EMPLOYMENT TRIBUNALS

Claimant: Mr A D Hourigan

Respondent: Interserve Group Limited and Others

Heard at: Reading (by CVP) On: 23 April and 20 May 2021

Before: Employment Judge Lang (sitting alone)

Appearances
For the claimant: in person
For the respondents: Ms S Tharoo (counsel)

JUDGMENT

The claimant's employer was ESG Saudi Arabia LLC (a Saudi Arabian registered business). The Employment Tribunal does not have jurisdiction to hear the claimant's complaints. His complaints against all respondents are dismissed.

REASONS

1. By a claim form presented on 24 December 2019 the claimant brought complaints of unfair dismissal, age discrimination, race discrimination and religion or belief discrimination and arrears of pay. The Tribunal confirmed on 26 August 2020 that it would only accept the complaints for arrears of pay or notice pay. The claimant submitted a reconsideration request in relation to this decision on 1 September 2020 and this appears not to have been acted upon by the Tribunal.

2. The case was listed before me for a preliminary hearing to decide the question of territorial jurisdiction. The hearing took place on 23 April 2021 but was partheard and resumed on 20 May 2021.

3. The hearing was conducted by video using CVP and the parties and their representatives attended by video.

The Hearing

4. The parties had prepared an agreed 297 page bundle and at the hearing I heard evidence from the claimant. I also heard evidence for the respondents from Oliver Sawle who was previously Regional Director responsible for support and services for Interserve in the Middle East and from Ben Brown, a solicitor practising in the United Arab Emirates.

5. The respondents also referred me to two Employment Tribunal cases involving the claimants Mr Lyons and Mr Salut. These decisions are obviously not binding upon me but they contained helpful summaries of the law, particularly by Employment Judge Hawksworth in the Lyons case.

The Issues

6. The issues were agreed as follows:

   Firstly, what was the claimant's employer?

   6.1. The claimant says that his employer was Interserve Group Limited (the First Respondent). The respondents say that the employer was ESG Saudi Arabia LLC which was a Saudi registered business.

   6.2. The second issue was whether the Tribunal had territorial jurisdiction to hear the claimant's complaint and the claimant's position was that he had a sufficiently strong connection with the UK to enable him to bring a Tribunal claim.

Findings of Fact

7. ESG Saudi Arabia LLC (ESG) is registered in the Kingdom of Saudi Arabia (which I will refer to as KSA) as a foreign limited liability company. Interserve acquired ESG in 2014 and it is jointly owned by two UK based limited companies, being Orient Gold Limited and Triangle Training Limited.

8. ESG traded as "Interserve Learning and Employment" interchangeably with "Interserve Learning and Employment International". ESG provided vocational training and educational services to Saudi Nationals. ESG has been a dormant entity since October 2020 and is in the process of being wound-up and no longer operates any colleges.

9. The claimant was employed at ESG's ITQAN College as an Engineering Teacher. This is an apprenticeship institution and students held job/apprenticeship offers which were conditional on them successfully completing a relevant course of study at the College. ESG at one time operated six Colleges in KSA but this reduced to two during the second half of 2019.

10. HR, IT and Finance were all managed by in-country teams and ESG had employees running each of these functions in KSA. All management decisions including staffing and HR decisions were made locally. The COO of ESG reported to a Managing Director and Commercial Director both based in the UK. However, the UK entities had no role in the day to day running of ESG.

11. The claimant is an Irish national who was recruited in 2018 while he was working in Oxfordshire. He had rented accommodation there and owned a house in County Cork. He had been in the United Kingdom for the purposes of work since 2015. He had been contacted in March 2018 by a Scottish recruitment company called Tenlive International. He was told that the client was Interserve Learning and Employment. He underwent a Zoom interview on 6th May 2018 with the Principal of the College by Zoom.

12. An offer letter was e-mailed to him on 9 May 2018 and accepted by the claimant on 15 May 2018.

13. On 17 May 2018 an employment agreement with "esgSA LLC" was e-mailed to him which he signed on the same day. This provided that "this agreement shall be governed for all purposes by and all matters not provided for therein shall be subject to the Saudi Labour Regulation. All disputes arising in connection with this agreement shall be referred for settlement to the relevant Labour Office in KSA."

14. The covering e-mail stated "We are delighted to send you the contract of employment attached".

15. The claimant flew to Bahrain on 23 June 2018 where he was issued with a business visa. His start date was 24 June 2018. The claimant lived in rented accommodation in KSA, was paid in KSA currency into his UK bank account and paid no UK tax.

16. The preferred approach for non-nationals working in KSA is to obtain an Iqama which is a full residence visa renewable annually. However, the process of obtaining Iqamas was complex and the authorities placed limits on how many Iqamas particular employers could apply for. Many employers in KSA therefore used alternative visa types and the most commonly used was a business visa. This was the type of visa obtained for the claimant. On a strict interpretation of the regulations in KSA business visa holders are not permitted to work but the reality was that while business visas did carry certain restrictions and a degree of risk, this rarely became an issue. I am satisfied that this practice was commonplace, indeed the claimant's Welcome pack stated "You will begin your employment on a business visa or work visa and we will transition you to an Iqama".

17. In March 2019 the claimant's contract was renewed and extended to June 2020. The claimant signed an extension of his employee agreement with esg Saudi Arabia LLC on 24 June 2019 extending the contract to 23 June 2020.

18. His business visa had expired on 23 June 2019 and arrangements were made for him to go to Bahrain to be issued with a new visa, however this was not possible

as his academic qualifications had not been attested and ultimately the claimant returned to Ireland on or about 9 or 10 July 2019 and made attempts to secure a new business visa from Ireland.

19. There were various difficulties with his qualifications being attested. He visited the Saudi Cultural Bureau in Dublin on 26 August 2019. His salary was withheld from this date because he had not been able to obtain a new visa.

20. The claimant was due to return to the College in or around September 2019 and because of his inability to do so a first written warning was issued on 1 October 2019. The visa issues had still not been resolved by 14 October 2019 and on that date a notice of termination was issued to him. The claimant then purported to resign by e-mail on 18 October 2019.

21. On 27 October 2019 he made a complaint to the COO of ESG.

22. Mr Brown in his evidence gave his opinion as to whether or not the claimant would have had legal recourse in KSA in relation to his employment. Mr Brown said that ,in so far as the claimant disputing the reasons for the termination of his employment was concerned, he ought to have filed a complaint with the Saudi Ministry of Labour and Social Development. This could have been done online from outside KSA. The claimant would have been required to upload his employment contract and any other documents which were relevant to his case and the claimant would not have been required to upload any Iqama as part of the process. He did not believe that the absence of an Iqama would have prevented him from filing a complaint.

23. Upon submission of the complaint it would have been transferred to the Settlement Department and if the parties were unable to reach an amicable settlement would then have been transferred to the KSA Court of First Instance. The claimant had to file a complaint within one year of the termination of his employment.

24. Mr Brown gave evidence that in his belief had the claimant filed the complaint, it was reasonably likely that the KSA Court would have determined that the claimant was entitled to assert his rights under KSA labour law. I accept his evidence as being more likely than not to be correct.

25. The claimant made reference to a number of Interserve Group policies that applied to him. These included the Human Rights Policy, Health and Safety Policy, Diversity Policy and Anti-Corruption Policy.

26. There were also specific KSA Policies which applied to him including an Absence Policy.

The Law

27. The relevant law is set out by my colleague Employment Judge Hawksworth in her decision in the Lyons case and I repeat below some helpful extracts from that decision -

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

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

29. 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.

30. 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.

31. 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).

32. 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)'.

33. 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."

34. 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.

35. 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."

36. 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.

37. 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."

38. 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).

39. 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'.

40. 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.

41. 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). "

42. I have also considered two cases that the claimant referred me to.

43. Carter v University College London was a London Central Employment Tribunal decision of Employment Judge Emery in August 2020 in which the Tribunal found on the facts of the case that the claimant's employment had an especially strong connection with the GB that outweighed his expatriate status.

44. Lodge v Dignity and Choice in Dying UKEAT/0252/14 was a case which again turned on its own facts. The claimant in that case worked for a British company and the contract provided that English law applied.

45. Both cases had very different facts from the claimant's case.

Conclusions

46. Issue 1 – What was the Claimant's employer?

47. I find that ESG Saudi Arabia LLC was the employer.

48. This is plain from the contractual documents in the bundle, namely the employment agreement and the extension. The claimant says that this was not legally binding and was really just a gentleman's agreement. I reject that contention.

49. The absence of some common employment particulars does not negate the legally binding nature of the contract. The claimant plainly worked in accordance with his terms.

50. The claimant also contends that the agreement was invalid as it was conditional upon him obtaining an Iqama within six months. I reject that contention also. Nowhere in the documentation is there any relevance to such a condition.

51. Further, the question of immigration status is not relevant in any event to the identity of the parties to the contract of employment.

52. Interserve Plc or Interserve Group Limited was not his de-facto employer either. This does not happen just because they are a holding Company or because his actual employer used a number of group policies. The evidence does not go anywhere near far enough to establish de-facto employment by those entities.

53. Issue 2 – Territorial Jurisdiction

54. Bearing in mind that the categories of expatriate worker who may fall within the scope of territorial jurisdiction are not closed , I have compared the strength of the claimant's employment connections with Great Britain and also with KSA.

55. The factors that favour the respondent are as follows:

    55.1. The claimant worked for a KSA company;
    55.2. His contract provided that KSA law applied;
    55.3. He lived and worked in KSA;
    55.4. He was paid in KSA currency;
    55.5. He did not pay tax in the UK;
    55.6. He was managed day to day in the KSA;
    55.7. It is likely that he had a legal remedy in the KSA.

56. The factors that the claimant can point to are:

    56.1. He was recruited while working in the UK by a UK recruiter;
    56.2. His pay was paid into his UK bank account;
    56.3. His employer was owned by UK legal entities;
    56.4. His employer used a number of policies produced by a UK parent company.

57. The claimant's connections with the KSA are much more substantial and are linked to his employment itself. His connections with the UK are not sufficiently strong to outweigh the territorial pull of his place of work. There is a much stronger connection with the KSA.

58. The complaints under the Employment Rights Act cannot proceed. Further, even if the Tribunal had allowed his Equality Act complaints to proceed initially they could not have proceeded further. I also agree with Employment Judge Hawksworth that a breach of contract complaint under the 1994 Order would also not be within the Tribunal's jurisdiction. The claimant's complaints against all respondents are dismissed.

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Employment Judge Lang

Date: 22/7/2021

Sent to the parties on:

13/9/2021

For the Tribunal:

N Gotecha