EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr Y Saloo	v	**Interserve Learning and Employment (Services) Ltd**

Heard at: **Leeds** **On:** **12 & 13 August 2020**

Deliberations 17 August 2020

Before: **Employment Judge T R Smith**

Appearance:

For the Claimant: **The Claimant in person**

For the Respondent: **Ms Shepherd (counsel)**

RESERVED JUDGMENT

The Claimant was not employed either actually or de facto by the Respondent. The Claimant does not have sufficiently strong connection with the United Kingdom to entitle him to bring a claim pursuant to Rule 8(2)(d) of the Employment Tribunal Rules of Procedure 2013. The Tribunal does not have jurisdiction and the claim is dismissed.

REASONS

1. **The Issues.**

The agreed issues, set out in an order of Employment Judge Wade dated 8 April 2020, were as follows: –

- Who was the Claimant employed by?
- Was he employed by ESG Saudi Arabia LLC or was the Claimant employed by the Respondent?
- If the Claimant was not directly employed by the Respondent was, he de facto employed by the Respondent

- Did the Claimant have a sufficiently strong connection with the United Kingdom to entitle him to bring a claim pursuant to rule 8(2)(d) of the Employment Tribunal Rules of Procedure 2013.

2. **The Evidence**

2.1. The Tribunal had before it, initially, a bundle of documents totalling 278 pages, bundle A.

2.2. However, there were issues with the documentation.

2.3. Firstly, the Claimant wanted to include a supplemental bundle consisting of some seven pages which he had disclosed to the Respondent, but which the Respondent contended was not relevant, and had not included in bundle A. Having heard representations the Tribunal admitted those documents, which it labelled bundle B.

2.4. Secondly Claimant wished to introduce a further bundle, totally 249 pages, which were the result of a reply to a request he made to the Department of Trade and Industry under the Freedom of Information Act. The heavily redacted documents had only been provided to him on or about 11 August 2020. Ms Shepherd's position was they were not relevant but she had had the opportunity of reviewing those documents and was not prejudiced by their disclosure. Whilst the Tribunal also had concerns as to relevance of the documentation the Tribunal was persuaded to admit those documents which it labelled bundle C. As it transpired neither party took the Tribunal to a document in bundle C.

2.5. A reference to a number is a reference to a document in bundle A unless the context provides otherwise.

2.6. The Tribunal heard evidence from Mr Ben Brown, partner with Addleshaw Goddard (Middle East) LLP and Mr Oliver Sawle, General Manager, both on behalf of the Respondent.

2.7. For the Claimant the Tribunal heard oral evidence from the Claimant and also had before it a written statement from Mr Wiktor Sosnowy. Mr Sosnowy was not called to give evidence and therefore could not be cross-examined. The Tribunal therefore attached less weight to his evidence.

2.8. The mere fact that the Tribunal has not referred to each and every piece of the voluminous evidence presented to it does not mean that it did not consider such evidence, even if it has not expressly mentioned it in the judgement.

3. **Terminology.**

3.1. Both parties used a number of abbreviations in their statements and evidence, and for clarity the Tribunal has adopted those abbreviations.

3.2. ESG Saudi Arabia LLC is referred to as ESG.

3.3. The Kingdom of Saudi Arabia is referred to as KSA.

3.4. During the course of the Claimant's employment Interserve PLC was placed into administration and its assets and liabilities transferred to Interserve Group Limited, a company wholly-owned by Interserve PLCs lenders. It was common ground that both the Respondent and ESG were subsidiary companies, the ultimate holding company initially being Interserve PLC and

latterly by Interserve Group Limited. Both parties referred to these as *"the holding company".* Throughout the course of this judgement the Tribunal has referred to these two companies as *"the holding company".*

3.5. Other subsidiary companies, ultimately owned by the holding company have been referred to by the Tribunal as *"group companies"* unless there was a specific reference to the Respondent.

3.6. Whilst dealing with terminology it is appropriate that the Tribunal explained that an Iqama is a residency permit issued in the KSA and, arguably, required by a person to work in the KSA.

4. **Submissions**

4.1. Somewhat unusually the Tribunal considered it helpful to record the respective parties' submissions at this juncture in its judgement, for the simple reason it would allow a reader to understand both the legal arguments and the factual matters in dispute.

4.2. In the Tribunal's findings of fact and subsequent discussion, it has concentrated on those disputes. It has not dealt with each and every minor factual dispute or argument.

4.3. The Tribunal heard submissions from both parties. The Tribunal had regard to all the submissions in reaching its judgement even if it has not recorded each and every one of them.

5. **The Claimant**

5.1. The Claimant relied upon oral submissions. They fell into a number of themes.

5.2. The Claimant emphasised that he was recruited by UK registered agency and although ESG was a KSA company, the holding company was British and he wasn't employed by ESG.

5.3. Linked to the above submission that he wasn't employed by ESG, although he signed contract documents with that name as his employer, they were *"fraudulent"* because he had no right to work in the KSA as he did not have an Iqama.

5.4. If the Claimant was employed by ESG it was a mere nominee and various disclosed policies showed that it was the holding company who exercised supervision and day-to-day control over ESG.

5.5. His salary was paid into a UK account and he had accommodation in the UK and he could not access a remedy in the KSA for his alleged unfair dismissal.

5.6. His employment had a strong connection with the United Kingdom and its government because he was representing Britain and British business and the government had given considerable assistance to the holding company. Linked to this, companies within the group received most of their funding from government contracts. In effect whoever he was employed by within the group, in reality he was employed by the British government or, if not, the connection was so close to the United Kingdom that he should be allowed to ventilate his complaint in the United Kingdom.

5.7. Mr Saloo in support of his arguments referred the Tribunal to **Lodge -v- Dignity in Dying and others UKEAT/0252/14** and made specific reference to the facts therein.

6. **Respondent**

6.1. Ms Shepherd relied upon a written submission which she briefly orally amplified.

6.2. In essence she contended that the contractual documentation clearly pointed to the fact that the Claimant was employed by ESG and that his contract of employment was subject to the laws of KSA.

6.3. Although ESG was owned by two UK-based limited companies and ultimately by the holding company it had always remained a foreign limited liability company registered in the KSA.

6.4. She submitted the Claimant's assertion that he was de facto employed by the Respondent because of his immigration status within the KSA, namely he only held a business visa as opposed to an Iqama, was not, on the evidence, capable of affecting status of the Claimant's employment contract or the identity of his employer, ESG.

6.5. Turning to the issue of whether the Claimant had a sufficiently strong connection with the United Kingdom she submitted the balancing act had to be undertaken and it was for the Claimant to show that he had much stronger connection with Great Britain and with British employment law and any other system of law:- **Duncombe -v- Secretary of State for Children Schools and Families (Number two) 2011 ICR 1312.**

6.6. There was she said no duty on the Tribunal to seek to seek to evaluate the legal rights in the two jurisdictions, **Creditsights Ltd -v-Dhunna 2015 ICR 105.**

6.7. She submitted this was not an exceptional case and the only matter that weighed in the Claimant's favour was that ESG was part of the holding company which was based in the United Kingdom.

Findings of fact.

7. **Introduction**

7.1. The Claimant is a British citizen.

7.2. He does not have his own property in the United Kingdom, but, when on vacation from working abroad, stayed with his parents.

7.3. Prior to his employment in the KSA the Claimant had worked abroad as a teacher in China.

7.4. The Respondent is an educational and training provider based in the United Kingdom although operating globally.

7.5. It is part of the group which ultimately reports to the holding company.

7.6. ESG is a company registered in the KSA.

7.7. ESG uses the trading name of *"Interserve Learning and Employment International"* or sometimes *"Interserve Learning and Employment".*

7.8. ESG provides vocational training and educational services to Saudi nationals and operates from a number of colleges within the KSA.

8. **The Contractual Documentation**

8.1. The Claimant applied for employment in the KSA when in the United Kingdom. Initially matters were handled by a UK recruitment agency.

8.2. A letter of offer was made to the Claimant on 29 November 2016 (44) signed by Ms Al-Saif, HR Business Partner, with *"Interserve Learning and Employment"*. She was employed by ESG. The details on the footer to the letter made it clear that the employment was with ESG. The letter stated that the employment was subject to the law of the KSA and Ms Al-Saif stated she looked forward to *"welcoming you to our company".*

8.3. The Claimant entered into a contract of employment on 04 December 2016 (46 to 54) with ESG.

8.4. The contract before the Tribunal was in both Arabic and English. The Tribunal, where it has quoted from the contract, has repeated the contractual terms verbatim and what may appear to be typing errors are in the original document and not in the Tribunal's reproduction of the evidence.

8.5. It was not disputed that at all material times the contractual documentation placed before the Claimant was in English.

8.6. Under the terms of the contract the Claimant was to provide chemistry tuition at ESG's College in Al Juaymah, an apprenticeship Institute.

8.7. The Claimant's contract was subject to ESG's policies, terms and conditions as amended and approved by the KSA Ministry of Labor (sic), where such approval was required.

8.8. In addition to a salary, calculated in Saudi Riyals, the Claimant was provided with various allowances. The Claimant accepted in cross examination that under the law of the KSA his remuneration had to be broken down into salary, transportation and accommodation.

8.9. The Claimant could not open a bank account in the KSA because he did not have an Iqama . His salary was paid into a UK bank but his payslips were in Saudi Riyals and the money transferred from the KSA to his UK bank account, where it was converted into pounds sterling.

8.10. The Claimant paid no tax in the KSA (as there is no income tax regime). The Claimant was not subject to any UK tax or national insurance deductions on the money paid into his English bank account.

8.11. The contract specifically provided that the Claimant was entitled to receive *"end of service benefits pursuant to articles 84 through 88* (sic) *of the Saudi Labor* (sic) *Workmen Regulation as amended from time to time"*(47).

8.12. Clause 12.1 of the agreement provided that *"this agreement shall be governed for all purposes by, and all matters not provided for therein shall be subject to, the Saudi Labor* (sic) *Regulation. All disputes arising in connection of this agreement shall be referred for settlement to the relevant Labor* (sic) *Office in the Kingdom of Saudi Arabia"(54)*

8.13. The contract also contained an entire agreement clause(54).

8.14. The contract was renewed and the renewals were in similar terms to that already recited by the Tribunal. Specifically, the subsequent contract and extension notices were in the name of ESG (55, 64 and 65). The Claimant also received a salary increase. The Tribunal did not accept the Claimant's evidence, given that he was educated man, that he believed he was employed by the Respondent and not ESG on the face of the documents. Nor did the Tribunal accept the Claimant's evidence that if he had noticed he was employed by ESG he thought he would be transferred to the Respondent once an Iqama was secured for him. If that was the case it is noticeable that at no stage did the Claimant raise a formal grievance prior to notice of termination, as to the identity of his employer. Given the length of time the Claimant was employment in the KSA the Tribunal did not find the Claimant would allow this matter to pass unchallenged for such a period of time if he genuinely believed the contractual documentation was wrong and he was employed by the Respondent.

8.15. The notice of none renewal of the Claimants contract was issued by ESG (67) and reminded the Claimant that he remained bound by his obligation of confidentiality to ESG set out in the contract. The Tribunal was satisfied the decision as regards nonrenewal was made by ESG. There was no cogent evidence before the Tribunal that the Respondent played any part in the decision of whether or not to renew the Claimants contract.

8.16. When the Claimant's employment was terminated by ESG his severance payment and termination documentation was in accordance with his contract, which in turn applied the law of the KSA (69/70). He received approximately 44,000 Riyals as a severance payment under KSA law applying articles 84 through 88. To put the severance payment in context the Claimant's annual salary was in the region of 170,000 Riyals.

8.17. The Tribunal noted the Claimant's argument that on the confidentiality and severance agreement (69/70, the registered office number and address, at the bottom of the paper, was in the United Kingdom. He contended that relying upon this agreement he was not employed by ESG. Looking at the agreement in its totality it specifically referred to settlement agreement being between ESG and the Claimant and also at the top of the notepaper stated *"ESG.Saudi Arabia an Interserve company".*

8.18. The Tribunal was not satisfied that by reference to the company number and registered office on the notepaper that have been used this converted the Respondent to the Claimants employer or de facto employer. In fact, the company number on the bottom of the notepaper related to Triangle Trading Ltd. Triangle Trading Ltd was one of the two companies that controlled the shareholding in ESG. Triangle Trading Ltd was ultimately a subsidiary company of the holding company, as was the Respondent, but they were not one and the same company.

9. **The Working Arrangements**.

9.1. The Claimant throughout his contract was based in the KSA. He provided his services in the KSA and lived there.

9.2. The most reliable evidence available to the Tribunal was that ESG employed approximately 118 staff in the KSA.

9.3. All the pupils taught by ESG were Saudi nationals. The teaching and management staffing was a mixture of Saudi and foreign nationals. Approximately 50% of the teaching cohort consisted of British nationals.

9.4. The registered manager of ESG was a Saudi national, Mr Al-Sulami.

9.5. ESG had an HR department, finance department and its own management structure. It had a responsibility for the maintenance and running of the premises from which it operated, which it subcontracted to another company within the group.

9.6. The Claimant took day-to-day management instructions from his line manager, employed by ESG.

9.7. The acts or omissions which the Claimant contended resulted in his unfair dismissal were acts or omissions committed in the KSA.

10. **Management**

10.1. The Tribunal accepted that given the number of subsidiary companies operated by the holding company within the Persian Gulf, including the KSR, that management from other more substantial subsidiary companies would from time to time visit and attend meetings at ESG. The Tribunal further found that that ESG would put forward budgets and predictions on student intake which were referred to other companies within the group and on occasions escalated matters outside ESG, if local management needed greater expertise, specialist help or resources. The Tribunal attached limited significance to this evidence as to actual or de facto employment of the Claimant. In any global company the Tribunal would expect subsidiary companies to have to provide business plans and financial projections for the purposes of overall planning to, more substantial subsidiary companies and ultimately to the holding company. Similarly, the Tribunal did not find the fact that senior management from other subsidiary companies, or the holding company, visited ESG occasionally to deliver roadshows to explain the state of the business, and future plans, was anything other than part of a communications strategy that any global company would utilise in relation to its subsidiaries to disseminate information and objectives. There was no cogent evidence that either the Respondent or the holding company was in reality a controlling mind of ESG.

10.2. Whilst the Tribunal noted that the evidence of Mr Sawle had to be treated with some caution, as he did not directly manage ESG whilst the Claimant was employed there, it preferred his evidence on day-to-day operations within that company. The Tribunal reach this decision firstly because it found the Claimant had a blinkered and biased perception of matters and secondly Mr Swale had the advantage of access to the documentation from his predecessor coupled with a handover and confirmed there had been no major changes that he discovered in the business affairs of ESG. The Tribunal found further support for this conclusion by reference to the structure in place at ESG whereby there were resources available for most decisions to be made within the company.

11. **Policies.**

11.1. Various policies were issued to the Claimant during his employment including a leave policy by *"Interserve Learning and Employment*

International". This was, it will be remembered, a trading name of ESG. The policy included details of holiday entitlement with public holidays being as defined by the Saudi Arabian government, and any underused holiday being unable to be carried forward except as otherwise determined by Saudi labour law. The Tribunal found this supported the Respondent's contention that the Claimant was employed by ECG and subject to the law of the KSA. The Claimant contended that many of the policies that were issued to him were created by the Respondent and not by ESG. The Tribunal was not able to identify whether it was the Respondent that authored all of the policies the Claimant referred too. What the Tribunal found was that not all the policies issued to the Claimant were authored locally by ESG. In the Tribunal's judgement the fact a policy was authored elsewhere did not mean that the Respondent or the holding company was the Claimant's employer in preference to ECG. The Tribunal was persuaded there were many good reasons why, for example, a policy might be prepared by a holding company to deal with matters such as human trafficking or corruption that potentially could apply anywhere within the holding company's global network, and why therefore, it would be reasonable to have a consistent corporate approach to such issues. The mere fact a policy was authored, other than by the employer, did not mean, as the Claimant suggested, in the Tribunal's judgement that the author was the Claimant's employer. The fallacy of the Claimant's argument is exposed by a simple example. Suppose an employer bought in policies from a third-party specialist provider which were to be applied in the employer's business. On the Claimant's argument that would make the third-party specialist provider the employer of the employees. That simply is flawed in law.

11.2. Neither did the Tribunal find the Claimant's argument that he was clearly employed in Great Britain, because some of the policies issued to him in the KSA, sought to use definitions of matters such as harassment and victimisation which closely mirrored the definitions in the Equality Act 2010. A global company was entitled to seek to try and ensure uniform standards of conduct for all its employees, wherever they operated, subject to the constraints of any local law. Indeed, this is well illustrated (132) by correspondence from the Head of Health and Safety in the KSA addressed to all *"group employees"* dated 30 April 2017 setting out health and safety standards which were *"UK aligned".* As the author of the email said *"this can only benefit our staff in KSA as the 18001 (safety management system standards) are probably the best worldwide thus very highly regarded no matter where the operation is".*

11.3. Similarly, the fact that the whistleblowing policy, issued by the holding company and available to employees at ESG (see page 117A) encouraged employees, if they could not resolve matters internally via ESG procedures , to contact the Group General Counsel did not persuade the Tribunal the Claimant was employed by the Respondent or de facto by the Respondent. Applying its industrial knowledge the Tribunal was satisfied that it was not uncommon in a large global company to have an ultimate right of reporting to the holding company of a whistleblowing concern.

12. **Myinterserve/DPA/e-mails**

12.1. The Claimant considered that as he received, from time to time information from the Respondent about its activities, or the holding company this established he was not employed by ESG. The Tribunal rejected that argument. Whilst the Tribunal did find that he received such information the Tribunal did not regard that as an indicator the Claimant was an employee of the Respondent or their de facto employee or by the holding company. The Tribunal have set out two examples for the parties to understand its reasoning on this point. The first was an email dated 25 April 2017 (130) which stated *"although a direct employee of Interserve Learning and Employment International* [the Tribunal adds this was ESG] *you are ultimately a valued member of the interserve group of companies with some 85,000 colleagues worldwide. As part of our ongoing commitment to enhance communication, awareness and information sharing across our organisation we are delighted to announce that all the employees of interserve learning and employment International can now register with Myinterserve".* It was clear from reading that email that the Claimant was expressly employed by ECG but was given access to group information, opportunities and benefits via a portal branded "Myinterserve". Again, applying industrial knowledge, it is common for a holding company to allow employees of its subsidiaries to access group benefits and have access to group opportunities. That did not make the Respondent the Claimant's employer or a de facto employer.

12.2. The second example was the fact the Claimant was informed, probably with all of the group employees that a new chief executive officer been appointed at Interserve PLC (137A). Again, that did not make the Respondent, or the holding company, the Claimant's employer or de facto employer. It was simply normal corporate communication.

12.3. Nor is the Tribunal persuaded that the fact the Claimant was invited to take part in a group survey, no doubt along with all other employees of subsidiaries, meant that he was not employed by ESG. There may have been some personal data given by the Claimant to the holding company in the survey or whilst seeking to gain benefits of using Myinterserve but he consented to giving that information. The fact that some personal data may have been volunteered by the Claimant to the holding company did not oust the clear contractual position.

12.4. The Tribunal did not find that the various emails (they were numerous and the mere fact the Tribunal has not referred to each and every one should not be taken to imply the Tribunal did not give them careful consideration) the Claimant referred to were such to establish the Respondent or the holding company was his employer and not ESG either looked at individually or taken together. In reality whilst the Tribunal accepted the Claimant has received emails from other subsidiary companies or the holding company and has been informed of events elsewhere in the group, and on occasion had, for example in connection with IT, sought support from the group, the quality of the e-mails even viewed cumulatively were not such to show that ESG was not the Claimants employer.

13. **The "fraudulent" contract and access to legal rights in the KSA.**

13.1. Whilst working in the KSA the Claimant did not hold an Iqama. His passport was stamped *"not permitted to work".* However ,the Claimant continued to work for ESG in the KSA until his contract was not renewed by ESG. No action was taken against him or against ESG by the KSA authorities.

13.2. The Tribunal heard evidence from Mr Brown and found him to be a credible and knowledgeable witness who could be regarded as an expert. Although based in the United Arab Emirates he acted as an adviser to international companies on the law of the KSA with specific expertise in employment law. With his previous employer he had spent six years with a law firm registered in the KSA. He very properly drew to the Tribunal's attention that there was no concept of judicial precedents in the KSA and nor was there a comprehensive reporting system so it was not always possible to reach a conclusive interpretation on how a point of law would be determined, other than applying his experience. This information as the lack of legal precedent, which was volunteered, added to his credibility in the eyes of the Tribunal.

13.3. Looking at the evidence in its totality the Tribunal accepted that an Iqama was technically required for a person to work in the KSA.

13.4. Nevertheless, given the difficulty in obtaining an Iqama, visas were frequently used to facilitate employment. The visa options to facilitate short-term working for foreign nationals were limited and a visa would result in a person's passport been stamped *"not permitted to work"* . In reality, visas were used by international companies and foreign nationals to work, if an Iqama could not be obtained. Whether the authorities in the KSA would issue an Iqama was not something that could be determined with certainty and factors such as a quota having already been reached would be grounds to turn down a valid application. The Tribunal noted that Mr Sawle, although not a lawyer, but a person who'd worked for a number of years in a management role in the Persian Gulf agreed with Mr Brown's opinion. He said whilst it was preferable to have an Iqama, because of the somewhat inconsistent manner in which they were issued or rejected, many employers within the KSA used business visas.

13.5. The Tribunal concluded that the method utilised to employ the Claimant would therefore, whilst not optimal, and technically in breach of the law of the KSA, was actually used fairly frequently in practice.

13.6. Mr Brown's evidence was that relying upon Article 6 of the KSA labour law and Article 1 of the Implementing Regulations that a person could assert rights under the KSA's labour law regardless of the basis on which they entered the KSA. He gave cogent reasons why he believed the KSA labour law would be engaged with particular regard to the fact that ESG was a KSA registered entity, and the contract granted jurisdiction to the KSA. The Tribunal accepted that evidence.

13.7. Mr Brown explained how the Ministry of Labour had not been staffed by lawyers and therefore under various reforms the specialist labour courts in the KSA were now staffed by lawyers. In his opinion the mere fact that a person had been working, in breach of the entry requirements would not weigh heavily in a court adjudication especially where the contractual

documentation gave exclusive jurisdiction to the KSA. He clearly explained that there was no link between the Labour Court and immigration services and it was wrong to assume that even if a breach was found of KSA immigration law it will be immediately reported to the immigration services. He conceded that the Claimant's evidence that enquiries made by some of his colleagues to the Ministry of Labour may well have resulted in them being told they could not access the Labour Court but this was because such staff were not trained lawyers.

13.8. The Claimant sought to discredit Mr Brown's evidence by reference to an email he obtained from Regent Visas Ltd. The qualifications of the author of the email were not clear to the Tribunal and nor was the author called to give evidence. Similarly the evidence of Mr Sosnowy, that he apparently had been told he could not pursue a claim in the KSA, was not evidence that could be challenged in cross examination. The Tribunal preferred the evidence of Mr Brown for the reasons set out above but did accept that the Claimant might well feel, at the very least, uncomfortable in seeking to approach the Labour Court, given his immigration status.

13.9. Mr Brown also stated in his expert opinion foreign nationals could issue proceedings in the KSA courts whilst outside the IKR utilising a power of attorney to a Saudi national legal representative. This evidence was not challenged by the Claimant.

14. **<u>The Claimants connections and the UK government.</u>**

14.1. Although the Claimant contended that his employment had *"strong connections with the government/the state and I was representing Britain and British business abroad"* the Tribunal rejected that analysis. He had chosen to work for a Saudi Arabian company as a teacher. Keeping quite happy when his contracts have been extended.

14.2. He had no official or quasi standing as a representative of the United Kingdom government in KSA. He was simply, like many other British citizens, a person working in a foreign country in order to better himself from its favourable tax position.

14.3. The Claimant made reference to various documentation between government departments and representatives in the KSA. Whilst the British government no doubt wished to maintain cordial relationships with the KSA it would do so with many other countries and no doubt would wish to find areas of commonality to directly and indirectly benefit British interests. In addition, the evidence pointed to the fact that the British government was seeking to promote the provision of educational expertise in the KSA, not just for the holding company, but also for a number of other British companies that have direct or indirect interests within the KSA. The submission that, in effect the British government was supporting the holding company and/or the Respondent and that influence therefore meant, whatever the contractual document said, that he was in some way furthering British interests and in reality worked for the Respondent, or the holding company, was not an argument that the Tribunal found attractive. It was fanciful.

14.4. Whilst ultimately ESG was controlled by the holding company, on the Claimants analysis any employee of a foreign company, controlled by a

British company would always be a British employee. That was not a proper analysis of the legal framework.

14.5. The Claimant suggested that as the holding company had gone into administration and was now controlled by its debtors, one of which he said was RBS, and given the government had put tax payer's money into RBS, the holding company was controlled by the British government. Even if what he said was true, and no evidence was before the Tribunal on this point, this was far too nebulous to establish that in reality, if the Claimant was not employed by the Respondent, then de facto he was employed by the holding company or the British government.

14.6. Whilst ESG and the Respondent were companies within the holding company the Tribunal was satisfied that of itself was not sufficient to show that de facto the Respondent employed the Claimant. In the United Kingdom it is relatively common for a holding company to have a number of subsidiary companies, a classic case being house builders, but that does not mean that employees of the subsidiary companies are also employees of the holding company.

15. **Conclusion and discussion.**

15.1. The first question the Tribunal had to address was who was the Claimant's employer.

15.2. The Tribunal had no hesitation in concluding that ESG was the Claimant's employer. His contract was with ESG. He was paid by ESG. ESG was based in the KSA and that was where the Claimant worked. His contractual documentation always made it clear he was employed by ESG and was subject to the KSA labour law. When his contract was not renewed, he received a settlement in accordance with the terms of the contract in accordance with KSA law. There are a number of renewals which the Claimant signed. The decision not to renew his contract was taken by ESG. The subject of the dispute arose in the KSA. Whilst it is true the Claimant described the contract as a *"fraudulent"* in his statement (paragraph 1) and had fraudulent clauses (paragraph 12) it was not. Save for that argument the Claimant could not construct a cogent argument as to why in terms of contractual documentation his employer was not ESG. For completeness the Tribunal was not satisfied that, even if the Claimant was right that he needed an Iqama to work, any defect in his immigration status vitiated the identity of the parties to the contract of employment.

15.3. The second issue the Tribunal had to determine was whether the Respondent was de facto his employer.

15.4. It is relevant at this stage to note that it was the Claimant's case he was employed by the Respondent and not by the holding company.

15.5. The Tribunal observed the claim form was professionally drafted. The Claimant did not in that claim form assert he was employed by the holding company, a group company, or by the British government although that was an argument he sought to deploy before the Tribunal. No application had been made to amend the claim form.

15.6. The Claimant has not issued proceedings against the group, or the British government claiming they were his employer, only the Respondent. It

follows that even if the Claimant was right that he was employed by the group or the British government that does not assist him as he has not issued proceedings against that entity. As the Tribunal had indicated in any event it was quite satisfied he was employed by ESG.

15.7. Whilst ESG is an independent company and part of a group, of which the Respondent is also part of that group, which appears to ultimately report to Interserve PLC that did not make the Respondent in itself a de facto employer. The Tribunal's findings of fact have looked at the principal matters raised by the Claimant to support his contention of de facto employment. For the reasons already given the Tribunal rejects that submission. Whilst the Claimant did receive group notifications, whilst ESG may have used some group policies, and whilst the group may have provided some assistance utilising an independent agency to assist with the Claimant's employment status so we could work in the KSA, the Tribunal concluded that evidence even looked at in totality does not go nearly far enough to establish de facto employment especially given the clear contractual documentation.

15.8. The Tribunal then turned to whether the Claimant had a sufficiently strong connection to the United Kingdom to pursue his claim in the Employment Tribunal.

15.9. Rule 8 (2) of the 2013 Rules provides as follows: –

"(2) A claim may be presented in England and Wales if –

(a) the Respondent, or one of Respondents, resides or carries on business in England and Wales;

(b) one or more of the acts or omissions complained of took place in England and Wales;

(c) the claim relates to a contract under which the work is or has been performed in England and Wales or

(d) the Tribunal has jurisdiction to determine the claim by virtue of a connection with Great Britain and the connection in question is at least partly a connection wit it was only in exceptional cases h England and Wales."

15.10. The leading case is **Lawson -v- Serco Ltd 2006 ICR 250** where the House of Lords, as it was, noted that the Employment Rights Act was silent as to its territorial scope but determined the Parliament must have intended, as a general principle, that for unfair dismissal rights to apply they would only normally apply to *"the employee who was working in Great Britain"* (para 25 of the judgement). This rule applied unless exceptionally the employee could show their employment relationship was sufficiently strong with Great Britain and British employment law that it could be presumed that Parliament had intended that unfair dismissal should apply to that employee.

15.11. To illustrate how high the hurdle is that this Claimant must surmount, even where an employee was engaged under an English contract of employment by a company incorporated in England and Wales(which the Tribunal have found this Claimant was not) that was not a compelling factor, see **Dhunna -v- Creditsights Ltd [2015] ICR 105.**

15.12. In **Duncombe -v- Secretary of State for Children Schools and Families (Number two) 2011 ICR 1312** the Supreme Court interpreted the effect of the decision in **Serco** to be that in order to be covered by the Employment Rights Act, the employment relationship of an employee who was working or based abroad at the time of his or her dismissal must have much stronger connections both with Great Britain and British employment law than with any other system of law. Whilst the decision itself introduced a further exception to the general principle enunciated by Lord Hoffmann in **Serco**, it factually bears no similarity to the facts here. Although the claimants in **Duncombe** were teachers they were employed by the British government, on terms and conditions of English law and working abroad so the British government could comply with its European obligations as to the education of children.

15.13. The need for there to be exceptional circumstances was further clarified in **Ravat-v-Haliburton Manufacturing and Services Ltd 2012 ICR 389** where the Supreme Court stated that *"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".*

15.14. The factors that favour the Respondent include:-

- The fact the Claimant worked for a KSA company,
- The contractual documentation incorporated KSA law,
- KSA law was respected on termination,
- The Claimant lived and worked in the KSA
- The factors giving rise to the dispute arose in the KSA.
- The fact the Claimant was paid in the currency of the KSA
- For all purposes of tax the Claimant was treated as a KSA employee he did not pay any form of PAYE or national insurance in the United Kingdom.,
- The fact the Claimant was managed, on a day-to-day basis in Saudi Arabia ,
- The length of time that work was undertaken in the KSA. The Claimant was not a peripatetic worker.

15.15. This is not a case, such as one of the examples given by Lord Hoffmann in **Serco** whereby the Claimant was virtually working in an extra-terrestrial piece of the United Kingdom.

15.16. Against that the Claimant can point to :-

- A number of circulars from the group,
- The fact that when he raised a whistleblowing complaint he referred the matter to the holding company
- He obtained some IT support from the United Kingdom
- On occasional visits from senior management of the holding and other subsidiaries were made to ESG and ESG was required to supply business information to more senior companies within the group.
- The Claimant is a British citizen and was recruited in Great Britain. The fact the Claimant is a British citizen and not a national of the KSA and was recruited in the United Kingdom are

either neutral factors or factors that Lord Hoffmann said in **Serco** (paragraph 37) not in itself sufficient to take a case out of the general that the place of employment was decisive and something more was required.

15.17. There is one factor which although relied upon by the Claimant in the Tribunal's judgement neutral and that is the issue of remedy. The Tribunal have not found that the Claimant would be remedy less in the KSA. Even if the Tribunal was wrong to accept the evidence of Mr Brown, and the Claimant was right that he had no rights in the KSA, it did not assist the Claimant. The mere fact he may not have rights under KSA law is not a factor the Tribunal should take into account in assessing exceptional circumstances . The competing merits of the relevant legal systems have no part to play in answering the sufficiency of connection question see **Haman -v-British Embassy in Cairo EAT/0123/19.**

15.18. Finally, the Tribunal should deal very briefly with the decision in **Lodge -v-Dignity in Dying and others UKEAT/0252/14** specifically referred to by the Claimant. With respect to the claimant that case is easily distinguishable on its facts. The claimant worked for a British company and the contract of employment incorporated the law of England and Wales. Whilst the claimant was working in Australia that was at the claimant's request due to domestic reasons. At least part of the claimant's grievance was dealt with in London. On the particular facts the decision did not set out any principle of wider application that assisted this Claimant.

15.19. In the Tribunal's judgement carrying up the weighing exercise that it must undertake the Claimant has not shown an exceptionally strong connection to the United Kingdom. This is not a case whereby the Claimant was posted abroad by British employer for the purpose of business carried out in Great Britain. This is not akin to the case of a British journalist posted abroad and living abroad but providing copy to his newspaper in the United Kingdom or the case of a British person operating in what for practical purposes was an extra territorial British enclave such as a military base.

15.20. In the circumstances the claim must be dismissed.

Employment Judge T R Smith

26 August 2020