Neutral Citation: [2024] UKFTT 736 (TC)

Case Number: TC09261

FIRST-TIER TRIBUNAL
TAX CHAMBER

George House, Edinburgh

Appeal reference: TC/2021/11086

National Insurance – Secondary Class 1 National Insurance contributions – Host Employer – Personal Services – Made Available

Heard on: 19, 21, 24-28 June 2024
Judgment date: 16 August 2024

Before

TRIBUNAL JUDGE MICHAEL BLACKWELL
JOHN WOODMAN

Between

BILFINGER SALAMIS UK LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Philip Simpson KC, instructed by ABB

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

DECISION

INTRODUCTION

1. Marathon Oil UK Ltd ("Marathon") operated oil platforms on the Brae field in the North Sea. In or around early 2008, the Appellant ("Bilfinger UK") was supplying services to Marathon. Bilfinger UK supplied those services using its own employees to do so. Those employees were divided between a core team, on permanent contracts, and ad hoc employees on short term contracts.

2. As the contract between Bilfinger UK and Marathon was coming to an end, Marathon put out a tender for the services for when its contract with Bilfinger UK was to end. In the tender documents, Marathon asked for an "employment model which did not incur Employer National Insurance Contributions" to be considered "if possible". Bilfinger UK's contract was renewed after submitting a bid-clarification setting out the "key aspects" of such an alternative employment model.

3. To implement an offshore employment model BIS Guernsey Limited ("Bilfinger Guernsey") was incorporated. Bilfinger Guernsey was a wholly-owned part of the Bilfinger Group. Incorporation was arranged through Voyonic Crewing Limited ("Voyonic").

4. The core team employees were transferred to Bilfinger Guernsey, with effect from 1 January 2009, while the ad hoc employees remained employees of Bilfinger UK. Bilfinger Guernsey entered into a contract for the provision of labour, scaffold and equipment to Bilfinger UK. Bilfinger UK entered into a further contract for the provision of human resource services to Bilfinger Guernsey. Bilfinger Guernsey also entered into a contract for the provision of payroll and administration services with Voyonic.

5. The core team members were transferred back to be employees of Bilfinger UK with effect from 1 April 2014. The relevant period is therefore between 1 January 2009 and 1 April 2014.

6. At issue in this appeal is whether paragraph 9 of Schedule 3 of the Social Security (Categorisation of Earners) Regulations 1978 (SI 1978/1689) ("paragraph 9") applies, so that Bilfinger UK is liable for Secondary Class 1 National Insurance contributions.

7. The structure of our decision is as follows. We initially consider the legal framework. We then provide findings of fact from the evidence of the six witnesses and the 3,608 pages of the hearing bundles and apply the legal framework to those facts.

BASIC LEGAL FRAMEWORK

8. The following largely draws on the submissions of Bilfinger UK. I understand they are not contentious and gratefully adopt them.

Social Security (Contributions and Benefits) Act 1992

9. Class 1 national insurance contributions are payable in respect of "earnings" from "employed earner's employment": section 6 of the Social Security (Contributions and Benefits) Act 1992 ("SSCB92").

10. "Earnings" includes "any remuneration or profit derived from employment", and "earner" is construed accordingly: section 3(1) SSCB92.

11. An "employed earner" is "a person who is gainfully employed *in Great Britain* either under a contract of service, or in an office (including elective office) with earnings": section 2(1)(a) SSCB92 (emphasis added). Thus, the starting point is that it is only individuals who are "gainfully employed in Great Britain" who can count as "employed earners" for the purposes of SSCB92.

12. There are two categories of Class 1 contributions, namely primary and secondary contributions. Both categories are paid in respect of "earnings" of "an employed earner": section 6(1) SSCB92.

13. Primary Class 1 contributions are the liability of the earner: section 6(4)(a) SSCB92. The secondary contributor is liable to pay them in the first instance, deducting them from earnings paid to the earner: paragraph 3(1) and 3(3) of Schedule 1 SSCB92.

14. Secondary Class 1 contributions are the liability of the secondary contributor: section 6(4)(b) SSCB92.

15. The "secondary contributor" is defined "in relation to any payment of earnings to or for the benefit of an employed earner" as being "in the case of an earner employed under a contract of service, his employer": section 7(1)(a) SSCB92. All the individuals in question in the present case were "employed under a contract of service". Throughout the material period their employer, within the meaning of this provision, was Bilfinger Guernsey. Accordingly, Bilfinger Guernsey would be the secondary contributor in relation to the individuals in question.

16. Section 1(6) SSCB92 imposes a territorial limit on liability to pay Class 1 contributions (both primary and secondary):

> "(6) No person shall–
>
> (a) be liable to pay any Class 1, Class 1A, Class 1B or Class 2 contributions unless he fulfils prescribed conditions as to residence or presence in Great Britain;"

17. Thus, where an employed earner is "gainfully employed in Great Britain", the earner and the secondary contributor can be liable to pay (respectively) primary and secondary Class 1 contributions if and only they fulfil prescribed conditions as to residence or presence in Great Britain. The term "Great Britain" is defined by section 172(1) SSCB92, which states it, "includes a reference to the territorial waters of the United Kingdom adjacent to Great Britain".

18. The territorial waters of the United Kingdom consist of the area of sea within twelve nautical miles of the United Kingdom coastline, measured from baselines fixed by Order in Council: Territorial Sea Act 1987, section 1. The Brae field (where all the work in question was performed) is outside that area.

19. On that definition, throughout the relevant period in question:

(1) none of the individuals in question was "gainfully employed in Great Britain"; and

(2) Bilfinger UK was present in Great Britain, but Bilfinger Guernsey was not.

20. However, so far as the individuals are concerned, it is common ground that in the material period they were all *deemed* to be gainfully employed in Great Britain, by regulation 114 of the Social Security (Contributions) Regulations 2001 (SI 2001/1004) ("SSCR01"), in conjunction with section 1(7) of the Continental Shelf Act 1963, together with the Continental Shelf Act (Designation of Areas) (Consolidation) Order 2000 (SI 2000/3062, as amended by the Continental Shelf Act (Designation of Areas) Order 2001 (SI 2001/3670) and the Continental Shelf Act (Designation of Areas) Order 2013 (SI 2013/3162)) and section 11 of the Petroleum Act 1998.

21. The parties agreed that it may be assumed that all the individuals in question were resident or present in Great Britain (in the sense that they lived in Great Britain when not working offshore), and are therefore liable to pay primary Class 1 contributions.

22. As regards liability to pay secondary contributions, in the material period the relevant part of regulation 145 SSCR01 set out the requirements as to residence in relation to secondary Class 1 contributors as follows:

> '(1) Subject to paragraph (2), for the purposes of section 1(6) of the Act (conditions as to residence or presence in Great Britain for liability or entitlement to pay Class 1 … contributions), … the conditions as to residence or presence in Great Britain or Northern Ireland (as the case requires) shall be—
>
> (a) …;
>
> (b) as respects liability to pay secondary Class 1 contributions … that the person who, but for any conditions as to residence or presence in Great Britain or Northern Ireland (as the case may be and including the having of a place of business in Great Britain or Northern Ireland), would be the secondary contributor… is resident or present in Great Britain or Northern Ireland when such contributions become payable or then has a place of business in Great Britain or Northern Ireland (as the case may be), so however that nothing in this paragraph shall prevent the employer paying the said contributions if he so wishes;
>
> …"

23. Thus, the prescribed condition as to residence or presence in Great Britain in relation to liability for secondary contributions was residence or presence, or having a place of business, in Great Britain when the secondary Class 1 contributions became payable.

24. Bilfinger Guernsey did not meet that condition in the material period. It was therefore not liable as secondary contributor to pay contributions. This is common ground.

The Social Security (Categorisation of Earners) Regulations 1978

25. The Social Security (Categorisation of Earners) Regulations 1978 (SI 1978/1689) ("SSR78"), however, 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. SSR78 were made originally under, inter alia, section 4(5) of the Social Security Act 1975. The issue in the present case is whether Bilfinger UK falls within one of the extensions provided for by these regulations: the so-called "host employer" provisions.

26. Regulation 5 SSR78 is entitled, "Persons to be treated as secondary contributors". In the material period it provided (as amended by the Social Security (Categorisation of Earners) (Amendment No 2) Regulations 2003, SI 2003/2420):

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

27. The reference to "section 4 of the Act" is treated as a reference to section 7 SSCB92: Social Security (Consequential Provisions) Act 1992, section 2(4).

28. The provisions in issue in the present appeal are in each of Columns (A) and (B) of paragraph 9 of Schedule 3 SSR78. These were inserted by amendment by the Social Security (Categorisation of Earners) Amendment Regulations 1994 (SI 1994/726) ("SSR94"). SSR94 were made by the Secretary of State:

> "in exercise of powers conferred by sections 2(2), 7(2), 122(1) and 175(1) to (3) of [SSCB92] and of all other powers enabling him in that behalf".

29. Section 7(2) SSCB92 specified that:

> "(2) In relation to employed earners who—
>
> (a) are paid earnings in a tax week by more than one person in respect of different employments; or
>
> (b) work under the general control or management of a person other than their immediate employer,
>
> and in relation to any other case for which it appears to the Secretary of State that such provision is needed, regulations may provide that the prescribed person is to be treated as the secondary contributor in respect of earnings paid to or for the benefit of an earner."

30. As in force in the material period, paragraph 9 Column (A) identified the following category of employment:

> "Employment by a foreign employer where—
>
> (a) in pursuance of that employment the personal service of the person employed is made available to a host employer; and
>
> (b) the personal service is rendered for the purposes of the business of that host employer; and
>
> (c) that personal service for the host employer begins on or after 6th April 1994.
>
> Where the employment is as a mariner, this paragraph only applies where the duties of the employment are performed wholly or mainly in category A, B, C or D waters."

31. If an individual's employment falls within this provision, paragraph 9 Column (B) specifies that the secondary contributor is:

> "the host employer to whom the personal service of the person employed is made available".

32. In the present case, the following points are common ground:

(1) all the relevant individuals were in "employment by a foreign employer". This is because each had a contract of employment with Bilfinger Guernsey, and Bilfinger Guernsey was a "foreign employer": see regulation 1(2) SSR78;

(2) what Bilfinger Guernsey required the relevant individuals to do was "in pursuance of" their employment with Bilfinger Guernsey;

(3) Bilfinger UK counted as a "host employer" within the meaning of this provision. This is because "host employer" was defined as, "a person having a place of business in Great Britain": regulation 1(2) SSR78. That definition does not require the "host employer" to be an "employer" in any ordinary sense of that term; nor indeed in any other technical sense of it;

(4) if the personal service of the relevant individuals was "made available to" Bilfinger UK, it was "rendered" for the purpose of Bilfinger UK's business. Accordingly Bilfinger UK accepts that if they are unsuccessful in their arguments on (a) of paragraph 9 Column (A) it would follow that they would lose on (b).

(5) the material period commenced after 6 April 1994 (to reiterate, the material period was from 6 January 2009 to 5 April 2014, this being the period covered by HMRC's decision).

33. Thus, what is in dispute is the interpretation, and the application to the facts of this case, of the requirement that:

> "the personal service of the person employed is made available to"

Bilfinger UK (as it is common ground that Bilfinger UK fell within the definition of "host employer").

INTERPRETATION OF PARAGRAPH 9, THE HOST EMPLOYER PROVISION

The Appellant's case

34. In outline, Bilfinger UK's case is that paragraph 9 is only satisfied where there is an arrangement whereby the individual becomes in substance the employee of the proposed "host employer": that is to say, the individual and the host employer act towards each other as if they were, respectively, employee and employer. The specific feature that is crucial is that the "host employer" should be entitled to exercise such supervision, management and control over the individual as is normally conferred by a contract of employment on the employer. Bilfinger UK's written submissions express this in terms of legal rights (at [32], [53] and [83] of the written submissions), as opposed to practices of the parties.

35. In summary, this interpretation is based on the following arguments:

(1) The phrase "personal service" means an individual must personally do what someone else tells them to do. "Service" implies obedience by an individual to commands of another. Thus, for an individual's "service" to be made available to another, that other must be put in a position whereby he can give commands to the individual. "Personal" implies that the individual must do the tasks in question personally: the individual has no option to engage someone else to do any or all of those tasks in his place.

(2) The use of the term "made available": to make something available to someone implies that that person must do something to take advantage of it. In the context of personal service, the implication is that what that person need do is decide whether and how to take advantage of that service, and then direct the individual whose service is being provided. If the foreign employer retains the right to direct the individual what to do and how to do it, then that individual's personal service is not being "made available" to the host employer.

(3) The use of the word "employer" in the defined term "host employer" suggests that what is being targeted is scenarios in which the individual's employment is transferred, in substance but not in form, from the foreign employer to a GB-resident employer.

(4) A broad contextual point as to the basic nature of Class 1 contributions. Class 1 contributions are, broadly, paid in respect of salary earned under a contract of employment. The person liable as secondary contributor is the person who is the employer: the person who gets the direct benefit of the individual's work, and who does so through its right to receive the individual's personal service. In circumstances where an individual's employer is not liable as secondary contributor (for example because the employer does not meet the relevant conditions as to presence in Great Britain) and the legislation operates to make someone else a secondary contributor, it makes sense that this is someone who is, in substance, the individual's employer. By contrast, if there is no other person who is, in substance, the individual's employer, for example because any engagement with the individual's formal employer is only for that employer to provide

services, rather than for individuals employed by that employer to provide services personally, then liability for secondary contributions should not be transferred.

(5) The Explanatory Note to SSR94, which in relation to paragraph 9 states:

> "Regulation 4 amends Schedule 3 to the principal Regulations by extending the description of employments in respect of which persons are treated as secondary Class 1 contributors to workers ***seconded***, on or after 6th April 1994, by foreign employers to ***employers in Great Britain***." (emphasis added).

Explanatory Notes are admissible aids to the construction of legislation, so far as relevant in the particular circumstances: *R. (on the application of Westminster City Council) v National Asylum Support Service* [2002] UKHL 38; [2002] 1 WLR 2956 at [5], per Lord Steyn. In this context Bilfinger UK says that:

> (a) The ordinary meaning of the verb "to second" (in the relevant sense) is "to remove (an officer) temporarily from his regiment or corps, for employment on the staff, or in some other extra-regimental appointment. Also [in transferred sense] of employees in other occupations and employments.": Oxford English Dictionary (2nd edn, 1989).
>
> (b) It is plain that whilst the Explanatory Notes refer to those to whom personal service is made available as being "employers", those persons are not "employers" in the sense of employing the relevant individuals under a contract of employment. That reference must therefore bear some other meaning. It is submitted that the meaning it bears is the sense of employer in substance: that is to say, the person having the right of supervision, management and control over the individual notwithstanding the fact that the individual is, formally, employed by someone else.

(6) It is said that paragraph 9 was inserted into Schedule 3 SSR 78 specifically by section 7(2)(b) SSCB92 that gives a power to make regulations in respect of "employed earners who… work under the general control or management of a person other than their immediate employer." Regulations are a form of delegated legislation; and delegated legislation is valid only if within the scope of the power conferred on the relevant authority to make it. A corollary of this is that delegated legislation will be interpreted, where possible, so as to be within the scope of the power under which it is made and therefore valid, rather than so as to go beyond the scope of that power and accordingly be invalid.

(7) Amendments that were made to the host employer provisions with effect from 6 April 2014. With effect from that date, SSR78 was amended by the Social Security (Categorisation of Earners) (Amendment) Regulations 2014 (SI 2014/635) ("SSR14"). In general, one purpose of this was to ensure that where individuals worked in Great Britain, there would be a secondary contributor liable for secondary Class 1 contributions in relation to that individual's earnings. This implies a recognition that, prior to the amendment, the legislation did not achieve that result.

(8) The decision of Judge Williams in *Goldman Sachs International v HMRC* ("*Goldman Sachs International*") [2010] UKFTT 205 (TC); [2010] SFTD 930, discussed below. Judge Williams held that the host employer provision applies where it is shown "as fact in a broad sense that the individual is working for the host employer and not the foreign employer".

(9) The language of certain parts of HMRC's published guidance and manuals. In the National Insurance Manual, HMRC describe the scope of the host employer provisions in the material period as being where, "in a broad sense, the person carries out their work for someone in the UK other than their contractual employer": NIM33720. In HMRC's Guidance Note on Offshore Intermediaries it is stated that "HMRC's overall approach is that the host regulations can apply in an arrangement where the worker works in a broad sense for a third party" and that "where the arrangement is a legitimate contract for the provision of a complete service, and the workers, as a matter of fact, work for the provider of that service and not the host, these provisions were not intended to apply". However Bilfinger UK concedes that neither is authority in relation to interpretation of the relevant provisions: *HMRC v K E Entertainments Limited* [2020] UKSC 28; [2020] STC 1402, per Lord Leggatt (with whom the other Justices concurred) at paragraphs 58 and 59. Bilfinger UK also concedes that the wording of that guidance is, in any event, somewhat vague.

(10) Regarding the discussion by MacKenna J in *Ready Mixed Concrete (South East) Limited v Minister of Work and Pensions* ("*Ready Mixed Concrete*") [1968] 2 QB 497 it is said the first limb does not concern "personal service" but substitution.

The Respondent's case

36. In outline, HMRC's case is that "personal service" is (and was at the time the amendment to the Regulations was made in 1994) a well understood part of the definition of a contract of service (as opposed to a contract for services), namely the obligation that the employee work "by one's own hands", not "by another": *Ready Mixed Concrete* [1968] 2 QB 497 per MacKenna J at 515C-E; see also *Mirror Group Newspapers v Gunning* [1986] 1 WLR 546 per Balcombe LJ at 556; and *HMRC v Talentcore Limited (t/a Team Spirits)* [2011] UKUT 423 at [27]. The reference in the host employer provision is to personal service being made available in pursuance of the employee's employment with the foreign employer. It is therefore a reference to the obligation to work personally which the employee owes to the foreign employer as that foreign employer's employee. It is this obligation (of the employee) which must be made available to the host employer. The requirement is that the foreign employer make available to the host employer that which the foreign employer has at its disposal: the obligation of personal service owed to the foreign employer by its employees.

37. In summary, this argument is based on:

(1) The absence of any express reference to control in paragraph 9, which is contrasted to column (A) of paragraph 2 of Schedule 3 SSR78.

(2) Case law, from employment law, in which "personal service" and "control" are treated as distinct elements of the employment relationship.

(3) The submission that limb (a) of paragraph 9 pre-supposes that there is an obligation of personal service owed to the foreign employer and that, in consequence of that obligation, the foreign employer is able to make its employees (who are obliged under their contracts of employment to follow the foreign employer's directions) available to the host employer. The factual exercise of supervision, management and control may be an indicator that an employee was "made available" (and in the present appeal, HMRC's position is that Bilfinger UK did exercise supervision, management and control), but it is not a necessary component of the statutory test.

(4) The submission that the host employer provision is an anti-avoidance provision. Its obvious purpose was to prevent liability for Secondary NICs being avoided by use of a foreign employer. It should be construed against that background.

Discussion

Summary of our view

38. Having had regard to the full arguments made by both sides, we consider, for the reasons set out below, that the purpose of the provisions is to cover secondment-like arrangements (as opposed to subcontracting of a service). It is not an anti-avoidance provision and would cover a secondment entered into for non-tax purposes.

39. "Personal service" has the same meaning as in the employment case law, namely the obligation that the employee work "by one's own hands", not "by another".

40. When personal service is *made available* some degree of direction (which need not include a *legal right* to give such direction) necessarily abides with the person to whom the personal service is made available. If the foreign employer tells the employee to obey the host employer's reasonable directions, which are made for the host employer's business, and the employee does so, we consider the requirements for the personal service to be "made available" (sub-paragraph (a)) and "rendered" (sub-paragraph (b)) are satisfied.

41. We also consider that the definite article, "the", preceding "personal service" carries significance in paragraph 9:

> "Employment by a foreign employer where… in pursuance of that employment ***the*** personal service of the person employed is made available to a host employer, and ***the*** personal service is rendered for the purposes of the business of that host employer" [our emphasis]

We consider that this requires (at any given time) the entirety (viewed realistically) of a given employee's personal service is "made available" and "rendered".

Purpose and context of the provisions

42. The approach we have adopted accords with a purposive approach to the statute.

43. We consider the broad purpose of regulation 5 and Schedule 3 of SSR78 is to deal with cases where either the identity of the secondary Class 1 contributor is ambiguous, or where there is arguably no secondary Class 1 contributor.

44. An example of where there is legal ambiguity is paragraph 5 Schedule 3 of SSR78, which relates to employment in Chambers as a barrister's clerk. (We understand that ambiguity is not present in Scotland, where advocates' clerks are employed by Faculty Services Limited.)

45. An example of where there is no secondary Class 1 contributor is paragraph 9.

46. More narrowly focusing on the purpose of paragraph 9, it is HMRC's position that the host employer provision was an anti-avoidance provision. They say its obvious purpose was to prevent liability for Secondary NICs being avoided by use of a foreign employer and that it should be construed against that background.

47. It is Bilfinger UK's position that the purpose of the provision is that where an individual has a contract of employment with a person who is non-GB resident, but acts in substance as the employee of a different person who is GB-resident but with whom the individual has no contract of employment, the GB-resident *de facto* employer is liable for secondary Class 1 contributions as the secondary contributor. They cite as authority the Explanatory Note to SSR94, which in relation to paragraph 9 states:

> "Regulation 4 amends Schedule 3 to the principal Regulations by extending the description of employments in respect of which persons are treated as secondary Class 1 contributors to workers ***seconded***, on or after 6th April 1994, by foreign employers to ***employers in Great Britain***." (emphasis added).

48. We accept HMRC's submissions that secondment is not a term with a fixed meaning. In the employment context, it has been said (with reference to the jurisdiction of the Employment Tribunal) that "secondments" "come in all shapes and sizes": *Pervez v Macquarie Bank Ltd (London Branch)* [2011] ICR 266, [12(3)]. For example in *Pervez* what mattered on the facts of that case was that the employee was working in the UK on a "settled (and indefinite) basis, as part of [the respondent's] operation, reporting to its managers and paid by it". In the context of the transfer of undertakings, it has been said that "secondment in its proper sense … connotes a temporary assignation regarded, at least at its outset, as being on the basis that the employee will return to work directly for the seconding employer …": *Capita Health Solutions Ltd v McLean* [2008] IRLR 595, [44]. We note also Bilfinger UK's example of secondment in *Edwards v HMRC* [2016] UKFTT 189 (TC), concerning a policeman in the West Mercia Police who was "seconded" to the Foreign and Commonwealth Office in Kosovo.

49. We note the dictionary definition of "to second", supplied by Bilfinger UK (see [35(5)] above). This again emphasises the fact that secondments come in all shapes and sizes. Here the paradigm example is an officer who throughout remains in service of the Crown, whilst paragraph 9 expressly contemplates the foreign employer and host employer are different legal entities.

50. Bilfinger UK points to the OED definition of secondment and the discussion of the particular secondment in *Edwards v HMRC* [2016] UKFTT 189 (TC) as authority for the proposition that the host employer must be the "*de facto* employer". We do not find this a helpful approach to interpretation, as it effectively seeks to generate a new test, distinct from the actual language of the legislation, from the explanatory note and these examples. It does not, in legal methodology, appear to be a conventional approach to interpretation. Rather it generates a test from the purpose, disregarding the language of the regulation.

51. We consider that the interpretation of the legislation we have adopted might cover factual situations which may be thought classic cases of secondment: such as when an overseas professional services firm sends an associate to work for an associated firm in Great Britain, or an overseas professional services firm sends an associate to work for a GB-based client.

52. However, the provision might also cover instances that are not generally considered instances of secondment, as the word "secondment" is not part of the statutory language. For example it need not be (intended to be) "temporary", as the OED definition suggests.

53. The examples of secondments we have considered are, of course, normally genuine commercial arrangements where there is no avoidance. We do not consider that the provision targets avoidance, although it may apply to avoidance arrangements. This is further evidenced by how there is no "main purpose" or other similar test that is often found in anti-avoidance provisions.

54. It will be recalled that Schedule 3 SSR78 was amended by SSR94 to introduce paragraph 9. The SSR94 say that they were made by the Secretary of State:

> "in exercise of powers conferred by sections 2(2), 7(2), 122(1) and 175(1) to (3) of [SSCB92] and of all other powers enabling him in that behalf"

55. Bilfinger UK suggests that paragraph 9 was specifically made under section 7(2)(b) SSCB92. They also submit that delegated legislation should be interpreted, where possible, to be within the scope of the power under which it is made and therefore valid, rather than so as to go beyond the scope of that power and accordingly be invalid. From these two propositions they infer that paragraph 9 should be read to infer a requirement for control and management by the host employer.

56. It will be recalled that 7(2) SSCB92 specified that:

> "(2) In relation to employed earners who—
>
> (a) are paid earnings in a tax week by more than one person in respect of different employments; or
>
> (b) work under the general control or management of a person other than their immediate employer,
>
> and in relation to any other case for which it appears to the Secretary of State that such provision is needed, regulations may provide that the prescribed person is to be treated as the secondary contributor in respect of earnings paid to or for the benefit of an earner."

57. We note that while that general proviso is preceded by "and", in this case that word is clearly disjunctive due to the reference to "any other case".

58. At the hearing we asked counsel if there were any examples of legislation being made specifically under either subsection 7(2)(a) or 7(2)(b) SSCB92. We were told, in closing submissions that all the secondary legislation that has been enacted under subsection 7(2) SSCB92[1] did not specify whether it was made under subsection 7(2)(a), 7(2)(b), or the general proviso. The same was true, we were told, of secondary legislation made[2] under the predecessor provision, section 4(5) of the Social Security Act 1975.

59. We consider there to be no reason to suppose that paragraph 9 was specifically made under subsection 7(2)(b) SSCB92. There is nothing on the face of it to suggest that the employee need work under the general control or management of the host employer. We find that paragraph 9 will have been made under the general proviso. There is therefore no reason to impute a requirement of "general control or management" in order to adopt a construction that supports the validity of paragraph 9.

60. Bilfinger UK argues that the legislative changes made in April 2014 to SSR94, so as to capture what HMRC knew was the structure in place in the present case (and other cases), supports the conclusion that the legislation in place in the material period did not encompass that scenario. We disagree. At best it shows that HMRC thought that cases such as Bilfinger UK's were arguable, and sought to put it beyond doubt. In any event, Lord Hodge made clear in *Project Blue Ltd v HMRC* [2018] UKSC 30; [2018] STC 1355 at [33] "subsequent amendments are not a legitimate tool in ascertaining prior parliamentary intention".

61. Bilfinger UK also cited HMRC's National Insurance Manual (NIM33720) and HMRC's Guidance Note on Offshore Intermediaries as consistent with their construction. However they rightly concede that this does not take their case further on a statutory appeal, as neither counts as authority in relation to the interpretation of the relevant provisions: *HMRC v KE Entertainments Ltd* [2020] UKSC 28; [2020] STC 1402, per Lord Leggatt (with whom the other Justices concurred) at [58] and [59].

---

[1] see SSR14; Social Security (Categorisation of Earners) (Amendment) Regulations 2012 (SI 2012/816); Social Security (Categorisation of Earners) (Amendment/2) Regulations 2003 (SI 2003/2420); Social Security (Categorisation of Earners) Amendment Regulations 2003 (SI 2003/736); Social Security (Categorisation of Earners) Amendment Regulations 1999 (SI 1999/3); Social Security (Categorisation of Earners) Amendment Regulations 1998 (SI 1998/1728).

[2] Social Security (Categorisation of Earners) Amendment Regulations 1990 (SI 1990/1894); Social Security (Categorisation of Earners) Amendment Regulations 1984 (SI 1984/350); SSR78 as originally enacted; Social Security (Categorisation of Earners) Amendment Regulations 1977 (SI 1977/1015); Social Security (Categorisation of Earners and Contributions) Amendment Regulations 1977 (SI 1977/1987); Social Security (Categorisation of Earners) Amendment Regulations 1976 (SI 1976/404); Social Security (Categorisation of Earners) Amendment Regulations 1975 (SIS 1975/528).

Interpretation of "personal service"

62. Personal service is a well understood part of the definition of a contract of service (as opposed to a contract for services), namely the obligation that the employee work "by one's own hands", not "by another". It is also part of the definition of "worker" in section 230(3)(b) of the Employment Rights Act 1996.

63. In *Ready Mixed Concrete* [1968] 2 QB 497 MacKenna J noted at 515C-E:

> "A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service.
>
> …
>
> As to (i). There must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind. The servant must be obliged to provide his own work and skill. Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be: see Atiyah's Vicarious Liability in the Law of Torts (1967) pp. 59 to 61 and the cases cited by him.
>
> As to (ii). Control includes 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 it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant. The right need not be unrestricted.
>
> > 'What matters is lawful authority to command so far as there is scope for it. And there must always be some room for it, if only in incidental or collateral matters.' - *Zuijs v. Wirth Brothers Proprietary, Ltd*.
>
> To find where the right resides one must look first to the express terms of the contract, and if they deal fully with the matter one may look no further. If the contract does not expressly provide which party shall have the right, the question must be answered in the ordinary way by implication."

64. The passage in Atiyah's Vicarious Liability in the Law of Torts,[3] referred to by MacKenna J, is reproduced below:

> "Although there appears to be no express decision in which this factor has by itself been treated as conclusive, it seems reasonably clear that an essential feature of a contract of service is the performance of at least part of the work by the servant himself. If, therefore, the person in question is entitled to delegate the entire performance of the work to another it is thought that this would be conclusive against the contract being a contract of service. As was said by a New Zealand judge, a servant 'is not a person who makes a profit out of the labour of others. He earns his wage entirely by the sweat of his own brow, and not partly by that and partly by the sweat of other people's brows' *McKenzie v Taratu Coal Co* [1919] NZLR 756, 758 per Sim J. The nearest English authority on the point is *Braddell v Baker* (1911) 104 LT 673, in which the respondent employed a jobbing gardener who came on four days a

[3] Taken from *Byrne Bros (Formwork) Ltd v Baird* [2002] ICR 667 (EAT) at [13], where it was quoted in full.

> week but who was entitled to send a substitute if he could not come. On appeal to the Divisional Court, Avory J applied the traditional control test, but Hamilton J regarded the fact that the gardener was not himself bound to do the work as conclusive that he was not a servant. He said: 'If a particular reason is necessary to show that, it appears to me that the fact in paragraph (c) of the case is itself conclusive. The jobbing gardener in this case, if he could not come on any date, was bound to send a qualified substitute. A servant contracts to render ***personal service***, and if illness or other lawful excuse prevents his rendering ***personal service***, he commits no breach of contract by his absence and is not bound to find a substitute; whereas a tradesman who contracts that a certain result shall be obtained—namely a garden kept in order—may break his contract unless somebody keeps it in order' (p 676). It may be that Hamilton J, was putting it a little high in treating this as conclusive in this case because the gardener was not, it seems, entitled to delegate the entire work to someone else. In another case where a cloakroom attendant was required to provide a substitute at her own expense on her evening off this was treated merely as one of the relevant factors to be considered [*Pauley v Kenaldo Ltd* [1954] 1 All ER 226]. And in *Hill v Beckett* [1915] 1 KB 578 where a person was employed to load and unload coal in the respondents' yard he was held to be a servant despite the fact that he employed assistants and occasionally, with the permission of the respondents, stayed away leaving the assistants to carry on in his absence. If it is correct to regard some degree of ***personal service*** as an essential part of a contract of service it would seem to follow that, as a matter of law, a corporation cannot be employed under a contract of service." [our emphasis]

65. It is clear from contemporary case law personal service is a composite phrase, with the meaning of to do or perform personally any work or services: see, for example, the judgment of Mr Recorder Underhill QC (as he then was) in *Byrne Bros (Formwork) Ltd v Baird* [2002] ICR 667 (EAT) at [9], [10], [12], [13] and [24]. It is inconceivable, in the context of the host employer provision, that Parliament intended the words "personal" and "service" to have a distinct meaning, as Bilfinger UK contends.

66. It follows that the concept of "control" does not form part of the concept of "personal service". It is clear from the passage quoted from *Ready Mixed Concrete* that these are two distinct, albeit related, ideas which are necessary but separate constituent elements of the existence of a contract of service.

67. Bilfinger UK also suggests that the use of the word "employer", in the defined term "host employer", suggests that what is being targeted is scenarios in which the individual's employment is transferred, in substance but not in form, from the foreign employer to a GB-resident employer. In support of this, they cite the speech of Lord Hoffman in *MacDonald v Dextra Accessories Limited* [2005] UKHL 47; [2005] STC 1111 at [18]:

> "In the ordinary use of language, the whole of the funds were potential emoluments. They could be used to pay emoluments. It is true that, as Charles J pointed out, 'potential emoluments' is a defined expression and a definition may give the words a meaning different from their ordinary meaning. But that does not mean that the choice of words adopted by Parliament must be wholly ignored. If the terms of the definition are ambiguous, the choice of the term to be defined may throw some light on what they mean."

68. Here we do not consider there to be sufficient ambiguity in the definition of "host employer" to justify placing emphasis on the word "employer". Also the host employer cannot be the employer, as the provision only applies when there is a foreign employer. Hence it would go against the statutory purpose to require them to be the employer in "substance but not in

form." Further, the use of the term "host employer" seems apt as they are the person who is liable for the secondary Class 1 NICs, which the employer would usually be liable for.

69. Considering the host employer provision in *Goldman Sachs International* [2010] UKFTT 205 (TC); [2010] SFTD 930 at [46], the only case in which the host employer provisions have been considered in any relevant way, Judge Williams commented that:

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

70. Read as a whole, the passage does not set out any strict rule that an employment-type relationship must be found. In any event, the scope of the host employer provision was not a matter in dispute in *Goldman Sachs International*, nor were any submissions made on its scope. The remarks are *obiter*. Whilst a decision of the FTT must of course be afforded due respect, insofar as it can be read as suggesting a requirement for a relationship akin to employment, requiring control, or that personal service equates to "work for", we consider such a reading is wrong in law for the reasons set out above.

Interpretation of "made available" and "rendered"

71. Paragraph 9 applies to:

> "Employment by a foreign employer where—
>
> (a) in pursuance of that employment the personal service of the person employed is ***made available*** to a host employer; and
>
> (b) the personal service is ***rendered*** for the purposes of the business of that host employer;
>
> …" [our emphasis]

72. It is Bilfinger UK's case that to "make something available" to someone implies that that person must do something to take advantage of it. In the context of personal service, the implication is that what that person need do is decide whether and how to take advantage of that service, and then direct the individual whose service is being provided. If the foreign employer retains the right to direct the individual what to do and how to do it, then that individual's personal service is not being "made available" to the host employer. Instead, the individual's personal service is being used by the foreign employer to meet whatever the GB-present entity in question has requested that foreign employer to do or have done.

73. HMRC's response on that point is that neither the words "made available" in sub-paragraph (a) nor the word "rendered" in sub-paragraph (b) is concerned with the concept of

"control". Rather, those words are directed to different aspects of obligation and performance in the context of work:

> (1) in sub-paragraph (a), the "making available" of "the personal service of the person employed", is directed to the point that the employee's obligation of personal service must be placed at the disposal of the host employer; and
>
> (2) in sub-paragraph (b), the "rendering" of "the personal service … for the purposes of the business of that host employer", is directed to the point that the employee's work must in fact be performed ("… is rendered"), as well as to the purpose of that performance, being for the purpose of the host employer's business.

74. We do not find the argument of Bilfinger UK on this point persuasive. If as Bilfinger UK suggests, the foreign employer were required to alienate the *legal right* (vis-à-vis the employee) to direct the individual, then they would not satisfy the second requirement of *Ready Mixed Concrete*, being the requirement for control. They would therefore cease to be the "foreign employer". Such an interpretation would render the provision impotent.

75. Further, we do not find that the correct reading of "make something available" to *x* implies that *x* must do something to take advantage of it. Rather it suggests that *x* has the potential to take advantage of it. We agree with HMRC that the requirement for *x* to have actually taken advantage of the personal service is found in limb (b) that requires that the personal service is rendered for the purposes of the host employer's business.

76. We consider HMRC's interpretation to be the correct reading of the provision. We would add that placing the obligation of personal service at the disposal of the host employer need not result in the host employer having any contractual rights against the employee.

77. If the foreign employer tells the employee to obey the host employer's reasonable directions, which are made for the host employer's business, and the employee does so we consider (a) and (b) are satisfied. We consider this to be the case even if (i) the foreign employer has not entered into any contractual agreement with the host employer, it can apply to voluntary arrangements; and (ii) whether or not there are any contractual restrictions on the foreign employer recalling the employee from their instruction of obedience to the directions of the host employer.

78. We consider the word "direction" to be more apt than management or control. Control might suggest a level of control equivalent to that in the second limb of *Ready Mixed Concrete*: that cannot be the case, otherwise there would be no foreign employer. Control in that sense also refers to a legal right against the employee. Management may suggest a power of the host employer to discipline or performance manage the employee: we do not consider that necessary. The host employer may (but need not) have a remedy against the foreign employer for inadequate performance by the employee. But that is not what (a) and (b) are driving at.

"The" personal service

79. As earlier noted in *Goldman Sachs International* [2010] UKFTT 205 (TC); [2010] SFTD 930 at [46], the only case in which the host employer provisions have been considered in any relevant way, Judge Williams commented that:

> "This would exclude cases where someone works for both the foreign employer and the host employer to a significant extent but under a single contract of employment. I adopt that interpretation because of the use of the definite article 'the' before the reference to personal service. If it were a reference to 'personal service' without the definite article then it could be argued that any part of the personal service of the individual would activate the test. On the reading I adopt, and subject to clarification of the proper

> burden of proof in applying the provision, it must be shown as fact in a broad sense that the individual is working for the host employer and not the foreign employer."

80. We have already commented on the parts of the decision which immediately precede and follow this passage, on which Bilfinger UK relies. However, we agree with the significance of the definite article.

81. If Parliament had meant to include situations where, at any time, only part of the personal service was available they could have said so, for example saying "all or any part of the personal service." They did not. Furthermore, this straightforward textual interpretation is reinforced by its consistency with the explanatory note which refers to the provision covering "secondment". Whilst we accept secondments come in many shapes and sizes, we consider making the entirety of an employee's personal service available (for a time) is consistent with what might be thought of as a paradigm case of "secondment".

82. We are not, however, suggesting that in making available the entire personal service, for a period, to the host employer the employee will not owe any obligation of personal service to the foreign employer. If that were the case one of the foundational elements of the employment contract would be absent: *Montgomery v Johnson Underwood Ltd* [2001] EWCA Civ 318; [2001] ICR 819 at [23]. Rather, the obligation to the foreign employer persists, but at the choice and command of the foreign employer, it is only rendered for the business of the host employer.

83. If during some part of the working day of an employee they were required to undertake a task that was not for the benefit of the host employer, but purely to circumvent the host employer provisions, then it may be that, viewed realistically, "the personal service" would still be made available to the host employer. But those are not the facts-in-issue in this appeal, so we need not discuss that further.

84. We note there is no provision to *pro rate* or otherwise divide the liability for secondary Class 1 contributions where the entire personal service is not made available to the host employer, as Bilfinger UK noted. This again points to the provision not applying where only part of the personal service is made available.

85. We note also that subparagraph 9(c) ("*that* personal service for the host employer begins on or after 6th April 1994") specifically contemplates that "the personal service" can relate (only) to a particular period of time.

The combined operation of the contracts

86. It is common ground that the contracts entered into created real rights and legal obligations. They were not shams.

87. Nevertheless, it is necessary to consider how the contracts interact. As Lord Briggs and Lord Leggatt (with whom the other members of the Supreme Court agreed) said in *Hurstwood Properties Ltd v Rossendale Borough Council* [2021] UKSC 16; [2022] AC 690:

> "Another aspect of the *Ramsay* approach is that, where a scheme aimed at avoiding tax involves a series of steps planned in advance, it is both permissible and necessary not just to consider the particular steps individually but to consider the scheme as a whole."

88. Viewed narrowly the purpose of the scheme was to enable Bilfinger UK to obtain the contract: as it was clear that Marathon had a strong preference for the implementation of an offshore employment scheme. It is also true that, due to the tax warranty, and the contractual framework under which salary costs were passed on to Marathon, the benefit was passed on to Marathon. Nonetheless, viewed realistically it cannot be doubted that the sole purpose of the scheme was aimed at avoiding National Insurance. The lack of any other purpose was shown

by how the scheme was unwound in 2014, once the legislation was changed that arguably had made the scheme effective.

THE HEARING

89. We heard live witness evidence in the following order:

(1) Martin Davidson – formerly scaffolder, then scaffold chargehand, latterly general foreman.

(2) Neil Carrington – Chief Executive of Voyonic Crewing Limited.

(3) Gavin Gilmour – formerly scaffolder, then a scaffolding chargehand/foreman (depending on how many men he was in charge of at the time).

(4) Marc Forbes – operations manager (Bilfinger UK).

(5) Derek McMann – formerly scaffolder, then scaffold chargehand, latterly general foreman.

(6) Robert ("Rab") Carson – formerly Rigging Chargehand, subsequently services supervisor.

FINDINGS OF FACT

90. Given the interpretation of the law we adopt in the decision, the findings of fact are perhaps fuller than they need to be on that interpretation of law. However, given the fact that we have heard a significant amount of evidence we make these findings in case the decision is appealed and we are found to have erred in our interpretation of the relevant law. Those fuller findings would hopefully result in the decision being able to be remade without being remitted, or if remitted limiting the need for new evidence to be heard. We consider this to be in line with the overriding objective and especially (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties; and (b) avoiding delay, so far as compatible with proper consideration of the issues. We set this out at the start of our findings simply to avoid any misunderstanding.

91. The oral evidence that we heard focussed on scaffolders. There is no reason to suppose that the operational practice was any different for any other of the relevant individuals who actually carried out tasks on the platform. This includes individuals involved in other areas such as rigging and rope access.

General approach to evidence

92. Each of Mr Davidson, Mr Gilmour, Mr Forbes, Mr McMann and Mr Carson was plainly doing his best to assist the Tribunal. We find their evidence to be entirely credible.

93. Mr Carrington in his evidence was at pains to stress the significance of the role of Bilfinger Guernsey and the scope of the powers which Bilfinger Guernsey exercised (or might have done). Mr Carrington did not always accept the self-evident scope of contractual documents put to him (for example his "gloss" on the contractual position where he suggested that Bilfinger UK's role was limited to "assisting" with Bilfinger Guernsey's role) and at times asserted that Bilfinger Guernsey had performed a function but, when pressed, was unable to provide any example of it (for example, in relation to appraisals and disciplinary hearings or in relation to removal of personnel). To that extent, his evidence was unduly partisan. We treat his evidence on these matters with appropriate caution and prefer that of the other witnesses and the documents where at odds with the position of Mr Carrington.

Background to the contractual arrangements

94. The Brae field is in the North Sea. It is outside UK territorial waters (as defined by and pursuant to the Territorial Sea Act 1987, and Orders in Council made thereunder). It is therefore not within Great Britain. It forms part of the continental shelf for the purposes of section 1 of the Continental Shelf Act 1964.

95. In or around early 2008, Bilfinger UK was supplying services to Marathon on platforms in the Brae field. Bilfinger UK supplied those services using its own employees to do so. Those employees were employed on standard terms. Addenda were concluded that contained any terms departing from or supplementing the standard terms.

96. As the contract between Bilfinger UK and Marathon was coming to an end, Marathon put out a tender for the services for when its contract with Bilfinger UK was to end. In the tender documents, Marathon asked for an "employment model which did not incur Employer National Insurance Contributions" to be considered "if possible".

97. On 1 February 2008 Bilfinger UK submitted a tender. Bilfinger UK's tender stated that "initial investigations" had taken place in relation to the adoption of an "alternative employment model". On 14 February 2008, Bilfinger UK issued a bid clarification setting out the "key aspects" of such an alternative employment model.

98. Bilfinger UK's tender was accepted.

99. Voyonic were first approached by Bilfinger UK in July 2008 and invited to put forward a brief proposal for the establishment and operation of a Guernsey Employment company which would initially employ around 100 people in the UK North Sea.

100. Its chief executive was (and is) Neil Carrington, whose background was in human resources and the provision of personnel for the marine and offshore industry. The result was the incorporation of Bilfinger Guernsey. Bilfinger Guernsey was a special purpose company set up for the purpose of employing the personnel to be used on the Marathon Contract as set out in that contract and the Bilfinger UK tender.

The contractual arrangements

The Marathon Contract

101. Bilfinger UK and Marathon executed a contract (the "Marathon Contract"), entitled "Contract for the Provision of Brae Field Platform Industrial Services", on 12 and 13 November 2008. The effective date of commencement of the Marathon Contract was agreed to be 1 June 2008. The Marathon Contract was initially agreed to last until 31 May 2013. Marathon had an option to extend the term of the Marathon Contract for up to five years. On 1 June 2013, Marathon extended the term to 31 May 2016.

102. In the contract Marathon is referred to as the "company" and Bilfinger UK as the "contractor". Under the heading "Scope of Work Outline" (Section IV, clause 1.0) the Marathon Contract specifies:

> "The Scope of Work the provision of Platform Industrial Services for the three Brae platforms. The CONTRACTOR will provide personnel and resources to accomplish the functions as summarised below:
>
> • Fabric Maintenance
>
> • Access solutions
>
> • Vessel Management
>
> • Rigging
>
> • Deck/Heli Operations

> • Accommodation Techs
>
> • Module Fire Door Maintenance
>
> • Industrial Cleaning
>
> • Project Support
>
> • Material Control
>
> • Inspection including NDT
>
> The CONTRACTOR will work within the Brae Field integrated planning system and plan, organise and implement specific defined workscopes. This will include an onshore management and planning function, which will work with COMPANY to optimise the effectiveness of the offshore resources.
>
> CONTRACTOR will provide the plant and equipment as indicated in Attachment six and seven."

103. It continues (clause 2.0), under the heading "Detailed Scope of Work":

> "The Scope of Work is the provision of offshore Platform Industrial Services to support Production Operations, Maintenance, Integrity, Construction modifications (TMRS) Projects and Drilling, and will function under the direction of the Contract Steering Group, with day to day direction being provided by Contractors Onshore Management Support based within MOUK House. Offshore reporting will be from Contractor Representative directly to Platform Manager."

104. The contract does not require particular employees to be provided, but does specify that particular numbers and types of crew will be provided. For example under the heading "Deck and Helideck Crew" (Section IV, clause 2.4.6), it specifies:

> "The Deck/Helideck crew will consist of a Deck foreman and a deck GA. These two positions are supplemented by a combination of riggers and scaffolders. The deck team will usually consist of five people."

105. It specifies that the offshore personnel provided are divided into "core" and "ad-hoc" categories and specifies that, with regard to the pay of the core team (Section IV, clause 2.1(i)):

> "Core - personnel regularly assigned offshore to Brae Field. Core personnel are currently paid 8.5 % Brae Field competitive uplift and work a 2 weeks on 3 weeks off rota (inclusive of all holiday entitlements). This is an enhanced non OCA Package. Annual rate reviews for core personnel will be mutually agreed between CONTRACTOR and COMPANY based upon market conditions and contractor's personnel individual or team performance."

106. The payments to Bilfinger UK from Marathon are set out in Section III of the Marathon Contract. These payments include (a) reimbursing Bilfinger UK for the costs of the core team and ad hoc staff (clauses 1.1(a), 4.4, 4.5); (b) a profit based on "scorecard" performance, capped at £5,000 per man (clauses 1.1(e), 1.2); and (c) an annual payment of £120,000 for "corporate overhead" (clauses 1.1(e), 3.5)

107. A "Special Condition of Contract" under the heading "Contractor Personnel" states:

> "Clause 9.2 is hereby revised to add the following new sentences at the end:
>
> > 'It is the responsibility of the CONTRACTOR to ensure that it has adequate systems in place, to the satisfaction of the COMPANY, to ensure and to demonstrate that the personnel it supplies to the COMPANY are competent. The COMPANY reserves the right to examine and audit the competency assurance systems of the CONTRACTOR at any time.'"

108. An "Offshore Employment Model" was to be implemented from 1 October 2008:

> "It is the understanding of the parties that the implementation of the Offshore Employment Model will mean that the CONTRACTOR is not required to pay employers national insurance contributions and that the COMPANY will therefore save this element of the payroll burden.": clause 3.3.2

109. In respect of the Offshore Employment Model Marathon was to pay a "fixed and firm set-up cost of £160,000" and a "fixed 'Offshore Employment Management Fee' of £2,250.00 lump sum charge per year per individual".

110. There was also a tax indemnity whereby Marathon would indemnify Bilfinger UK if the offshore employment model was not effective (clause 3.3.5(i)):

> "In the event that the CONTRACTOR or any of its AFFILIATES is subsequently required to account to HM Revenue & Customs for secondary class 1/and or class 1A (employer's) national insurance contributions in respect of the CONTRACTOR's Offshore Core Team, the COMPANY hereby covenants and undertakes to pay to the CONTRACTOR an amount equal to, and shall indemnify the CONTRACTOR against, all amounts of secondary class 1 and/or class 1A national insurance contributions in respect of the period from 1 January 2009 required to be paid or accounted for by the CONTRACTOR or AFFILIATE to HM Revenue & Customs along with all related fines, penalties, interest, costs and expenses PROVIDED THAT COMPANY's total liability shall be capped at the value of the savings made by the COMPANY as a direct result of the implementation of the Offshore Employment Model effective from 1 January 2009. COMPANY also hereby agrees to pay to the CONTRACTOR the remaining sum of set-up costs still to be paid to the CONTRACTOR subject to 3.3.2."

111. Section V of the Marathon Contract is entitled "Health, Safety and Environment". Clause 1.5 specifies:

> "The CONTRACTOR shall ensure that its personnel are fully aware in advance and do not take, consume, or use offshore any alcoholic beverages, drugs, weapons or any other harmful substances or materials. CONTRACTOR is required to maintain a similar drugs policy to that of COMPANY that requires CONTRACTOR's personnel to agree to submit to random drugs testing."

112. The Marathon Contract was concluded on the basis of the Leading Oil and Gas Industry Competitiveness ("LOGIC") General Conditions of Contract for Services (On- and Off-Shore) (2nd edn, October 2003). Potentially relevant clauses of the LOGIC General Conditions include:

> "1.13 'WORK' shall mean all the work that the CONTRACTOR is required to carry out in accordance with the provisions of the CONTRACT, including the provision of all materials, services and equipment to be rendered in accordance with the CONTRACT.
>
> …
>
> 4.3 Except to the extent that it may be legally or physically impossible or create a hazard to safety the CONTRACTOR shall comply with and strictly adhere to the COMPANY's instructions and directions on all matters relating to the WORK.
>
> …
>
> 4.7 The CONTRACTOR shall be responsible for the programming of the WORK.

…

8.2 Subcontracting

(a) The CONTRACTOR shall not subcontract the whole of the WORK. The CONTRACTOR shall not subcontract any part of the WORK without the prior approval of the COMPANY which approval shall not unreasonably be withheld or delayed.

…

(d) The CONTRACTOR shall be responsible for all work, acts, omissions and defaults of any SUBCONTRACTOR as fully as if they were work, acts, omissions or defaults of the CONTRACTOR.

…

9.8 The COMPANY may instruct the CONTRACTOR to remove from the WORKSITE any person engaged in any part of the WORK who in the reasonable opinion of the COMPANY is either:

(a) incompetent or negligent in the performance of his duties; or

(b) engaged in activities which are contrary or detrimental to the interests of the COMPANY; or

(c) not conforming with relevant safety procedures described in Section V - Health, Safety and Environment or persists in any conduct likely to be prejudicial to safety, health or the environment.

Any such person shall be removed forthwith from the WORKSITE. Any person removed for any of the above reasons shall not be engaged again in the WORK or on any other work of the COMPANY without the prior approval of the COMPANY.

…

28.4 Independence of the CONTRACTOR

The CONTRACTOR shall act as an independent contractor with respect to the WORK and shall exercise control, supervision, management and direction as to the method and manner of obtaining the results required by the COMPANY."

The Contract for the Provision of Labour, Scaffold and Equipment

113. Bilfinger UK and Bilfinger Guernsey entered into a contract for the provision of labour, scaffold and equipment (the "LSE Contract") which was executed on 21 January 2009, and was agreed to have an effective date of 1 January 2009. The LSE Contract was to remain in force until 31 May 2013, unless terminated before then in accordance with its terms.

114. In the LSE Contract Bilfinger UK is referred to as "BIS Salamis" and Bilfinger Guernsey is referred to as the "Subcontractor".

115. The scope of work is set out in Section III of the LSE Contract, which provides (in clause 1.1) that:

"Subject to the terms and conditions herein provided, during the period of this Agreement, the Subcontractor shall carry out Services for and on behalf of BIS Salamis. The Subcontractor will carry out the duties as required of an employer under laws applicable to the Subcontractor and shall have authority to take such actions as it may from time to time in its absolute discretion consider to be necessary to enable it to perform this Agreement in accordance with sound Employment management practice."

116. The exact nature of those "Services" are set out in the LSE Contract, which provides (in clause 1.2) that:

> "The Subcontractor shall provide suitably qualified Employees as required by BIS Salamis in accordance with the relevant industry requirements, provision of which includes but is not limited to the following functions:
>
> i. selecting and engaging the Employees;
>
> ii. entering Into and Issuing employment contracts;
>
> iii. handling all payroll arrangements, pension administration, Employees' tax, social security contributions, and other dues payable from the Subcontractor's funds;
>
> iv. ensuring that the applicable requirements of the law of Place of Registry of the Operating Unit are satisfied in respect of manning levels, qualification and certification of the Employees and employment regulations including disciplinary and other requirements;
>
> v. ensuring that all Employees have passed a medical examination with a qualified doctor certifying that they are fit for the duties for which they are engaged and are in possession of valid medical certificates Issued in accordance with appropriate operating unit requirements. In the absence of applicable requirements the medical certificate shall be dated not more than three months prior to the respective Employees members leaving their country of domicile and maintained for the duration of their service on board the Operating Unit;
>
> vi. being responsible for employee disciplinary matters, including hearing employee appeals and implementing an employee disciplinary procedure;
>
> vii. ensuring that the Employees shall have a command of the English language or other appropriate common language of a sufficient standard to enable them to perform their duties safely;
>
> viii. instructing the Employees to obey all reasonable orders of the Client and/or the Company, including, but not limited to orders In connection with safety, avoidance of pollution and protection of the environment;
>
> ix. ensuring that no Connected Person shall proceed on board the Operating e prior consent of the Client (such consent not to be unreasonably withheld);
>
> x. arranging transportation of the Employees, including repatriation;
>
> xi. provide trained Employees. Arrange and recommend training of the Employees as required by the Client who will be the principal for any training required. Costs incurred for the training will be paid on behalf of the Client who will be named as principal in any training agreements;
>
> xii. conducting union negotiations; and
>
> xiii. operating a drug and alcohol policy, unless otherwise agreed."
>
> [this is reproduced verbatim, including the clear typographical errors]

117. That clause then goes on to set out, in tabular format, the number of "employees/disciplines" required at the outset in particular categories. For example it includes seven service coordinators, six "scaffolder/chargehand" and 26 "scaffolders". It subsequently specifies (in tonnes, totalling 355) the quantities and types of scaffolding to be provided (clause 1.3).

118. Other potentially relevant clauses in Section II include:

"3.0 WORK

3.1 The Subcontractor shall provide all the equipment, personnel and services specified or inferable from the summary in Section III (Scope of Work) and whenever indicated, in accordance with the time schedules specified In Section III (Scope of Work).

…

4.3 The Subcontractor warrants to BIS Salamis that the Work shall be performed by personnel who are careful, skilled, experienced and competent in their respective professions, that the Work shall be performed with promptness and due diligence and not be defective, that it will be fully in accordance with the requirements and specifications in this Contract and that it will conform with applicable laws, regulations, standards and rules In force at the time of completion of the Work.

…

4.5 The Subcontractor shall perform and document the Work in accordance with any reasonable instructions of BIS Salamis in order that any applicable certificates of compliance or design approval from a certifying agency and/or all necessary approvals from the authorities can be obtained in due course.

…

12.0 INDEPENDENT SUBCONTRACTOR

12.1 During the performance of the Work, the Subcontractor shall be an independent contractor, retaining complete control over its personnel and operations, conforming to all statutory requirements with respect to all its employees, and providing appropriate employee benefits. Neither the Subcontractor nor its employees or Subcontractors shall be, in any way, employees or agents of BIS Salamis, or have any authority to represent or bind BIS Salamis in any way. It is expressly agreed that the parties to this Contract are individual and separate entities.

…

14.0 SAFETY, HEALTH AND ENVIRONMENTAL REQUIREMENTS

14.1 The Subcontractor is responsible for the safe performance of the Work and shall give the highest priority to safety in order to avoid injury to any person and/or damage to any property and to ensure that all equipment and other items used for the performance of the Work are safe and in good condition.

…

15.0 SUBCONTRACTOR'S PERSONNEL

15.1 Any employee of the Subcontractor or its other Subcontractors deemed by BIS Salamis, in its sole opinion, to be objectionable, superfluous or unqualified shall be removed by the Subcontractor from the Work immediately upon BIS Salamis's request an shall be promptly replaced by the Subcontractor at no extra expense to BIS Salamis. BIS Salamis will not use this right unreasonably.

17.0 INSPECTION AND CONTROL

…

17.2 Although the actual performance and supervision of the Work hereunder shall be carried out by the Subcontractor, BIS Salamis shall have the right to

> designate one or more representatives who shall at all reasonable times have access to the Work for the purpose of securing the satisfactory completion of the Work. BIS Salamis has the right, but not the obligation, to inspect, test and examine all things provided by the Subcontractor and including but not limited to materials and equipment, together with all documentation related thereto.
>
> 25.0 INSURANCE
>
> 25.1 Without limitation to Its obligations and responsibilities under this Contract, the Subcontractor shall at its own cost obtain and maintain or ensure that is maintained in full force and effect throughout the duration of this Contract the following insurances which shall In any case be not less than that required by any applicable legislation:
>
> (i) Employer's Liability Insurance/Workmen's Compensation…"

119. Extensive health and safety obligations were imposed on Bilfinger Guernsey (Section VII). Bilfinger Guernsey was not entitled to renumeration in respect of personnel or equipment where the time was incurred through non-productivity which was, essentially, Bilfinger Guernsey's fault through, factors including "shortages or delays in the supply by [Bilfinger Guernsey] of personnel…" (section IV, clause 1.3). Bilfinger UK had the right to require Bilfinger Guernsey to suspend work, if it was carried out in an unsafe manner.

The Contract for the Provision of Human Resource Services

120. Bilfinger UK and Bilfinger Guernsey entered into a further contract, entitled "Contract for the provision of Human Resource Services" (the "HRS Contract"). The HRS Contract was executed on 21 January 2009, and was agreed to have an effective date of 1 January 2009. The HRS Contract was to remain in force until 31 May 2013, unless terminated before then in accordance with its terms.

121. It is clearly a standard form contract but adapted for this agreement. This is shown by how clauses 8 and 11 are "Not used for this contract."

122. In the HRS Contract Bilfinger UK is referred to as "BIS Salamis" or "the Subcontractor" and Bilfinger Guernsey is referred to as "BIS".

123. The recitals state:

> "WHEREAS BIS requests to be provided with certain employee administration services, as specified hereunder.
>
> WHEREAS the Subcontractor is engaged in the business of such services and warrants that it has adequate resources, equipment fit for purposes of the services, fully trained personnel and is ready, willing and able to perform such services on an all inclusive, self relieving basis together with such management and support services as are necessary to undertake the services satisfactorily."

124. The scope of work is set out in Section III of the HRS Contract, which provides (in clause 1.1) that:

> "The Subcontractor shall provide the personnel, necessary to undertake Human Resource Services including but not limited to the following:
>
> i. selecting and recommending for employment by the Employer the Operating Unit's Employees;
>
> ii. ensuring that the applicable requirements of the law of the Operating Unit are satisfied in respect of manning levels, qualification and certification of the Employees.

iii. ensuring that all Employees have passed a medical examination with a qualified doctor certifying that they are fit for the duties for which they are engaged and are in possession of valid medical certificates issued in accordance with appropriate Place of Registry requirements. In the absence of applicable Place of Registry requirements the medical certificate shall be dated not more than three months prior to the respective Employees members leaving their country of domicile and maintained for the duration of their service on board the Operating Unit;

iv. ensuring that the Employees shall have a command of the English language of a sufficient standard to enable them to perform their duties safely;

v. instructing the Employees to obey all reasonable orders of the Employer and/or the Company, including, but not limited to orders in connection with safety and navigation, avoidance of pollution and protection of the environment;

vi. ensuring that no Connected Person shall proceed on board the Operating Unit without the prior consent of the Employer (such consent not to be unreasonably withheld);

vii. arranging transportation of the Employees, including repatriation;

viii. recommending training courses for the Employees and arranging the training if approved by the Employer;

ix. operating the Employer's drug and alcohol policy, unless otherwise agreed.

x. performing duties in connection with the administration of the disciplinary and grievance procedures that may be in place at any time."

125. There is a noticeable overlap between these provisions and the scope of work in the LSE Contract. This overlap, and differences, are shown in track-changes by the comparison in the Appendix to this decision, which has re-ordered the clauses of the LSE Contract in order to assist the comparison.

126. Certain clauses of the LSE Contract are effectively repeated word-for-word in the HRS Contract. In such instances, in effect, the obligation undertaken to Bilfinger UK by Bilfinger Guernsey is being placed fully back on Bilfinger UK. For example sub-clause 1.1(vii) of the HRS Contract.

127. In other instances the wording may be tweaked, but is largely the same. For example sub-clause 1.1(ix) of the HRS Contract, the difference is to make clear it is Bilfinger Guernsey's drug and alcohol policy. As a practical matter it is likely to have been based on Marathon's drug and alcohol policy. As previously noted, under the Marathon Contract Bilfinger UK was required to maintain a similar policy to Marathon's. This would explain the comment of Bilfinger UK HR Manager, Kathryn McDonald, in the disciplinary hearing of E2 (in this decision we anonymise references to employees subject to disciplinary proceedings), for an alcohol related infraction, saying:

> "The company stance for BIS Salamis and BIS Guernsey is to impose a consistent sanction."

128. The differences in language between these obligations in the LSE Contract and HRS Contract are further discussed below, under the headings of disciplinary matters, performance appraisals and recruitment.

129. The only three sub-clauses of the LSE Contract that were not mirrored, to some degree, in the HRS Contract were (ii), (iii) and (xii), being:

> "ii. entering Into and Issuing employment contracts;
>
> iii. handling all payroll arrangements, pension administration, Employees' tax, social security contributions, and other dues payable from the Subcontractor's funds;
>
> …
>
> xii. conducting union negotiations."

which were, at least to some extent, mirrored in the Contract for the Provision of Payroll and Administration Services with Voyonic, which we now consider. (At the relevant time there was collective pay bargaining between the employers and unions through membership of the Offshore Contractors Association.)

The Contract for the Provision of Payroll and Administration Services

130. Bilfinger Guernsey and Voyonic entered a contract entitled, "Contract for the provision of payroll and administration services" (the "PAS Contract"). The PAS Contract was executed on 5 March 2009, and was agreed to have an effective date of 1 January 2009. The PAS Contract was to remain in force until 31 May 2013, unless terminated before then in accordance with its terms.

131. In the PAS Contract, Voyonic – then Offshore Employment Services (Guernsey) Limited – is referred to as the "Subcontractor" and Bilfinger Guernsey is referred to as BIS.

132. The scope of work is set out in Section III of the PAS Contract, which provides (in clause 1.1) that:

> "(i) payroll arrangements, pension administration, Employees' tax, social security contributions, and other dues payable, issue payslips, P45, P60;
>
> (ii) assist as required in conducting union negotiations;
>
> (iii) accounting and administration of the Employer's financial and payroll records;
>
> (iv) provide regular accounting services, supply regular reports and records; and
>
> (v) maintain the records of all costs and expenditure incurred as well as data necessary or proper for the settlement of accounts between the parties;
>
> (vi) issue employee contracts, letters and correspondence;
>
> (vii) correspond with Inland Revenue and other Authorities and respond to reference requests
>
> (viii) undertake any required year end submissions to Inland Revenue or other Authorities."

133. Section V of the PAS Contract is entitled "service level agreement". The paragraphs are not numbered but the second paragraph states:

> "This SLA is to be used in conjunction with the main Agreements between the two parties and in particular the agreed operating procedures."

134. Main Agreements is not defined: and indeed the PAS Contract is the only agreement between Bilfinger Guernsey and Voyonic.

The last page of the service level agreement contains a table outlining the expected performance in relation to certain actions and whose responsibility it was. We reproduce the

contents of that part of the table under the heading "personnel" below. There are also sections in relation to payroll, accounts and "general".

Service to be provided	Expected Performance	Action
Notify OES of proposed new start	At least 7 days before proposed start date	BIS G
Notify OES of any potential disciplinary incidents.	Within 1 day of occurrence	BIS G
Advise of changes to employee details	Within 1 day of being aware	BIS G
Issue of offer letters/contracts of employment	Within 5 days of advice	OES
Response to ad hoc letters e.g. mortgage queries etc.	Within 5 days of receipt	OES
Response to disciplinary advice	Within 1 day of notification	OES

135. Here the references to BIS G are to Bilfinger Guernsey, with OES being a reference to Voyonic. This abbreviation is because Voyonic was originally called Offshore Employment Services (Guernsey) Limited (2007-2009), then Confiance Employment Services Limited (2009-2015), then CESG Limited (2015-2018) and finally Voyonic Crewing Limited (since 2018).

The employment contracts

136. With effect from 1 January 2009, all of Bilfinger UK's employees who were working as part of the core team on platforms in the Brae field ceased to be employees of Bilfinger UK. This was pursuant to a process that was commenced by letters dated 17 November 2008, sent to each employee whose employment with Bilfinger UK was to terminate. They became employees of Bilfinger Guernsey and were issued with new contracts with Bilfinger Guernsey. Their employment was transferred by a transfer intended to replicate one taking place under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246).

137. The number of individuals who transferred to Bilfinger Guernsey was about 100. The number of individuals in the core team over the material period was 100 plus or minus about 10%.

138. Under the Bilfinger Guernsey "Statement of Main Terms and Conditions of Employment: Offshore", clause 4, Bilfinger Guernsey had the right to transfer employees from one location to another (onshore or offshore).

139. Until 31 March 2014, employment continued to be with Bilfinger Guernsey (unless terminated). With effect from that date, their contracts of employment with Bilfinger Guernsey were terminated; new contracts with Bilfinger UK were entered into with effect from 1 April 2014. This followed a consultation process that commenced on 25 February 2014, the outcome of which was notified by notice dated 28 March 2014.

140. Any additional employees who worked within the Bilfinger group of companies on the Brae field platforms in the material period as members of the core team entered into contracts of employment with Bilfinger Guernsey in that period.

141. It is agreed that core team members were resident or present in Great Britain throughout the material period.

142. This appeal only concerns members of the core team, not ad hoc personnel. Individuals who were engaged as *ad hoc* personnel from time to time during the material period were employees of Bilfinger UK. The number of individuals engaged as *ad hoc* personnel over the material period fluctuated. At its most it was around 200-220.

Operating procedures manual

143. In addition to the contractual documents there is also a Bilfinger Guernsey Operating Procedures Manual (the "Operating Procedures Manual"). The Operating Procedures Manual was a Voyonic document, with a version of the document used for each of Voyonic's clients.

144. This contains flowcharts for various personal procedures including absence, appraisals, disciplinary, grievance, promotions, recruitment, redundancy situations, termination of employment and training. The action points in the flow charts are positioned in a column that reflects whose responsibility the action is. The manual contains a final section on "Do's and Don'ts of offshore employment".

145. Bilfinger UK was referred to in the Operating Procedures Manual as "M&I" when a recipient of a service from Bilfinger Guernsey and as "SC" when providing HR services to Bilfinger Guernsey.

146. The Operating Procedures Manual is discussed further below in relation to various of the topics.

The operation in practice of the contracts

Voyonic and Bilfinger Guernsey

147. Bilfinger Guernsey was a wholly-owned part of the Bilfinger Group. It was incorporated specifically for the purpose of providing employees for the Marathon Contract. Incorporation was arranged through Voyonic (for fees of £1,750 and a further £7,000 in relation to "set up").

148. Voyonic is an "employment services" provider. Mr Carrington explained that this meant the provision of "

> "all the services connected with… employment… Voyonic employs its own staff in Guernsey, their own HR and payroll and accountancy staff. What we do, we incorporate an employment company and we then run that employment company and I act as director for those employment companies.'

This was Mr Forbes' understanding also: he described the Voyonic business as "HR management services".

149. Bilfinger Guernsey was managed by staff provided by Voyonic in Guernsey.

150. Voyonic did not only provide services for Bilfinger but also for several (unrelated) companies.

151. At that time, Voyonic had about fourteen or fifteen staff, "looking after" between 1,000 and 2,000 employees. Mr Carrington's evidence was that as a "rule of thumb" one HR and payroll administrator was capable of looking after 300 employees.

152. Voyonic did not have an existing workforce to supply to the Bilfinger Group: it was the existing Bilfinger UK core team who were transferred to be employees of Bilfinger Guernsey.

153. There were five members of staff in the Bilfinger Guernsey office. They were listed in the Operating Procedures Manual. Of these staff, Mr Carrington himself was also a director of Voyonic (and latterly, at some point within the relevant period, its owner).

154. Lorrane Vidamour was a Voyonic employee, and indeed was also employed by the other companies incorporated by Voyonic, but unrelated to Bilfinger, to provide employment services. Sarah-Jane Vivian was a Voyonic employee. Donna Reid was an employee of Voyonic at the time and has since become a director. Rebecca Breban (who was not listed in the Operating Procedures Manual but whose e-mails featured in the correspondence before the Tribunal) was also a Voyonic employee. The Bilfinger Guernsey staff had (and used) both Bilfinger Guernsey and Voyonic email addresses. The two companies shared an office address.

Day-to-day work on the platform

155. The basic structure on the platform was, starting at the bottom of the hierarchy and using the scaffolding function as an example, (i) scaffolder, (ii) scaffolder chargehand, (iii) scaffolding foreman, (iv) services supervisor, and then (v) Marathon employees up to the offshore installation manager.

156. The following factual findings are made on the basis of the evidence of Mr Forbes and Mr Carson.

157. It was ultimately Marathon employees who decided what tasks needed to be done on the platform by Bilfinger Gurnsey employees. These instructions were given to the foremen/services supervisors on the platform who had responsibility for the particular tasks. This was done through daily planning meetings on the platform. No onshore management was involved.

158. The following factual findings are made on the basis of the testimony of Mr Davidson, Mr Gilmour and Mr McMann.

159. Before starting on a task, the foreman was required to draft a permit for it, and have the permit granted; permits were granted by a Marathon employee. The foremen/services supervisors then gave instructions as to what specific scaffolding tasks to do, and, to the extent necessary, how to do them, to the individuals who actually did those tasks. Sometimes, the Marathon employee who needed the scaffolding would show the men where it was required.

160. Any problems in carrying out a particular task would have been taken first to the scaffolding foreman, and then the services supervisor, and then platform management (Marathon) or the other contractor who had requested the job (for example Petrofac).

On shore liaison

161. Mr Carson was asked:

> "You say that Marc Forbes was your contact responsible for liaising with installation staff and when you say 'liaising', what sort of things are you talking about?"

He answered:

> "Well, he was the one who would look after day to day work planning, simply if something needed fixing or scaffolding needed moving or – the actual day to day hands on, which tools to use, that sort of operational activity."

162. When asked to explain the offshore employment model Mr Carrington described the role of Bilfinger Gurnsey as to:

> "take on all responsibilities for the employment for the individuals, recruiting them, dismissing them, effectively we were the HR personnel department based in Guernsey."

163. Mr Carson, who was at the relevant time services supervisor, so the most senior Bilfinger Guernsey employee on the platform, said the following in re-examination:

"Q. So, when you were an employee of Guernsey, how would you describe Marc Forbes in relation to you? My learned friend put it to you, he was your boss. You say –

A. Yes, he was still –

Q. – first line of contact.

A. He was project manager, so he was still my boss. Legally, my boss, because I was sending everything to him for ad hoc personnel.

Q. Right. So, as far as ad hoc personnel were concerned, he was your boss?

A. Yes.

Q. What about in relation to the core team?

A. Well, I think they still classed him as their boss. He'd come out for site visits. I think I've seen him in the – once in the five year. In fact, 2009, I've seen him before then, offshore in 2006, like I say, when he phoned to introduce himself."

164. Mr Carrington said the following in cross-examination:

"Q. Again, feel free to say you cannot comment, but the question is Marc Forbes is genuinely Mr Carson's line manager?

A. On board, yes. He is his reporting line.

Q. Marc Forbes is not on board. Marc Forbes is working in Aberdeen. He comes offshore, as I understand it from time to time, but he is primarily based at Bilfinger UK's office in Aberdeen?

A. He is the best placed technical person to (inaudible)

Q. Quite so. He understands the work –

A. Yes.

Q. – and can tell whether somebody is doing a good job or not?

A. That is correct."

165. Mr Davidson, then a scaffolder, described Mr Forbes as "onshore management" and as in-charge of his services supervisor. Indeed, that is consistent with clause 2.0 of the Marathon Contract with "day to day direction being provided by Contractors Onshore Management Support based within MOUK House".

166. When an issue arose as to pay for services supervisors on Brae Alpha, it was raised with Mr Forbes by Mr Carson. Mr Forbes, for his part, indicated that it would have been necessary for him to take this up with Marathon: not Bilfinger Guernsey. This is not surprising, since under the contractual framework such costs would have been passed on to Marathon. Similarly, concerns about rota balance days were dealt with by Mr Forbes after being raised by Mr Carson. Similarly, where concerns were raised by Marathon about the control of rigging equipment, it was Mr Forbes who indicated that he would investigate and instigate disciplinary proceedings if necessary (although his experience suggested to him that the concerns might not have much substance). When a request for further training was made by Derek McMann, it was Mr Forbes to whom the request was made and who determined whether further training was justified (with Mr Forbes coming to the view in that case that no training was required).

Disciplinary matters

167. Under the LSE Contract Bilfinger Guernsey contracted to:

> "being responsible for employee disciplinary matters, including hearing employee appeals and implementing an employee disciplinary procedure"

But under the HRS Contract Bilfinger UK undertook responsibility for:

> "performing duties in connection with the administration of the disciplinary and grievance procedures that may be in place at any time."

168. The process as laid down in the Operating Procedures Manual is for Bilfinger UK to receive a report from Marathon and then to forward that to Bilfinger Guernsey. Bilfinger Guernsey then requests Bilfinger UK to hold investigatory meetings. Bilfinger UK does this and prepares a full report and recommendations. Bilfinger Guernsey determines if further action is required: if so Bilfinger UK holds a disciplinary hearing and prepares a full report. Bilfinger Guernsey then decides if further action is required and if so issues a disciplinary letter. Bilfinger Guernsey then also holds any appeal hearing.

169. An example of a disciplinary matter of a core crew member that was discussed at the hearing was of E1. Mr Forbes held an investigatory hearing on 31 August and 14 September 2009. The issue was that E1 had used a Marathon issued phone to make calls to Spain. It was explained in oral testimony and is evident from the notes of the disciplinary meeting the main concern was that it was in work time and detracting from performance of work. At the outset of both meetings Mark Forbes explained that he was conducting the meeting on behalf of Bilfinger Guernsey. He also makes clear that it is the decision of Bilfinger Guernsey, and he will discuss this with them, but says "I would think I would be recommending a written warning for this."

170. On 15 September, the day after the final meeting, Lorrane Vidamour writes on behalf of Bilfinger Guernsey with the written warning.

171. Another example was E2, who failed an alcohol breath test prior to check-in. (Alcohol is not allowed on oil rigs and employees are required to be free of the effects of alcohol prior to check-in.) In a letter, dated 1 June 2012, E2 was invited to attend a disciplinary hearing in Aberdeen at 10:00 on 7 June 2012. The letter states that:

> "[t]he hearing will be conducted by Marc Forbes on behalf of BIS Guernsey; BIS Salamis HR will also be in attendance."

172. Seemingly enclosed with that letter is the disciplinary procedure, with a "BIS Salamis" header and logo.

173. The minutes of the meeting make it clear it is being conducted on behalf of Bilfinger Guernsey. They record the Bilfinger UK HR Manager, Kathryn McDonald, saying the following:

> "— We will conduct the meeting on behalf of BIS Guernsey
>
> …
>
> — LF will take minutes which will then be forwarded to BIS Guernsey to formulate an opinion
>
> …
>
> — After the meeting we will forward the contents of the meeting along with our opinion to BIS Guernsey
>
> — You will be notified of the outcome in writing and we will try to do it as quickly as possible as I understand that you don't want this to be hanging over your head."

174. They also record her as saying:

> "— Are you aware that a failed breath test is classified as gross misconduct and punishable up to summary dismissal
>
> — The company stance for BIS Salamis and BIS Guernsey is to impose a consistent sanction
>
> — You are facing dismissal because it is consistent with what we have done in the past
>
> — Obviously you have put forward a different set of circumstances to us, we have not come across this before so it is something we have to consider.
>
> — But why should we treat this case as exceptional? can you tell us anything else other than what you have already"

175. The minutes also record her saying that it is now too late to resign. However later on (at 15:47) on the same day E2 sends an email to Mr Forbes saying:

> "I have thought long and hard about this decision, and hereby give notice of my resignation from bis guernsey. I would just like to thank you for everything that you have done for me."

176. Mr Forbes then forwards this email (at 15:49) to Kathryn McDonald and Rebecca Breban of Bilfinger Guernsey saying:

> "See below
>
> In mark of this excellent service and contribution prior to incident I would request we accept his resignation.
>
> Please advise"

177. Rebecca Breban responds (at 16:14) saying:

> "Thanks for sending this through.
>
> We would like to draw your attention to the minutes where [E2] was advised that it was too late to resign, however as [E2] has already submitted his resignation we have no alternative but to accept it.
>
> Please could you forward a letter that you would like to be sent to [E2], and please could you confirm his date of leave?"

178. We were not provided with any examples of disciplinary appeals. However, Mr Carrington stated he held some. Relatedly we were provided with the example of a redundancy appeal heard by Mr Carrington on 22 February 2010.

179. We have no reason to doubt that these were typical of disciplinary procedures. However, the need for disciplinary procedures was very occasional. Mr Carson's evidence, for example, was that whilst he was aware of the disciplinary flowchart in the Operating Procedures Manual, he had never had occasion to use it.

180. In oral evidence Mr Forbes explained that there were only three possible outcomes of the disciplinary procedure: dismissal, a written warning or a verbal warning. In the case of a verbal warning it would be given at the disciplinary meeting and followed up by a letter. Accordingly it would appear that Bilfinger Guernsey would not be involved in making that decision, but only documenting it.

181. In cross examination Mr Forbes was asked:

> "Q. Can you recall any occasion when Bilfinger Guernsey disagreed with a judgment call you had made about a disciplinary –"

To which he answered:

> "A. if they didn't like something. So, you know, sometimes if we did a disciplinary, they might have thought that the information wasn't robust enough and could obviously get us in trouble. Maybe a handful of times, I can't remember.
>
> Q. Of that order? It was like HR advice –
>
> A. Yes."

182. This was followed-up by the following exchange in re-examination:

> "Q. … You were asked: was there any occasion when Guernsey disagreed with you, and your reply was: 'It was more that they were looking for more information in relation to a disciplinary matter, and the information was not robust enough. It happened maybe a handful of times." What sort of further information might Guernsey – or did Guernsey request from time to time in this context?
>
> A. So if there's maybe a question that could have been asked of the person, would have to be asked that question. I couldn't give you an example to be honest with you but just if the investigation wasn't robust enough and there was potentially holes that we missed in the investigation process, then Guernsey could come back and ask us to provide information about – if there was any paperwork missing, that type of thing.
>
> Q. Essentially Guernsey are saying: we are not making a decision now, but provide us with these bits of information –
>
> A. That's right, yes.
>
> Q. And take it from there I suppose.
>
> A. Yes."

183. Overall, in respect of disciplinary matters, the evidence supports a practice led by Mr Forbes (or others at Bilfinger UK) in which recommendations were made to, and followed by, Bilfinger Guernsey.

Performance appraisals

184. Performance appraisals are not directly covered by either the LSE Contract or the HRS Contract. However both contracts cover training, which may arise as a result of appraisals under the Operating Procedures Manual. In evidence we also had examples of training being requested by employees in appraisals.

185. Under the LSE Contract Bilfinger Guernsey contracted to:

> "provide trained Employees. Arrange and recommend training of the Employees as required by the Client who will be the principal for any training required. Costs incurred for the training will be paid on behalf of the Client who will be named as principal in any training agreements."

But under the HRS Contract, Bilfinger UK undertook responsibility for:

> "recommending training courses for the Employees and arranging the training if approved by the Employer."

186. The process, as laid down in the Operating Procedures Manual for the appraisal process, is for Bilfinger Guernsey and Bilfinger UK to jointly agree the "appraisal period for each post". Bilfinger Guernsey then instructs Bilfinger UK "to set up [the] appraisals timetable". Bilfinger UK is then to "Liaise with Line Managers to agree timetable". The line managers then carry out the appraisal and return the forms to Bilfinger UK. It is then for Bilfinger UK to "send appraisal forms to [Bilfinger Guernsey] along with any comments." It is then for Bilfinger

Guernsey to "Review Forms and any comments discuss/approve any necessary actions with [Bilfinger UK]" and "Instigate Promotion/Demotion if necessary." It is for Bilfinger UK to "Arrange training, other action etc as required by [Bilfinger Guernsey]."

187. A number of appraisals were covered in evidence by the witnesses. From these and from the witness evidence it is clear that appraisals were either carried out by services supervisors offshore (in the case of more junior employees) or by Mr Forbes (in the case of the services supervisors). Mr Forbes reviewed and signed the appraisals of the more junior team members carried out by the services supervisors. Mr Forbes' evidence was that he did so as he was "manager for the overall contract", which he clarified to mean the Marathon Contract.

188. Bilfinger Guernsey was involved in the appraisal process, but this appears to have been relatively limited. In relation to appraisals, Mr Carrington observed in evidence-in-chief:

> "Basically the appraisal was carried out by people who knew the individuals on a day to day basis. We would get the forms in and review them for completeness and if we had any comments to make on what was in there, whether that be performance related issues that were identified or one of the common problems we see is people are fairly lenient when they are giving appraisals so you don't get the true picture at times and then if we did have any comments to make we would go back to the UK and discuss it with them and suggest what they needed to do."

189. The receipt of comments from Bilfinger Guernsey suggests a process which was led by others. This was not surprising given that Bilfinger Guernsey's staff were not directly involved in the offshore operations: Mr Carrington acknowledged that Mr Forbes was the "best placed technical person" for appraisals. A focus by Bilfinger Guernsey on matters of HR procedure rather than the substance of individual cases is consistent with Voyonic's background in HR and with the approach noted in other areas such as disciplinary proceedings. Mr Carrington's evidence was that Bilfinger Guernsey reviewed the appraisals but he suggested that over the entirety of the relevant period had intervened "half a dozen times maybe". In the context of the number of core employees and years of the contract, this suggests minimal involvement on the part of Bilfinger Guernsey.

Recruitment

190. Under the LSE Contract Bilfinger Gurnsey undertook responsibility for:

> "selecting and engaging the Employees"

But under the HRS Contract Bilfinger UK undertook responsibility for:

> "selecting and recommending for employment by the Employer the Operating Unit's Employees."

191. The process as laid down in the Operating Procedures Manual is for Bilfinger Guernsey to "issue a letter and job advertisement instruction authorising recruitment of staff". The responsibility of Bilfinger UK is then "Advertise/contact agencies etc to create pool of applicants" and to determine "candidate suitable?" We take this to mean select a single candidate or where there are multiple candidates a number equivalent to the number of vacancies. Where a candidate is not suitable Bilfinger UK are to advise the candidate. Where they judge them suitable they are to:

> "Advise Employer by e-mail of potential employee including all relevant information such as cv, certificates, interview notes and recommend where appropriate for proposed role. Include also personal details, bank detail and recommended pay scale etc."

It is then the role of Bilfinger Guernsey to decide whether to "Approve the offer of employment". It they don't they so "Advise Candidate", if they do they "Issue Offer letter and Terms and Conditions of Employment etc".

192. Recruitment to core positions (that is those where employment was through Bilfinger Guernsey) appears to have been relatively limited in scale. The original core workforce was transferred from Bilfinger UK. Core team jobs were seen as desirable and members tended to stay in position. Mr Forbes estimated that the number of core employees fluctuated by about ten per cent. Mr Forbes' evidence was that when recruitment was necessary, positions were generally advertised internally at Bilfinger UK rather than to the "wider industry".

193. The instances where evidence is available suggest a recruitment process led by Bilfinger UK and Mr Forbes. The most revealing example of this is the recruitment of Keith Lowry as services supervisor for the Brae Bravo platform. The services supervisor was a critical and senior position. Mr Lowry himself was, in Mr Forbes' evidence, an important and well-known industry figure. The recommendation was made by Mr Forbes (having consulted with Marathon management) and was approved overnight by Bilfinger Guernsey. The recommendation was made at 16:27 on 4 July 2012 and approved at 10:08 the next day. Mr Forbes agreed that he would not have expected much "push back" from Bilfinger Guernsey.

194. Overall, this suggests a process led by Bilfinger UK and Mr Forbes. Although the final legal decisions were taken by Bilfinger Guernsey, this is as would be expected as they were their employees.

Paperwork

195. We accept the evidence of Mr Carson, then Services Supervisor, that the offshore employment model resulted in certain paperwork being sent to Guernsey (for the core team) and Aberdeen for ad hoc staff as he explained:

> "Q. Thank you. What distinction were you drawing between the core team and ad hoc individuals in terms of correspondence being transferred to Bilfinger?
>
> A. It was all the paperwork. There was two lots of paperwork I had to do for it, holiday requests, training requests, time sheets. Time sheets were different for Guernsey than they were for Aberdeen office. Ad hoc had to go on one; base crew went on another one. So, they went to different departments. So it's just more work for myself."

196. From 2009 to 2014, matters concerning wages were dealt with by communicating with individuals in Guernsey rather than Aberdeen (or elsewhere in Great Britain), in particular Lorrane Vidamour (an employee of Voyonic). Mr Davidson took any issues to his services supervisor, and did not know what happened after that.

Check-ins

197. Under the LSE Contract Bilfinger Guernsey undertook responsibility for:

> "arranging transportation of the Employees, including repatriation".

Under the HRS Contract Bilfinger UK undertook responsibility for exactly the same.

198. Despite this, the evidence was clear the check-ins were conducted by Bilfinger Guernsey. We heard no evidence on who arranged the flights.

Perspective of staff

199. It is clear from the resignation letter of E2 when he referred to his "resignation from bis guernsey" that he was aware that he was an employee of Bilfinger Guernsey.

200. Other members of the core team, who were employed by Bilfinger Guernsey, had less clarity as to how the arrangements worked. For example Mr McMann's evidence was that he would put in a holiday request and this would be passed on to "Aberdeen" (ie Bilfinger UK) by the scaffold foreman he reported to. Similarly, he was asked in cross-examination, by reference to his witness statement:

> "Q. … Who are you talking about whether or not you refer to the "direct manager"?
>
> A. Our project manager; we would ultimately answer to in Aberdeen."

201. He said later, in re-examination:

> "Q. So in 2009 and 2014 you were employed by Bilfinger Guernsey.
>
> A. Employed by Bilfinger Guernsey. I would say that Bilfinger Guernsey were paying my wages bill. To my mind I was still employed by Bilfinger Salamis. That's the way I looked at it back then."

202. In the evidence we heard, operations were often characterised as being conducted for Bilfinger UK.

203. Mr Davidson said in evidence:

> "Q. If you did have issues with pay, who would you go to?
>
> A. I would have went initially to Rab Carson or Rab Cooper, depending on who was on at the time.
>
> Q. They held what positions?
>
> A. They were services supervisor.
>
> Q. Do they work onshore or offshore?
>
> A. They were offshore, they were like a focal point, the Salamis' focal point. You know, they're sort of in charge of everyone else that's on the platform for Bilfinger."

204. In Mr Carson's December 2011 appraisal, while it is on a Bilfinger Guernsey form, Mr Forbes frequently references Bilfinger UK, saying "BIS Salamis will be expected to deliver or show improvement on in number of areas" and "Keep up the good performance and continue to promote BIS Salamis."

205. Overall, this suggests that the employees of Bilfinger Guernsey still perceived themselves as working for Bilfinger UK, although they were aware that their legal employer was Bilfinger Guernsey. This is also apparent from the evidence of Mr Carson, discussed above, who referred to Mr Forbes as his "boss" and suggested the core team would share his view.

DISCUSSION

206. It is HMRC's case that the offshore employment model, as implemented, fell within limb (a) of paragraph 9 simply because:

(1) between 2009 and 2014, Bilfinger Guernsey engaged employees who worked on the Brae Field on Marathon operations;

(2) the employees' contracts of employment entitled Bilfinger Guernsey to direct their employees to work on the Brae Field;

(3) Bilfinger Guernsey did direct the employees to work on the Brae Field;

(4) the reason for the direction to work on the Brae Field was an obligation owed by Bilfinger UK to Marathon; and

(5) there was no direct contract between Bilfinger Guernsey and Marathon.

207. While we accept such facts, we consider that something more is required to fall within limb (a) of paragraph 9. This is unsurprising since otherwise ordinary subcontracting could be caught, whilst the purpose of the provisions is to apply to secondment-like-arrangements

208. Applying the reasoning in paragraphs [38] to [88] above, for the reasons below, we find that viewed realistically, "the personal service" of individuals was "made available" and "rendered" to Bilfinger UK for the purposes of Bilfinger UK's business. Accordingly paragraph 9 applies.

Personal service

209. The fact that "personal service" rather than "services" was provided is shown by how the LSE Contract named specific categories of men, in defined categories (eg riggers and scaffolders) that were to be deployed. Indeed, viewing matters realistically, it was known at the outset precisely which men they would be, as the only suitably qualified men Bilfinger Guernsey (an SPV) employed were the ones transferred to them by Bilfinger UK. When new individuals were hired they were effectively chosen by Bilfinger UK, although the employer was Bilfinger Guernsey.

210. Beyond specifying the categories of men to be provided, the LSE Contract is very uninformative as to what services are being provided, or what the deliverables are. This points to "personal service", rather than "services".

211. While scaffold and equipment were also provided under the LSE Contract, the value of this was very small compared to the value of the labour. Section IV of the LSE Contract specifies the monthly invoiced amount in respect of labour to be £531,267.15 and in respect of scaffold and equipment to be £7,984.18.

212. It is notable that the payments to Bilfinger Guernsey under the LSE Contract (Section II, clause 7 and Section IV) are fixed amounts for particular categories of employee. This contrasts to the Marathon Contract, which provided for a profit based on scorecard performance. The very limited circumstances in which Bilfinger Guernsey was not entitled to renumeration in respect of personnel or equipment included where the time was incurred through non-productivity which was, essentially, Bilfinger Guernsey's own fault through, (i) "shortages or delays in the supply by [Bilfinger Guernsey] of personnel…"; and (ii) lack of planning (section IV, clause 1.3). Again, this points to the "personal service" of men being provided, rather than a contract for services – as the justification for withholding payment (at least with regards to (i)) is the failure to provide men, rather than poor performance of those men in completing a task.

213. This is reinforced by how the core team worked alongside the ad hoc crew, under the same day-to-day operational chain of command. This makes it far harder to pinpoint any separate service supplied beyond the men and the scaffold/equipment.

214. This is also reinforced by the overlap between the scope of work as set out in the LSE Contract and the HRS Contract. When these obligations are netted out, as shown in the Appendix, it is apparent that the bulk of labour related obligations assumed by Bilfinger Guernsey are passed back to Bilfinger UK. Viewed realistically, the main obligation that is left with Bilfinger Guernsey is to provide specified numbers of particular categories of men.

Made available

215. The personal service was "made available" to Bilfinger UK, for the purposes of Bilfinger UK's business, by the core team's deployment on the platform: where they worked to fulfil Bilfinger UK's obligations under the Marathon Contract.

216. The employees worked as part of a team that was, on the platform, ultimately accountable to the Services Supervisor, themselves a Bilfinger Guernsey employee. The core team generally perceived themselves to be working for Bilfinger UK. Mr Carson, then Services Supervisor, identified Mr Forbes as his boss. Through this chain of command the personal service of the core team was placed at the disposal of Bilfinger UK, that was sufficiently able to direct the core team to ensure that personal service was rendered on a day-to-day basis. For the most part this was achieved through the deployment. The initial core team had previously been working in the same roles when employees of Bilfinger UK. Following their transfer it was just a matter of carrying on as before.

217. An illustration of what happened when the employees did not make themselves available for work was E1, who was the subject of the disciplinary proceedings for excessive use of a work phone, for personal calls, during working hours. A written warning was issued by Bilfinger Guernsey on the recommendation of Mr Forbes. We heard a great deal concerning irregular events such as this, however we consider them to be of limited significance compared to the day-to-day operational norm that the core team operated under the direction of Bilfinger UK.

218. Marathon was the client of Bilfinger UK. Ultimately the work of the core team was for the benefit of Marathon. However, viewed realistically the personal service of the core team was made available to Bilfinger UK, not Marathon. In making this finding we consider it relevant that there was no contract between Bilfinger Guernsey and Marathon: so from the legal perspective of the LSE Contract the personal service was made available to Bilfinger UK. From a commercial perspective there was no reason why Bilfinger Guernsey would wish to benefit Marathon, other than its contractual obligation to Bilfinger UK. We also consider it relevant that the core team identified themselves as working for Bilfinger UK.

219. Bilfinger Guernsey retained "control" in the employment law sense: the core team were still their employees. But the control by Bilfinger Guernsey was generally exercised on the advice of Bilfinger UK. This is unsurprising since the control by Bilfinger Guernsey was exercised from a remote location, by non-technical staff, who knew little or nothing of the work being done, and that control deployed by staff employed primarily by Voyonic, whose services were in employment, not platform operations.

"The" personal service

220. On the evidence before us the entirety of the personal service was put at the disposal of Bilfinger UK. The employees were placed on the platform. The very nature of their job, as scaffolders and riggers, meant that it was not possible for them to work remotely for another person.

Conclusion

221. The appeal is therefore dismissed. As was suggested in closing submissions, the parties are invited to agree quantum. If they cannot agree they are at liberty to apply to the Tribunal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

222. 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.

MICHAEL BLACKWELL
TRIBUNAL JUDGE

Release date: 16 August 2024

APPENDIX

Comparison between the LSE Contract and the HRS Contract

i. selecting and ~~engaging~~recommending for employment by the Employer the Operating Unit's Employees;

~~iv~~ii. ensuring that the applicable requirements of the law of ~~Place of Registry of~~ the Operating Unit are satisfied in respect of manning levels~~,~~, qualification and certification of the Employees ~~and employment regulations including disciplinary and other requirements;~~ .

~~v~~iii. ensuring that all Employees have passed a medical examination with a qualified doctor certifying that they are fit for the duties for which they are engaged and are in possession of valid medical certificates ~~Issued~~issued in accordance with appropriate ~~operating unit~~Place of Registry requirements. In the absence of applicable Place of Registry requirements the medical certificate shall be dated not more than three months prior to the respective Employees members leaving their country of domicile and maintained for the duration of their service on board the Operating Unit;

~~vii~~iv. ensuring that the Employees shall have a command of the English language ~~or other appropriate common language~~ of a sufficient standard to enable them to perform their duties safely;

~~viii~~v. instructing the Employees to obey all reasonable orders of the ~~Client~~Employer and/or the Company, including, but not limited to orders ~~In~~in connection with safety and navigation, avoidance of pollution and protection of the environment;

~~ix~~vi. ensuring that no Connected Person shall proceed on board the Operating ~~e~~ Unit without the prior consent of the ~~Client~~Employer (such consent not to be unreasonably withheld);

~~x~~vii. arranging transportation of the Employees, including repatriation;

~~xi. provide trained Employees. Arrange and recommend training of the Employees as required by the Client who will be the principal for any training required. Costs incurred for the training will be paid on behalf of the Client who will be named as principal in any training agreements;~~
~~xiii~~viii. recommending training courses for the Employees and arranging the training if approved by the Employer;

ix. operating ~~a~~the Employer's drug and alcohol policy, unless otherwise agreed.

~~vi. being responsible for employee disciplinary matters, including hearing employee appeals and implementing an employee disciplinary procedure;~~
x. performing duties in connection with the administration of the disciplinary and grievance procedures that may be in place at any time.

~~ii. entering Into and Issuing employment contracts;~~

~~iii. handling all payroll arrangements, pension administration, Employees' tax, social security contributions, and other dues payable from the Subcontractor's funds;~~

~~xii. conducting union negotiations; and~~