) a contract of employment, or (b) "*any other contract, whether express or implied and (if it was express) whether oral or in writing, whereby the individual undertook to do or perform personally any work or services for another party to the contract whose status was not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual*" (section 230(3) ERA). The same definition is in Regulation 2 of the Working Time Regulations 1998. The detriment provisions relating to blacklisting in the Employment Relations Act 1999 apply to both workers and employees.

38. Discrimination law protects those who are in "*employment under a contract of employment, a contract of apprenticeship or a contract personally to do work*" - section 83(2) of the Equality Act 2010 ("EqA"). In practice this is treated as the same test as deciding whether an individual is a worker under the ERA, despite the difference in wording (***Sejpal v Rodericks Dental Ltd*** [2022] EAT 91 (at paragraph 13), relying on the Supreme Court decision ***in Pimlico Plumbers Ltd***

v Smith [2018] UKSC 29).

39. The ERA does not define a contract of employment. Caselaw has established that there are three essential elements, frequently referred to as the "irreducible core" or "irreducible minimum". The judgment in Ready ***Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance*** [1968] 1 All ER 433, QBD, sets these out as follows:

(a) An obligation for the individual to have provided the work personally.
(b) Mutuality of obligation.
(c) The individual must have been expressly or impliedly subjected to the control of the employer.

40. If the three essential elements are present, it is also necessary to consider all of the other surrounding circumstances. Those circumstances can include the degree of personal financial risk, the extent to which the individual provided their own equipment, whether the individual was paid holiday and/or sick pay, whether the individual was subject to the usual employment policies of the employer, and whether they paid their own tax and national insurance.

41. It is well-established that employment status is not to be determined simply by the terms of the written agreement by the parties. In ***Autoclenz Ltd v Belcher and others*** [2011] IRLR 820, the Supreme Court held that it is necessary to ascertain the true nature of the agreement, and employment tribunals may disregard terms included in a written agreement where they do not reflect the genuine intention of the parties.

42. A worker under the "limb b" test in section 230(3) ERA must satisfy all three parts of that test – a contract, personal work or services, and not performed for a client/customer of the individual's profession or business. The decision of the Supreme Court in ***Uber BV and others v Aslam and others*** [2021] UKSC 5 held that worker status was a question of statutory rather than contractual interpretation, and the written documentation was not irrelevant but was not the correct starting point. The Supreme Court held that it was necessary to consider the purpose of the relevant legislation, which was to protect vulnerable individuals in a position of subordination and dependence in relation to another person who controls their work. The greater the extent of control over the work or services performed by the individual, the stronger the case for classifying that individual as a worker.

Dual employee and worker status

43. It is doubtful that an individual can be an employee of two different employers for the same work, or an employee and worker of two different employers for the same work.

44. This issue was considered in the recent case of ***United Taxis Ltd v Comolly and another and another*** [2023] EAT 93, where the EAT looked at whether a taxi driver could simultaneously be an employee and a worker of two different employers in respect of the same work. The EAT noted that the Court of Appeal and the EAT have both said it would be "problematic" to hold that an individual is, simultaneously, the employee of two different employers in respect of the same work. Where the individual has been found to be the employee of one party, it

cannot be necessary to imply that they are also the employee of another party to secure that they are not deprived of employment protection rights. In this case, was not necessary to imply a worker relationship between the claimant and the taxi operator that recruited him to ensure that he was not deprived rights, because he had been found to be an employee of a different company for this work. This principle that that in general terms one employee cannot simultaneously have two employers was also applied in ***Patel v Specsavers Optical Group Ltd*** UKEAT/0286/18/JOJ.

Conclusions

45. My conclusions are as follows, taking the issues in turn.

46. Firstly, I wish to be clear about what I am not deciding. These claims were brought by the Claimant against the Respondent GNI only. I am not deciding the Claimant's employment status in relation to any other company, including NNB. I am also not deciding anything about the employment status of any other individuals who are seconded to the Respondent.

47. ***Was the Claimant an employee of the Respondent within the meaning of section 230 of the Employment Rights Act 1996?*** I have considered the key tests set out in the caselaw to decide whether there was a "contract of service" between the Claimant and GNI.

48. Firstly, was there a contract? The secondment agreement was between NNB, GNI, CNPECL and the Claimant. This was a contract between the Claimant and GNI – although there were other parties involved as well.

49. Secondly, was there an obligation for the Claimant to provide the work personally? There is no suggestion in the secondment agreement that the Claimant could provide a substitute to do the work. The real question is whether the Claimant was carrying out any significant work for GNI at all, as opposed to CNPECL or NNB. This overlaps with the issue of control by GNI, and consideration of all of the relevant factors.

50. Thirdly, was the Claimant subject to the control of GNI? The Claimant argues that he was under the control of GNI while he was in the UK – he says that he was subject to long-term and intensive management by GNI so that they were functioning as his de facto employer. The Respondent says that GNI simply facilitated the onward secondment to NNB, and had no management role in relation to the Claimant except for immigration arrangements.

51. A number of the factors indicate that the Claimant was not under the control of GNI. His job in the UK was working as a project manager at the HPC site. He had a line manager from NNB who directed his day-to day work and assessed his performance. He was not given instructions about this work by GNI. He had an NNB laptop, phone, email address, security pass and uniform. He had to obtain approval from NNB for annual leave. The secondment agreement makes it clear that he was providing services to NNB, and contains various obligations towards NNB, including on intellectual property rights and confidentiality. This agreement does not contain any specific obligations between the Claimant and GNI.

52. There are some factors that indicate a degree of control by GNI.

    a. GNI was responsible for visa sponsorship and immigration issues. This is consistent with a secondment where a local company needs to sponsor an overseas worker, and in itself does not mean that the Claimant was employed by GNI. It does not relate to his actual work as a project manager. GNI also had to approve any requests from the Claimant to travel overseas. However, I accept the Respondent's evidence that this was due to immigration rules and Chinese government requirements. GNI did not have a role in deciding when the Claimant was permitted to take time off – this was up to NNB.

    b. The Claimant also had a "home" manager, who was a senior manager also seconded to NNB via GNI as part of the HPC team. The home manager has a dual role. Firstly, they assist with the move to the UK, and provide pastoral care and support as needed. Secondly, they have a role in managing the HPC Team in terms of their work. The Claimant argues that the expat team, headed by the home manager, is a separate "department" of GNI. He points to the bi-weekly meetings including discussion of work assignments and plans, and training on the work being done in the UK. I agree that the home manager's role including discussion and direction about the work being done at HPC. However, I do not agree that this meant his work was being controlled by GNI. The home manager was also seconded to NNB. The HPC team as a whole was seconded to NNB and doing work for NNB. The home manager's direction of work done by seconded employees is consistent with this secondment arrangement. It does not mean that directions were being given by GNI. They were given as part of the work of the HPC team for NNB.

    c. Although NNB provided GNI with feedback for his annual appraisal, the Claimant says that his overall rating included work done for the CGN group. It does appear that appraisals were not solely based on NNB's feedback and structure. Mr Liu explained that the home manager was involved in ensuring grading in line with CGN group's internal grading system. This was reported back to CNPECL. I find that this is consistent with the Claimant remaining employed by CNPECL as part of the CGN group. The home manager was also seconded to NNB, so was not working directly on behalf of GNI when conducting appraisals for secondees in the HPC team. It does not indicate that his appraisals were being controlled by GNI or done on behalf of GNI.

    d. The Claimant was required to provide weekly reports on his work. He says these were provided to GNI, because it was sent to managers from the CGN group using CGN UK email addresses. Again, I do not find that this was done on the direction of GNI. It was sent to other managers in the HPC team, who were on the same secondment arrangements to NNB. The reports were about the work done at the HPC site.

    e. The Claimant also argues that the requirement to contribute to monthly

reports shows he was required to do work for GNI. This report was sent to the CGN group in China, but it was also provided to a senior GNI manager and used at board meetings. I agree that this was not work done for or directed by NNB. However, it was required by the CGN group, not GNI. This is consistent with the Claimant remaining employed by CNPECL, which is part of the CGN group. It does not indicate control by GNI, as opposed to the wider corporate group.

f. Overall, the Claimant argues that he was sent to work in the UK to protect the interests of and enhance the development of CGN group. He says that people were selected by the group to go to GNI and act on behalf of CGN group. I accept that part of the Claimant's role was on behalf of the CGN group, in that he remained part of this group and continued to have obligations towards them as well as towards NNB. However, this is consistent with the Claimant remaining employed by CNPECL, which is part of the wider CGN group. It fits with a secondment arrangement within the CGN group. It does not necessarily mean that he was directly employed by GNI.

53. Overall, I find that the Claimant was not under significant control by GNI. Most importantly, the majority of instructions about his day to day work came from his NNB manager. Any instructions about this work from his home manager were given as part of the seconded team working for NNB rather than on behalf of GNI.

54. I have also considered the other surrounding circumstances. There are some factors that point towards employment.

a. GNI paid the Claimant's salary, and initially his expenses. These were fully reimbursed by NNB. Direct payment of salary can indicate employment, but in this case it is also consistent with an overseas secondment arrangement where payroll is operated by a local company.

b. Some documents name GNI as the Claimant's employer. His tax returns clearly do so. I did not have an explanation as to why the accountants chose to state his employment position in this way. However, it is well established that employment status for tax purposes does not determine the position for statutory employment rights. There are also the two "confirmation of employment" letters which somewhat ambiguously refer to the Claimant as being expatriated by CGN group to GNI. These are relevant, but do not state clearly who the Claimant's actual employer is said to be.

c. The Claimant had a CGN UK email address, mobile phone and laptop. It appears that he used these for some of his work related to NNB (e.g. sending the weekly report), as well as for accessing the CGN group systems for matters such as payroll.

55. Although there are some factors that point towards employment, I do not find that they are sufficient to indicate that the Claimant was employed by GNI. The terms of the secondment arrangements clearly stated that the Claimant remained employed by CNPECL and was seconded on to work for NNB. These terms can

be disregarded if they do not reflect the reality of the situation. From the evidence I have considered, I find that there was little if any obligation for the Claimant to provide work personally to GNI as opposed to NNB, GNI had no real control of the Claimant's work, and there are no other factors pointing towards employment that are sufficient to make the Claimant an employee. I agree with the Respondent's submissions that the actual work he was engaged to do was not for GNI, and GNI did not exercise sufficient management or control to have become the Claimant's employer.

56. I have also considered whether it is necessary to find the Claimant to be an employee of GNI in order to ensure he is not deprived of employment protection rights. I find that this is not necessary. This is not a case where no organisation accepts that it is the Claimant's employer. The documents say that CNPECL was the Claimant's employer, and the secondment agreement makes it clear that it was intended he continued to be employed by CNPECL while he was on overseas secondment. The Claimant says that he was deliberately not made an employee of GNI to prevent him from bringing employment tribunal claims in the UK. However, the Claimant still has statutory employment rights because he was working in the UK. This does not depend on the identity of his employer.

57. I have considered the example of ***Fitton v City of Edinburgh Council***, where a seconded employee was found to have transferred employment to the host company. This shows that something that is called a "secondment" may become direct employment by the organisation to which an individual was seconded. This all depends on the facts of the arrangements. The ***Fitton*** case had somewhat different facts. The secondment was described as open ended, and the host company bore all the costs of the individual's salary. In this case, there was always an intention that the Claimant would return to China under his contract with CNPECL. As discussed above, although GNI actually paid the Claimant, this was on behalf of CNPECL and was fully reimbursed by NNB. The ***Comolly*** decision makes it clear that it is not necessary to imply an employment relationship if an individual is already employed by another employer for the same work.

58. I therefore find that the Claimant was not an employee of GNI under the Employment Rights Act 1996. This means that his claim for unfair dismissal against the Respondent cannot proceed.

59. ***Was the Claimant an employee of the Respondent within the meaning of section 83 of the Equality Act 2010? Was the Claimant a worker of the Respondent within the meaning of section 230 of the Employment Rights Act 1996?*** I have dealt with these issues together as the test is essentially the same. This is a lower bar than the test for employment under the Employment Rights Act, meaning that on the same facts an individual can be a worker but not an employee. I can deal with this question more briefly as the same factors are relevant.

60. Firstly, was there a contract? As set out above, there was a contract between the Claimant and GNI because there was the secondment agreement (although CNPECL and NNB were also parties to this agreement).

61. Secondly, did the Claimant undertake to do or perform personally any work or services for GNI under this contract? In the contract itself, the services are to be

provided to NNB. GNI has a limited role as a local company through which the end secondment to NNB is arranged. The terms of the contract are a relevant factor, but as set out in ***Aslam*** the real issue is whether the statutory test is satisfied.

62. I have considered whether, in reality, the Claimant was carrying out work personally for GNI. For the same reasons as set out above in relation to employment status, I find that he was not.

63. Many of the factors I have considered in relation to control are relevant to whether there was an obligation to carry out work personally for GNI. These indicate that the Claimant was not carrying out any significant work at all for GNI. All of his day to day work was for NNB. Any limited additional work (such as the monthly report) was for the CGN group, and so consistent with him remaining employed by CNPECL. As stated by the Supreme Court in ***Aslam***, the greater the degree of control over the work or services performed by an individual, the more likely they are to be a worker. GNI exercised only limited control over the Claimant's work, as set out above.

64. I have taken into account the purpose of the legislation, and whether it is necessary to find the Claimant to be a worker of GNI in order to ensure he is not deprived of employment protection rights. As already explained, that is not necessary in this case. The Claimant was stated in the documentation to be an employee of CNPECL, the majority of his work was done for the benefit of NNB, and it is not necessary for him to be a worker of GNI in order to have statutory employment rights in the UK.

65. I therefore find that the Claimant was not a worker of the Respondent within the meaning of section 230 of the Employment Rights Act 1996. The Claimant's discrimination claims are put on the basis that he was an employee of GNI. As this is essentially the same test as for worker status, I also find that the Claimant not an employee of the Respondent within the meaning of section 83 of the Equality Act 2010. This means that his claims for holiday pay, blacklisting detriment, direct discrimination and indirect discrimination cannot proceed.

66. All of the Claimant's claims depended on him being an employee or worker, and so all claims are dismissed.

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Employment Judge Oliver

Date 16 November 2024

RESERVED JUDGMENT AND REASONSSENT TO THE PARTIES ON 14 December 2024 By Mr J McCormick

FOR THE TRIBUNAL OFFICE

Notes

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https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/