EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr S Gregory	v	(1) 48.3 International Consultancy Engineering Services LLC (2) Mr B Beaumont (3) Ms F Sennett (4) Mr J J Trichardt

OPEN PRELIMINARY HEARING

Heard: by telephone **On:** 20 April 2020

Before: Employment Judge Truscott QC

Appearances:

For the Claimant: in person (Ms S Adams as MacKenzie friend)
For the Respondent: no appearance

JUDGMENT on PRELIMINARY HEARING

1. The Employment Tribunal does not have jurisdiction under the Employment Rights Act 1996 (ERA) to hear the claimant's claims of unfair dismissal and unlawful deduction of wages, accordingly the claims are dismissed.

2. In any event, even if the Tribunal had jurisdiction, the claims under sections 13 and 94(1) of the ERA were presented outside the primary time limit contained in sections 23(2)(a) and 111(2)(a) of the ERA as amended by the early conciliation provisions.

3. It was reasonably practicable for the claims to be presented within the primary time limits, accordingly, if the Tribunal had jurisdiction, the claims would be dismissed.

REASONS

Preliminary

1. This has been a remote hearing which has been agreed to by the claimant. The form of remote hearing was fully audio. A face to face hearing was not held because it was not practicable and specific issues could be determined in a remote hearing.

2. This case was listed for a Preliminary Hearing on 21 October 2019 to determine:
   1) Does the claimant's employment with the respondent in UAE have sufficient connection with the UK [more accurately, Great Britain] such as to give the Employment Tribunal jurisdiction to consider his claims?
   2) Did the claimant submit his claims to the Employment Tribunal within the requisite period required by the statute for so doing?

Addressing the first of these issues involved determining whether the claimant had been employed by the first respondent. Addressing the second of these issues involved determining whether the claimant had his employment with the first respondent terminated.

3. Issues which were identified but which were not addressed were:
   (1) The basis upon which the second, third and fourth respondents have been cited as they are not the employer.
   (2) If the ET has jurisdiction, does the claimant have the requisite two years employment under section 108(1) of the ERA.

4. In advance of the hearing, the claimant provided a witness statement, pdf versions of the documents and a skeleton argument.

5. The hearing was conducted by telephone, the oath was administered to the claimant, he confirmed the truth of his statement and answered questions from the Employment Judge. Thereafter submissions were made on his behalf. Although the claims are being dismissed, the Tribunal would like to record its appreciation of the way in which the claimant and Ms Adams assisted the Tribunal at every point in the proceedings.

Findings of fact

6. The claimant is a scaffolding instructor with a number of qualifications which include a Construction Industry Training Board (CITB) qualification. His family reside in Great Britain and he takes his vacation time with them.

7. He commenced employment with 48.3 International Design and Technical Services DMCC in either 14 April or December 2015 working in Dubai as a senior scaffolding instructor. The company offered Construction Industry Training Board (CITB) courses in the UAE. His contract was prepared in conformance with the local laws [1.1-1.11 at para 9.1]. It provided for a six month probationary period. It was unsigned. He was resident in Dubai and had a resident's visa. He was paid monthly

in local currency. As the company only had a Freezone licence, it was only able to trade under strict restrictions. The company was not trading satisfactorily. The claimant was asked to and did resign from the DMCC company on 12 July 2016 [4.1].

8. The formation of an LLC company with an Emirate Partner permitted wider business activity. The LLC (first respondent) was set up on 2 February 2016 in accordance with the local laws and was based in Dubai [3.34]. It had the second, third and fourth respondents as shareholders. Work was moved over from the DMCC company to the first respondent.

9. On 3 August 2016, the second respondent, Mr Beaumont wrote to the passport office in Peterborough requesting a second passport for the claimant. This letter was on the first respondent paper [3.27] and stated that the claimant was employed by the first respondent. It also said "Steve also travels back to the UK for continuous professional development and to work in our sister companies in Reigate and Leeds." The Tribunal heard no evidence about the claimant working in Reigate or Leeds nor what was required for his continuous professional development. In relation to the latter, this did not displace the requirement under his contract to be resident in Dubai. On 14 August 2016, the claimant returned to Dubai where he worked until 27 March 2017.

10. On 31 August 2016, the CITB wrote to the first respondent to say that the International Licence Agreement with the CITB was due to expire on 5 November 2016 and would not be renewed [16.1]. The claimant said he was told that this did not necessarily mean the end of work for him, so he did not accept other employment.

11. The claimant has produced documents to show he was providing training on behalf of the first respondent for Layler in October 2016 through to March 2017 [26.1].

12. On 10 January 2017, the third respondent Ms Sennett asked the claimant to sign a new contract with the first respondent [27.3-27.7]. The claimant raised a number of points, he took issue with being described as an archives clerk and there is reference to a probationary period of six months. There was a probationary period of six months in the DMCC contract. He was told that the job title was selected simply to bring his visa application within the constraints [27.1]. The claimant did not sign the contract.

13. The licence for the first respondent was due to expire on 1 February 2017 and was not renewed. The claimant was paid his wages in January 2017 [31.1-31.2]. He was not paid thereafter.

14. He returned to the UK on 10 April 2017 as he was unable to stay in Dubai because as he was not being paid by the first respondent and was at risk of imprisonment. He had no contact from the first respondent in this period. When he returned to the UK, the claimant sought payment of what he considered was due but was "fobbed off".

15. The claimant submitted a grievance letter on 22 February 2019 and his ET1 thereafter.

16. There is a sister company [29.3] 48.3 Scaffold Design Limited which is a UK entity in which Mr Beaumont is a shareholder. The addresses given for the second, third and fourth respondents are addresses for that or another UK entity, 48.3 Design Training Mentoring Ltd, The claimant did not undertake any work in the UK for the UK companies despite what was said in the letter to the passport office dated 3 August 2016 [3.27].

Submissions

17. In essence, the claimant submitted that he was never dismissed so his claim was in time. He submitted that his contract was subject to UK law because his home is in the UK, his UK CITB qualifications were the reason for his employment, 48.3 has a sister UK entity with a principal office in the UK and under his UAE contract he has to return home every six months or for medical requirements. The respondents' position was taken from its ET3 as it did not participate in the proceedings.

Law

18. The right to claim unfair dismissal is set out in section 94 of the ERA which provides:

(1) An employee has the right not to be unfairly dismissed by his employer.

19. The Act contains no express limitations on territorial scope. In the combined appeals in **Lawson v. Serco Ltd, Botham v Ministry of Defence, and Crofts v Veta Ltd** [2006] ICR 250 HL, the House of Lords considered for the first time what limits apply to the territorial scope of employment legislation which contains no express limitations on the reach of an employment tribunal's jurisdiction. In **Lawson**, Lord Hoffmann (who gave the only reasoned speech) noted that the right to pursue a claim for unfair dismissal before a British employment tribunal necessarily does not have worldwide effect: there are implied territorial limitations to which the courts must give effect. in delineating the territorial span of a tribunal's jurisdiction, the primary factor is the location of work of the claimant. For those employees who 'commute' from Great Britain to perform work abroad (so-called partial expatriates), it will be necessary to show a sufficient connection with Great Britain and British employment law to displace the expectation that any claim against their employer would have to be pursued in the jurisdiction where the work is performed. For those working and living outside Great Britain (so-called true expatriates) it will only be in exceptional cases that a tribunal has jurisdiction over a claim in Great Britain. The employee in such a case would have to show an overwhelmingly closer connection with Great Britain and British employment law than with the jurisdiction in which they live and work. The determination of the implied limits on territorial jurisdiction will not be dependent simply on classifying where the

employee lives, works or is based, but on an analysis of the entire factual matrix.

20. In **Lawson**, Lord Hoffmann set out a number of scenarios in which a tribunal might have jurisdiction over a claim despite the employee working outside Great Britain. This covered peripatetic employees, expatriate employees, those posted abroad to perform work relating to Britain and those employed overseas in a British enclave. The Supreme Court in **Duncombe v. Secretary of State for Children, Schools and Families (No 2)**, [2011] ICR 1312 SC *(*per Lady Hale at para 8) observed the folly of trying to 'torture the circumstances of one employment to make it fit one of the examples given'. This was reiterated in **Ravat v. Halliburton Manufacturing and Services Ltd**, [2012] ICR 389 SC where the Supreme Court, faced with an employee who did not readily fit into any of the **Lawson** examples, stressed that the resolution of territorial jurisdiction will depend on a careful analysis of the facts of each case, rather than deciding whether a given employee fits within categories created by previous case law.

21. Although the established categories in the **Lawson** line of case law serve as a useful guide, the starting point must therefore be the principles laid down in **Duncombe** and **Ravat**, rather than on giving a particular label to the circumstances of the employee in question. In each case it will be 'a question of fact and degree as to whether the connection [with Great Britain] will be sufficiently strong to overcome the general rule that the place of employment is decisive' (per Lord Hope in **Ravat**, at para 28). Having applied these principles and reached a conclusion on the facts of a particular case, it will often be a useful yardstick to test the conclusion reached by asking whether on those facts it can be said the employee has 'equally strong connections with Great Britain and British employment law' as the established categories set out in **Lawson**.

22. Location of work is therefore the pre-eminent factor in determining whether territorial jurisdiction exists. In **Ravat**, Lord Hope described as 'the general rule' that the place of employment is decisive (para 28).

23. In determining the implied limits to territorial jurisdiction for employees working outside Great Britain (and who do not fall within the peripatetic category), there is a distinction between those employees who commute from Great Britain to work abroad (partial expatriates) and those who both work and live outside Great Britain (true expatriates). However, for both kinds, the starting point is that employment statutes ordinarily have no application to work outside the UK (see **Powell v. OMV Exploration and Production Ltd**, [2014] ICR 63 EAT*)*.

24. The burden on true expatriates is more onerous than the burden on partial expatriates to show a sufficient connection with Great Britain. True expatriates must have an overwhelmingly closer connection with Great Britain and British employment law than with any other jurisdiction. As Lord Hope put it, for the true expatriate, it will be exceptional to establish territorial jurisdiction, while for

the partial expatriate it will not be exceptional (**Ravat** at paras 28–29). The comparative exercise does not include a comparison between the system of employment legislation available in Great Britain and that available in the jurisdiction where the employee was working at the time of his dismissal.

25. It was clarified by the Court of Appeal in **Bates van Winkelhof v. Clyde & Co LLP**, [2012] IRLR 992 (at para 98) that the comparative exercise – analysing the strength of the connection between the claimant and Great Britain versus the strength of the connection with the foreign country – does not apply to partial expatriates. In resolving whether the partial expatriate has a sufficient connection with Great Britain, the whole factual background must be considered. Thus according to the Supreme Court (see **Ravat** at 27), the fact that the employment relationship was 'rooted and forged' in Great Britain because the employee is British and was recruited in Great Britain by a British company, will be relevant, though on its own is not sufficient to automatically qualify an employee who works abroad to bring claims in Great Britain. Other factors which were considered probative in the **Ravat** case included the fact that the claimant was treated as a commuter by his employer such that all the benefits for which he would have been eligible if he had worked in Britain were preserved for him.

26. An additional relevant factor in determining the sufficient connection with Great Britain is the parties' choice of law or jurisdiction and any representations made by the employer to the employee about the protection of British employment legislation.

27. Another point to note from **Ravat** (see Lord Hope at para 30) is that a court must be circumspect when taking into account the corporate structure of the employer. Corporate entities may use subsidiaries and service companies incorporated, registered or headquartered in a particular country for tax or other strategic reasons. The 'location' or base of that employer may therefore be of little assistance in determining the question of a sufficient connection with Great Britain. As Lord Hope stated in **Ravat**: 'The vehicles which a multinational corporation uses to conduct its business across international boundaries depend on a variety of factors which may deflect attention from the reality of the situation in which the employee finds himself … it is notorious that the employees of one company within the group may waft to another without alteration to their essential function in pursuit of the common corporate purpose' (para 30).

Termination of employment

28. As a matter of general contract principle, according to Chitty on Contract, the wrongful repudiation or wrongful purported termination of a contract cannot in itself terminate the contract, at least unless it renders any continuance of the contract totally impossible by reason of its catastrophic nature. There is, however, a body of authority which treats wrongful dismissal as an exception to that general principle, so that the contract of employment is said to be

terminated by wrongful dismissal even where the employee refuses to accept the dismissal as a termination of the contract. That view is a conclusion based on the fact that common law and equitable remedies will not normally be so applied as to keep a contract of employment in being following a wrongful dismissal. The contrary view is that the contract of employment is not necessarily in principle terminated by wrongful dismissal even though no remedy may lie to maintain the contract in being. That theoretical issue has acquired a new importance because of the statutory consequences attached to the termination of the contract of employment. The ultimate answer is that "termination of the contract of employment" is not really a concept with a single clear meaning but with that qualification the better view is in favour of regarding wrongful dismissal as not in principle terminatory of the contract unless accepted as such by the employee.

29. This was decided in **Geys v. Societe Generale** [2013] 1AC 523 SC where Lord Wilson (with particular support by Lord Hope) held that the common law norm was the elective theory. This was now to be the correct view on Supreme Court authority, as a matter of policy because it preserves the rights of the innocent party and does not reward the contract breaker. Lord Wilson did, however, accept that as far as remedies are concerned, it remained the law (1) that there would rarely if ever be specific performance of a (personal) contract of employment and (2) that, even if an employee does not accept the repudiation, what he or she may not do is to sue the employer for wages into an indefinite future because those wages would not have been earned (thus the employee is left with the action for damages for wrongful dismissal, with its normal restrictive rules—always the basis for the argument that in most 'ordinary' cases the practical difference between the automatic and elective theories was miniscule).

30. In the elective case of **Gunton v. Richmond-on-Thames BC** [1980] ICR 755 CA, Buckley LJ said that, although in law the employee must accept the repudiation, 'in a wrongful dismissal case the court should easily infer [that acceptance]' but Lord Wilson in **Geys** (at [92]) expressly disapproved that view because it would deprive the innocent party of the real value of the power of acceptance. Lord Wilson's view was that acceptance of a repudiatory breach should be unequivocal. If the right of the innocent party to preserve the contract could easily be displaced by inference, it would deprive the innocent party of a benefit of real value. Not turning up for work is still likely to be an act deemed to be acceptance of the breach bringing the employment contract to an end. The acceptance need not be communicated to the employer, see **Mr Clutch Auto Centres v. Blakemore** UKEAT/0509/13 (8 May 2014, unreported)

Time limits

30. The time limit for a complaint of unfair dismissal is set out in section 111.

111 Complaints to [employment tribunal]

(1) A complaint may be presented to an [employment tribunal] against an employer by any person that he was unfairly dismissed by the employer.

(2) [Subject to the following provisions of this section], an [employment tribunal] shall not consider a complaint under this section unless it is presented to the tribunal—

(a) before the end of the period of three months beginning with the effective date of termination, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

Unauthorised deductions from wages

31. Section 13 contains the deduction from wages provisions.

13 Right not to suffer unauthorised deductions

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

None of the exclusions apply in this case.

32. Section 23 sets out the time for making a claim to the Tribunal.

23 Complaints to employment tribunals

(1) A worker may present a complaint to an employment tribunal—

(*a*) that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)), (2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—

(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or

(b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.

33. A Tribunal may only extend time for presenting a claim where it is satisfied of the following:

"It was "not reasonably practicable" for the complaint to be presented in time

The claim was nevertheless presented "within such further period as the Tribunal considers reasonable"

(Section 23(4) ERA 1996.)

34. In accordance with section 207B(4) of the ERA 1996, compliance with the early conciliation procedure extends time:

"If a time limit would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period".

35. There are two limbs to the formula of reasonable practicability. First, the employee must show that it was not reasonably practicable to present the claim in

time. The burden of proving this rests on the claimant (**Porter v. Bandridge Ltd** [1978] ICR 943 CA). Second, if she succeeds in doing so, the Tribunal must be satisfied that the time within which the claim was in fact presented was reasonable.

36. In **Dedman v. British Building Engineering Appliances Ltd.** [1974] ICR 53 Lord Denning held that ignorance of legal rights, or ignorance of the time limit, is not just cause or excuse unless it appears that the employee or his advisers could not reasonably be expected to have been aware of them. If he or his advisers could reasonably have been so expected, it was his or their fault, and he must take the consequences. Scarman LJ indicated that practicability is not necessarily to be equated with knowledge, nor impracticability with lack of knowledge. If the applicant is saying that he did not know of his rights, relevant questions would be:

> 'What were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived? Should there prove to be an acceptable explanation of his continuing in ignorance of the existence of his rights, it would be inappropriate to disregard it, relying on the maxim "ignorance of the law is no excuse".

The word "practicable" is there to moderate the severity of the maxim and to require an examination of the circumstances of his ignorance'

37. This approach was endorsed in **Walls Meat Co. Ltd. v. Khan** [1979] ICR 52. Brandon LJ dealt with the matter as follows:

> 'The performance of an act, in this case the presentation of a complaint, is not reasonably practicable if there is some impediment which reasonably prevents, or interferes with, or inhibits, such performance. The impediment may be physical, for instance the illness of the complainant or a postal strike; or the impediment may be mental, namely, the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to, essential matters. Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of three months, if the ignorance on the one hand, or the mistaken belief on the other, is itself reasonable. Either state of mind will, further, not be reasonable if it arises from the fault of the complainant in not making such inquiries as he should reasonably in all the circumstances have made, or from the fault of his solicitors or other professional advisers in not giving him such information as they should reasonably in all the circumstances have given him'.

38. **Palmer & Saunders v. Southend-on-Sea Borough Council** [1984] ICR 372 CA followed this line and talked in terms of reasonable possibility at page 384-385.

DISCUSSION and DECISION

39. The claimant was employed by the first respondent under a written contract which was never signed by him under UAE law to work in the UAE and was paid in local currency commencing around the time of his resignation from the DMCC company. The contractual arrangements were very like those he had with the DMCC

company. The Tribunal makes no finding as to continuity of employment between the DMCC company and the first respondent. Any connection with Great Britain flowed from the personal characteristics of the claimant, his family and his qualifications and not his employment. He could not be considered a "commuter" as he lived and worked in Dubai. Even if the matters identified in the claimant's submission (above) move him into the category of commuter, the claimant still does not have a sufficient connection to British law. Leaving aside the categories discussed in **Lawson** and assessing the facts overall, this was a contract for work in the UAE under UAE law and paid in local currency. There was no connection with the employment law of Great Britain. The Tribunal has no jurisdiction and the claims against the respondents are dismissed.

40. If, contrary to what the Tribunal has found, British employment law did apply, so do the time limits. The claimant says he was never dismissed but he has not been paid since January 2017. Failure to pay is a fundamental breach of contract in British law. In consequence, the claimant had to leave Dubai, his place of work, on 10 April 2017 because of the draconian nature of local labour laws. This constituted acceptance of the repudiatory breach even if the claimant would have wanted otherwise. In these circumstances, his employment terminated on 10 April 2017 at the latest. The time limit for lodging a claim began and by the time it was made in 2019, the claim was well out of time. The Early Conciliation procedures make no difference in this case. The claimant said he was fobbed off when he asked for payment but this does not mean it was not reasonably practicable to make the claim in time. The Tribunal considered that it was reasonably practicable for the claimant to submit his ET1 in time. Accordingly, the claims against all respondents would have been dismissed.

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Employment Judge Truscott QC

Date 28 April 2020