EMPLOYMENT TRIBUNALS

Claimant: Mr. S. Gibbs

Respondent: Systech International Limited

Heard at: London South, Croydon
On: 12 September 2018 and the 15 October 2018 in chambers

Before: Employment Judge Sage
Representation

Claimant: Mr. Devitt of Counsel

Respondent: Mr. Paines of Counsel

RESERVED JUDGMENT

The Claimant was not employed by the Respondent.
The Claimant's claims are therefore dismissed.

REASONS

1. This case was listed for a preliminary hearing by Judge Morton in order to determine whether the Employment Tribunal has jurisdiction to determine the Claimant's claims. The Respondent's claim that the Claimant was not "employed in the UK" and was not employed by the Respondent Company but by Systech International Hong Kong.

2. There was some discussion at the commencement of the hearing as to whether the Claimant's application for a Joinder of Parties should be addressed at this hearing (to add a further named Respondent); after some discussion it was decided that this application could not proceed today. The only issues that had been listed before this Tribunal was whether the Tribunal has jurisdiction to hear the claims against the

Respondent and if the evidence was before the Tribunal, the issue of who is the employer.

Witnesses

3. The Claimant and for the Respondent we heard from Mr Timmons.

Findings of Fact

4. The Claimant holds an Honours Degree in Law and is a non-practicing Barrister; he accepted in cross examination that he was experienced in dealing with contractual negotiations and had experience of working overseas. His experience included appearing in Court as a professional witness in the construction industry and as an Advocate. The Claimant has worked abroad on a number of contracts in South Africa, Abu Dhabi, Qatar, Azerbaijan, Libya, Hong Kong, Kazakhstan and Peru.

5. The tribunal heard that the Respondent is a non-trading holding company for a number of overseas subsidiaries. Mr Timmons described the structure of a number of branch offices describing the Dubai office of Systech Limited being the Regional Head Office for all Systech's Middle East and African operations (referred to as "MEA"). All those working on contracts in the middle East or Africa would be managed out of the base country of UAE. Systech's Asia Pacific operations are run out of the Hong Kong subsidiary company (which is referred to as "APAC") which is incorporated and has a Registered office in Hong Kong.

6. The Tribunal saw that the Claimant was first contacted by the Respondent on the 27 September 2016 (page 117 of the bundle) after his CV was seen on a UK job notice board. The Respondent indicated that they may have a position for the Claimant in South Africa and he was asked to contact them if he was interested. The Claimant contacted the Respondent to discuss this but was not available for the role and he took this opportunity no further at the time.

7. Ms. Virnog Head of Recruitment for APAC, MEA (and for the Americas) then contacted the Claimant on the 5 May 2017 (see page 118). The Tribunal noted from this email that APAC, MEA and the European based operations (based in London) were identified as different entities. From the interview notes in the bundle the Claimant indicated that he would be "available to commence a full time overseas assignment from the beginning of August – possibly first 3 weeks of July as well if pushed". The Claimant confirmed that he was experienced in preparing "claims for contractors, advocacy and expert witness roles".

8. The Claimant was sent a draft contract on or around the 7 June 2017 (see page 164) for a role working in South Africa as a Quantum Expert Witness Director Role with a start date of the 3 July 2017 working on a 11 week on and 2 weeks off rota, this was working for the MEA. The Claimant's comments on the contract were seen on pages 167-182. The Claimant did not question the identity of the Company based in Dubai. The Claimant asked for the clause 27 to be deleted which provided that the document was "to be construed in accordance with the relevant laws in force in UAE" asking that the agreement and the conditions shall be

governed by UK law; this amendment was refused. Mr Timmons gave evidence of the negotiations that took place with the Claimant at paragraphs 21 and 22 of his statement, he stated that despite the Claimant pushing on the point of jurisdiction, he did not agree to the contract being construed in accordance with the laws of England and Wales. It was Mr Timmons' evidence that the Claimant was fully aware that the contract was an overseas service agreement and that "it had no UK connection at all". No further concerns were raised by the Claimant about the construction of the contract or about the relevant jurisdiction.

9. The Claimant signed the agreement and returned the signed copy on the 3 July 2017 (page 269 and the signed copy was at page 303). The service agreement was in the bundle at page 254 and it was noted that the parties to the contract was "Systech International (Dubai Branch), Office 1109 & 1110, 11th Floor, Executive Heights Building, Barsha Heights PO Box 213787, Dubai, UAE, registered office address: Systech International Limited, 5th Floor, Chapter House, 18-20 Crucifix lane, London SE1 3JW United Kingdom" this was defined as "the Company". The UK Company registered number was 04090970 and Mr Timmons accepted in cross examination that a UK Company was a party to this contract. This contract will be identified in this decision as the "Dubai Contract". The contract went on to define the base country as UAE and it stated that the Claimant would take up the position for the Company in Dubai. The contract stated at paragraph 2.3 that the Claimant will be allocated to a Base Office which "is likely to be the Company's office in Johannesburg however the nature of the assignment and Client's day to day requirements will determine the location(s) where the employee will carry out the services". The Claimant was to work a 11 week on and 2 weeks off rota (paragraph 4.3); the contract also stated that when the Claimant was not working on a project he would be required to "attend the office" (paragraph 4.4) based in Dubai. The Claimant was to be paid in US$.

10. The Dubai contract was governed and construed according to UAE law. The commencement date of this contract was stated to be "early July 2017" (page 268) and it was put to the Claimant in cross examination that it was incorrect when the Claimant stated at paragraph 18 of his statement that he commenced employment with the Respondent company on the 3 July 2017. He stated that it was his view that he was employed from the 3 July and the Respondent paid him for his visa but they failed to 'mobilise' him at that time.

11. The contract in South Africa fell through and the Claimant was then offered an opportunity of a contract in Peru commencing on the 17 July 2017; this was felt to be an ideal opportunity as the Claimant had worked in this location previously (see above at paragraph 4). Mr Timmons asked the Claimant to provide a few details of his previous experience of working in Peru in order to emphasise his experience to the client, this he did (page 309).

12. On the 19 July 2017, the Claimant asked for reimbursement of his expenses for a radiology report in connection with the preparations for the South Africa assignment (of £127) and for £100 for medical expenses. These were identified as expenses for the South African Visa. Mr Fredrick

the Regional Director of Hong Kong Macau Systech International and China, asked the Claimant whether it was "presumably best in GBP?". The Claimant provided his bank details but did not appear to reply to this question. In any event the Claimant's expenses were paid in pounds sterling.

13. The next communication from Mr Timmons was on the 20 July 2017 (page 320) informing the Claimant that he had been put forward for a number of roles in Japan, RSA and Peru but was awaiting confirmation of approval. Mr Timmons stated that he did not wish to keep the Claimant 'hanging on' so proposed a "confirmed start date of the 14 August 2017, whatever the status of these projects". The Claimant replied that the 14th August "would be acceptable". The tribunal find as a fact that the Claimant did not commence employment on the 3 July 2017, had the Claimant been of the view that he commenced employment under the Dubai contract in July, he would have objected to this proposal. In cross examination he stated that the 14 August was what he described as a mobilization date for an assignment, but there was no evidence that there was an assignment due to start on that date and this is not reflected in the email discussion. The Claimant conceded in cross examination that in the period from the 3 July 2017 to the 19 August 2017, he had only been paid medical expenses, there was no evidence to suggest that prior to the 20 August 2017 there was a contract in force or that he was paid remuneration under the terms of the Dubai or the Hong Kong contract (see below).

14. An opportunity then arose on the 26 July 2017 for a contract in India which was described as a "claims strategy type role". The role came under the auspices of the APAC group which was managed by Mr Fredrick. Mr Timmons told the tribunal that Mr Fredrick was employed by Systech Hong Kong and is based in the Hong Kong office, he is not based in the UK and has no day to day connections with Systech Group UK operations (see paragraph 27 of Mr Timmons statement). The Claimant attended a conference call on the 1 August 2017 and the email from Mr Fredrick reflected that he had explained to the client that the Claimant would "*probably mobilise there from India as the application for visa should be easier from there than for a UK national in Japan. But then look to relocate you to Japan long-term after initial assessment*". The role was at a company called Primetals (part of Mitsubishi). The Claimant agreed with the suggested arrangements. The Claimant was told that he would need a Hong Kong contract and the arrangements were discussed on a conference call (see page 324).

15. The draft contract was sent to the Claimant under cover of an email dated the 13 August 2017 (page 335); the email was from Mr Fredrick's office was in Hong Kong, the headquarters of APAC. The email was headed 'Employment Contract HK 2017 Sean Gibbs Final'. The first line of the email read "*Please find attached a copy of your service agreement with our HK business working in Japan. Thank you for returning your signed Dubai contract and I believe that you will recognize many of the same terms. I believe I have taken the key elements from (sic) Dubai contract and included in HK contract*". The email went on to ask the Claimant to sign and return the contract. Mr Fredricks also sent to the London office the Claimant's temporary business cards for him to use

when he was first mobilized in India (page 332 email from Mr Fredrick dated the 11 August 2017). The tribunal noted that the email read together with the above email dated the 1 August, made specific reference to the Hong Kong business and to relocating to Japan, there was no mention of working out of the UK or being based in the UK. This was entirely consistent with the terms of the contract.

16. The Claimant referred to a document at page 331 dated the 10 August 2017 which was an application for a visa which referred to the Company as Systech Group Employees Limited with the address of Chapter House 18-20 Crucifix lane London SE1 3JW; the Claimant relies upon this as evidence he was employed in Great Britain as well as referring to various tasks he carried out on his return to the UK at paragraph 42 of his statement. Mr Timmons was taken in cross examination to a letter dated the 11 August 2017 from Mr Woodward-Smith the Group Managing Director of Systech International referring to the Claimant as "our employee" (see page 334). The letterhead referred to company registration number 3784800 which is the Company based in the UK. Mr Timmons told the Tribunal that it was the Claimant who suggested that visa application be submitted to the Birmingham Consulate on Systech UK Office letterhead (page 329 of the bundle). Mr Timmons evidence at paragraph 32 of his statement said that this was at the suggestion of the Claimant, to deal with the practicalities of obtaining a visa and was not evidence that he was employed by Systech Limited in the UK. The evidence of Mr Timmons was preferred to that of the Claimant. The letter referring to "our employee" was solely for the purpose of obtaining a visa.

17. When the Claimant received the Hong Kong contract, he suggested some amendments and returned his comments to Mr Fredrick on the 15 August 2017. It was agreed by the Claimant that his employment would "definitely commence on the 20 August" (page 339). When the Claimant was taken to this page in the bundle and it was put to him that this was the start date of employment however he still maintained that he was employed from the 3 July, relying on the evidence that his medical expenses had been paid. However, the Claimant conceded that he had been paid no remuneration under the Dubai contract during this period. There was no consistent evidence before the tribunal that the Claimant had been employed prior to the 20 August 2017.

18. The Tribunal saw a copy of the Hong Kong contract at pages 346 of the bundle; the Claimant accepted that the terms of this contract had been agreed. The Company was defined as "Systech International Limited of Unit 1505, Office Plus Building, 93-103 Wing Lok Street, Sheung Wan, Hong Kong" "the Hong Kong Company". There was no company registration number on the document. The Claimant agreed in cross examination that there was no mention of a UK employer in this contract and he replied that "*as far as I was concerned, I had been working for a UK employer*" however there was no evidence before the Tribunal that this was the case. He accepted in cross examination that his Base Country was identified in the contract as Hong Kong and he also accepted that paragraph 2.2 of the contract stated " …*the Company will allocate the Employee to a Base Office which is likely to be the Company's office in Hong Kong*..". The Claimant was required to pay taxes in Hong Kong. It

was also put to the Claimant in cross examination that if he were not working on billable work he would attend the office in Hong Kong and he accepted he would attend "*whatever office they told me to work at*". Mr Timmons evidence was that although the Claimant was provided with a number of business cards showing the London address, he stated that he was provided these cards as a matter of expediency, they were a stop gap to get him out to India with some business cards. As the Claimant had left at short notice, there had been insufficient time to post the cards from Hong Kong. It was put to Mr Timmons in cross examination that the reason he wanted a British Company identified was because he was afraid of not getting paid, Mr Timmons said that this was not a concern that had been raised by the Claimant at the time of negotiations (see above).

19. It put to the Claimant in cross examination that the Hong Kong contract required the Claimant to take leave according to Japanese holidays (page 352 and 611) and he accepted that "the contract envisaged me working in Japan and getting a visa". The Claimant conceded in cross examination there was no mention of working in the UK (only to two weeks unpaid leave at paragraph 12.1). It was put to the Claimant in cross examination that the contract was subject to Hong Kong law (page 358) as it stated at paragraph 24.1 that "the document is governed by and is construed to be in accordance with relevant laws in force in Hong Kong"; it was the Claimant's view however was that it was not an exclusive jurisdiction clause.

20. The Claimant flew out on his first assignment to Delhi on the 26 August 2017 (page 385) however he was detained by the authorities in Dubai for reasons unrelated to this case. He arrived in India a few days later on the 30 August 2017.

21. It was put to Mr Timmons that the Respondent would pay for flights to and from locations and the Claimant would be "paid while travelling". Mr Timmons denied that the under this contract the Claimant would be paid for rotation flights unless the client had agreed to pay. He confirmed that the Claimant's flights to Hong Kong would not be paid. Mr Timmons confirmed that the Claimant had his flight paid from London to India because these were in the terms of agreement with the client (as referred to on page 338 where it was confirmed that the client was arranging travel to India).

22. The tribunal were taken to an email from the Claimant to Mr Fredrick dated the 4 September 2017 at pages 367-8 of the bundle. In this email he stated that "*I've seen the news about North Korea and don't want to work in Japan whilst they are intent on starting world war 3*". The Claimant appeared to be aware from this email that the contract required him to work from Japan as the Base Country and he indicated that he did not wish to locate there. In this email the Claimant tendered his resignation "*as required under Clause 14.5 of the contract of employment*". The Claimant confirmed that he was prepared to "*honour the commitment of preparing a claims strategy report on or before a departure on a latest date of departure of the 25th September..*". Mr Fredrick spoke with the Claimant and got to the bottom of various concerns raised by the Claimant (which

included a concern about medical insurance), the medical expenses insurance was identified and the Claimant was informed that they could offer two types of cover available in Japan (page 382), the emails dealing with insurance again confirmed that the Claimant would be based in India and Japan (see Mr Timmons statement at paragraph 40).

23. The Claimant left Delhi on the 25 September 2017 (page 427) and he emailed Mr Fredrick a copy of the final report and suggested that they could be sent to the customer once they had been reviewed. The Claimant conceded in cross examination that he was returning to the UK not to Hong Kong. It was put to the Claimant in cross examination that he was then unavailable for work until mid-November; he disputed that saying he had received "thousands of emails" during his time in the UK. These emails were not before the Tribunal. The Claimant said that during this time he was working and described the duties he carried out as "reading various documents, looking at a fee agreement and I was asked to do marketing by Louis Cointreau". The Tribunal saw these emails in the bundle at 571-7 dated September and October 2017. The Claimant confirmed in cross examination that the marketing task was to put Mr Cointreau Regional Director based in France in touch with someone on LinkedIn. Mr Timmons was taken to these emails and it was put to him that this was marketing at a high level, he replied that it was minimal work and it was not assigned to him by his line manager, he offered to do this of his own volition and it was part of what he described as 'cooperation'.

24. The Claimant referred to carrying out further work on the claims strategy report after his return from India. The Claimant was taken in cross examination to the document at page 428 which was the report dated the 25 September 2017 timed at 06.43, which was the date the Claimant left India. The Claimant said that there were other emails that had been exchanged regarding this report but they were not before the Tribunal. Mr Timmons evidence to the Tribunal was that the Claimant left India unannounced and if he did carry out work on the report in the UK, he had no authority to do so as he was not authorized to work in the UK. The Tribunal find as a fact that the Claims Strategy Report sent by the Claimant as he left India was complete (as indicated in his email above) and was ready to be sent once it had been reviewed, there was no consistent evidence before the Tribunal that the Claimant had continued working on this document on his return to the UK.

25. The Claimant was asked in cross examination what work was carried out in relation to his '*reading and reviewing correspondence to keep abreast of issues at the Primetals Technologies between September 2017 and January 2018*' and he referred to pages 635-639 which was a letter dated the 10 November 2017. The Claimant accepted that he was copied in to correspondence but no evidence in the bundle to reflect that any work had been carried out during the period from the 25 September until mid November when he was ready to return to India.

26. The Claimant referred to conference calls he participated in between October and December 2017 to support the project and they were on the 27 September 2017 and in October 2017 (page 594), 20 December 2017 (page 701) and on the 12 February 2017 (page 748). The Claimant confirmed that all the conference calls were to support the work he carried

out in India. Mr Timmons described the Claimant's input to the October conference as 'minimal' and accepted that he engaged in the conference but noted that, at this time, the Claimant should have been working out of the Hong Kong office. The Claimant's evidence was that he continued to manage the 3 people on the project when he was back in the UK but Mr Timmons denied that this was the case, saying that the Claimant "may have spoken to them but he was not directing them and managing them". The evidence of Mr Timmons was preferred to that of the Claimant, there was little credible evidence to suggest that the he continued to manage the team working in India.

27. It was accepted that the Claimant received a goodwill payment in December and the email that evidenced this was on page 657 dated the 4 December 2017. Mr Timmons agreed to pay the Claimant a retainer for December 2017 as he was ready to return to work and take up the next stage of the Primetals project, but it had been delayed. Mr Timmons authorized the retainer from the London office but it was paid in US $. The Tribunal saw the bank transfer that was authorised on the 18 December 2017 at page 581 of the bundle. Mr Timmons was asked about this payment in cross examination, he explained that he was trying to do the Claimant a favour by paying this to him on the 18 December as the Claimant had indicated to him that he wanted to go Christmas shopping and did not want to wait until the 31 December. Mr Timmons described this payment as an oddity as it was paid on the day from the London office and the Tribunal noted that two previous payments made under the Hong Kong contract for September and October 2017 had been authorised from the Hong Kong bank.

28. The Claimant returned to work on the Primetals contract on the 12 January 2018 for his next 11 week rotation. On the 4 February the Claimant had to return to the UK due to ill health. The Claimant was allowed to work from home in the UK with the consent of the client due to his ill health, the work carried out was in connection with his role in India.

29. The Claimant accepted that there was not enough work to do on the Primetals contract and he was therefore offered work in Korea by an email dated the 1 February 2018. The email which outlined the essential terms of this offer was in the bundle at pages 727 of the bundle which was described the contract as a "*solid commitment to what is a good opportunity – long term commitment (2 years but possibility of 4 years) solid income/no downtime, a strategic role, opportunity to build a team, some training opportunities of Korean staff etc*". The start date for the role in Seoul was due to be the 19 February but the very latest the 26 February. The Claimant would be provided with an apartment in Seoul and would be paid in US$; the rotation was 11 weeks on and 2 weeks off. The Claimant accepted in cross examination that this contract had "*nothing to do with the UK*" and it was noted that the Claimant would be based abroad for the entirety of the contract.

30. The Claimant gave one month's notice on the 13 February 2018 due to ill health (see page 751) and then treated himself as constructively dismissed on the 28 February 2018 (page 782).

31. It was put to the Claimant in cross examination that he was not employed under the Dubai Agreement and in reply he stated that he was employed by "Systech in London" and added that the company had a UK Company number and address. It was put to the Claimant in cross examination that the Hong Kong and Dubai contracts were both overseas contracts and the Claimant replied that in his view the Respondent "*do things to suit themselves, they kept me available to support Primentals, my work supported the new contract*". This did not appear to answer the question. It was put to the Claimant that the work he did in the UK was incidental to his overseas employment and he replied "it was substantial, I was employed for 7 months and was only abroad for 11 weeks". However, the tribunal have found as a fact that although he only worked abroad for 11 weeks, this was due to his unilateral decision to return to the UK early from the first rotation and not to report to his base country. The Claimant's second rotation ended early due to ill health. When he was in the UK and working it was in connection with his assignment in India and carried out in connection with his overseas contract. The reason the Claimant was only abroad for 11 weeks over the entire period of employment was not due to the intermittent nature of the contract but due to the Claimant's decision to terminate each rotation early.

Closing Submissions

32. The Respondent provided written submissions that have been referred to where relevant but in addition made the following oral submissions:

33. They referred to the statutory claims and to the extent that there was employment with the Systech UK he can bring a contract claim. However there are two parts, the Dubai Agreement, there is no dispute that a party to the agreement is the UK Company but until the 20 August 2017 no contract was effective and that was with the Hong Kong company. Mr Timmons explained in his statement at paragraphs 23-4 and 31 about the commencement date and he was not cross examined on this. The Dubai contract was postponed and it was clear from all the documents (pages 320, 339, 343 and 385). The Claimant was well aware that the contract had not commenced and that it had not commenced on the 3 July 2017; his evidence was inconsistent. He was not expecting to be paid. The Dubai contract is a red herring, this only related to discussions of overseas employment.

34. The Hong Kong contract – the Claimant says this is Systech International a UK company the Respondent says that it is Systech Hong Kong. The background facts are that the Claimant is a qualified lawyer and was a non-practicing barrister who had extensive experience in working worldwide where jurisdictional issues are standard. When looking at the identity of the parties one has to look at when the contract is formulated and the contract is the appropriate starting point. The Company is identified as a Hong Kong entity, this can be distinguished from the Dubai contract where it stated to be a UK company. From the negotiations conducted on the Dubai contract, the Claimant sought to refer to UK law but there was no such negotiation by him in relation to applicable law in respect of the Hong Kong contract. The key point is page 335 which refers to "our HK business", the natural reading of this email by

a qualified lawyer would show that this showed that he was dealing with a different entity. This is fully consistent with the Respondent's case.

35. The Claimant seeks to rely on post formation facts, they are irrelevant. The only pre formation facts are the visa and vaccinations. The visa was done at his request. Mr Timmons said the business cards were a temporary measure and this was supported by documentation. What a reasonable person would take was that the Hong Kong Company was the employer from the 20 August. If the Respondent is right on this the claim is over.

36. If the Respondent is wrong one must consider jurisdiction, and the case of Lawson v Serco limited [2006] ICR 250 at paragraph 23 the test is whether parliament intended statute to apply in these circumstances. [Counsel also referred to Duncombe v Secretary of State for Schools and Families (No 2) [2011] ICR 1312]. Have the parties agreed that the Hong Kong jurisdiction should apply? The Claimant is not employed by the Government. Although the Holding Company is in the UK, they have companies all over the shop.

37. Counsel referred to the case of *Ravat v Halliburton Manufacturing & Services Ltd [2012] ICR* which is a commuter case of a person working in Libya and he referred to paragraph 7 where it is stated as follows: "The Claimant had little by way of day to day contact with the Aberdeen office while he was in Libya, and he had no formal obligation to do any work during the 28 days while he was at home. Any duties that he performed in Great Britain, such as responding while at home to emails, were incidental to that overseas employment. A feature of the employer's commuter policy was that while he was working on a foreign assignment the employee's terms were such as to preserve the benefits, such as pay structure and pensions, for which he would normally be eligible had he been working in his home country other than those which were purely local such as a car allowance…The Claimant was remunerated on the normal UK pay and pensions structure that applied to the employer's home based employees. He was paid in sterling into a UK bank account, and he paid UK income tax and national insurance on the PAYE basis". The Respondent accepted that there were similarities in this case.

38. The Claimant was managed out of Hong Kong and had little if any day to day contact with the UK. He did little or no work in the UK. The Claimant did a certain amount of reading and took calls, but these were incidental to his work in India. The Claimant was paid in US $ and this was the currency paid to all consultants. The payments were made from Hong Kong and the Claimant was required to comply with Hong Kong tax laws and insurance requirements. In paragraph 8 of the Ravat case it was assumed he would be governed by UK law; in the Ravat case the employee was assured that he had the full protection of UK law when he worked abroad. The circumstances are different in this case. It is accepted that this is a commuter case but the long term intention was to deploy the Claimant long term overseas.

39. Turning back to his written submissions, counsel referred to paragraph 32 where he stated that the starting point is that Statute has no operation overseas. The intention was for the Claimant to work overseas (in Korea

for Daewoo). What changed was that following the 25 September 2017 the Claimant returned to the UK without proper notice and without finishing his report. The Claimant was then unavailable. It was Mr Timmins' evidence that the Claimant was working on his house, Mr Timmins was not cross examined on this. Evidence of the work done in the period when the Claimant was in the UK was slender. There are a few bits of emails and a LinkedIn introduction and work preparing for the Claimant to go back to India. The Claimant was told that if he wanted to be paid he had to work out of the Systech Office. The Claimant was not working in the UK, he was unavailable for work and the work he did was connected with his contract in India.

40. The claimant went back to India and then fell ill and returned to the UK. He did a small amount of work in the UK but only as a consequence of falling ill. His first resignation is when the Claimant knows he cannot work overseas, he knows that this is an overseas role (Respondent counsel refered to his skeleton at paragraph 34(2)(7)). The applicable law chosen is Hong Kong law, this is a strong connection. Applying a multifactorial test, the strongest connection is Hong Kong and the only problem is the return to the UK but this is the fault of the Claimant. Had the Claimant not disappeared he would have been a fully overseas employee given the jurisdiction clause, the payment in US$ and all the other facts.

41. The same point is made with the Dubai contract.

42. There is no territorial jurisdiction.

The oral submissions of the Claimant are as follows:

43. The first issue is who are the parties? The first contract names the Respondent as the employer. The Claimant's understanding is that it started on the 3 July 2017 until it is replaced. That contract subsisted until the Hong Kong contract. The Claimant was at pains to ensure that the employer was identified as an English Company for fear he may not be paid.

44. What then happened in the Claimant's subjective view was also what an objective observer would have concluded; no reasonable person would have known of the Hong Kong company and there is nothing in the bundle that suggested that it existed. There is no company number. A reasonable person would conclude that he had contracted with an English Company who he contracted with first. There is a fog and lack of rigour around the Respondent's dealings. It is said on behalf of the Respondent that that Group Company was the employer but Mitsubishi thought it was someone else. The Hong Kong Company paid some money in GB£

45. What would an objective observer having contracted with a UK company reasonably conclude? That he had contracted with the Respondent a second time. It was never pointed out to the Claimant that he had not. When the employer refers to "our HK Business" the Claimant understood this to be the British Company and the office was an address. The Claimant had two letters before him, the visa letters referred to the UK company and the business cards, albeit temporary also carried the UK address. He could conclude on an objective basis that he believed that he

was contracting with an English company. The reason the Claimant gave for doing business with a Hong Kong Company was that it was easier to get a visa for Japan. The email footers all referred to a UK Company in the UK which gives weight to the impression that he is dealing with a UK Company. The Claimant's understanding is objectively justified.

46. If the Tribunal is of the view that it is with the Hong Kong Company, there are a number of pointers to suggest that the Tribunal has jurisdiction. The Claimant was a commuter and was based in London and he lives in England. The rota started from London Airport. He flew into and out of London. What is said in the contract is not much help. The Claimant never worked in Hong Kong, Dubai or Japan. He had a much stronger connection with the UK. The Claimant was only in India for 7 weeks out of 7 months, he has a stronger connection with India. The fact and degree as to how stronger a connection he feels is on the English side. He is a peripatetic employee and had not planned to be domiciled abroad. The Claimant preferred English and Welsh law, that was his view. His travel was paid when he left the UK and he was paid when travelling. There was nothing to link the Claimant between Hong Kong or India.

47. The Hong Kong contract started on the 20 August 2017 and he didn't fly out until the 25, I say he was carrying out preparatory work. On the 25 September he sent out a lengthy report which he said was a draft.

48. He did an introduction on LinkedIn which he described as marketing. He also said the emails on page 427 were associated with work. In his statement at paragraph 42(d) he referred to a conference in Delhi which was paid for by the Claimant and he said dovetailed with his work in India.

49. At the end of October, the Claimant hoped he would be paid for what he had done. In November he called Mr Timmons and he was put on retainer in December. He worked during this time in the UK.

50. He went back to India but became ill and returned home but carried out work in the UK. I say the work carried out in the UK was sufficient.

51. There was a significant and sufficient amount of work undertaken in the UK. The Respondent said it was a consequence that he came back to the UK. The test is where the work was done, it was done in the UK.

The Respondent's response:

52. Nothing was said about the Dubai contract and its subsequent postponement.

53. Considerable reliance was placed on the Claimant's anxiety to contract with a UK Company, if that is right that is a point against him. Mr. Timmons was responsible for Dubai in the first agreement, it reinforced the Respondent's position. He should have been fully aware of the Hong Kong business as an entity or Unit.

54. In response to some factual details where it was said he was paid by a Group Company, there were three payments from the Group Company,

which related to medical matters. The December payment is paid as a favour for him to go Christmas shopping, there is no suggestion of murk.

55. The statement that the Claimant 'strongly preferred UK law' this is a point against the Claimant. He is not competent to say that I negotiated but didn't get it, but I wanted it anyway. The parties expressly agreed the terms.

56. In response to the submission that the Claimant was paid while travelling, you heard Mr Timmons, there were back to back arrangements.

57. In response to page 427 and reference to the emails. You heard what Mr Timmons said, the client will copy you in to emails but it is what work is being done at the direction of the Company.

58. The reason the Claimant was in the UK was because he was too sick to work. This was an international agreement. Yes he may have kept up with emails but you have to look at what was agreed. What they envisaged was that there was no strong connection with UK law.

59. In response to the point about the email footer, the difficulty with that point is the company number is the Systech Group it is a legal privilege footer, it does not suggest who is sending the email.

Decision

60. The Tribunal has to determine the identity of the Claimant's employer at the time of the acts complained of (paragraph 2.1 of the Respondent submissions). If the Claimant was not employed by the Respondent, then it is suggested that is an end to the matter as presently constituted. The issue identified at paragraph 2.2 of the Respondent's submissions only applies if it is found that the Claimant was employed by the Respondent in respect of any of his claims, in that case the Tribunal must consider whether they have jurisdiction to consider the allegations raised by the Claimant.

61. From the findings of fact made above, the Claimant signed the Dubai Contract on the 3 July 2017 but there was no evidence that any work was carried out pursuant to this agreement. In the findings of fact made above at paragraph 8 the Claimant asked for the contract to be construed and governed by UK law; this request was rejected. The Claimant agreed to the contract with full knowledge that the contract was to be construed in accordance with UAE law. However, there was no evidence that the contract ever came into effect. The South African assignment under the Dubai Agreement never got off the ground (see above at paragraph 9). There was no credible evidence to suggest that the Claimant was employed from the 3 July 2017, there was no record of any remuneration paid under the terms of this agreement and no work was ever undertaken by the Claimant pursuant to this signed contract. The Claimant only received payments for medical expenses paid in pounds sterling (see above at paragraph 11) for potential deployment to South Africa but deployment never took place. The agreement was of no effect.

62. The Claimant was then offered an opportunity to work in India but this time under a separate agreement offered by the Hong Kong Company and the terms were referred to above at paragraph 14-15. The covering email sending a copy of the draft contract showed that the Claimant would be working "with our HK business working in Japan" and the company was looking to relocate the Claimant to Japan after an initial assessment. It was also clear that this was an entirely separate contract from the Dubai contract and would therefore supersede it. The company offering the contract was Systech International Limited in Hong Kong. The Claimant conceded in cross examination that the contract confirmed that the base country was identified as Hong Kong and there was no mention of the UK Company in the contract (unlike the Dubai agreement). The Claimant also accepted in cross examination that he was aware that the relevant jurisdiction applicable to this contract was Hong Kong law, the Claimant did not challenge this as he had done with the Dubai contract. Despite being on notice that the contract was subject to the jurisdiction of Hong Kong law, he accepted the terms.

63. The Respondent has taken the Tribunal to the case of Hamid (T/A Hamid Properties) v Francis Bradshaw Partnership [2013] Civ 470 at 57 (see paragraph 22 of the Respondent's submissions) which confirmed that parol evidence is admissible to assist in the resolution of an issue in relation to the identity of a party to a deed or contract. However, when determining the identity of the contracting party, "the court's approach is objective, not subjective. The question is what a reasonable person, furnished with the relevant information would conclude. The private thoughts of the protagonists concerning who was contracting with whom are irrelevant and inadmissible". The issue of the identity of the contracting parties must be determined at the date of formation of the contract. The contract clearly set out that the contracting company is Systech International Limited at the Hong Kong address and the position being offered is working out of the Base Country which is also Hong Kong. The contract was stated to be governed and construed in accordance with the laws in force in Hong Kong (see above at paragraph 18). On all the facts and on an objective interpretation all the evidence before the Claimant at the time reflected that this was a contract with a Hong Kong Company in the APAC group to work in Asia. This was entirely consistent with the covering emails that confirmed that the contract was for the Claimant to work with the HK business and to be relocated to Japan. All communications from Mr Fredrick's also gave the Hong Kong office as the address of the HK Company.

64. At the date the contract was signed, all documentation was consistent that the contract was with a HK company. The Claimant's only challenge was on the basis that he was not aware of the HK subsidiary, however the email sending the contract to the Claimant clearly stated that this was a service agreement with the HK business. The Claimant had a legal background and had significant experience working abroad on international assignments. The Claimant was conversant with legal documentation and with working abroad, he conceded in cross examination that he was aware that the contracting party was a company registered in Hong Kong and he also confirmed that he knew that at the date he signed the agreement, there was no reference to a UK registered company.

65. The Claimant relies in support of his contention that he objectively believed he was contracting with a UK company with reference to a letter referred above in our findings of fact above at paragraph 16. The Tribunal heard evidence from Mr Timmons that it was a matter of expediency for the visa application to be pursued by the UK based company and this was at the suggestion of the Claimant. This did not suggest that the Claimant was employed by the Respondent company. It was also clear from the wording of the contract that it was the HK company who employed the Claimant not the UK company.

66. The Claimant also referred to the fact that his business cards were provided by the UK Company, however the correspondence referred to above reflected that they were provided as a stop gap measure to ensure the Claimant had business cards on him when sent on his first assignment. A reasonable person would not have concluded from this that the company that sourced the business cards was the employer. This was again accepted to be mere administrative convenience for the cards to be sourced in London to ensure that when the Claimant reported for duty in India he would have business cards.

67. The consistent evidence before the Tribunal was that the Claimant's employment commenced on the 20 August 2017 and he was employed by Systech International Hong Kong. The Hong Kong contract superseded the Dubai contract, which never came into existence. The Claimant was at no time employed by the Respondent. The claims against the Respondent are therefore dismissed.

68. Although this is an end to these proceeding, for the sake of completeness the Tribunal will go on to consider whether the Tribunal would have any territorial jurisdiction to hear any of his statutory claims, had the Claimant contracted with Systech UK.

69. The Tribunal was referred to the cases of Lawson v Serco Limited [2006] ICR 250, Duncombe v Secretary of State for Children, Schools and Families [2011] ICR 1312 and Ravat v Halliburton Manufacturing & Services Limited [2012] ICR 389 (see above) by the Respondent.

70. The Tribunal was reminded that the ratio of these cases is that the "*standard normal or paradigm case of the application of [the statutory employment rights] was the employee who was working in Great Britain*" (Lawson v Serco at paragraph 25). The tribunal was also taken to Duncombe case at paragraph 8 where it is stated that "*the right will only exceptionally cover employees who are working or based abroad. The principle appears to be that the employment must have much stronger connections both with Great Britain and with British employment law than with any other system of law*". The tribunal was also taken to the Ravat case discussed in paragraph 31.3 of the Respondent's submissions (but will not be replicated in this decision).

71. The case of Powell v OMV Exploration & Production Limited [2014] ICR 63 confirmed the starting point when applying the substantial

connection test is that statute has no application to work outside the UK. The word sufficiently has to "*be understood as sufficient to displace that which would otherwise be the position*".

72. The Tribunal took the above legal principles into account when considering the factual circumstances of this case. The relevant facts are that the Claimant was an experienced international claims consultant and had significant experience working abroad on overseas employment contracts. The Tribunal concluded that the Dubai contract (which was a branch of the Respondent Company) did not commence and no work was carried out under this contract.

73. The Dubai contract was superseded by the Hong Kong contract. The Hong Kong contract required the Claimant to relocate to Japan as the tribunal have found as a fact above, the Claimant raised no objection to this suggestion at the time the contract was signed. The Claimant was paid in US$, his Base Country under the contract was Hong Kong. The contract was subject to Hong Kong law and jurisdiction. Other factors taken into account when considering the stronger connection test were that the Claimant's holidays were dealt with according to holidays in Hong Kong and the administration of his contract was carried out from the Hong Kong office. There was no evidence he would be paid travelling time between his Asia home location and work site.

74. There was no evidence to suggest that the Claimant was managed in the UK; under the Hong Kong contract he was managed out of Hong Kong by Mr Fredrick. Although the Claimant returned to his UK home and to that extent he was a commuter, he only carried out very limited work whilst in the UK and that was due to the particular circumstances of his return to the UK which were referred to above at paragraph 22 and 28. The work he carried out in the UK was limited and only related to the Primetals contract in India and one referral on LinkedIn. There was no consistent evidence to suggest that the contract required the Claimant to perform his duties in the UK or that duties were assigned to him by the Hong Kong employer to undertake in the UK. The Tribunal conclude on these facts that the contract had a stronger connection with Hong Kong law than with any other jurisdiction. The Tribunal conclude on these facts that the contract had a stronger connection with Hong Kong law than with any other jurisdiction.

75. The Claimant has failed to establish that the Hong Kong contract had a sufficiently stronger connection with Great Britain than with the jurisdiction referred to in the contract. There is therefore no territorial jurisdiction.

Employment Judge **Sage**
Date 26 October 2018