Case No: 2201789/2018

EMPLOYMENT TRIBUNALS

Claimant: **Miss F Mukhtar**

Respondent: **Tas Anastasiou**

Heard at: **London Central** **On: 13 September 2018**

Before: **Employment Judge Henderson**

Representation
Claimant: In Person
Respondent: In Person

JUDGMENT at a PRELIMINARY HEARING

1. **The Tribunal has jurisdiction (under rule 8 (2) of the Employment Tribunal Procedure Rules 2013) to hear the claimant's claims for race discrimination/harassment (under the Equality Act 2010) and unlawful deduction of wages (under the Employment Rights Act 1996).**

2. **The Respondent's application for a Deposit Order (pursuant to rule 39 of the Employment Tribunal Procedure Rules 2013) is refused.**

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Employment Judge Henderson
13 September 2018
Date_____

JUDGMENT SENT TO THE PARTIES ON

13 September 2018
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FOR THE TRIBUNAL OFFICE

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REASONS

1. This matter was listed for a Preliminary Hearing on the issue of territorial jurisdiction. I confirmed with the parties at the commencement of the hearing that they understood the purpose of the hearing, recognising that it was not the Full Merits Hearing. The parties both appeared person and had each presented a small bundle of documents relating to that issue. The claimant and the respondent gave evidence to the Tribunal and had the opportunity to cross-examine each other and I heard brief submissions from the parties.

Findings of Fact

2. There was very little dispute between the parties on the facts. The claimant had worked for the respondent as a hairdresser from 21-28 December 2017 at the Kempinski Hotel in St Moritz, Switzerland. She lodged an ET1 on 22 March 2018 claiming race discrimination and unpaid wages.

Residence of the Parties

3. It was accepted that both parties are resident in the UK: the claimant in Newcastle-upon-Tyne and the respondent in London.

The Respondent's business

4. The respondent said that he was a hairdresser. He was the sole proprietor of his business (there was no registered company). He had a salon in London where he worked with one other part-time employee. He had a long-standing (14 years) contract with the Kempinski Hotel in St Moritz to provide hairdressing services at the Hotel over the winter season. He had also previously had a similar arrangement with a hotel in Spain, but this had now ceased.

5. When asked about the tax treatment of his workers in Switzerland, the respondent initially said that he regarded his workers as free-lance. However, he then changed his answer to say that he paid tax to the Swiss authorities. I did not find the respondent's evidence on this point to be credible.

6. The respondent accepted that he had never told the claimant that she would be taxed in Switzerland. The claimant also pointed out that she had been asked to fill in an HMRC checklist starter form which required her National Insurance number and she had (understandably) assumed that she would be taxed in the UK. The respondent could not explain why he used the HMRC checklist.

Recruiting the claimant

7. The respondent showed the Tribunal the advert he issued for hairdressers to cover the winter season in St Moritz. He described the arrangement as a "Working Holiday" as employees lived in the hotel, and he said it was a very exclusive place and they could "see how the other half lived". However, it was accepted that the claimant had never seen or responded to this advert.

8. The claimant had put out her profile on “Hair2beauty Jobsource” a UK website setting out her working experience. She had been contacted by the respondent (there was an exchange of text messages from end Nov-mid December 2017) and he had told her about the post in St Moritz. The claimant said that she did recall the respondent mentioning the phrase “working holiday”.

The Contract

9. The respondent produced a document headed “Contract of Employment”, which had been signed by the claimant. This follows a form common in the UK and covers the items set out at section 1 ERA to be included in the Terms and Conditions of Employment. This document is inconsistent with the respondent’s evidence that his workers in Switzerland were free-lance as this is clearly a contract of employment.

10. The dates of employment were from 21 December 2017 to 9 January 2018; the place of work was in the Kempinski Hotel in St Moritz, and it was accepted that the claimant did all her work there. There is a provision in the contract for one week’s notice in writing and the final clause cites Swiss Law as the applicable law and that the contract is subject to the jurisdiction of the Swiss Courts. The respondent said that this final clause was drafted by a Swiss lawyer.

11. The salary is stated as £200 for the duration of the contract. The respondent said that this was calculated by reference to a Swiss Franc equivalent, but he accepted that this was not contained in the contract and that he had never communicated this fact to the claimant. He also said that if he had paid the claimant’s wages he would either have done this in cash (which many of his workers chose) or transferred the money to the claimant’s UK bank account. The contract also provided for the respondent to pay the cost of transfers from UK Airports to St Moritz and return trips; lunch and dinner and accommodation. The respondent also said that the claimant’s work visa for Switzerland was organised by the Kempinski Hotel. These facts were not in dispute.

Conclusions

12. In reaching my decision, I am mindful of the rule 8 (2) of the Tribunal Procedure Rules which states,

13. *“A claim may be presented in England and Wales if-*
14. *The respondent resides or carries on business in England and Wales;*
15. *One or more of the acts or omissions complained of took place in England and Wales;*
16. *The claim relates to a contract under which the work is or had been performed partly in England and Wales; or*
17. *The Tribunal has jurisdiction to determine the claim by virtue of a connection with Great Britain and the connection in question is at least partly a connection with England and Wales.”*

18. I am also mindful of the case law which relates to the question of whether there is a sufficient connection with Great Britain and in particular the case of **Lawson v Serco Ltd (House of Lords) [2006],** which considered the unfair dismissal provisions of ERA and which held that although it would be unusual for an employee who had worked abroad to

19. come with the scope British employment legislation, there could be exceptional cases where there were sufficiently strong connections with Great Britain to justify granting jurisdiction.

20. I find that this is such a case. Both parties live in the UK. The respondent's business is in Great Britain: he currently has one contract with the hotel in St Moritz for the winter season and does some work for private clients abroad, but his business is essentially based in England. The claimant was recruited in the UK based on the profile she placed on a UK website. The contract of employment contained the provisions which would be expected of such a contract in Great Britain (under section 1 ERA). The pay was expressed in sterling (the claimant was never told of any Swiss Franc equivalent) and would have been paid into her UK bank account. Other than the fact that she was working abroad, I find that the connections of the employment relationship were most closely linked to England.

21. I accept that the contract said that Swiss Law was the applicable law and this was signed by the claimant, however, I note the provisions of Articles 3 (1) and 8(1) of the EU Regulations on the Law Applicable to Contractual Obligations (593/2008), which provides that an applicable law clause can be "overruled" by the law of the country which with the parties have the closest connection.

22. Based on that provision and on 8 (2) ((d) of the Tribunal Procedure Rules, I find that the Tribunal has jurisdiction to hear the claims in this case.

Respondent's Application for a Deposit Order

23. The respondent indicated that he wished to make an application for a Deposit Order as set out at Schedule B 3.3 of the Case Management Order of EJ Hodgson of 13 July 2018. However, he was unable to explain why he maintained that the claimant's complaints had little reasonable prospect of success other than to stress that this episode had cost him money and had inconvenienced him. He referred to the fact that he had dismissed her for gross misconduct, but it was noted that this had not been pleaded in the ET3 and in any event, it did not address the question of "little reasonable prospect of success". I refused the application.

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Employment Judge Henderson
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