Case Number: 3353038/2017

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss N Sithirapathy	**v**	(1) PSI CRO UK Limited; (2) PSI CRO AG; (3) Mr Martin Schmidt; (4) Ms Angelika Ruf.

Heard at: Norwich **On:** 28 and 29 January 2019
In Chambers on: 25 and 26 February 2019

Before: Employment Judge Postle

Members: (delete if not required)

Appearances
For the Claimant: Mr Kemp, Counsel
For all the Respondents: Mr Howell, Counsel

RESERVED JUDGMENT

1. The Tribunal has no jurisdiction to hear any claims arising out of the claimant's employment in Switzerland during the period 4 September 2017 to 19 October 2017.

RESERVED REASONS

1. This is a preliminary hearing to consider the following preliminary issues:

    1.1 Whether the claimant's claims relating to her employment with PSI CRO AG (the second respondent), are within the territorial jurisdiction (both of the Tribunal and legislation relied upon);

    1.2 It would appear there are two issues to be determined:

        a. does the Tribunal have jurisdiction over R2? R2 being a Swiss company and this question is governed by the Lugano

Convention 2007 with particular reference to the special rules on jurisdiction contained in section 5 of that convention;

b. is the claimant's employment with the second respondent within the territorial reach of the substantive law on which she relies? That being part 5 of the Equality Act 2010 (discrimination, harassment and victimisation) and part x of the Employment Rights Act 1996 (unfair dismissal) and part 2 of the 1996 Act (unlawful deduction of wages).

2. The Tribunal have had the benefit of a skeleton argument from the claimant's Counsel, and an opening note from the respondent's Counsel.

3. The Tribunal was provided with a bundle of authorities comprising of:

Treaties

1. Lugano Convention 2007;

UK Authorities

2. *Lawson v Serco* [2006] ICR 250;
3. *SCA Packaging v Boyle* [2009] ICR 1056;
4. *Duncome v SSCSF* [2011] ICR 1312;
5. *Ravat v Halliburton Manufacturing & Services Ltd*. [2012] ICR 389;
6. *Dhunna v CreditSights Ltd*. [2015] ICR 105;
7. *R (Hottak) v Secretary of State for Foreign and Commonwealth Affairs* [2016] EWCA Civ 438;
8. *Benkharbouche v Embassy of the Republic of Sudan* [2017] ICR 1327;
9. *Wright v Aegis BVI* UKEAT/0173/17/DM;
10. *P v Commissioner of Police of the Metropolis* [2018] ICR 560;
11. *Jeffery v British Council* [2018] EWCA Civ 2253;

CJEU Authorities

12. *Boukhalfa v Germany* (C-214/94) [1996] ECR I-2253;
13. *Prodest v Caisse Primaire d'Assurance Maladie Paris* (C-237/83);
14. *Mahamdia v Algeria* [2013] ICR 1.

4. The Tribunal has also had the benefit of a bundle of documents consisting of 793 pages.

5. The Tribunal heard evidence from the claimant through a prepared witness statement.

6. For the respondents, Miss A Ruf, also through a prepared witness statement.

The Facts

7. The claimant was originally employed by the first respondent as Legal Counsel pursuant to a UK Employment Contract (dated 1 August 2014, pages 121 – 137), from 1 September 2014. It would appear during this period, i.e. prior to 4 September 2017 the claimant was working predominantly in the UK office based in Kidlington, Oxfordshire.

8. The first respondent is a company incorporated in England with its headquarters in Kidlington. The first respondent is a wholly owned subsidiary of the second respondent. The second respondent being a company incorporated in Switzerland and has its headquarters in Zug, Switzerland.

9. The first and second respondent is a Contract Research organisation which provides support to pharmaceutical, bio-technology and medical device industries in the form of research services outsourced on a contract basis. In simple terms providing various services to customers involved in clinical trials either directly or through its subsidiaries.

10. The third respondent is the Managing Director, Corporate and Finance within the PSI CRO Group and acts as the Country Manager for Switzerland. He is also a Director of the first respondents and a Member of the Board of the second respondents and also an employee of the second respondents.

11. The fourth respondent is Head of Legal and ultimately responsible for all legal matters within the PSI Group.

12. Both the third and fourth respondents are based at the second respondents' offices in Zug.

13. The claimant was the first point of contact whilst employed by the first respondents for all legal matters affecting the first respondents. This includes UK clinical trial agreements, UK corporate work (including the acquisition of the UK office space and legal work relating to the UK office), UK commercial work, UK data protection work, UK HR employment law work. In addition, the claimant was responsible for global clinical trial agreements. The claimant was not involved in any global real estate activities whilst employed by the first respondents. It would also appear the claimant had little or no involvement in legal corporate work whilst employed by the second respondents.

14. There had been discussions in late 2016 with the claimant about the possibility of moving to Switzerland into the Zug office to take up the role as Legal Counsel in the Legal Department. The claimant, far from not being interested, did express a positive interest in this role and the move. Indeed, the claimant requested Ms Strange, a colleague in the first respondents, to provide her the details of salaries in Switzerland (pages 168 – 169) and the various deductions that had to be made under Swiss

law from salary payments. The claimant, far from any pressure being exerted by the respondents over the move, confirmed that she was excited about the prospect of a move to Zug (page 169b). However, subsequently, in November the claimant indicated although interested in the move, the timing was not right due to personal circumstances beyond her control in the UK that required the claimant to remain in the UK (page 169b). The respondent therefore did not pursue the matter with the claimant.

15. The fourth respondent being the claimant's line manager, discussed with the claimant her career development in May 2017 (page 176). It was accepted by Ms Ruf that the claimant had potential but still needed to be closely managed and supported in her current role. Clearly, this was difficult given the claimant was based in the UK. At this time the second respondents and Mr Schmidt were looking for a person to support him in real estate. Consideration was therefore given, as to whether the claimant was interested and would be willing to move from the Legal Team to finance and administration in Zug reporting directly to Mr Schmidt.

16. Ms Ruf and the claimant discussed over the phone on the 11 May her career development and the future. The claimant wanted a change and it was then discussed about the possible opportunity to work for the second respondents / Mr Schmidt in Zug although not in the same position as had been previously discussed last November 2016.

17. Ms Ruf made it clear the role was focusing on real estate and would be attached to the Finance and Administration Department. This was to be a non-legal managerial position in which the claimant would now report directly to Mr Schmidt. It was felt by Ms Ruf this was a good career opportunity for the claimant to progress and develop her managerial skills, it is clear the claimant was not under any pressure to accept this position.

18. Once the claimant expressed interest in a move to Zug and this position, she was put in touch with Mr Schmidt to discuss the role. Indeed, the claimant emailed Mr Schmidt on 12 May clearly expressing interest in the role and wanting to hear more about the role that she had discussed with Ms Ruf.

19. It is clear, the claimant was very positive about the role as by 18 May she emailed Mr Schmidt,

    "I am really very excited, thank you very much for the opportunity, I really appreciate being given such a chance." (page 184)

    Which is contrary to what the claimant asserts she felt pressured and coerced into accepting the position. In the same email she advises Mr Schmidt that she had pre-booked a holiday from 22 September to 8 October and wondered whether that could be honoured. It was subsequently confirmed that the claimant could take this period of leave even if she took up the job in Zug.

20. On 22 May, the claimant is sent a contract of employment for the position with the second respondents in Switzerland (page 196), to commence on 4 September in the position of Manager of Real Estate Portfolios. At the same time there was correspondence regarding payroll deductions under Swiss law, leave, working hours, insurance and relocation support (pages 195 – 196).

21. There were further discussions taking place over the claimant's role by email, and holiday and contract wording and tax status in Switzerland (pages 198 – 202) and the claimant ultimately signed the contract with the second respondent on 31 May (pages 165 – 167). There clearly was no pressure on the claimant to either accept the role or sign the new contract with the second respondents. It is clear, had the claimant not taken up this new position with the second respondents she could have remained in her existing role with the first respondents.

22. The contract of employment the claimant signed with the second respondents appears to be a standard Swiss agreement, was to be governed by Swiss law and recites the fact that any disputes arising from the contract would come under the sole jurisdiction of Swiss Law / Courts. The contract further provided for payment of the claimant's salary in Swiss Francs (CHF) and was to be subject to Swiss Law deductions for unemployment insurance, occupational pension, payments of salary were to be paid into a Swiss bank account in the claimant's name. The claimant was now to work in a new role in Finance and Administration with the new line manager Mr Schmidt in the Swiss office. The role contemplated was clearly different to that performed by the claimant in the UK.

23. Once the claimant accepted the new role a recruitment exercise was commenced in the UK to fill the claimant's role, although there would be a period of handover. The claimant's role was ultimately filled although the incumbent of that role could not take up the position until 10 October 2017. The claimant, after signing the new contract with the second respondents agreed to sign a formal termination of her role within the first respondents. Such termination agreement was in fact drafted by the claimant and signed by the claimant on 19 June with Miss Wilson and Miss Strange signing on behalf of the first respondents (page 164).

24. Miss Breitenstein, on behalf of the second respondent appears to have been the link with the claimant on behalf of the second respondent involved in arranging / assisting the claimant's work permit application, together with finding the claimant a corporate apartment in Zug whilst the claimant looked for permanent accommodation. It would appear she dealt with and assisted with health assurance, registration with the tax authorities in Switzerland, and assistance with the opening of a Swiss bank account which apparently was delayed (pages 208 – 210, 217 – 224, 229 – 230, 239 – 240 and page 243).

25. The claimant's last day of employment in the UK office was 31 August 2017 and on the same day she emailed the UK office (page 284) in which the claimant makes it clear whom enquiries should be made to in respect of her UK work until her replacement arrives (page 284).

26. The claimant was now to focus on global real estate projects with the second respondents. It would appear the only exception was until the end of 2017 the claimant would keep her global responsibility for the ongoing clinical trial agreements, which in fact in the short time in which the claimant was to work with the respondent, resulted in very little work at all. In fact, the claimant's time sheets show no ongoing clinical trial agreement work after relocation to Switzerland. The claimant duly joined the second respondent on 4 September where she would work under the direction of Mr Schmidt and no longer reported to Ms Ruf. On 6 September the claimant travelled to Argentina to commence work on real estate acquisition. On the way back, she stopped off in England to commence a period of holiday from 23 September returning to Zug on 9 October where she had three working days before her notice of dismissal on 12 October was given as a result of the reorganisation of the Real Estate Department in Zug.

27. It is clear from the claimant's WhatsApp messenger that while she was in Argentina, the claimant was in close contact with Mr Schmidt updating him on an ongoing basis. During the period the claimant was employed by the second respondent it appears from the email evidence, any UK work the claimant was involved with was largely forwarding emails and occasionally being asked to comment on a limited basis. There appears to have been no requests for formal advice. Clearly, the majority of the claimant's time now was spent on real estate matters for the second respondents.

28. It is not clear from the evidence whether the claimant's property in the UK had now been rented, what is clear, her parents address was now being used as a post box and the claimant retained no motor vehicle in the UK and was clearly setting up her base in Zug, Switzerland.

29. It is true there was a delay (page 753), in the claimant's salary statement being provided by the second respondents for September 2017, but it does show deductions for AHV which is contribution for old age pension under Swiss Law, there is also a UI contribution for unemployment tax. The salary statement for October is at page 752 and again the same percentage deductions are applied. The unpaid salary for September is shown in the October payment at page 752. The delay was due to the claimant's bank account in Switzerland being set up late and therefore no payments could be made until this had been arranged together with a work permit which was required in order for the claimant to work in Switzerland. The payments in the October salary for work in Switzerland, less deductions showed 8,611 Swiss Francs (CHF). During this period, namely 4 September to 19 October the claimant was not paying UK tax or UK national insurance.

The Law

30. The Lugano Convention 2007 regulates the allocation of jurisdiction between the Courts and Tribunals of the European Union member states and appears to be relevant in so far as R2 is domiciled in Switzerland.

31. Particularly article 5.5 provides,

"Section 2

Special Jurisdiction

Article 5

A person domiciled in a state bound by this Convention may in another state bound by this Convention be sued:

5. as regards a dispute arising out of the operations of a branch, agency or other establishment in the Courts for the place in which the branch, agency or other establishment is situated;

Article 18 of the convention then goes on to state,

1. in matters relating to individual contracts of employment, jurisdiction shall be determined by this section, without prejudice to articles 4 and 5(5);

2. where an employee enters into an individual contract of employment with an employer who is not domiciled in a state bound by the Convention, but has a branch, agency or other establishment in one of the states bound by this Convention, the employer shall in disputes arising out of the operation of the branch, agency or establishment, be deemed to be domiciled in that state.

Article 9

An employer domiciled in a state bound by this Convention may be sued:

1. in the courts of the state where he is domiciled;

2. or in another state bound by this Convention:

a. in the courts for the place where the employee habitually carries out his work or in the courts for the last place where he did so; or

b. if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated."

32. It would therefore appear, for the claimant to establish the Tribunal's jurisdiction over the second respondent, the claimant will have to establish any one of the following:

    a. that the second respondent is domiciled in England and Wales;

    b. that the claimant habitually carried out her work for the second respondent in England and Wales;

    c. that the claimant did not habitually work in any one country but that the second respondent (the business which engaged her) was situated in England and Wales; or

    d. that the claims asserted in these proceedings against the second respondent concern a dispute arising out of the operation of a branch, agency or establishment of R2 in England and Wales.

33. On the question of territorial jurisdiction under the Employment Rights Act 1996, it is a question of law and also one of degree. The basic rule is that it only applies to an employee who works in the UK. However, in exceptional circumstances it may cover working abroad as summarised by the Court of Appeal in Bates van Winkelhof v Clyde & Co LLP and Another [2013] ICR 883,

    "Where an employee works partly in Great Britain and partly abroad the question is whether the connection with Great Britain and British Employment Law is sufficiently strong to enable it to be said that Parliament would have regarded it as appropriate for the Employment Tribunal to deal with the claim."

34. In Ravat v Halliburton Manufacturing and Services Limited [2002] ICR 389,

    "Where an employee works and lives wholly abroad it would be more appropriate to ask whether his or her employment relationship has much stronger connections both with Great Britain and with British Employment Law than with other systems of Law – Duncombe v Secretary of State for Children's Schools and Families (2) [2011] ICR 1312, SC."

35. The Tribunal has had some clear guidance when the matter finally came before the House of Lords, now the Supreme Court, the issue it concerned being the circumstances in which employees working overseas have the right to bring claims of unfair dismissal under the Employment Rights Act 1996.

36. Lord Hoffmann who delivered the leading judgment, divided employers into three categories for the purposes of establishing whether a UK Employment Tribunal has territorial jurisdiction to hear a claim for unfair dismissal and they were,

"In the standard case the question will depend on whether the employee was working in Great Britain at the time of dismissal, rather than on what was contemplated when the contract was entered into. Though they are not determinative of that question, the terms of the contract in any prior contractual relationship between the parties may be of relevance in determining whether the employee was actually working in Great Britain or on a casual visit.

In the case of peripatetic employees who, owing to the nature of their work, do not perform services in one territory, the employees base, the place at which he or she started and ended assignments should be treated as his or her place of employment. The question then is whether the base was in Great Britain at the time of dismissal. Determining where an employee's base is requires more than just looking at the terms of the contract. It is necessary to look at the conduct of the parties and the way they had been operating the contract in practice."

37. Ex-patriot employees working and based abroad may in exceptional circumstances be entitled to claim unfair dismissal. Lord Hoffmann gave two examples of circumstances where such an employee will enjoy unfair dismissal protection. The first was an employee posted abroad by a British employer for the purposes of business carried on in Great Britain for example, a foreign correspondence on the staff of a British newspaper. The second was an ex-patriot employee of a British employer who is operating within what amounts for practical purposes to extra territorial British enclave in a foreign country.

Discrimination

38. The Equality Act 2010 is silent as to its territorial scope. As with the Employment Rights Act 1996 it is for the Employment Tribunal to determine whether the Act applies. This means when determining whether the Tribunal has jurisdiction to hear a claim under the Equality Act 2010, Tribunal's would generally be obliged to follow the approach set out by the House of Lords in Lawson v Serco Ltd. and two other cases, Duncombe v Secretary of State for Children's Schools and Families (2) and the Ravat case referred to above.

39. The Equality and Human Rights Commission Code of Practice on Employment Law advises that where an employee works partly or wholly outside Great Britain, in determining whether there is a sufficiently close link existing, a Tribunal may consider such matters as where the employee lives and works, where the employer is established and what laws govern the employment relationship in all other respects, particularly where tax is paid and other matters it considers appropriate.

Conclusions

40. On the question of jurisdiction governed by the Lugano Convention 2007, the question arises does the operation of the second respondent arise out

of the operation of the first respondent. It is clear that the second respondent and the first respondent are separate companies. It does not appear to be the case advanced by the claimant that the second respondent is in some way vicariously liable for the first respondent. It is clear in relation to the wrongful dismissal claim against the second respondent, the second respondent's offices in Zug is not a branch office and therefore Article 5.5 is not engaged in that argument and therefore fails.

41. In relation to discrimination claims at page 107(f), the table sets out allegations and clearly late allegations relate to what happened in Zug between 4 September 2017 and 19 October 2017. Zug, it is clear was an entirely separate office, the second respondent was incorporated in Switzerland and the claimant was to be no longer line managed by Ms Ruf but to be line managed by Mr Schmidt. The claimant's time whilst working for the second respondent was spent on an extended business trip to Argentina performing work in relation to her new role for the second respondent. She did not work in the UK during that period (4 September 2017 to 19 October 2017) for the first respondent, only dealing with a very small number and very minor enquiries from the UK office in relation to her former role which largely consisted of passing such enquiries on to the relevant personnel in any event in the UK office. Any suggestion of vicarious liability of the second respondent for the third and fourth respondent does not relate to a branch office and again, therefore, Article 5.5 is not engaged.

42. The claimant would need to establish against the second respondent that actions arise out of the operation of the first respondent. Clearly, in the absence of any employment relationship between the two, section 109 of the Equality Act 2010 is not engaged.

43. It is clear, the claim against the second respondents do not rise out of the operation of the UK branch. The Lugano Convention 2007 at 6.1 clearly relates to closely related claims heard together, but not employment claims and the authorities appear to support that.

44. Dealing with the territorial arguments. The claimant, during the period 4 September to 19 October was solely based at the Zug office in Switzerland and during that period undertook a business trip to Argentina in relation to work relevant to her new role working for the second respondent.

45. The new contract of employment the claimant signed freely before taking up her new role in Switzerland made it clear the place of jurisdiction and applicable law within that agreement was subject to Swiss Law and any dispute arising from the agreement would be Zug (page 167) and that was signed freely by the claimant on 31 May. Furthermore, the claimant had prepared around 19 June the date (the additional document was signed), a document headed 'Termination of Employment Agreement' as of 31 August (page 164) which terminated her employment with the first

respondent. The reason for that was that the claimant was taking up new employment with the second respondents in Switzerland. The claimant at the time never questioned these documents, that in particular her employment was ending with the first respondent and a new contract of employment would commence with the second respondents in Zug on 4 September. That contract clearly stated the jurisdiction in respect of any disputes arising out of the second respondents and the claimant's employment was to be Swiss Law. That was never questioned.

46. The claimant, upon taking up the employment with the second respondent agreed to rent a corporate property in Zug whilst she looked for her own property to rent. This was not a temporary arrangement in Zug, a work permit was required, the work was clearly of a permanent nature and was entirely separate from that of the first respondents. It was not intended as some short term posting abroad to deal with projects on behalf of the respondents. The claimant was no longer line managed by Ms Ruf, but clearly under the management working for the second respondent's direction of Mr Schmidt during her time in Zug.

47. The claimant retained virtually no work from the UK, the Tribunal repeats, other than routine enquiries were made of her pending the arrival of her replacement in the UK in early October. Furthermore, upon commencing her employment with the second respondents on 4 September she travelled to Argentina on 6 September for work relating entirely to the second respondents, returned to Zug on 22 September then had pre-booked holiday, returned to Zug on 9 October and notice of her dismissal on 12 October. It would appear 3 working days in Zug, 11 working days in Argentina and during that period it is clearly unlikely that there was any purposeful work carried out by the claimant for the first respondents.

48. The claimant set up a Swiss bank account in order to be paid and was paid in Swiss Francs with all the local taxes being deducted in accordance with Swiss Law (pages 752 – 753).

49. The claimant appears only to have a correspondence address in the UK, care of what is believed to be her parents' address and retained no motor vehicle or indeed any close links with the UK while based, albeit only for a short period, in Zug. It was clearly the intention, had the second respondents not carried out a reorganisation, to remain in Zug on a permanent basis.

50. The claimant has suggested that the failure to have access to the server in Zug is a relevant factor in advancing her claims, quite how the Tribunal sees this as relevant to territorial or jurisdictional jurisdiction does not follow, but in any event, it is clear from the explanation provided this was merely an administrative error. Another example, the claimant asserts as evidence of UK jurisdiction is that she continued to be responsible after she left the first respondents for Data Protection Compliance, including periods long after her dismissal from the second respondents. Again, the Tribunal accepts this was an administrative oversight and a perverse

argument to advance on behalf of the claimant as she clearly would not and could not have been responsible for Data Protection long after her dismissal.

51. In all the circumstances, the Tribunal concludes, it neither has jurisdiction under the Lugano Convention 2007 or territorial jurisdiction to hear the claimant's claims arising out of her employment in Switzerland for the period 4 September 2017 to 9 October 2017.

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Employment Judge Postle

Date: ……10/4/19
Sent to the parties on: .....10/4/19.....

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For the Tribunal Office