Appeal No. UKEAT/0062/15/DM

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 7 July 2015
Judgment handed down on 23 September 2015

Before

HIS HONOUR JUDGE PETER CLARK

(SITTING ALONE)

MR P STRICKLAND — APPELLANT

(1) KIER LIMITED
(2) KIER GROUP PLC
(3) KIER INFRASTRUCTURE & OVERSEAS LTD
(4) KIER INTERNATIONAL LTD — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MISS KATHERINE APPS (of Counsel) Instructed by: Gordon Dadds LLP 6 Agar Street London WC2N 4HN
For the Third Respondent	MR IVAN HARE (of Counsel) Instructed by: Lewis Silkin LLP 5 Chancery Lane London EC4A 1BL
For the First, Second and Fourth Respondents	No appearance or representation by or on behalf of the Respondents

SUMMARY

JURISDICTIONAL POINTS - Working outside the jurisdiction

PRACTICE AND PROCEDURE - Amendment

Permission to amend the grounds of appeal to add a point not argued below refused. The argument that 'whistle-blowing' protection required a wider test than that for unfair dismissal so far as extra-territorial jurisdiction is concerned was rejected in the light of EAT decisions in **Fuller** (EAT/0464/13/BA) and **Smania** [2015] ICR 436.

The finding that the Claimant's employment had a closer connection with his place of work in the Middle East than the UK was a permissible one. There was no error in the application of the **Rome Convention**.

The Claimant's appeal is dismissed.

HIS HONOUR JUDGE PETER CLARK

Introduction

1. This is an appeal by the Claimant, Mr Strickland, against so much of the Reserved Judgment of Employment Judge Ord, promulgated with Reasons on 17 November 2014, sitting at the Huntingdon Employment Tribunal, as held that the Employment Tribunal did not have territorial jurisdiction to entertain his complaints of unfair dismissal and 'whistle-blowing' detrimental treatment under the **Employment Rights Act 1996**, brought against four separate Respondents within the Kier Group of Companies. Nothing turned on the precise identity of the Claimant's employer, and like the Employment Judge (see Reasons, paragraph 3) I shall refer to the Respondents collectively as "Kier".

Background

2. Kier carries out construction work in the UK and abroad, materially in Dubai and Saudi Arabia.

3. Between September 1997 and October 2007 the Claimant was employed by Kier, living and working in the UK. In 2007 he took employment in the Middle East with another construction business, Laing. Whilst living in Dubai in 2008 he had discussions with Kier with a view to returning to their employment in the Middle East. As a result he was offered and accepted the post of Area Commercial Manager based in the Dubai office on the terms set out in an offer letter dated 7 January 2009. He commenced that employment on 19 April 2009 and he continued to work under the terms of that contract, as amended as to salary, in Dubai and Saudi Arabia, until his resignation in June 2013.

The Employment Tribunal Decision

4. Before the Employment Tribunal the Claimant was represented by Mr Jacques Algazy QC. Mr Ivan Hare has represented the Respondents throughout.

5. The principal question, for present purposes, identified by the Employment Judge was whether the Claimant's contract of employment (with the Third Respondent, Kier Infrastructure and Overseas Limited, formerly Kier Construction Ltd) had a closer connection with Britain and British law or with the Middle East (Dubai and Saudi Arabia). The answer was the latter; see paragraphs 111 to 123.

6. For completeness, the Employment Judge considered a reconsideration application by the Claimant at a hearing held on 17 April 2015. Save for an agreed correction, immaterial for present purposes, to paragraphs 24 and 25 of the original Reasons, set out at paragraph 6 of the Reconsideration Judgment dated 13 May 2015, the application was dismissed.

The Appeal

7. The original Notice of Appeal, settled by junior counsel, Mr Adam Ohringer, contained three grounds of appeal. Those grounds were permitted to proceed to this Full Hearing on the paper sift by HHJ Shanks. The third ground was essentially a perversity challenge to the Employment Judge's finding that the connection with Great Britain and its employment laws was not stronger than that of the country where the work was being carried out. I note that this ground of appeal acknowledges that the Employment Judge was correct to carry out that comparative exercise; see the observation of Elias LJ in **Bates van Winkelhof v Clyde & Co** [2013] ICR 883, paragraph 98, that a comparative exercise will be appropriate where the Claimant is employed wholly abroad.

8. In advancing the appeal before me Miss Katherine Apps, now appearing on behalf of the Claimant, applied to amend this ground of appeal to add an alternative contention that the Employment Judge was wrong to carry out the comparative exercise, rather than the sufficiently strong connection test to which Elias LJ later referred at paragraph 98 of **Bates van Winkelhof** on the premise that the Claimant did not work wholly abroad.

9. The factual basis for that premise, Miss Apps submitted, was the reference by the Employment Judge at paragraph 117 of his original Reasons to a letter written by the Claimant to Her Majesty's Revenue & Customs ("HMRC") on 30 April 2012 seeking reinstatement of his No Tax (NT) tax coding, in which he said, among other things:

> **"I have travelled back to the UK only to visit family and to attend the occasional meeting. …"**

Miss Apps seeks to elevate that last statement, "to attend the occasional meeting", to amounting to a finding of fact by the Employment Judge that the Claimant attended business meetings in the UK in connection with his employment with Kier so that his employment was not performed wholly abroad, thus engaging the sufficiently strong connection test to be found in **Ravat v Halliburton** [2012] ICR 389, paragraphs 27 to 29.

10. The amendment application was opposed by Mr Hare and I refused to allow it. It was not simply the lateness of the application, attributable to Miss Apps being brought into the case at a late stage, but rather the factual premise on which the proposed amendment was based. I do not accept that the Employment Judge should be taken to have found as fact that the Claimant attended meetings in the UK on Kier business; he merely recorded an extract from the HMRC letter written by the Claimant. That assertion was not repeated, I am told by counsel, in the Claimant's 63 page witness statement below; nor is it consistent with the evidence of Mr Corrigan, called by the Respondent below, albeit that he did not take up his post line managing

the Claimant until November 2012; and nor does this line appear to have been taken by leading counsel, very experienced in this area of the law, on behalf of the Claimant below. In these circumstances I was not prepared to allow the point to be taken now by way of amendment.

11. Further, and for completeness, I did not entertain an argument which Miss Apps sought to advance in the appeal that statutory protection for 'whistleblowers' requires a wider test than that applicable to unfair dismissal, in light of the EAT decisions in **Fuller v United Healthcare Services** (UKEAT/0464/13/BA, 4 September 2014, Lady Stacey, paragraph 44) and **Smania v Standard Chartered Bank** [2015] ICR 436 (Langstaff P, paragraph 31), which, in the interests of comity, I shall follow.

Discussion

12. Returning to the original grounds of appeal, it is convenient to deal first with the third, perversity, ground.

13. Accepting that the Employment Judge asked himself the correct question, was he entitled to conclude that the Claimant's employment had a closer connection with the countries in which he worked than with Britain and British employment law? I am satisfied that he was.

14. The Claimant was recruited in Dubai, where he then lived and worked, to work for Kier in Dubai. On the express finding of the Employment Judge, under the January 2009 contract he worked primarily in Dubai, with some work in Abu Dhabi and Saudi Arabia. That is why he insisted on NT status so far as HMRC was concerned. Whilst I accept that not paying UK tax is not of itself fatal to the Claimant's case, it is a factor that the Employment Judge was entitled to take into account in his overall assessment (see Reasons, paragraph 117).

15. Reliance is placed on the Claimant's evidence below that he was given an assurance by Mr Keir, a director, prior to taking the relevant employment with Kier, that he would be employed on expatriate terms and that United Arab Emirates law would not apply to his UK employment contract, for the inference that UK law would apply. That evidence, together with an internal email from Mr Keir, who was not called below, was carefully considered by the Employment Judge (paragraphs 35 to 41). His conclusion, permissibly in my judgment, was that neither party considered what the relevant law to be applied to the contract was.

16. Based on that finding the closer connection question remained to be determined on the facts found as a whole. Unlike Mr Ravat, the Claimant could not rely on a clear assurance (**Ravat v Halliburton**, paragraph 8).

17. Similarly, reliance is placed on the references to domestic employment protection legislation in the Kier Handbook. However, the Employment Judge found (paragraph 119) that the Handbook was not part of the Claimant's contract and thus took the matter no further.

18. Bearing in mind the respect due to the decision of the fact-finding Employment Judge (see **Ravat**, paragraph 35, per Lord Hope), I am satisfied that the conclusion that the Claimant's employment had a closer connection to the country where he worked, that is Dubai and elsewhere in the Middle East, is one with which I should not interfere (see, by analogy, the approach of the Court of Appeal in **Dhunna v Creditsights Ltd** [2015] ICR 105, summarised by Rimer LJ at paragraph 43). Accordingly, I reject the third ground of appeal.

19. The first two grounds of appeal are directed to the application of the **Rome Convention**. Article 3 of the Convention provides that a contract shall be governed by the law chosen by the

parties. The finding in this case (paragraph 41) is that neither party considered what the relevant law was. In these circumstances, Article 4 provides for a presumption (subject to Article 4(5)) that the contract shall be governed by the law of the country with which it is most closely connected.

20. Article 6 deals specifically with individual contracts of employment. By Article 6(2) the applicable law is that of the country in which the employee habitually carries out his work unless it appears from the circumstances as a whole that the contract is more closely connected with another country.

21. Article 7 is concerned with the application of mandatory rules of another country with which the situation has a closer connection.

22. Ground 1 asserts that here the parties agreed that the contract would be governed by UK law, so that Article 3 of the Convention applied. That ground fails on the facts (see paragraph 41). The Employment Judge revisited the question of agreement in his Reconsideration Judgment and makes it absolutely clear that he had found no agreement so that Article 3 was not engaged (see Reconsideration Reasons, paragraphs 15(1) and 19(1)). Thus ground 1 fails on the facts permissibly found.

23. Ground 2 contends that if the contract of employment is to be enforced in an English Tribunal, then it must apply the mandatory laws applicable in England (including the **Employment Rights Act 1996**) by reference to the judgment of Langstaff P in **Simpson v Intralinks** [2012] ICR 1343.

24. It seems to me that the Employment Judge was right (paragraph 111) to equate the closer connection test under the **Rome Convention** with that identified by Elias LJ in **Bates van Winkelhof**, paragraph 98, where the employee is employed wholly abroad (as, on the facts found, was the case here). However, the real answer to ground 2, as Mr Hare submits, is that the question of the applicable law under Article 7 only arises if the Employment Tribunal has territorial jurisdiction, and (see the discussion in relation to ground 3 above) here the Employment Judge permissibly found that it did not. Hence **Simpson** is to be distinguished. The error in that case, corrected on appeal, was to conflate the questions of territorial jurisdiction with the applicable law of the contract. In **Simpson** the Employment Tribunal had territorial jurisdiction to entertain Ms Simpson's complaints brought under the **Sex Discrimination Act 1975** and **Equal Pay Act 1970**. Mr Hare, having appeared below, tells me that Mr Algazy did not pursue a separate point under Article 7 below. If so, he was right not to do so.

25. For completeness I should also draw attention to an *obiter* remark which I made in **Lodge v Dignity and Choice in Dying** [2015] IRLR 184. That was a case in which the Claimant continued to work for the employer's business in London, albeit remotely from Australia. On that basis I held that she was an expatriate worker within Lord Hoffmann's categorisation at paragraph 40 of **Lawson v Serco** [2006] IRLR 289 (see **Lodge**, paragraph 23). Having thus determined the Claimant's appeal I went on to observe, at paragraph 24, that the fact that the Claimant had no right to bring her claim in Australia was a factor which supported my principal conclusion in favour of allowing the Claimant's appeal. I merely record, without deciding, a potential argument in a future case, identified by Mr Hare, that that observation is inconsistent with the approach of Rimer LJ in **Dhunna** to a comparison between competing

systems of law, which is not a necessary enquiry for an Employment Tribunal (see paragraph 40).

Disposal

26. It follows that this appeal fails and is dismissed. Essentially it fails on the facts permissibly found for the reasons that I have endeavoured to give.