EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mr D Lyons	**v**	Interserve Group Limited

Heard at: Reading (by CVP) **On:** 14 December 2020

Before: Employment Judge Hawksworth (sitting alone)

Appearances
For the Claimant: Ms R Morton (counsel)
For the Respondent: Ms J Shepherd (counsel)

RESERVED JUDGMENT

1. The claimant was not employed or de facto employed by the respondent. The claimant was employed by ESG Saudi Arabia LLC, a company registered in the Kingdom of Saudi Arabia.

2. The tribunal does not have territorial jurisdiction to decide the claimant's claim. The claimant's complaints fail and are dismissed.

REASONS

The claim and the issues

1. By a claim form presented on 23 August 2019 the claimant brought complaints of unfair dismissal, protected disclosure detriment, race discrimination, harassment and victimisation and for other payments. The respondent defends the claim and says that the tribunal does not have territorial jurisdiction to consider the claim. The ET3 was submitted on 25 October 2019.

2. On 21 December 2019 Employment Judge Vowles directed that there would be a public preliminary hearing to decide the question of territorial jurisdiction. Case management orders were made for that hearing.

3. The public preliminary hearing took place before me on 14 December 2020. The hearing was conducted by video using CVP. The parties and their representatives attended by video.

The hearing and evidence

4. The parties had prepared an agreed bundle with 208 pages. Page numbers in these reasons are references to that bundle.

5. At the hearing I heard evidence from the claimant and from Mr Sawle who was a regional director responsible for overseeing ESG Saudi Arabia LLC. Both the claimant and Mr Sawle had prepared witness statements for the hearing.

6. Both representatives had prepared helpful written skeleton arguments and made closing submissions.

7. I reserved judgment. I apologise to the parties and their representatives for the delay in promulgating this judgment. This was because of absence over the Christmas period.

The preliminary issue to be decided

8. The preliminary issues for me to decide are:

    8.1. whether the claimant was employed by the respondent; and
    8.2. whether the tribunal has territorial jurisdiction to hear the claimant's complaints.

Agreed facts

9. The following facts were agreed by the parties.

10. The Claimant is a British citizen.

11. The claim has been brought against Interserve Group Limited ("the Respondent"), a company registered in England. Interserve Group Limited was formed after Interserve Plc entered into administration with the majority of its assets being acquired, ultimately by the Respondent.

12. The Claimant's written contract of employment was with ESG Saudi Arabia LLC ("ESG").

13. ESG used the trading styles "Interserve Learning & Employment" and/or "Interserve Learning & Employment International".

14. ESG is registered in KSA as a Foreign Limited Liability Company.

15. ESG is wholly owned by two UK based limited companies; Orient Gold Limited (1%) and Triangle Training Limited (99%), both of which are part of the wider Interserve group of companies, of which the Respondent is the ultimate parent company.

16. The Claimant was recruited by a UK recruitment agency to work as a teacher in the Kingdom of Saudi Arabia ("KSA").

17. The Claimant was employed at the ITQAN College as an English teacher. ITQAN is an apprenticeship institute. Its students (all Saudi Nationals) all hold job/apprenticeship offers which are conditional on them successfully passing a relevant course of study at college. The ITQAN College was part of a wider group of colleges across KSA, owned and operated by ESG.

18. Throughout the course of his employment with ESG, the Claimant lived and worked in the KSA although he periodically travelled back to the UK and maintained a home in the UK.

19. The Claimant commenced employment on 15 October 2016 and worked in KSA on a business visa for the first 8 months of his employment with ESG, returning to England in May 2017 to apply for the Iqama (a KSA working and residence visa) via the Saudi Embassy in London. The Claimant was issued with an iqama (a KSA residence visa) in June or July 2017.

20. The Claimant was registered with the General Organisation of Social Insurance on 22 June 2017 and social security contributions were made on his behalf in KSA thereafter.

21. During the course of his employment, the Claimant paid no income tax in the UK.

22. The Claimant's written contract of employment with ESG was stated to be subject to the laws of KSA and contained an entire agreement clause.

23. The Claimant's written contract of employment was a 12 month fixed term contract which was renewed twice (in October 2017 and October 2018), it was not renewed again and therefore terminated on expiry.

24. The Claimant's first five months' salary was paid into his UK bank account. His salary for the period April to June 2017 was paid into a New Zealand bank account in the name of Luke Hawkins. His salary for July 2017 was paid into his UK bank account. Thereafter the Claimant's salary was paid into a KSA bank account in his name.

25. The Claimant's salary was split, in accordance with the KSA Labour Law, into a basic salary, a transport allowance and an accommodation allowance.

26. On 17 October 2018 the Claimant contacted Adrian Pound, Assistant General Counsel for Interserve Plc, raising a query regarding the request for the Claimant to teach during his lunch breaks. The Claimant also queried whether his employment was governed by English law or Saudi Arabian law and how he should deal with the matter going forward. Adrian Pound responded to the Claimant and advised that the matter should be addressed as a grievance and that "our HR team" will address the concerns raised.

27. On 10 February 2019, Jonny Bourne sent an e-mail to the Claimant regarding the Claimant's grievance and allegations made against him which Mr Bourne copied to Assistant General Counsel Adrian Pound, of the Respondent, and Rachel Liptrot.

28. On 11 March 2019, Kevin Clarke, the Director of Training Operations of ESG, sent the Claimant a grievance outcome letter. On 21 March 2019, Simon Cotton, the Director of Quality & Curriculum for ESG, responded to the Claimant's appeal against the grievance outcome.

29. On 21 March 2019, after Interserve Plc had gone into administration, the Claimant raised a further grievance via Adrian Pound at Interserve Group Limited. Adrian Pound, responded stating "I have escalated the concerns you have raised and the Company will be investigating these as a grievance and will be in touch with you separately."

30. On the termination of the Claimant's employment, he received an end of service gratuity in accordance with the KSA Labour Law.

Additional findings of fact

31. I have made the following additional findings of fact from the evidence I heard and read.

The claimant's recruitment, contract and benefits

32. The claimant's recruitment arrangements were made with a recruitment agency in Glasgow. The contract he signed with ESG was bi-lingual in English and Arabic (page 46). It was a standard form contract. The business visa on which the claimant worked for the first 8 months of his employment with ESG was secured in Bahrain. The extensions to his contract were also in English and Arabic and both set out that his employment was with ESG (pages 64 and 83).

33. He was able to claim travel expenses for his inbound and outbound ticket at the start and end of his employment, but no other travel was paid for. The claimant was paid in Saudi riyals.

34. On 25 April 2017 Interserve Learning and Education International (ILEI) sent an email about 'MyInterserve' an internal online hub enabling staff which gave information and access to employee forums and benefits (page 104a). The email starts:

> *"Although you are a direct employee of Interserve Learning and Employment International you are ultimately a valued member of the Interserve Group of companies with some 85,000 colleagues worldwide."*

35. On 8 October 2017 an HR Business Partner provided an employment reference for the claimant (page 107). It was on headed paper which said 'esg.Saudi Arabia An Interserve Company'. The letter said

> *"Interserve Learning Employment (ILEI) is an international company based in the UK and works as an educational provider in the Middle East."*

36. This was an inaccurate summary of the legal position, as ILEI is a trading name not a company, and ESG is not a company based in the UK.

The claimant's managers and grievance

37. The claimant's line manager was based in KSA. The chief operating officer of ESG was Mr Bourne. The claimant did not at any stage carry out any work in the UK or report to anyone in the UK.

38. Mr Clarke, who dealt with the claimant's grievance, was based in South Africa. The claimant did not have any dealings with any member of a UK HR team regarding his complaints. Mr Clarke's grievance outcome letter was on headed paper with a footer which said 'ESG SA LLC trading as Interserve Learning & Employment' (page 113).

ESG's human resources team and policies

39. ESG had its own human resources team based in the KSA, and this team dealt with all HR issues for ESG staff.

40. ESG had HR policies regarding well-being (page 73) and equality and diversity (page 85), and a document called whistleblowing principles (page 96a). The well-being policy contained definitions of harassment and victimisation which appear to be based broadly on the Equality Act definitions. The equality and diversity policy referred to the EHRC. These documents all had ILEI (Interserve Learning & Employment International) as the start of the title at the foot of each page. The whistleblowing principles document had an ILEI logo on the front page and ILEI in the title on the footer.

41. There was another whistleblowing policy (page 97) which said staff could contact the group general counsel or assistant general counsel if they did not feel able to talk to their line manager or senior manager. I find that this was a group policy. Unlike the other policy documents, it did not have a footer and the logo was an Interserve logo, not an ILEI logo.

Emails within the Interserve group

42. The claimant also relied on a staff email about a 'refer a friend' scheme (page 106). The email was sent by ILEI. It included a weblink to an online recruitment website at an interserve.com address.

43. The respondent is the parent company of a large group of companies worldwide. Many of the group companies use 'Interserve' as a trading name. To present itself as a unified company and promote a 'one team' approach, external emails go through a connector in the email system

which changes the email address to a generic Interserve address, and adds a footer with the Berkshire address of the head office of (what was at the time) the UK based plc. An example of this footer is on the claimant's email of 19 March 2019 (page 117). The 'MyInterserve' email at page 104a has the same address at the bottom.

44. On 28 March 2019 the claimant received a group email headed 'Deleveraging Update' (page 121). It was addressed 'Dear Colleague'. It said that Interserve plc had been put into administration and that

> "*all the businesses and assets which sat beneath the plc business were sold to a new entity, called Interserve Group Limited."*

The law

45. The claimant has brought complaints against the respondent of:

45.1. unfair dismissal and protected disclosure detriment under the Employment Rights Act 1996; and

45.2. race discrimination, harassment and victimisation under the Equality Act 2010.

46. The claimant has said in his ET1 that he has a pay claim although the nature of this complaint is not clear. Such a claim could be brought as a complaint of unauthorised deduction from wages under the Employment Rights Act 1996 or for breach of contract under the Employment Tribunals (Extension of Jurisdiction) Order 1994 (the '1994 Order').

47. The first preliminary issue for me to decide is whether the claimant was employed by the respondent. I also have to decide whether the tribunal has territorial jurisdiction to hear these complaints. There are a number of aspects which potentially fall to be considered in a case where a claimant works wholly or partly outside the UK, including:

47.1. the jurisdiction of the employment tribunal under rule 8 of the Employment Tribunal Rules of Procedure 2013; and
47.2. the territorial reach of the applicable law.

48. Rule 8 of the Employment Tribunal Rules of Procedure 2013 provides at sub-paragraph 2:

> *"(2) A claim may be presented in England and Wales if—*
>
> *(a) the respondent, or one of the 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 partly 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 with England and Wales."*

49. Sub-paragraph 3 is a parallel provision setting out when a claim may be presented in Scotland.

50. Rule 8 deals with the question of whether the tribunals in the UK have jurisdiction to hear particular proceedings and whether they should be dealt with in England and Wales or in Scotland. This is not the same as the territorial 'reach' of the statutory employment rights which the claimant seeks to enforce. Both jurisdiction under rule 8 and territorial reach are issues in this case.

51. As to territorial reach, neither the Employment Rights Act nor the Equality Act expressly refer to the extent of the territorial boundaries within which they apply. This is to be determined on a case by case basis by reference to case law.

52. The starting point is the decision of the House of Lords in Lawson v Serco [2006] ICR 250. That case concerned the territorial reach of complaints of 'ordinary' unfair dismissal. The principles are the same for complaints of unauthorised deduction from wages (Bleuse v MBT Transport Ltd [2008] ICR 488) and for complaints of discrimination under the Equality Act (Jeffery v British Council [2019] ICR 929).

53. In Lawson v Serco, Lord Hoffman held that the application of the right not to be unfairly dismissed depends upon the construction of section 94(1) of the Employment Rights Act, and the application of principles to give effect to what parliament may reasonably be supposed to have intended, including implied territorial limitations. He said that parliament must have intended as the 'standard case' someone who, at the time of the dismissal, was working in Great Britain. This is distinguished from someone who is 'merely on a casual visit (for example in the course of peripatetic duties based elsewhere)'.

54. In relation to work outside Great Britain, Lord Hoffman said that in general, parliament can be understood as having intended that someone who lives and works outside Great Britain will be subject to the employment law of the country in which they live and work, rather than the law of Great Britain. But there may be cases which are exceptions to this general rule. Lord Hoffman considered in particular the position of peripatetic and expatriate employees. In relation to expatriate employees (those who live and work entirely or almost entirely abroad) Lord Hoffman said:-

> *"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."*

55. He gave two examples of those who might come within the scope. The first is an employee who is posted abroad by a British employer for the purposes of a business carried on in Great Britain, who *'is not working for a business conducted in a foreign country which belongs to British owners or is a branch of a British business, but as representative of a business conducted at home…"* The second is an employee operating within an extra-territorial British enclave such as a military base.

56. Lord Hoffman further explained the kind of connection with Great Britain that might be required in the case of an employee who is posted abroad:

> "*37. First, I think that it would be very unlikely that someone working abroad would be within the scope of section 94(1) unless he was working for an employer based in Great Britain. But that would not be enough. Many companies based in Great Britain also carry on business in other countries and employment in those businesses will not attract British law merely on account of British ownership. The fact that the employee also happens to be British or even that he was recruited in Britain, so that the relationship was 'rooted and forged' in this country, should not in itself be sufficient to take the case out of the general rule that the place of employment is decisive. Something more is necessary."*

57. The Supreme Court in Duncombe v SoS for Children Schools and Families ([2011] ICR 1312) confirmed that the types of expatriate employees who might come within the scope of British employment law which were referred to in Lawson v Serco are not closed categories, but examples of exceptions to the general rule. Duncombe concerned British employees of British government/EU-funded international schools abroad, and it was held that, although they did not fall within the examples given in Lawson v Serco, the 'very special combination of factors' in their case was such that it was right to conclude that parliament must have intended the employees to enjoy protection from unfair dismissal. In reaching this conclusion, Lady Hale placed particular emphasis on the fact that the employees were employed under contracts which were governed by English law and in international enclaves which had no particular connection with the country in which they were situated.

58. Territorial reach was considered again by the Supreme Court in Ravat v Halliburton Manufacturing Services Ltd [2012] ICR 389. In that case, Lord Hope identified guiding principles from Lawson v Serco as follows:-

> *"Firstly, the question in each case is whether section 94 applies to each particular case notwithstanding its foreign elements. Parliament cannot be taken to have intended to confer rights on employees having no connection with Great Britain at all.*
>
> *Secondly, the employment relationship must have a stronger connection with Great Britain than with the foreign country where the employee works. The general rule is that the place of*

> *employment is decisive. But it is not an absolute rule. The open-ended language of section 94(1) leaves room for some exceptions where the connection of Great Britain is sufficiently strong to show that this can be justified. …*
>
> *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 also live outside Great Britain require an especially strong connection with Great Britain and British employment law before an exception can be made for them."*

59. Assessing whether the employment relationship's connection with Great Britain is stronger than with the country where the worker works necessarily requires a comparative exercise, but what is not required is any comparison of the merits of the local employment law of the employee's workplace with the employment law applicable in Great Britain. 'The object of the exercise is not to determine which system of law is more or less favourable to the employee' (Dhunna v CreditSights Ltd [2015] ICR 105).

60. The Court of Appeal has considered the jurisdiction of the employment tribunal to hear claims by employees working outside Great Britain more recently in British Council v Jeffery and Green v SIG Trading Ltd [2019] ICR 929, two appeals heard together. Lord Justice Underhill reviewed the position as now established by the case law and set out a summary of the position for the purpose of the two appeals, emphasising that 'in the case of a worker who is "truly expatriate", in the sense that he or she both lives and works abroad, the factors connecting the employment with Great Britain and British employment law will have to be specially strong to overcome the territorial pull of the place of work'.

61. The claimant also pursues a breach of contract claim under the 1994 Order. Article 3 of the 1994 Order allows the employment tribunal to hear claims of breach of contract if they satisfy a number of conditions, which include that they are claims which a court in England and Wales would have jurisdiction to hear. The claims which a court in England and Wales would have jurisdiction to hear include claims concerning a contract made (or breached) in England or Wales, one governed by English law or one which confers jurisdiction on the English court.

62. The principles established in the case law on the territorial scope of statutes that are silent on the matter such as the Employment Rights Act and the Equality Act have been held to be relevant to the interpretation of statutes whose provisions do expressly set out their territorial application (for example R (on the application of Fleet Maritime Services (Bermuda) Ltd) v Pensions Regulator 2016 IRLR 199, QBD, in which the High Court accepted that the Lawson v Serco approach was also applicable when interpreting a territorial reach provision in the Pensions Act 2008).

Conclusions

The claimant's employer

63. The claimant says that he was employed by the respondent. He says, in the alternative, that he was de facto employed by the respondent, because the respondent had ultimate control over his employment and was in reality his employer. In support of this, the claimant relied on the terms of ILEI's policies, the wording of the staff emails he received from Interserve, email addresses and automatic footers. He also relied on the respondent's involvement with his grievance complaints.

64. I have concluded that the claimant was employed by ESG. This was expressly and clearly set out in his initial employment contract and the two contracts extending the term of his employment. ESG was not a 'branch' of the respondent. ESG Saudia Arabia LLC was a legal entity in itself. The inaccurate summary contained in the reference of 8 October 2017 did not affect the underlying employment position.

65. ESG was part of a group of companies of which the respondent was the ultimate parent company. Interserve Learning and Employment (ILE) and Interserve Learning and Employment International (ILEI) were trading names of ESG. The use of 'interserve.com' email addresses, and reference to the head office address on emails and email footers arose from the fact that ESG is part of the Interserve group. It was designed promote a consistent 'one team' approach, as were the references to all staff within the group as 'colleagues', and the provision of information and benefits via an online hub called 'Myinterserve'. This consistent approach across the group was also seen in the ESG policies which applied to the claimant, some of which reflected and used British employment law concepts or principles rather than the labour law of KSA. However, adopting a 'one team' approach in this way does not mean that all employees of every company in the group is an employee of the parent company. The position remains that the claimant's employer is ESG.

66. I reach the same conclusion in respect of the involvement of the respondent's employees with the claimant. It was entirely understandable that the respondent's assistant general counsel would reply to an email seeking guidance about employment concerns, but that did not in this case constitute 'dealing' with the grievance or being the decision maker or that the respondent had ultimate control over the claimant's employment. The claimant's grievance was referred back to and dealt with by the HR team in KSA.

67. As I have concluded that the claimant was not employed by the respondent, the basis on which the claimant brings complaints against the respondent is not clear. Further, no application was made to amend the claim to include ESG as a respondent. For completeness, I have left this point to one side and gone on consider the question of territorial jurisdiction.

Territorial jurisdiction

68. I am also leaving aside the question of whether the employment tribunal has jurisdiction to hear the claimant's claim under rule 8, because it is not determinative of the territorial jurisdiction issue. This is because the claimant worked in KSA throughout his employment with the respondent. The general rule is that, because of the 'territorial pull' of his place of work, he would be subject to the employment law of KSA. Therefore, even if one of sub-paragraphs 8(2) applies to the claimant, I will still need to go on to consider the territorial reach of the complaints the claimant is bringing and whether the claimant comes within the scope of British employment law.

69. This requires me to consider "the sufficient connection question", that is whether there are factors connecting the claimant's employment to Great Britain, and British employment law, which pull sufficiently strongly to overcome the territorial pull of the place of work and justify the conclusion that Parliament must have intended the employment to be governed by British employment legislation.

70. A fundamental factor in the claimant's case is that, as I have found, he was not working for an employer based in Great Britain. His employer was a company registered in KSA. This makes it, 'very unlikely' that he would be within scope, as the starting point in Lawson in respect of employees working abroad was that "it would be very unlikely that someone working abroad would be within the scope … unless he was working for an employer based in Great Britain" and even that would not in itself be enough. However, bearing in mind that the categories of expatriate worker who may fall within the scope of territorial jurisdiction are not closed, I have gone on to compare and evaluate the strength of the claimant's employment connections with Great Britain on the one hand and with KSA on the other.

71. The factors suggesting some connection between the claimant's employment and Great Britain are very limited:

    71.1. The claimant was recruited via a recruitment business in Glasgow;
    71.2. The claimant maintained a home in Great Britain and travelled back to the UK from time to time, paying travel costs for these trips himself;
    71.3. Some of the claimant's salary payments were paid into his UK bank account;
    71.4. The claimant was employed by a company which was part of a group whose parent company (the respondent) is British;
    71.5. Employees of group companies had some shared benefits and access to an online information hub ('MyInterserve');
    71.6. The respondent's name and/or registered address in Great Britain was sometimes used in email addresses and email signatures of the claimant and/or other staff communicating with him;

71.7. The claimant's employer used trading names which included the name of the parent company;
71.8. Some of the employment policies which applied to the claimant used some concepts from British employment law;
71.9. The assistant general counsel of the respondent corresponded with the claimant about his grievance and some concerns he raised.

72. The factors suggesting a connection between the claimant's employment and KSA are as follows:

72.1. The claimant lived and worked in KSA;
72.2. His contract was with a company which was registered in KSA and was subject to the laws of KSA;
72.3. The claimant's salary was structured in accordance with KSA labour law and he received end of service benefits provided for in KSA labour law;
72.4. The claimant was paid in the currency of the KSA and some of his salary payments were paid into a KSA bank account;
72.5. Social security contributions were made in KSA on the claimant's behalf, and he paid no income tax in Great Britain;
72.6. The claimant was line managed in KSA, not by anyone in Great Britain;
72.7. The claimant's grievance was dealt with by a director of ESG based outside Great Britain and the HR team in Great Britain did not deal with his complaints.

73. Many of the claimant's connections with Great Britain are consequences of his being employed by a company which is part of a larger corporate structure. They are of a type that would be expected for an employee who works for a company which is part of a large group of companies. It is to be expected in that context that there may be some reference to the name and address of the parent company in correspondence, and the use of similar trading names for marketing purposes. It might also be expected that a group of companies would have some shared values and principles across the group, and that it would implement them by using concepts from the employment law of the country in which the parent company is based. It would also be expected that a senior employee of a parent company would respond to an employee of a group company who got in touch with them to raise concerns. These are not exceptional features of expatriate employment.

74. Other connections the claimant had with Great Britain were not connected with his work or were a matter of personal choice. It was his choice to maintain a home in Great Britain, and to have some of his salary paid to his bank there.

75. The claimant's connections with KSA are much more substantial. They are much more clearly linked with his employment itself: his contract, salary and end of service benefits were all in accordance with and governed by KSA labour law. His social security arrangements were in KSA, not Great

Britain. He was managed by people in KSA. His grievance and other concerns were addressed in KSA.

76. Having carried out this comparison and evaluation, I conclude that the claimant's employment connections with Great Britain and British employment law are not sufficiently strong to overcome the territorial pull of his place of work. The factors clearly demonstrate a stronger connection with KSA and do not justify the conclusion that parliament must have intended the claimant's employment to be governed by British employment legislation.

77. The claimant's complaints under the Employment Rights Act 1996 and the Equality Act 2010 cannot therefore proceed. In light of my conclusion that the claimant was employed by ESG, it is not clear that a breach of contract complaint would fall within the scope of article 3 of the 1994 Order (as being a claim which a court in England and Wales would have jurisdiction to hear). Even if it did, the conclusions I have reached on the sufficient connection test in relation to the complaints under the Employment Rights Act and the Equality Act in this case lead me to conclude that the tribunal does not have jurisdiction to hear a breach of contract complaint either.

78. The tribunal does not have jurisdiction to consider the claimant's complaints. I reach the same conclusion in respect of all of the claimant's complaints. They are dismissed.

Employment Judge Hawksworth

Date: 18 January 2021

Sent to the parties on:..

..S Bloodworth.....
For the Tribunals Office

Public access to employment tribunal decisions:
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