EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		Respondent
MR ANDREW HENWOOD	**AND**	**FOREGENIX LIMITED**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: BRISTOL ON: 19TH MAY / 20TH MAY 2021 (CHAMBERS)

EMPLOYMENT JUDGE MR P CADNEY
(SITTING ALONE)

APPEARANCES:-

FOR THE CLAIMANT:- **MR J MCKEOWN (COUNSEL)**

FOR THE RESPONDENT:- **MR C ADJEI (COUNSEL)**

PRELIMINARY HEARING JUDGMENT

The judgment of the tribunal is that:-

1. The tribunal has jurisdiction to hear the claimant's claims of unfair and wrongful dismissal.

Reasons

1. By this claim the claimant brings claims of unfair and wrongful dismissal. The case came before EJ Maxwell for a case management hearing on 27th January 2021. He listed the case for final hearing, and for a preliminary hearing today to determine whether the tribunal has jurisdiction to hear the claimant's claims. I have heard evidence from the claimant, and from Mr Benjamin Hosack for the respondent.

Facts

2. The respondent is an international company providing cybersecurity and compliance risk services. The company was incorporated in April 2009 at which point its only directors and employees were Mr Hosack and Mr Andrew Bontfort. The claimant originally invested in the business in 2009 and was subsequently appointed as an employed Director of Operations on 1st July 2011. At that time all three were resident in the UK and would all attend the respondents offices at Leatherhead, Surrey on most days of the week. For completeness sake the office subsequently moved to Marlborough, Wiltshire. There is no dispute that at this point all three were shareholders, directors and employees of the company (albeit that none had written or formal contracts of employment) and that no question would have arisen at that stage as to the territorial jurisdiction of the Employment Tribunal of England and Wales in the event of a dispute. Mr Hosack's evidence which I accept is that although the focus of the business was initially on the UK, it rapidly acquired a number of international clients who required a physical presence on site meaning that from 2011 all three travelled internationally extensively and regularly. Since that point the respondent has established a number of wholly owned subsidiary companies in a number of countries around the world.

3. The claimant has UK and South African citizenship and has strong family connections in South Africa. In 2010 he brought a property near Cape Town and from then until November 2013 divided his time between South Africa and the UK, spending approximately six months each year in each. In November 2013 he moved permanently to South Africa and has since then only visited the UK for relatively short periods each year as is set out in greater detail below.

4. On 4th April 2011 he set out a business proposal for the employment of a "local FGX/Africa Sales representative" together with a number of discussion points as to the structure of and other aspects of the proposed business. The proposal was accepted and Foregenix PTY Ltd (FPTY) a wholly owned subsidiary of the respondent was incorporated in July 2012 in South Africa. Mr Ross Hammond was appointed as the first director. On 30 September 2013 the claimant was appointed a director but did not become an employee of it at that point or at any stage thereafter. In May 2014 FPTY opened an office in Johannesburg, The claimant's evidence which I accept is that it had obtained a number of contracts, in particular with local banks which wished them to have a physical presence in South Africa which is why they opened the office. The claimant's father, who had also been employed by him in an earlier business venture was employed to run the office on a day to day basis.

5. In February 2014 the claimant was appointed Global CEO of the respondent. It is not in dispute that there were regular video conferences and that the claimant returned the UK for board meetings, industry events and to see clients. The claimant's evidence, which I accept, and which is supported by a schedule setting out flight details is that he returned to the UK on average for approximately thirty days each year staying for about four or five days at a time.

6. An original shareholders agreement (which is not before me) was entered into 2014. A revised agreement was entered into in 2015 which includes a number of provisions upon which the claimant relies. Firstly it provides that (clause 25) the governing law is the law of England. Secondly it includes “bad leaver” provisions; a bad leaver being defined as an employee shareholder who “..is lawfully dismissed for gross misconduct, provided that such dismissal is not determined by an employment tribunal or at a court of competent jurisdiction….to be an unfair dismissal.” .

7. Until 2017 no written contracts of employment had been entered into. It is not in dispute that in or about 2017 the issue of creating employment contracts arose because the Finance Director was concerned that the company had no protection in relation to intellectual property rights. As a result employment contracts were drafted in essentially identical terms for the claimant, Mr Hosack and Mr Bontfort and all three signed and entered into them. The terms of the employment contract on which the claimant relies are firstly that it is expressly to be construed in accordance with English law (Clause 12.8.1) and that the courts of England and Wales are granted exclusive jurisdiction in respect of any claim arising out of or in connection with the agreement, its subject matter or formation. Secondly other specific terms relied on are that relating to his holiday allowance including “the usual public holidays in England”; the reference to the Working Times Regulations 1998; the provision of statutory sick pay; the reference to whistleblowing provisions; the reference to copyright and patent provisions in accordance with CDPA 1988/ Patents Act 1977; and various other references to other UK legislation in the contract. He contends that these provisions all relate explicitly or implicitly to rights and obligations under English law which is clearly and obviously correct.

8. It is not in dispute his salary and dividends were paid in GBP into his UK bank account and were subject to UK tax and national insurance deductions; were declared on UK tax returns; that he paid no income tax in South Africa on any income derived from his employment with the respondent; and that his pay and benefits were managed by the accounts team based in Wiltshire. The only financial relationship with FPTY is that approximately one eighth of his expenses were paid by it in South African Rand.

9. It is also not in dispute that the disciplinary process and dismissal which gives rise to these proceedings was conducted in accordance with the respondent’s disciplinary and capability policy; that it was conducted in accordance with his rights in UK law such as being informed of his right to be accompanied by a colleague or trade union representative; and that it was chaired by a Mr Thompson of an HR advisory company which is based in the UK and advises on UK employment law issues; and that the hearing was held in London.

10. There are a number of points which are in dispute between the parties. My specific conclusions are set out below but my general conclusions are that I did not believe that either of the witnesses were intentionally attempting to mislead the tribunal. Both gave thoughtful careful evidence and both readily conceded points where it was obviously appropriate to do so. There is very little documentary evidence in relation to the points in dispute

11. The claimant was initially cross examined about the fact that his hotel booking records showed very infrequent visits to England. The claimant's evidence was that this was because for the most part any accommodation was booked by the company itself and that the flight schedule better reflected the frequency of his visits. The claimant and Mr Adjei appeared to agree that the flight records reflected an approximate average of about thirty days a year as being an accurate reflection of his physical attendance in England and in any event I accept that evidence as being a broadly accurate figure.

12. The second dispute concerns a property in London owned by the claimant. His evidence is that he let out three rooms and retained one for his own and his families use, and that he would often stay there for one or so nights if he was in London and spend others with friends. Mr Adjei disputed that and invites me to conclude that this was in reality an investment property and that the claimant should not be regarded as having retained a London home. As is set out below in his final submissions Mr Adjei accepted that if and to the extent that it is necessary to categorise the claimant that he was not a wholly expatriate employee but partially and predominantly expatriate. Given that it is not in dispute that he did return to the UK reasonably regularly for some thirty days a year to attend board meetings and the like for the purposes of the UK business, in the circumstances precisely where he stayed when he did so appears to me to be of very little if any significance.

13. The more substantial dispute concerns the extent to which the claimant spent his time on the day to day affairs of FPTY. Mr Hosack's estimate is that he spent some fifty percent or so of his time on FPTY business in South Africa, and the other fifty percent on his Global CEO duties. The claimant does not accept that. His evidence is that he lived in Cape Town and had no day to day presence in Johannesburg, which is some thirteen hours away by car, or a two hour flight. The office was managed on a day to day basis by his father. He did not have a desk at the office and estimates that he spent more time in the UK than in Johannesburg. He accepted that as he was based in South Africa that it made sense for him to deal with some issues relating to FPTY rather than the other directors. He gave the example of a disciplinary hearing he conducted as his father was not able to deal with it. It would have made no sense for someone to fly from London to deal with the issue when he was in Cape Town. Although he does not give percentages he sets out his day to day activities as including supervising four employees, three of whom were UK based; working on the respondents global strategy; preparing for and conducting weekly global regional director sessions, weekly management sessions, the two monthly board meetings in the UK; and carrying out extensive regional and international business, the respondent having under his tenure as CEO opened offices and subsidiaries in Germany, USA, Australia, Brazil, Singapore and Uruguay. Overall he estimates that he spent about two weeks each month away from home. There is nothing specifically to contradict this assessment and I accept the claimant's evidence.

14. The final significant dispute of fact concerns the circumstances of the signing of the employment contracts. Mr Hosack's evidence is that they were understood to be necessary to protect the companies intellectual property interests, which is not in

dispute, and signed for that purpose with little or any consideration being given to the specific terms of the agreements. His evidence is that they were signed without discussion. The claimant's evidence is that whilst that may have been true for Mr Hosack it is not true of hm. He read the document very carefully and in particular checked to ensure that it was consistent with the shareholders agreement, which it was, and that certainly on his part he signed having read it and understood it and believing that it genuinely reflected the employment relationship between him and the respondent. The respondent invites me to conclude that this evidence is either untrue or is at least an exaggeration, and that Mr Hosack's account is more plausible. Mr Adjei points the fact that the holiday provisions including UK bank holidays makes no sense for someone living in South Africa and that in effect the claimant must have realised that at least parts of this agreement did not correspond to the reality of the relationship. The claimant's evidence is that given the amount of travel he undertook his holidays in reality corresponded with neither UK nor South African public holidays; but he maintains that he genuinely understood it to reflect the underlying reality. He was an employee of a UK company with a contract of employment governed by and setting out his rights and obligations under UK law. Again I accept the claimant's evidence as to his understanding of the position.

Law

15. The law is not essentially in dispute between the parties but for completeness sake. Rule 8(2) of Schedule 1 of the ET rules sets out four factual circumstances, at least one of which must apply to allow a claim to be presented to the Employment Tribunal:-

a) *The respondent .. 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 a least partly a connection with England and Wales.*

16. There is no dispute that the claimant is entitled to present the claim pursuant to those rules. However the Employment Rights Act 1996, under which the primary claim of unfair dismissal is brought, is silent as to territorial jurisdiction and there is a dispute as to whether the Employment Tribunal has territorial jurisdiction to hear the claim. There is no submission before me that any separate question or any different principles apply to the wrongful dismissal / notice pay claim and I approach this preliminary hearing on the basis that they stand or fall together in relation to territorial jurisdiction.

17. The authorities to which the tribunal has been referred are:-

    i) *Lawson v Serco [2006] ICR 250;*

    ii) *Duncombe v SoS for Children Schools and Families [2011] ICR 1312*

    iii) *Ravat v Haliburton Manufacturing and Services Ltd [2012] ICR 389*

    iv) *British Council v Jeffrey and others [2018] EWCA Civ 2253*

18. In Lawson v Serco Lord Hoffman identified three (on one analysis four) broad categories of employee; employees ordinarily working in Great Britain; peripatetic employees ; expatriate employees; and employees not fitting any of those categories but with an equally strong connection with Great Britain. In *Duncombe* Baroness Hale counselled against attempting to fit an individual strictly within any of Lord Hoffman's categories; and in *Ravat* Lord Hope stated that the tribunal should ask the single question of whether the connection with Great Britain is sufficiently strong to enable it to be said that Parliament would have regarded it as appropriate for a tribunal to deal with the claim and that the starting point is that *"..the employment relationship must have a stronger connection with Great Britain than with the foreign country where the employee works.*" As set out above Mr Adjei accepts that, to the extent that it is necessary to categorise the claimant he is not fully expatriate, but a partially expatriate employee, and that in consequence the "Ravat" question is the appropriate one for the tribunal to answer in this case. To put it simply, and as summarised in the IDS handbook the principle is :-

    "The basic rule is that the ERA only applies to employment in Great Britain. However, in exceptional circumstances it may cover working abroad. As summarised by the Court of Appeal in Bates van Winkelhof v Clyde and Co LLP and anor 2013 ICR 883, CA:

    . *where an employee works partly in Great Britain and partly abroad, the question is whether the connection with Great Britain and British employment law is sufficiently strong to enable it to be said that Parliament would have regarded it as appropriate for the employment tribunal to deal with the claim — Ravat v Halliburton Manufacturing and Services Ltd 2012 ICR 389, SC*

19. The fact that the employment contract in this case provided that it was governed by the law of England and Wales is not determinative, as the parties cannot simply contract in to the jurisdiction of the Employment Tribunal, but it is a relevant factor (per Lady Hale in Duncombe).

Submissions

20. The respondent's essential position is that whatever the claimant's precise division of responsibilities between FPTY and the other subsidiary companies, that he was on any analysis permanently based outside the UK; his duties were concerned with the respondent's worldwide subsidiaries outside the UK; and that from 2014 onwards his only significant connection with the UK was attending board meetings in the UK. If that is in reality the only significant connection then it is insufficient to establish the necessary sufficiently strong connection.

21. Mr Adjei relies on the proposition that the employment contract cannot genuinely have been regarded by the claimant as being wholly governed by the law of England and Wales as that would produce absurd results, particularly in relation to his holiday rights. Similarly whether the claimant paid closer attention to the terms of the agreement than Mr Hosack it is clear that from the respondent's perspective that the employment contracts were not entered into to create rights for the employees but to protect the intellectual property interests of the respondent and there is no suggestion that the respondent made any specific representation as to the applicable law (as in Duncombe) beyond the content of the agreement itself; and that in those circumstances the terms of the contract itself should carry very little weight.

22. The tax and national insurance arrangements should in reality be regarded as a hangover from, and a reflection of the fact that neither party sought to alter the arrangements established when the claimant was unquestionably an employee based in England rather than any considered position once that situation had changed. It is essentially a reflection of inertia and not choice.

23. Looked at overall if the contractual, financial and taxation points should be discounted as having very little weight, then the picture revealed is of a partially expatriate employee with minimal connection with England and Wales; and, on the correct analysis, insufficient connection to satisfy the Ravat test.

24. The claimant submits that there are a number of factors which clearly indicate a sufficiently strong connection:-

i) The claimant was at all times a (dual nationality) British citizen. His decision to move to South Africa was a personal one and was not related to any aspect of his work, or prompted in any way by the respondent.

ii) He was recruited in the UK and worked initially in the UK for a UK company, and the fact that he subsequently moved to South Africa does not fundamentally alter that relationship, and was not treated by the parties themselves as altering that relationship at the time. Specifically he continued to be treated as an English employee with salary and dividends being paid into a UK bank account, tax being paid in the UK and the salary and other provisions were dealt with by the HR team in the UK.

iii) The employment contract explicitly provides that it is to be governed by English law and the contractual terms refer exclusively to rights and obligations arising under English law.

iv) Although resident in South Africa he was and remained the Global CEO of the UK company; and had no employment relationship with the South African corporate entity. By contrast his management responsibilities related to employees who were with one exception based in the UK.

v) The parties themselves agreed that the relevant law should be that of England and Wales at a time when the claimant was living in South Africa, and the claimant himself genuinely understood, and reasonably understood, that this was the law that governed his employment. No suggestion to the contrary was ever made by the respondent until this litigation (and even then as something of an afterthought).

vi) The contractual position of all three of the employee directors and shareholders were governed by essentially identical contractual terms and the same relevant law which makes clear and obvious practical sense. It follows that the employment contracts have to be looked at not in isolation but as a part of a number of connected contractual rights. Specifically the bad leaver provisions of the Shareholder's agreement will be determined by the conclusion as to the leaver's employment rights and whether his dismissal was "unfair" which is a UK statutory construct derived wholly from the Employment Rights Act 1996.

vii) HR generally, and the disciplinary process leading to his dismissal specifically, were conducted in the UK and in accordance with UK law.

Conclusion

25. In my judgement the claimant's submissions are compelling. The employment contract clearly in my view had a far closer connection to the UK than to South Africa, or any other location. In reality in my judgement the link between the employment contract and the UK is very significant, whereas it is at best tenuous with South Africa, and certainly comparatively far weaker. In particular the fact that the contractual rights and obligations of all three employee director shareholders are governed by a suite of interconnected contractual documents governing their employment and shareholding all of which are expressed to be governed by English/UK law reflects an extremely close connection to the UK of which the employment contract was simply one part. As is set out above whilst this is not determinative it is relevant, and when set alongside the other links to the UK set out at paragraph 29 above points overwhelmingly in my judgement to that conclusion, and the conclusion that Parliament would have regarded it as appropriate for this case to be determined by the Employment Tribunal of England and Wales.

26. It follows that in my judgement in this case the employment tribunal has jurisdiction to hear both claims.

Employment Judge Cadney
Date: 25 May 2021

Judgment & Reasons sent to parties: 04 June 2021

FOR THE TRIBUNAL OFFICE