EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4110711/19 (P)

Held on 15 October 2020

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Employment Judge N M Hosie

Mr S Truszkowski	**Claimant** **Represented by** **Mr S Szulkowski,** **Wesley Legal**
Maersk Offshore Crew Management (Guernsey) Limited	**1st Respondent** **Represented by** **Ms T Walker,** **Solicitor**
Mr Marcin Kosinski	**2nd Respondent** **Represented by** **Ms T Walker,** **Solicitor**
Mr Piotr Orfin	**3rd Respondent** **Represented by** **Ms T Walker,** **Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Judgment of the Tribunal is that the claim is dismissed for want of jurisdiction.

REASONS

Introduction

5 1. The claim in this case comprises several complaints: unfair dismissal, discrimination on the grounds of race and disability, "whistleblowing" and complaints relating to notice/sick pay, arrears of pay and other payments. The claim is denied in its entirety by the respondent.

10 2. I conducted a preliminary hearing to consider case management on 30 July 2020. The Note which I issued following that hearing is referred to for its terms.

3. I recorded in my Note that the respondent's solicitor had taken two preliminary
15 points in relation to so-called territorial jurisdiction and the terms of the early conciliation certificate.

4. I also recorded that it was agreed that the preliminary issue of territorial jurisdiction would be addressed first and that would be done by way of written
20 submissions.

Parties' submissions

5. The respondent's solicitor attached "outline submissions" to her e-mail of 14
25 August 2020 at 21:19; the claimant's solicitor made "outline submissions" by way of attachment to his e-mail of 22 August 2020 at 10:06 and also attached a bundle of documentary productions; the respondent's solicitor commented on the claimant's submissions by way of e-mails on 7 September 2020 at 22:30 and 22:37.

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Relevant facts

6. On 4 February 2020, I issued the following Orders: -

"1. The claimant to specify which, if any, of the facts listed in the respondent's e-mail of 23 January 2020 he disputes and, if so, on what basis?

2. Aside from the reference to English Law in his contract of employment, what does the claimant say supports an argument that he had a substantial connection with the UK entitling him to bring statutory claims of constructive unfair dismissal, whistleblowing and/or discrimination in the UK Tribunal system."

7. The claimant's solicitor responded to the Order by letter dated 28 February 2020.

8. The claimant's solicitor did not dispute the "material facts" as set out in the respondent's ET3 response form and as detailed in the e-mail of 23 January 2020 from the respondent's solicitor. Accordingly, I make the following findings in fact in relation to the issue of territorial jurisdiction, with which I was concerned: -

- The claimant is a Polish national residing in Poland.
- The first respondent is a Company incorporated and based outside the UK (Guernsey).
- The first respondent's parent Company is Maersk Drilling A/S which is incorporated and based in Denmark.
- At all times during his employment with the respondent, the claimant worked outside of Great Britain and outside the UK Continental Shelf (working in Singapore and latterly in Ghana).
- The claimant was initially contacted/recruited via the respondent's office in Denmark.
- Immediately prior to the claimant's resignation, the claimant was assigned to the Maersk Drill Ship IV Singapore Pte Ltd, Ghana branch, otherwise known as the Maersk Voyager, on a 28 day on, 20 day off rotation.
- The Maersk Voyager has a Singapore flag.
- At the time the claimant resigned, the Maersk Voyager was located in Ghanaian waters.

- The claimant mobilised to and from the Maersk Voyager Drill Ship to/from Poland.
- The claimant reported to and received day-to-day instructions from the Deckpushers on the Maersk Voyager, who were also employees of the respondent (a Guernsey Company).
- The claimant was paid in US Dollars, which was paid into his Polish bank account.
- The claimant did not pay UK tax.
- The claimant's contract of employment makes reference to the governing law of contract being English law. It provides as follows: -

  *"**22 Jurisdiction***
  22.1 This Contract of Employment shall be subject to English law and it is mutually agreed that all claims of whatever nature (including but not limited to claims for death or personal injury) shall be subject to English law and the exclusive jurisdiction of the English Courts."

9. As far as the response to the second part of the Order of 4 February 2020 was concerned, relating to the issue of, *"a substantial connection with the UK",* the claimant's solicitor submitted: -

   "I will argue that (amongst others) because I was paid to take training in UK (Scotland) I will have a right to bring claim to Employment Tribunal in UK…… I will argue that the respondent carried out activity in Scotland, by so virtue of paying employees (including claimant) not least by training to take part in Scotland, providing payment to its employees to take this training but also paying taxes for these employees in UK".

10. In the submissions, which the claimant's solicitor made on 22 August, he did not take issue with any of the foregoing findings in fact. He also reiterated that the claimant, *"spent some time on training in Aberdeen; it was between 3 to 4 weeks, and was paid for by Respondent 1. Apart of that period of time, when he was having training, he was also using UK airports, when relocating for work. Other than this period of time, the claimant was not rendering his services for R1 in the UK. The claimant received his certificates of training*

made under UK law. These training centres provided the claimant and his fellow employees in certificates that can then be used in employment at different employer, and were widely accepted as an training that may open gates to other lucrative positions". He also referred to the term in the claimant's contract of employment that the contract would be subject to English Law. As no issue was taken by the respondent's solicitor, I also had regard to these undisputed facts when considering the issue of territorial jurisdiction and arriving at my decision.

Discussion and decision

11. Territorial boundaries apply to employment rights. As the House of Lords put it in ***Lawson v. Serco Ltd*** [2006] UKHL3, UK legislation is "*prima facie territorial. The United Kingdom rarely purports to legislate for the whole world*".

12. S.196 of the Employment Rights Act 1996 used to exclude employees who ordinarily worked outside Great Britain from the right to claim unfair dismissal and from other protections in the Act. However, that section was repealed by the Employment Relations Act 1999 and was not replaced, leaving the Employment Rights Act silent regarding its territorial scope. Also, contrary to the position under the antecedent discrimination legislation, the Equality Act 2010 is silent as to its territorial scope.

13. This means that Tribunals and Courts are left to determine the territorial scope of the legislation; the Tribunal will be guided by the test laid down by the House in Lords in ***Lawson***, the leading case on territorial jurisdiction under the 1996 Act.

14. Lord Hoffmann delivered the leading Judgment in ***Lawson***. He divided employees into three categories for the purpose of establishing whether a UK

Employment Tribunal has territorial jurisdiction to hear a claim for unfair dismissal under s. 94(1):

- In the standard case, the question will depend on whether the employee was working in Great Britain at the time of dismissal.
- In the case of peripatetic employees who include, for example, airline pilots and international management consultants and sales people), the employee's base – the place at which he or she started and ended assignments – should be treated as his or her place of employment. The question is whether the place of employment is in Great Britain at the time of dismissal.
- Employees working and based abroad may, in exceptional circumstances, be entitled to claim unfair dismissal, even though they are not employed in Great Britain at the time of dismissal, provided their employment has sufficiently strong connections with Great Britain and British employment law. This would cover, for example, expatriate employees, such as foreign correspondents of British newspapers, who live and work in a foreign country but who nevertheless remain permanent employees of their British employer, and expatriate employees of a British employer who worked within a British enclave in a foreign country; for example, at a British military base.

15. In ***Ravat v. Halliburton Manufacturing & Services Ltd*** [2012] ICR 389 Lord Hope reiterated the comments of Lady Hale in ***Duncombe v. Secretary of State for Children etc.*** [2011] ICR 1312 that the three category test in ***Lawson*** was not a hard and fast rule, but only examples of the general principle that the right to claim unfair dismissal will only exceptionally cover employees working and based abroad. For it to apply, the employer must have stronger connections with Great Britain and British employment law than with any other legal system.

16. Lord Hope went on to say this in his Judgment in ***Ravat***: -

"***27***…...*The general rule is that the place of employment is decisive. But it is not an absolute rule. The open-ended language of s.94(1) leaves room for some exceptions where the connection with Great Britain is sufficiently strong to show that this can be justified. The case of the peripatetic employee who was based in Great Britain is one example. The expatriate employee all of whose services were performed abroad but who had nevertheless very close connections with Great Britain because of the nature and circumstances of employment, is another.*

28. *The reason why an exception can be made in those cases is that the connection between Great Britain and the employment relationship is sufficiently strong to enable it to be presumed that, although they were working abroad, Parliament must have intended that section 94(1) should apply to them. The expatriate cases that Lord Hoffman identified as falling within its scope were referred to by him as exceptional cases: para. 36. This was because, as he said in para.36, the circumstances would have to be unusual for an employee who works and is based abroad to come within the scope of British labour legislation. It will always be a question of fact and degree as to whether the connection is sufficiently strong to overcome the general rule that the place of employment is decisive. The case of those who are truly expatriate because they not only work but live outside Great Britain requires an especially strong connection with Great Britain and British employment law before an exception can be made for them.*

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

17. In ***Bates van Winkelhoff v. Clyde & Co. & Another*** [2013] ICR 833, Elias LJ reviewed the development of the case law through ***Duncombe***, ***Ravat*** and ***MOD v. Wallis & Anor*** [2011] ICR 617. It was submitted that a comparative exercise should be carried out, weighing up matters which favoured a connection with Great Britain, compared with factors which favoured another

jurisdiction and only if the former outweighed the latter would the Tribunal have jurisdiction. Helpfully, so far as the present case is concerned, as the claimant lived and worked wholly abroad, Elias LJ said this in his Judgment at para.98: -

5 "*……....The comparative exercise will be appropriate where the applicant is employed only abroad. There is then a strong connection with the other jurisdiction and Parliament can be assumed to have intended that in the usual case that jurisdiction, rather than Great Britain, should provide the appropriate system of law. In those circumstances it is necessary to identify factors which* 10 *are sufficiently powerful to displace the territorial pull of the place of work, and some comparison and evaluation of the connection between the two systems will typically be required to demonstrate why displacing factors set up as sufficiently strong counter-force. However, as paragraph 29 of Lord Hope's Judgment makes plain, that is not necessary where the applicant lives/and or* 15 *works at least part of the time in Great Britain as is the case here. The territorial attraction is then far from being all one way and the circumstances may not be truly exceptional before the connection with the system of law in Great Britain can be identified. All that is required is that the Tribunal should satisfy itself that the connection is, to use Lord Hope's words: "sufficiently* 20 *strong to enable it to be said that Parliament would have regarded it as appropriate for the Tribunal to deal with the claim."*

18. I was also mindful of what Mr Justice Langstaff said at para. 51 in ***Powell v.*** 25 ***OMV Exploration & Production Ltd*** [2014] ICR 63: -

"*The starting point which must not be forgotten in applying the substantial connection test is that the statute will have no application to work outside the United Kingdom. Parliament would not have intended that unless there were a sufficiently strong connection. "Sufficiently" has to be understood to be* 30 *sufficient to displace that which would otherwise be the position."*

19. In the present case, the claimant worked exclusively abroad and undertook no work (apart from some training) in the UK. This meant that these other countries where he worked would have jurisdiction, unless that jurisdiction 35 could be displaced by factors which established a sufficiently strong connection with Great Britain.

20. I was also mindful, having regard to the Judgment in ***Smania v. Standard Chartered Bank*** [2015] ICR 436 that the "looser test" which was applied in 40 ***Ravat***, should not be adopted in a claim of whistleblowing.

Contract

21. The contractual provision was a material factor, to be weighed in the balance. In this regard, I was mindful of what Baroness Hale said in ***Duncombe*** that:- "*Unfair dismissal does not form part of the contractual terms of conditions, but it was devised by Parliament in order to fill a well-known gap in the protection offered by the common law to those whose contracts of employment were ended.*" However, she also said at para.16 that: - "*It must be relevant to the expectation of each party as to the protection which the employees would enjoy.*"

22. There were no submissions about the parties' expectations. There was only reference to the contractual provision itself. It appeared that the main "connections" relied upon by the claimant, apart from the contractual provision, were that he had undergone training in the UK which was paid for by the first respondent and that he had used UK airports when travelling to and from his home in Poland to work destinations outwith the UK.

23. In his submissions, the claimant's solicitor also referred, at some length, to the "Maersk family of Companies" and the beneficial owner/control of the first respondent. However, as the respondent's solicitor submitted, as it was accepted that the first respondent was the employer, there was "little relevance" to the issue of territorial jurisdiction in looking at the wider Company group structure.

24. While mindful of the jurisdictional provision in the contract, I was not persuaded that the factors advanced by the claimant's solicitor were, *"sufficiently powerful to displace the territorial pull of the place of work".* The general rule is that the place of employment is decisive. The claimant neither lived nor worked in Great Britain. In my view, the contractual provision and the fact that he underwent training in the UK, paid for by the first respondent,

and sometimes used UK airports on his way to work abroad were insufficient to, *"set up a sufficiently strong counter-force".*

25. I arrived at the view, therefore, and I am bound to say without a great deal of difficulty, that the claimant did not have a stronger connection with Great Britain and British employment law than with any other legal system. The so-called "territorial attraction" was virtually all one way and not in the direction of Great Britain.

26. I decided, therefore, that the Tribunal does not have jurisdiction to consider the claim and that the claim should be dismissed.

Employment Judge	**Nick Hosie**
Date of Judgement	**27 October 2020**
Date sent to parties	**27 October 2020**