Appeal No. UKEAT/0252/14/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 2 December 2014

Before

HIS HONOUR JUDGE PETER CLARK

(SITTING ALONE)

MRS L LODGE — APPELLANT

(1) DIGNITY & CHOICE IN DYING
(2) COMPASSION IN DYING — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR SAMUEL HEALY (of Counsel) Instructed by: Messrs Bird & Co LLP Solicitors 15 Castlegate Grantham Lincolnshire NG31 6SE
For the Respondents	MISS KERRY GARDINER (of Counsel) Instructed by: DWF LLP Bridgewater Place Water Lane Leeds West Yorkshire LS11 5DY

SUMMARY

JURISDICTIONAL POINTS - Working outside the jurisdiction

The Claimant moved to Australia, with the consent of the Respondents for family reasons and there continued to work remotely wholly and exclusively for the Respondents' London operation. The Employment Judge held that the Employment Tribunal had no jurisdiction to entertain her **Employment Rights Act** claims. The Claimant's appeal is allowed and jurisdictional ruling reversed.

HIS HONOUR JUDGE PETER CLARK

1. This appeal raises a fresh twist on the vexed question of the ET's territorial reach in cases brought under the **Employment Rights Act 1996**. It is brought by the Claimant before the London (Central) ET, Mrs Lodge, against the ruling of Employment Judge Glennie following a Preliminary Hearing held on 27-28 January 2014, that the Employment Tribunal did not have jurisdiction to consider her claims of unfair dismissal and detrimental treatment on the ground of having made a protected disclosure (the whistleblowing complaint). On the same occasion the Employment Judge, by consent, heard and determined the Claimant's complaint of breach of contract brought under the **1994 Extension of Jurisdiction Order**, upheld it and awarded her compensation totalling £6,142.15. His Judgment with Written Reasons was promulgated on 25 March 2014.

The Facts

2. As the Employment Judge observed (Written Reasons paragraph 7) there was little, if any, dispute of fact between the parties. The dispute was as to the interpretation and consequences of those facts.

3. The Respondents are (1) Dignity and Choice in Dying and (2) Compassion in Dying. The First Respondent is a not-for-profit company which campaigns for a change in the law of the UK in respect of terminally ill adults; the Second Respondent is a charity which works closely with the First Respondent. Their offices are at 181 Oxford Street, London.

4. The Claimant, an Australian citizen, commenced employment with the First Respondent on 27 February 2008 as Finance Manager. On 22 October 2009 she became jointly employed by both Respondents. She became Head of Finance.

5. Shortly after commencing her employment, based at the Oxford Street office, the Claimant had the virtual private network (VPN) installed on her laptop computer. In this way she could on occasions work remotely from her then home in Ealing, West London.

6. By a written contract of employment made between the Claimant and the First Respondent and dated 27 February 2008, at Clause 19 it was agreed that the contract was governed by the law of England and Wales. The parties submitted to the exclusive jurisdiction of the English courts in relation to any claim arising out of or in relation to the contract of employment.

7. Further, the Claimant was issued with an Employee Handbook, which provided for a disciplinary and grievance procedure. At the time of joining the statutory disciplinary and grievance procedures held sway under the **2004 Dispute Resolution Regulations**. Those provisions are faithfully reproduced in the Handbook and do not appear to have been removed following repeal of the Regulations in 2009.

8. In December 2008 the Claimant and her family decided to return to Melbourne, Australia for family reasons; her mother was unwell. She put forward a proposal to the Respondents whereby she would continue her function as Head of Finance remotely from Australia, using the VPN. Agreement was reached and between 1 January 2009 and her resignation on 28 June

2013 “the Claimant continued to work as Head of Finance remotely from her home in Melbourne” (Reasons, paragraph 10).

9. At paragraph 11 the Employment Judge records the following agreed features of the arrangement during the period 2009-13:

> **“The following features of the arrangement over the years 2009 to 2013 were common ground between the parties save to the limited extent indicated below:-**
>
> **11.1 The move to Australia occurred at the Claimant’s instigation.**
>
> **11.2 The Respondents’ only office was in Oxford Street, London.**
>
> **11.3 The Claimant and her family settled and made their home in Melbourne.**
>
> **11.4 The Claimant is an Australian citizen.**
>
> **11.5 On moving to Melbourne the Claimant took up Australian residence. This meant that she paid a lower tax rate than would have been the case had she transferred there as a foreign resident.**
>
> **11.6 The Claimant dealt with her own tax affairs in Australia and was responsible for accounting for this to the Australian authorities.**
>
> **11.7 The Claimant was subject to the Australian pension regime.**
>
> **11.8 The Claimant did not pay tax or national insurance in the United Kingdom.**
>
> **11.9 On the Claimant’s departure the Respondents obtained a refund of the United Kingdom contributions that they had paid in respect [of] her employment during 2009.**
>
> **11.10 While in Melbourne the Claimant carried out her duties using the VPN. She generally did her work during the hours 8.00 am to 5.00 pm local time but also made herself available during the evenings, from time-to-time so that she could, if necessary, be in contact with the London office during London office hours.**
>
> **11.11 The Claimant returned to London in January of each year for a period of two weeks in order to assist with the annual audit.**
>
> **11.12 The Claimant also travelled to London on two other occasions in each year to attend the AGM for one day and to attend an annual away day for one day. The Respondents were not entirely in agreement with the Claimant’s evidence on this point as their records left some doubt as to whether or not she had travelled on both of the one day occasions in 2010 and 2011. The Claimant’s case was that she may have travelled to London using free flights acquired through her husband’s employment, and if so, the Respondents’ records would not show any claim for travel expenses. She was however sure that she had not missed the two one day events in those years, and I accepted her evidence on that point.**
>
> **11.13 During her time when she was located in the London office the Claimant attended meetings from time to time, which she did not attend once she had relocated to Melbourne.”**

10. Relevant to grounds 2 and 3 of the Claimant’s Notice of Appeal are the following matters, adverted to in the Claimant’s witness statement but not rehearsed in the Employment

Judge's findings of fact. First, the Claimant asserted that she had no cause of action before the Australian equivalent of the Employment Tribunal, the Fair Work Commission. That is not gainsaid by the Respondents.

11. Secondly, and I am told by Ms Gardiner, uncontroversially, the Claimant raised a grievance under the Respondent's grievance procedure. That grievance was heard in London as was her appeal. She made submissions by e-mail from Australia. Following her unsuccessful grievance the Claimant was informed that she would be subject to disciplinary action. She then resigned in circumstances which she alleges amount to constructive unfair dismissal. I am not here concerned with the merits of that disputed claim nor her whistleblowing claim, also disputed by the Respondents.

The Law

12. Determining the territorial reach of the Employment Tribunal in **Employment Rights Act** cases prior to the repeal of section 196 in 1999 was never straightforward. Following repeal, without replacement, the House of Lords/Supreme Court has provided guidance on the topic in three cases: **Lawson v Serco** [2006] IRLR 289, **Duncombe v Secretary of State for Children, Schools and Families (No 2)** [2011] IRLR 840 and **Ravat v Halliburton Manufacturing and Services Ltd** [2012] IRLR 315. More recently the Court of Appeal has considered the question in **Dhunna v Creditsights** [2014] IRLR 953.

13. Employment Judge Glennie carefully considered the principles emerging from the highest authority. **Dhunna** had not then been heard in the Court of Appeal, but he considered the Judgment of Slade J, sitting in the EAT in that case: [2013] ICR 909 and directed himself as to the principles at paragraph 24 of the Written Reasons:

"It therefore seemed to me that I should apply the following principles:

> **24.1 The basic question is whether Parliament can reasonably be taken to have intended that an employee in the Claimant's position should have the right to take his claim to an Employment Tribunal.**
>
> **24.2 This is a question of fact and degree.**
>
> **24.3 It is not necessary for the Claimant to demonstrate that the case falls within any particular exception to a general rule.**
>
> **24.4 In the case of a truly expatriate employee who works and lives abroad there must be an especially strong connection with Great Britain and British employment law and it may not be sufficient to establish that there is a stronger link with Great Britain than with the jurisdiction in which the employee works."**

14. I do not understand that statement of the principles to be in dispute between Counsel.

The Employment Judge Decision

15. Having found that the Claimant was not a "truly expatriate" employee (paragraph 25) the Employment Judge expressed his reasoning for concluding that the Employment Tribunal did not have jurisdiction to entertain the **Employment Rights Act** claims (paragraph 29) at paragraphs 26 to 28 thus:

> **"26. However, applying the principles that I have outlined above, I do not consider that it is strictly necessary for me to find that the Claimant's employment fell into any one particular category of that nature. I find that the factual position was that for the great majority of the working year she worked in Australia and that it would be correct to say that her workplace was in Melbourne. It is also a fact that she returned to London on three occasions each year, one for a period of two weeks and the other two, for periods of one day. Under those circumstances, and given that the Claimant lived and in a family and social sense was based in Australia, I find that whether or not she should be termed as "expatriate" employee, this is a situation in which it is necessary for her to show "an especially strong connection with Great Britain and British employment law" in the sense identified by Lord Hope in *Ravat* if the Tribunal is to have jurisdiction.**
>
> **27. The Claimant's employment was clearly connected with Great Britain. The Respondents and their activities are located in Great [Britain]. The contract of employment identified the law of England and Wales as the governing law and recognised the jurisdiction of the English courts, although that as stated in *Ravat* is relevant but not decisive.**
>
> **28. However, I have come to the conclusion that Parliament cannot reasonably be taken to have intended that an employee who is an Australian citizen, who asked to be allowed to work in Australia and was so permitted, who relocated herself and her family to Australia, and who submitted herself to the Australian tax and pension regimes as opposed to the British ones, should nonetheless be able to bring a complaint of unfair dismissal or detriment in relation to whistleblowing before the Tribunals in England and Wales. I find that the nature of the connection between the Claimant's employment and Great Britain and British employment law is not such that it could be described as "especially strong" in the *Ravat* sense, such that I could find that Parliament could be taken to have intended that she should be able to bring her complaints before the Tribunal."**

The Appeal

16. The key to this appeal, it seems to me, lies in the approach of the EAT, HHJ Burke QC presiding, in **Financial Times Ltd v Bishop** [2003] All ER (D) 359, referred to without disapproval by Lord Hoffmann at paragraph 38 of his opinion in **Lawson v Serco**.

17. The facts are there summarised. The appeal was allowed and the case remitted for a factual finding as to whether Mr Bishop was selling advertising space in San Francisco as part of the FT business conducted in London or whether he was working for a business conducted in the USA. If the former, then the Employment Tribunal had jurisdiction to consider his **Employment Rights Act** claim; if not, it did not, as in my case of **Jackson v Ghost Ltd & Anr** [2003] IRLR 824, also referred to by Lord Hoffmann at paragraph 38.

18. I note that in **Dhunna** in the EAT Slade J, at paragraph 17, recorded a submission by Counsel for the Respondent below that **Bishop** was no longer good law. She does not comment on that submission; nor did Rimer LJ in the Court of Appeal.

19. Mr Healy submits that **Bishop** was correctly decided; Ms Gardiner does not disagree. For the avoidance of doubt I am satisfied that the approach in **Bishop** is endorsed by Lord Hoffmann at paragraph 38 of **Serco**, and is correct.

20. Can the case of **Bishop** be distinguished? Yes, answers Ms Gardiner. Mr Bishop was posted to San Francisco by his employer. Mr Lodge chose to move to Australia, where she came under the Australian tax and pension arrangements.

21. True it is that Ms Lodge does not fall foursquare within the posted employee referred to at paragraph 40 of Lord Hoffmann's opinion in **Serco**. However, the examples there given are just that. As Underhill P observed in **Ministry of Defence v Wallis & Anr** [2010] IRLR 1035 at paragraph 11:

> **"The judge's decision on the unfair dismissal point appears at paragraphs 22-23 of the reasons. In paragraph 22 she rejects a submission made by the claimants that they worked in a 'British enclave' of the kind referred to by Lord Hoffmann at paragraph 39 of his speech in *Serco*, and thus that their position could be equated with that of Mr Lawson or Mr Botham. As she puts it, 'if anything, [they worked in] an international enclave or part of an international enclave'. Mrs Grocott in her respondent's answer contends that that conclusion was wrong and that the judge 'applied too … restrictive a test to the meaning of the word "enclave"'. I disagree, though for reasons which will appear I need not go into my grounds for doing so. But I would observe that the approach, discernible to some extent in both parties' submissions despite avowals to the contrary, of trying to fit the facts of this case into one or other of what are said to be the 'categories' prescribed by Lord Hoffmann, and attempting for that purpose to construe his precise language, wholly disregards the tenor of his speech. Lord Hoffmann went out of his way to emphasise that he was not propounding rules but giving illustrations of the operation of a principle which it was not possible to define with precision."**

22. In the present case, as Ms Gardiner acknowledges, all of the work done by the Claimant from her computer in Melbourne was for the benefit of the Respondent's London operation. Any tasks which she could not perform were managed, as Ms Wootton, who gave evidence for the Respondent, made clear at paragraph 14 of her witness statement, to which Ms Gardiner referred me. The fact that, to their credit, the Respondents permitted the Claimant to work remotely from Australia for family reasons makes her situation no different from the employee posted to work abroad with his or her consent.

23. In these circumstances I shall accede to the Claimant's first ground of appeal. The Employment Judge fell into error in failing to treat the Claimant as a third sub-category of "expatriate worker" as identified by Lord Hoffmann at paragraph 40 of **Serco**.

24. There are two further grounds of appeal. First, the Claimant asserted that she had no right to bring her claim in Australia. That is not gainsaid by the Respondents, through Ms

Gardiner. That is a relevant factor, not expressly mentioned by Employment Judge Glennie in his Reasons. In my view it merely assists towards my overall conclusion; as does the fact that the Claimant's grievance was handled in London under the terms of the Respondent's Employee Handbook: namely that, on a proper application of the law as revealed by the House of Lords in **Serco**, this Claimant did not lose her right to bring her **Employment Rights Act** claims in the Employment Tribunal because, instead of working as a physical employee in the Oxford Street office, she continued to do so as a virtual employee from Australia.

25. It follows, in my judgment, that this appeal must be allowed. Since all necessary primary facts have been found I see no need to remit the case, having considered the recent guidance in **Jafri v Lincoln College** [2014] IRLR 544 and **Burrell v Micheldever Tyre Services Ltd** [2014] IRLR 630; accordingly I shall reverse the decision of the Employment Judge and substitute a declaration that the Employment Tribunal has jurisdiction to consider the Claimant's **Employment Rights Act** claims, which will now proceed to a hearing on the merits.