THE EMPLOYMENT TRIBUNALS

BETWEEN

Dr Robert Gardner ***Claimant***

and

Network Rail Consulting Inc. ***Respondent***

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: London Central **ON**: 1 October 2018
EMPLOYMENT JUDGE: Mr Paul Stewart

Appearances:

For Claimant: in person
For Respondent: Ms A Carse of Counsel

JUDGMENT

(i) The Claimant was an employee of the Respondent at the same time as he continued to be an employee with National Rail Infrastructure Ltd.

(ii) This Tribunal does not have jurisdiction to hear the Claimant's complaint of unfair dismissal and failure to comply with section 92 (written reasons for dismissal) Employment Rights Act 1996.

REASONS

2. The Claimant was employed from 3 January 2016 until 19 January 2018 when he was dismissed, unfairly so he claimed in his ET1 received by the Tribunal on 17 May 2018.

3. His case came before me on 1 October 2018 on a preliminary hearing which Employment Judge Henderson had ordered on 17 August 2018 to determine the following issues:

Employment Relationship

Was the Claimant an employee of the Respondent? If so,

Territorial Jurisdiction – Unfair dismissal

Does the Tribunal have jurisdiction to hear the Claimant's complaint of unfair dismissal and failure to comply with section 92 (written reasons for dismissal) Employment Rights Act 1996?

4. If both those questions were answered in the affirmative, the case would require further case management orders.

The Facts

5. The facts in this case are largely agreed: the parties are at loggerheads as regards the conclusion I should come to on the issues to be decided.

6. The Claimant is a chartered engineer with over 20 years' experience in telecommunication systems. He obtained the degree of PhD for research into fault identification techniques and high-speed data networks from the University of Strathclyde in 2000.

7. In September 2006, the claimant joined Network Rail Infrastructure Limited (NRIL) which is a subsidiary of Network Rail Limited which is an arms-length public body of the Department of Transport. Network Rail Limited owns most of the rail network in Great Britain through NRIL. Initially, the claimant worked as a Testing Design Engineer in Network Rail's Glasgow office and later as a Senior Strategy and Innovation Engineer at Edinburgh Waverly Station.

8. In early 2015, the claimant applied through Network Rail's vacancy list the role of Subject Matter Expert (SME) Communications with Network Rail Consulting [*NRC*]. The advertised position was for a two-year secondment to Network Rail Consulting Inc [*the Respondent*] in Sacramento, California with an option to extend for a further five years. The claimant was interviewed for this role in June 2015.

9. On 26 August 2015, the Claimant was offered by NRC an assignment with the Respondent as SME Communications. Attached to the offer letter was a Schedule which set out the total annual remuneration and allowances. The Claimant was required to acknowledge and agree that the Schedule contained all compensation payable to him and, therefore, in the event that he was entitled to any other payments or benefits under United States or any other law, NRC would be entitled to deduct the cost of such payment or benefits from the remuneration and benefits payable under the contract. The letter informed the Claimant that he should:

   further understand that this contract may be subject to more detailed terms and conditions outlined in your NRC Inc employment contract which you will be required to enter.

10. The letter was signed by Mr Mark Smith, Global Human Resources Lead on behalf of NRC. The Claimant signed his acknowledgment and agreement the same day, 26 August 2015.

11. NRC describes itself as being wholly-owned international consultancy arm of Network Rail, with access to a full range of technical expertise and experience within Network Rail. By sharing such knowledge and expertise, the Respondent's project teams gain valuable international experience and insight to bring back to Britain's railway.

12. The Respondent, whom NRC describes as being its North American subsidiary, sent the Claimant via email a letter on 16 September 2015 offering him the position of SME Communications working on the California High Speed Rail Project in Sacramento subject to, and conditional upon, gaining the necessary approvals and visa from the US authorities. [These were obtained, so the Claimant stated in his submissions, on 4 December 2015.] The letter specified that the Claimant:

    > *… will still be subject to your terms and conditions under employment legislation of England and Wales and the further terms and conditions outlined in your NRC Inc employment contract attached.*

13. This letter was also signed by Mr Mark Smith on behalf of the Respondent. Again, the Claimant signed the letter on the day it was sent.

14. The attached contract, described as "Employment Agreement – California USA", specified that the employment would be for a term of two years starting 3 January 2016

    > *subject to either party's right to terminate this secondment on 6 months' written notice.*

    It also specified that:

    > *At the end of the term, your employment with Network Rail Infrastructure Ltd shall resume.*

    And Clause 10(c) dealing with "Governing Law" specified:

    > *This agreement and all matters arising out of or relating to or in connection with this agreement shall be governed by and construed in accordance with the laws of England and Wales, subject to the application of the US Federal Arbitration Act under section 10 of this Agreement (Alternative Dispute Resolution).*

15. Under the Agreement, the Claimant "directly reported to Ron Hartman, Vice President, North America" (of NRC Inc). Once again, Mr Mark Smith provided the signature on the Agreement on behalf of the Respondent.

16. At a pre-departure induction event organised by NRC in London, the Claimant and other Secondees were informed that, despite having signed a contract with the Respondent, they would not lose continuous service with NRIL.

17. This point was later reinforced in an "Agreement for the Secondment of Network Rail Employees on a Long-Term Project Basis" which was dated 1 December 2015 and made between NRIL and NRC (respectively referred to in the

Agreement as "Network Rail" and the "Company"). The Agreement provided for certain specified employees ("Secondees") to be seconded to NRC by NRIL for a term that was specified not to last for more than 3 years and which, in the Claimant's case, was specified as starting on 10 January 2016 and ending on 9 January 2019. At Clause 2.9, the Agreement stated:

> *Each Secondee shall at all times during the period of their Secondment remain subject to Network Rail's terms and conditions of employment and shall remain an employee of Network Rail and will not lose their continuous service with Network Rail. Nothing in this agreement shall create an employment relationship between the Company and the Secondee.*

18. The Agreement also specified the Governing Law of the Agreement was that of England.

19. The Claimant arrived in the US on 19 January 2016. By June 2016, there was a total of 13 Secondees working in the Sacramento office of the Respondent. As per his contract with the Respondent, the Claimant reported to Ron Hartman based in Washington DC. Mr Harman in turn reported to Mr Nigel Ash, the Managing Director of NRC, based in London, who reported to a director of NRIL.

20. Whilst he was on secondment in the US, the Claimant was entitled to continue to pay into the NRIL pension scheme. In January 2016, personnel staff in London sought, and obtained, the Claimant's permission to make monthly deductions from the Claimant's salary to cover the cost of his employee pension contribution.

21. During his secondment, the Respondent paid the Claimant's salary, expenses and all costs associated with his relocation. Because the Claimant had, several years previously, relinquished the company's UK private healthcare benefit, he continued to be paid a "small taxable amount" each month in sterling in the UK. He also continued to receive a bonus payment via the NRIL payroll and continued to file HMRC tax returns for this and other UK-derived income. NRC in London paid the Claimant's National Insurance employee contributions on his behalf to the HMRC.

22. An HMRC "Certificate of continuing liability to the UK National Insurance legislation for people working in the USA" specified the Claimant's employer in the UK as the Respondent company and the employer in the USA to be the Respondent.

23. At the end of March 2016, the Claimant's family joined him in California, and he rented out his UK family home. In mid-2016, the Respondent promoted him within the California High-Speed Rail organisation to a position with the title of "Lead Communications Engineer", responsible for overseeing the development of all telecoms-related aspects of the California High-Speed Rail project.

24. During the secondment, local line management within NRC carried out annual appraisals on the Claimant producing a Performance Rating. This was a comparative rating which fed into the determination of their Annual Salary Review

for Secondees although NRC opted to adopt NRIL's UK collective bargaining process to produce a percentage rise for the salary increment.

25. Day-to-day personnel management during the secondment was provided by Mr Mark Smith and his team based in London. Some administrative tasks were done online. Payroll processing and annual salary increments were administered from the London office of the Respondent as were local IT issues.

26. While on secondment, the Claimant had access to NRIL's HR and IT systems in the UK which allowed the Claimant to keep abreast of company news, have access to documentation and log on to the job vacancies portal. NRIL also maintained a notional salary for the Claimant in the UK that was reviewed annually, and the pay award was communicated to him by the Chief Executive of NRIL.

27. NRC in London arranged for HMRC to issue a new "Certificate of continuing liability to the UK National Insurance legislation for people working in the USA" for 2017 which specified the Claimant's employer in the UK as NRIL and the employer in the USA to be the Respondent.

28. At the end of 2016 and during 2017, there were discussions about Secondees having extensions to their original two-year period. The Claimant was anxious to obtain an extension. However, there were matters which had caused him some disquiet. On 15 November 2017, the Claimant raised an individual grievance. In his ET1, he said the grievance was raised with "his employer" with NRIL because of his perception that the company had failed to honour several contractual and non-contractual issues. His grievance was considered through to an appeal stage. The decision of the person hearing the appeal – who worked for NRIL in the UK - was notified to the Claimant in May 2018. While his grievance was upheld in certain respects, at least two issues were not resolved in his favour – those being his allegations, first, that unlawful deductions had been made from his pay in respect of pension contributions and, second, that he had not received a salary uplift that had been promised.

29. On 12 December 2017, all Secondees apart from the Claimant received letters from Mr Hartman - President, North America for the Respondent – offering them extensions to their two-year contracts. The Claimant wrote to Mr Hartman and to Ms Jeanette Frett (Chief Human Resources Officer for the Respondent) asking why he had not received such an offer. This led to him having a meeting with Mr Hartman and Ms Frett on 14 December 2017 at which they rather bluntly, and without giving any reasons, said that they would not be offering the Claimant a contract renewal for a third year.

30. At the meeting, the Claimant was handed a letter signed by Mr Hartman dated 13 December 2017 entitled "Notice to End of current Assignment Agreement" in which it was written:

> *Your secondment agreement expires on 10 January 2018. This is to confirm that we will not be renewing your assignment.*

We are prepared to provide a three-month extension beyond the current expiration date of your existing agreement to assist with transition which will take place in accordance with the terms of your existing agreement.

31. The Claimant requested written reasons for the refusal to offer a longer contract extension but was told by Mr Hartman that he was not required, and therefore was not prepared, to do this. The Claimant argued that the non-renewal of the contract was a form of dismissal and that therefore he had a right to know the reasons. Mr Hartman did not agree: as he saw it, the secondment was merely coming to an end and there was no obligation on the Respondent to extend it.

32. The Claimant in due course raised a further grievance concerning the non-renewal of his contract. Mr Hartman responded in April 1918 saying:

    To be clear, you have not been dismissed from employment. Prior to your secondment to North America, you had a standing contract of employment with Network Rail Infrastructure Limited. This remained as your contract of employment throughout your assignment and as the contract under which you continue to be employed today.

    The terms of your secondment were set out in the letters you signed on 26 August 2015 and 16 September 2015. It is clear in both letters that your secondment to Network Rail Consulting would be for a period of two years. While the letters contain an option to extend the secondment period, there is no obligation on either party to do so.

    In conclusion, it is not possible for me to undertake the individual grievance procedure for a claim of unfair dismissal for someone who has not been dismissed.

33. An appeal against this decision was still outstanding when the Claimant presented his ET1 alleging that that he been unfairly dismissed by the Respondent. His present position is that he is back in the UK working for NRIL.

The Law

34. The Claimant has referred me to nine cases in all, Ms Carse for the Respondent to four. Three were referred to by both parties and are:

    Serco Limited v Lawson [2006] UKHL 3

    Ravat v Halliburton Manufacturing and Services Ltd [2012] UKSC 1

    Duncombe v Secretary of State for Children Schools and Families (No 2) [2011] UKSC 36

35. In addition, the Claimant referred me to:

    Edwards v Skyways Ltd [1964] 1 W.L.R. 349

    Esso Petroleum v Commissioners of Customs & Excise [1976] 1 W.L.R. 1, HL

Duncombe v Secretary of State for Children Schools and Families [2011] UKSC 14

Clyde & Co LLP v Bates van Winkelhof [2014] UKSC 32

Creditsights Ltd v Dhunna [2016] EWCA 1238

Jeffery v British Council UKEAT/0036/16/JOJ, [2016] I.R.L.R. 935

Green v SIG Trading Ltd [2017] UKEAT/0282/16/DA

36. The last two of these cases, both heard separately in the EAT, have since been argued at a conjoined hearing before the Court of Appeal whose judgment is to be found at [2018] EWCA Civ 2253.

37. The fourth case Ms Carse directed my attention to was:

Mrs L Lodge v Dignity & Choice in Dying, Compassion in Dying UKEAT/0252/14/LA

38. Underhill LJ's judgment in the Court of Appeal in the Jeffrey and Green cases helpfully sets the scene as regards the development of case law with regard to the territorial jurisdiction of the Employment Tribunals.

2. The question of the territorial reach of British employment legislation has notoriously given rise to problems in recent years and has produced a plethora of reported cases, including one decision of the House of Lords and two of the Supreme Court – Lawson v Serco Ltd [2006] UKHL 3, [2006] ICR 250 ; Duncombe v Secretary of State for Children, Schools and Families (no. 2) [2011] UKSC 36, [2011] ICR 1312 ; and Ravat v Halliburton Manufacturing & Services Ltd [2012] UKSC 1, [2012] ICR 389 . The effect of those decisions has been fairly recently reviewed in this Court in Bates van Winkelhof v Clyde & Co LLP [2012] EWCA Civ 1207, [2013] ICR 883, and Dhunna v CreditSights Ltd [2014] EWCA Civ 1238, [2015] ICR 105. It will not be necessary in these appeals, and would indeed be likely to be positively unhelpful, to attempt a further comprehensive survey of that well-travelled ground. The position as now established by the case-law can be sufficiently summarised for the purpose of the cases before us as follows:

(1) As originally enacted, section 196 of the Employment Rights Act 1996 contained provisions governing the application of the Act to employment outside Great Britain. That section was repealed by the Employment Relations Act 1999. Since then the Act has contained no express provision about the territorial reach of the rights and obligations which it enacts (in the case of unfair dismissal, by section 94 (1) of the Act); nor is there any such provision in the Equality Act 2010.

(2) The House of Lords held in Lawson that it was in those circumstances necessary to infer what principles Parliament must

have intended should be applied to ascertain the applicability of the Act in the cases where an employee works overseas.

(3) In the generality of cases Parliament can be taken to have intended that an expatriate worker – that is, someone who lives and works in a particular foreign country, even if they are British and working for a British employer – will be subject to the employment law of the country where he or she works rather than the law of Great Britain, so that they will not enjoy the protection of the 1996 or 2010 Acts. This is referred to in the subsequent case-law as "the territorial pull of the place of work". (This does not apply to peripatetic workers, to whom it can be inferred that Parliament intended the Act to apply if they are based in Great Britain.)

(4) However, there will be exceptional cases where there are factors connecting the employment to Great Britain, and British employment law, which pull sufficiently strongly in the opposite direction to overcome the territorial of the place of work and justify the conclusion that Parliament must have intended the employment to be governed by British employment legislation. I will refer to the question whether that is so in any given case as "the sufficient connection question".

(5) In Lawson Lord Hoffmann, with whose opinion the other members of the Appellate Committee agreed, identified two particular kinds of case (apart from that of the peripatetic worker) where the employee worked abroad but where there might be a sufficient connection with Great Britain to overcome the territorial pull of the place of work, namely (a) where he or she has been posted abroad by a British employer for the purposes of a business conducted in Great Britain (sometimes called "the posted worker exception") and (b) where he or she works in a "British enclave" abroad. But the decisions of the Supreme Court in Duncombe and Ravat made it clear that the correct approach was not to treat those as fixed categories of exception, or as the only categories, but simply as examples. In each case what is required is to compare and evaluate the strength of the competing connections with the place of work on the one hand and with Great Britain on the other.

(6) In the case of a worker who is "truly expatriate", in the sense that he or she both lives and works abroad (as opposed, for example, to a "commuting expatriate", which is what Ravat was concerned with), the factors connecting the employment with Great Britain and British employment law will have to be specially strong to overcome the territorial pull of the place of work. There have, however, been such cases, including the case of British employees of government / EU-funded international schools considered in Duncombe.

> *(7) The same principles have been held by this Court to apply to the territorial reach of the 2010 Act: see R (Hottak) v Secretary of State for Foreign and Commonwealth Affairs [2016] EWCA Civ 438, [2016] ICR 975.*

39. Underhill LJ went on to emphasise that this was not intended to be a comprehensive summary of the effect of the decided cases but was the background for the issues that arise in the appeals before the Court. However, they seem to me to set out the background of the effect of the decided cases in this case.

40. I would only add reference to the judgment of Lord Hope (with whom the four Supreme Court judges agreed) at paragraphs 27 to 29:

> *27. Mr Cavanagh drew attention to Lord Hoffmann's comment in Lawson, para 37, that the fact that the relationship was "rooted and forged" in Great Britain because the respondent happened to be British and he was recruited in Great Britain by a British company ought not to be sufficient in itself to take the case out of the general rule. Those factors will never be unimportant, but I agree that the starting point needs to be more precisely identified. It is that the employment relationship must have a stronger connection with Great Britain than with the foreign country where the employee works. The general rule is that the place of employment is decisive. But it is not an absolute rule. The open-ended language of section 94(1) leaves room for some exceptions where the connection with Great Britain is sufficiently strong to show that this can be justified. The case of the peripatetic employee who was based in Great Britain is one example. The expatriate employee, all of whose services were performed abroad but who had nevertheless very close connections with Great Britain because of the nature and circumstances of employment, is another.*
>
> *28. The reason why an exception can be made in those cases is that the connection between Great Britain and the employment relationship is sufficiently strong to enable it to be presumed that, although they were working abroad, Parliament must have intended that section 94(1) should apply to them. The expatriate cases that Lord Hoffmann identified as falling within its scope were referred to by him as exceptional cases: para 36. This was because, as he said in para 36, the circumstances would have to be unusual for an employee who works and is based abroad to come within the scope of British labour legislation. It will always be a question of fact and degree as to whether the connection is sufficiently strong to overcome the general rule that the place of employment is decisive. The case of those who are truly expatriate because they not only work but also live outside Great Britain requires an especially strong connection with Great Britain and British employment law before an exception can be made for them.*
>
> *29. But it does not follow that the connection that must be shown in the case of those who are not truly expatriate, because they were not*

both working and living overseas, must achieve the high standard that would enable one to say that their case was exceptional. The question whether, on given facts, a case falls within the scope of section 94(1) is a question of law, but it is also a question of degree. The fact that the commuter has his home in Great Britain, with all the consequences that flow from this for the terms and conditions of his employment, makes the burden in his case of showing that there was a sufficient connection less onerous. Mr Cavanagh said that a rigorous standard should be applied, but I would not express the test in those terms. The question of law is whether section 94 (1) applies to this particular employment. The question of fact is whether the connection between the circumstances of the employment and Great Britain and with British employment law was sufficiently strong to enable it to be said that it would be appropriate for the employee to have a claim for unfair dismissal in Great Britain.

41. The difficulty that arises in applying these principles to the Claimant's position is that it was always intended, and acknowledged, that the Claimant would have a continuing employment relationship with NRIL and Great Britain which was sufficiently strong to justify the Employment Tribunal having jurisdiction had there been a severance of that relationship. But that was not the relationship that was severed. It was the relationship with the subsidiary company – the Respondent – which was severed when the Respondent refused to extend the period of secondment.

42. It is right that the Claimant entered into a contract of employment with the Respondent for the period of his secondment. He ascribes the motivation for the requirement that he, as a Secondee, enter into legal employment relations with the Respondent as being the need to obtain the appropriate US work visa.

43. All the factors which suggest a strong territorial pull to Great Britain that can be discerned in this employment flow naturally from the fact that throughout the period of employment, as the "Agreement for the Secondment of Network Rail Employees on a Long-Term Project Basis" was to make clear, "Each Secondee shall at all times during the period of their Secondment remain subject to Network Rail's terms and conditions of employment and shall remain an employee of Network Rail and will not lose their continuous service with Network Rail."

44. The employment contract between the Respondent and the Claimant, put in place for the purposes of obtaining a visa for the Claimant, did not displace the employment contract between the Claimant and NRIL. If the non-renewal of the secondment with the Respondent had been accompanied by a termination of the employment relationship with NRIL, the issue of whether that employment relationship was sufficiently strong to allow the Claimant to pursue a claim of unfair dismissal against NRIL would have been most difficult for NRIL to deny.

45. As it is, during the period of secondment, all the work the Claimant carried out was for the Respondent. His contract with the Respondent, while governed by and in accordance with the laws of England and Wales, was subject to the application of the US Federal Arbitration Act under section 10 of this Agreement (Alternative Dispute Resolution).

46. Ms Carse has advanced five factors that should be considered in the context of whether the connection with Great Britain is sufficiently strong to enable it to be said that Parliament would have regarded it as appropriate for a tribunal to deal with a claim under the Employment Rights Act. These factors are:

    (i) The Claimant's home was in Great Britain. During the period of secondment, he rented it out for additional income.

    (ii) The Claimant's salary was at all times paid in US dollars, but he had a continuing liability for National Insurance contributions in the UK.

    (iii) The Claimant continued to pay into his UK based pension scheme which was with NRIL, not the Respondent or NRC Ltd.

    (iv) While the contract with the Respondent declared the contract to be governed by the law of England and Wales, repeatedly it was emphasised to the Claimant that he was on an assignment or secondment which, when ended, meant that he continued to be employed by NRIL.

    (v) Human Resources issues were handled from London save for the final stages of the secondment when the Claimant raised grievances which were raised first with the Respondent's Sacramento line manager and when the Respondent dealt with the issue of non-renewal of the secondment (which led to the second of the two grievances).

47. It seems to me that the involvement of London in Human Resources issues, the continuation of payments for UK National Insurance and for the UK employer's pension scheme all seem explicable on the basis of the continuing relationship with NRIL.

48. I am not persuaded that there was such a strong connection in the employment relationship the Claimant had with the Respondent as to justify the conclusion that Parliament must have intended that section 94(1) of the Employment Rights Act should apply to him.

49. So, to answer to the questions set down for determination at this preliminary hearing:

    (i) The Claimant was an employee of the Respondent at the same time as he continued to be an employee with NRIL.

    (ii) This Tribunal does not have jurisdiction to hear the Claimant's complaint of unfair dismissal and failure to comply with section 92 (written reasons for dismissal) Employment Rights Act 1996.

50. Finally, the parties have waited for this judgment for too long a time and, for that, I apologise.

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Signed:

EMPLOYMENT JUDGE Stewart

On: 8 March 2019

DECISION SENT TO THE PARTIES ON

.......8 March 2019...
AND ENTERED IN THE REGISTER

..
FOR SECRETARY OF THE TRIBUNALS