Appeal No. UKEATS/0018/19/SS

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 13th November 2019
At 10.30am

Before

THE HONOURABLE LORD SUMMERS

(SITTING ALONE)

Hexagon Sociedad Anonima — APPELLANT

Mr Neil Hepburn — RESPONDENT

Transcript of Proceedings

JUDGMENT

FULL HEARING

APPEARANCES

For the Appellant	Mr Andrew Knight Burness Paull LLP 5th & 6th Floor Union Plaza 1 Union Wynd Aberdeen AB10 1DQ
For the Respondent	Mr Barry Nichol Anderson Strathern LLP 1 Rutland Court Edinburgh EH3 8EY

SUMMARY

This appeal concerns a challenge to the jurisdiction of the UK employment tribunals to hear a claim brought by a former employee following his dismissal. The EAT following earlier authorities considered whether the claimant had a sufficiently strong connection with the UK to justify hearing the case where the claim arose. The claim arose from conduct on a vessel moored in the territorial waters of Equatorial Guinea. In particular the EAT considered the effect of a clause in the claimant's contract of employment which prorogated the jurisdiction of the courts and tribunals in Scotland. The EAT held that following the reasoning of Lady Hale in **Duncombe v Secretary of State for Children, Schools and Families** the existence of such a clause was a relevant factor provided there were other connections that supported the prorogation clause and that independently connected the claim with the jurisdiction of the UK employment tribunals. The EAT also rejected an argument that the jurisdiction of Equatorial Guinea was supported by the wording of another clause in the contract.

THE HONOURABLE LORD SUMMERS

Introduction

1. The claimant is a UK citizen. His contract of employment states that his "home location" is Scotland. The appellants are a company registered in Equatorial Guinea and are part of the Wood Group, a multinational group of companies. The claimant worked for the Appellants on an installation permanently moored off the coast of Bata in the Gulf of Guinea. The Gulf of Guinea is in the territorial waters of Equatorial Guinea Although the judgment below does not specify what type of vessel the Asset was, I assume that it was an oil rig or a vessel utilised in the oil industry.

2. The claimant was dismissed from his employment. On his return to Scotland he instructed solicitors and lodged a claim with the Employment Tribunal. He claimed that he had been dismissed because he had made a protected disclosure and that his dismissal was therefore automatically unfair. His claim was based on UK legislation.

3. His contract of employment is written in English and contains a clause headed "Law and Jurisdiction". It states that the contract is "governed by" and to be "construed in accordance with the laws of Scotland". It prorogates the exclusive jurisdiction of the "Scottish Courts and Tribunals". The terms of the contract are unnumbered and in short compass.

4. When the case called before the Employment Tribunal in Aberdeen the appellants challenged the relevance of the term prorogating the jurisdiction of the "Scottish Courts and Tribunals" to the task of determining the jurisdiction on the Employment Tribunals of the UK or (as the contract provided) Scotland to hear his claim under s. 94(1) of the

Employment Rights Act 1996. The appellants took the point that the jurisdiction of an Employment Tribunal in the UK to hear a claim is determined by the employment law of the UK and that it if UK employment law was applied jurisdiction to hear the case should be allocated to the courts of Equatorial Guinea notwithstanding the term in the contract.

5. The appellants' challenge to the jurisdiction of the Employment Tribunal in Aberdeen was rejected. They now appeal that decision.

Legal Background

6. Until the repeal of s. 196 of the Employment Rights Act 1996 the jurisdiction of the Employment Tribunal was territorial in scope. The territorial rule was removed by the Employment Rights Act 1998. No new statutory rule was promulgated to take the place of s. 196. In this circumstance the Courts have in a series of cases developed a body of law which sets out the principles that determine whether the UK Employment Tribunals have jurisdiction to hear a claim. The body of case law is extensive. From that case law I derive two threshold propositions that appear to be relevant to the issues before me. First, Parliament could not have intended the UK Employment Tribunals to acquire worldwide jurisdiction. The general rule is that employment disputes should be resolved in the jurisdiction where they arise (see Lord Hoffman **Lawson v Serco** [2006] I.C.R. 250 paragraph 24; Lord Hope **Ravat v Halliburton Manufacturing & Services Ltd** 2012 S.C. (U.K.S.C.) 265; [2012] I.C.R. 389, para. 27). In this case the claimant's place of employment was Equatorial Guinea and therefore prima facie his claim should have been brought there. Second, the Courts have held that a claim may be brought in the UK even if it has not arisen in the UK provided the claim has a sufficiently strong connection with the UK. Thus in **Ravat** Lord Hope held that the Employment Judge was entitled to decide

whether the claim's connection with the UK was "sufficiently strong to enable it to be said that Parliament would have regarded it as appropriate for the tribunal to deal with the claim". The cases have to be consulted in order to determine the factors that qualify as a "connection" for the purpose of assessing jurisdiction.

7. In the cases since the repeal of s.196 the Courts have addressed the issues posed by peripatetic workers (**Lawson** paragraphs 28-33), expatriate workers (**Lawson** paragraphs 35-40), workers in an international enclave (**Duncombe v Secretary of State for Children, Schools and Families** [2011] 4 All E.R. 1020;| [2011] I.C.R. 1312) and workers employed overseas but who return to the UK on a rotational basis (**Ravat** paragraph 5) and have accepted that such persons may, in appropriate circumstances, bring their case before a UK Employment Tribunal.

8. In approaching this case I acknowledge that each case will turn on its own facts. There will be strong cases and weak cases. Inevitably there will borderline cases. The claimant's representative argued that because each case was fact sensitive I could not disturb the Employment Tribunal's findings in fact and that therefore the appeal should be refused. As Lord Hoffman pointed out in **Lawson** however what is in dispute at this stage is not the facts but the interpretation of the facts (**Lawson** paragraph 34). In that situation it is open to the appellants to argue that the interpretation favoured by the Employment Judge was wrong in law. Lord Hoffman also observed however that the evaluation of the facts was a matter of degree. In other words, if the Employment Tribunal Judge had correctly understood the law it was a matter for the Employment Judge to determine the degree to which those facts satisfied the relevant rules. Thus, while Lord Hoffman rejected the suggestion that the Employment Tribunal was exercising a discretion he accepted that the judgment of the finder of fact should enjoy considerable respect. This is so particularly

when the case is a borderline case. In this case I note that the Employment Judge considered the case to be "finely balanced" (paragraph 41). I approach this appeal with those strictures in mind.

9. I should also note that this case is unusual in that it requires consideration of a clause prorogating the jurisdiction of the Scottish courts and tribunals. None of the cases in the House of Lords or Supreme Court or any of the other appellate courts to which I was referred entailed such a clause. Of the cases supplied to me by the parties' representatives, the only case that involved the assessment of a clause prorogating jurisdiction was **Pickard v Hexagon Sociedad Anonima** a decision of Employment Judge Hoey sitting in Aberdeen on 11 June 2018 (S/4102328/2018). The contract of employment contained a clause prorogating the jurisdiction of the Scots Courts identical to that in this case. This was probably because the employer was the same as the appellant in this case. The Employment Judge dismissed the claim having concluded that he had no jurisdiction to hear the case. It was decided on the 11 June 2018. The Employment Judge in this case was referred to **Pickard** but came to a different conclusion.

The Strength of Connection Issue

10. In presenting the appeal the Appellant drew my attention to the long list of connections between the claim and Equatorial Guinea (narrated in Judgment para 33). I note that the list was longer than the list of connections provided by the claimant (Judgment para 34). While of course the number of connections is important it is important to bear in mind that it is the strength of these connections that matters. Some connections will be more significant than others. It is also necessary to be alive to the possibility that connections may be interdependent. The appellants relied on the fact that on the fact that the claimant worked in

Equatorial Guinea. They also relied on the fact that he was accommodated in Equatorial Guinea. But since he worked offshore in Equatorial Guinea waters, the fact that he was accommodated there was a consequence of his employment. Of course there may be situations where such connections may have independent strength. But I do not think that this is such a case

11. The list also reveals that the claimant had connections with other countries. He had a connection with the USA because he was paid in dollars through a US dollar payroll. He had a connection with the Bahamas because the vessel he worked on, the Asset, was registered in the Bahamas. He had in one sense a multitude of connections. His work colleagues were from all over the world. While these connections may not support the jurisdiction of the Scottish Employment Tribunal equally they do not support the jurisdiction of Equatorial Guinea. The Employment Tribunal should therefore winnow the connections so as to separate the wheat from the chaff.

12. The Employment Judge notes the factors connecting the claim to Equatorial Guinea (paragraph 33). In my opinion the key factors in favour of founding jurisdiction in Equatorial Guinea are that the dispute arose from events that occurred there, the claimant was resident in Equatorial Guinea at the material time and the claimant paid Equatorial Guinea taxes. I am satisfied that the Employment Judge took these factors into account.

13. It is evident that the presence of a prorogation clause in the contract was the crucial consideration in the Employment Judge's mind. He describes it as a "powerful factor" (paragraph 35). He states –

"It seemed to me that for the respondent to specifically include this provision which was only afforded to employees who were UK nationals, to recruit the claimant on that basis and then to maintain that the claimant could not avail himself of recourse to a "Scots tribunal", was inconsistent if not "disingenuous", as the claimant's solicitor maintained. That contractual provision connected the claimant to Great Britain (paragraph 36)."

14. At a later point in his judgment he states, "*while the contractual provision is not determinative, it creates a connection with Great Britain*" (paragraph 41). He concluded that although there was a strong territorial pull to the place of work the presence of the prorogation clause taken in combination with other factors created the necessary connection with the UK. Although he does not specify which factors he has in mind, he references the factors set out at paragraph 34 of the Judgment. It is also evident that he was influenced by the fact that the claimant was under the supervision of Mr Jim Beveridge (paragraph 39) who was based in Aberdeen with the appellants' parent company John Wood Group plc. He considered that this was a factor connecting the claim to the UK.

15. In argument the claimant's representative sought to support the prominence given by the Employment Judge to the prorogation clause. He drew attention to the fact that the claimant was asked whether he had drawn "comfort" from the fact that the contract prorogated the jurisdiction of the Scottish Courts and chose Scottish law as the law of the contract. The claimant confirmed that he had taken comfort from the clause (Judgment p17). Finding in Fact 16 explains why the clause was inserted in the contract.

As the claimant held a UK passport, the template contract which was used for him was that which contains a UK jurisdiction clause.

16. As noted above the claimant's contract did not prorogate UK jurisdiction. It prorogated the jurisdiction of the Scottish courts and tribunals. The employment tribunals are part of a UK jurisdiction and jurisdiction in Scotland as opposed to England and Wales is controlled by regulation (SI 2013/1237 schedule r 8(3)). The issue before me however is not the effectiveness of the clause to prorogate the jurisdiction of a Scottish employment tribunal The clause was designed to deal with all forms of civil dispute and it is plain that its intention was to enable proceedings to be brought in the UK as opposed to other possible jurisdictions including Equatorial Guinea. Workers from Equatorial Guinea or the Philippines had an Equatorial Guinea prorogation and choice of law clause. All other workers were given a clause prorogating the jurisdiction of the USA (findings in fact 18-19). Plainly therefore jurisdiction was not selected on the basis of nationality or citizenship alone. Whether the choice of Scotland for a UK passport holder was indicative of the fact that the parent company was based in Aberdeen or because the claimant's "home location" was in Scotland (see contract page 1; page 10 of Core Bundle) is unknown to me.

17. The evidence did not disclose why he took "comfort" from this term (cf. **Ravat** paragraph 8). It may be that he thought it would be easier to raise proceedings in his home country. It may be that he knew nothing about the legal system in Equatorial Guinea or was unclear about the state of employment law in Equatorial Guinea. Whatever the position, the practice of inserting a prorogation and choice of law clause to match his UK passport suggests that the parties thought that Scotland was the correct jurisdiction for an employment dispute.

18. The Employment Judge (as paragraph 36 shows) was influenced in his thinking by the apparent unfairness of the appellant's objection to jurisdiction. He considered that it was inconsistent to draft and agree a term with the claimant only to disown it when a claim was brought. The Employment Judge also thought that the employer was disingenuous in denying that they had agreed to prorogate the jurisdiction of the Scottish Employment Tribunal. In his view the appellants had recruited the claimant on the basis of the term (paragraph 36).

19. The EJ refers in his reasoning to the decision of the Supreme Court in **Duncombe**. Lady Hale acknowledged that ordinarily a claim should be brought in the jurisdiction where the claim arose. But she acknowledged the existence of exceptional cases:

> *"…. where the employment has such an overwhelmingly closer connection with Britain and with British employment law than with any other system of law that it is right to conclude that Parliament must have intended that the employees should enjoy protection from unfair dismissal. This depends upon a combination of factors. First, as a sine qua non, their employer was based in Britain; and not just based here but the Government of the United Kingdom. This is the closest connection with Great Britain that any employer can have, for it cannot be based anywhere else. Second, they were employed under contracts governed by English law; the terms and conditions were either entirely those of English law or a combination of those of English law and the international institutions for which they worked. Although this factor is not mentioned in Lawson v Serco Ltd., it must be relevant to the expectation of each party as to the protection which the employees would enjoy (paragraph 16)."*

20. In her judgment the terms of the contract created an "expectation" that any dispute would be resolved under reference to English Law because of the employee protections it had to offer. Lady Hale evidently considered that this carried with it the implication that the dispute would have to be resolved by an English Court. It follows from Lady Hale's judgment that that a term prorogating the jurisdiction of the Scottish courts and tribunals is relevant to the question of statutory jurisdiction. If an expectation is formed because the courts of Scotland are prorogated and Scots law chosen as the law of the contract then that is a factor that must be considered. Where the expectation arises from the wording of the contract whether it be because it is written in accordance with English Law or because it prorogates the jurisdiction of Scottish courts and tribunals, that expectation is a connection to the UK and its system of employment law. Such a connection differs in nature from considerations such as the place the claim arose and the location of the employer. It appears to me that Lady Hale's judgement permits regard to be had to the expectation of an employee provided the expectation is consistent with other relevant connections. Parties with no connection to the UK and whose dispute has otherwise no connection to the UK could not establish a connection by prorogating the jurisdiction of the UK courts. That, if permitted, would be a form of forum shopping.

21. I accept that the Employment Judge was correct to rely on **Duncombe** in the present case. It is authority for the proposition that a term which invokes the jurisdiction of the UK courts creates an expectation that the employer will honour the term and that this is relevant to the exercise of determining whether a sufficiently strong connection exists between the claim and the UK. It may even be that a clause that prorogates the Scottish Employment Tribunals is a clearer example of a term apt to create the "expectation" identified in Lady Hale's

judgment. I do not need to consider whether any other wrong is committed where a party induces contract by means of such a term and then fails to honour it.

22. The prorogation clause is more than a bare choice of forum. Having regard to the facts and circumstances it demonstrates that the parties considered the claimant had a strong connection with Scotland. The claimant was a UK passport holder. He lived in Scotland and paid UK taxes. While the parties' intentions are not determinative and while the Courts should test the strength of any connection on an objective basis, the clause is a recognition of the claimant's personal connection to Scotland.

23. I note that Lady Hale stated in **Duncombe** (above) that a sine qua non of jurisdiction is that the employer is based in the UK. I do not consider that she had in mind a situation where, as here, the employer is part of a multinational group of companies (see findings in fact 3-7) and where the parent company, John Wood Group plc, is a UK-registered company headquartered in Aberdeen (finding in fact 10).

24. I should note that the appellants' submissions did not provide me with any help in assessing the implications of their argument. I was left to speculate as to what the situation might be if I upheld their challenge to jurisdiction. The appellants did not know anything about the employment law of Equatorial Guinea. They could not tell me whether the Court in Equatorial Guinea would if seized of the claim be obliged to recognise the choice of law clause and apply UK Employment Law legislation to the dispute. I did not consider this to be a satisfactory situation. I note also s. 204 of the Employment Rights Act 1996, although I acknowledge that it has no part to play in this appeal.

The Contractual Wording Issue

25. The appellants also argued that on a sound construction of the contract it assigned jurisdiction to Equatorial Guinea and that this should influence the assessment of the strength of the claim's connection to the UK. They relied on the following term:

> WGEG Limited will comply with all statutory obligations and employment laws of host country.

26. It was argued that this demonstrated that the claimant could not rely on UK employment law and that this term implied that the employment law of Equatorial Guinea was applicable. I reject this submission for the same reasons as the Employment Judge (paragraph 38). The term applies to the appellants and indicates that they will fulfil the statutory obligations and employment laws incumbent upon them under Equatorial Guinean law. It is designed to give rights to the claimant not take away rights he would otherwise have under Scottish Law. It requires to be read if possible along with the clause incorporating the laws of Scotland. In any event the clause does not address the question of forum and does not prevent the claimant from raising proceedings in Scotland. In the absence of any evidence about the employment law of Equatorial Guinea is it is difficult to conclude that the clause undermines the prorogation clause or is inconsistent with the choice of law.

27. In these circumstances I refuse the appeal and remit the case back to the Employment Tribunal to proceed as accords.